UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

STOP RECKLESS ECONOMIC INSTABILITY CAUSED BY DEMOCRATS, *et al.*,	)	
Plaintiffs,	)	Civ. No. 1:14-397 (AJT-IDD)
v.	)	
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

PLAINTIFFS' CONSOLIDATED REBUTTAL BRIEF IN SUPPORT OF MOTIONS TO AMEND COMPLAINT AND DISMISS NIGER INNIS' AND NIGER INNIS FOR CONGRESS' CLAIMS

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Dated July 21, 2014

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INTRODUCTION

A few weeks after this case was filed, Niger Innis lost his primary election. As a result, Innis and his candidate committee, Niger Innis for Congress ("NIFC"), no longer wish to pursue their claims in this campaign finance lawsuit. Buttressing the need for their dismissal are the facts that this Court may lack subject-matter jurisdiction over Innis' claims under 2 U.S.C. § 437h, *see Wagner v. FEC*, 717 F.3d 1007 (D.C. Cir. 2013) (per curiam), and that Innis' and NIFC's claims may not even remain justiciable in light of his loss. Those claims certainly have become non-justiciable as a result of Innis' and NIFC's manifest lack of desire to pursue them. 13B Charles A. Wright et al., *Federal Practice and Procedure*, "Jurisdiction and Related Matters," § 3533.2 (3d ed.); *Webster v. Repro. Health Servs.*, 492 U.S. 490, 512-13 (1989).

Defendant Federal Election Commission ("FEC") contends that Innis and NIFC should be compelled to involuntarily remain in this case as plaintiffs at least through the close of discovery.[1] Before even entertaining this unusual demand, this Court should require the FEC to acknowledge, on the record, that Innis' and NIFC's claims remain justiciable because they are "capable of repetition, yet evading review" despite Innis' loss in the primary,[2] and that this Court may exercise subject-matter jurisdiction over Innis' claim under § 437h. If the FEC itself is unwilling to assert that Article III permits this Court to continue to entertain Innis' and NIFC's claims, this Court need not waste time further considering the FEC's peculiar request to compel Innis and NIFC to remain involuntary plaintiffs in this case.

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[1] The FEC's brief wisely declines to defend the position that the FEC articulated earlier on this issue, that Innis and NIFC should be dismissed from the case, but nevertheless continue to be treated as plaintiffs solely for the purpose of allowing the FEC to take discovery from them. *Cf.* FEC Br. at 1 (arguing that "the special protections for nonparties should be deemed inapplicable to [Innis and NIFC] for any future Rule 45 requests").

[2] The FEC itself recognizes Innis as a "former candidate." FEC Br. at 2.

The FEC's position suffers from numerous other legal, conceptual, and practical problems, as well, and there is no basis for the repeated aspersions and accusations that the FEC's brief gratuitously casts on Innis and NIFC. *See* FEC Br.[3] at 1 (arguing that Innis and NIFC lied to this Court about their reasons for wishing to drop their claims, and that they seek to do so "for the improper purpose of evading" a non-existent discovery order); *id*. at 7 (same); *id*. at 8 (arguing that Innis and NIFC misled the Court by claiming that they were "investigating legal options for contesting the results" of the primary in the days afterwards). At heart, the FEC claims that Innis and NIFC should continue to be treated as plaintiffs simply because doing so purportedly would give the FEC an advantage in this litigation. *See* FEC Br. at 1 (arguing that the FEC would like to take discovery from Innis and NIFC without having to respect Fed. R. Civ. P. 45's "special protections for non-parties"). That is not a valid legal argument.

Plaintiffs filed an Amended Complaint as of right, pursuant to Fed. R. Civ. P. 15(a)(1)(A), which omits Innis and NIFC as Plaintiffs and does not include any claims from them. This Amended Complaint is now the operative complaint in this case; this Court should hold that Innis and NIFC are no longer party litigants and do not remain subject to any of the discovery obligations of party litigants. *Smith v. Green Tree Servs., LLC*, No. 2:09-CV-710, 2010 U.S. Dist. LEXIS 25784 (S.D. W. Va. Mar. 18, 2010); *see also Galustian v. Peter*, 591 F.3d 724, 730 (4th Cir. 2010).

Plaintiffs concomitantly filed protective motions under Fed. R. Civ. P. 15(a)(2) and 41(a)(2)—well before service of any discovery requests or even entry of a scheduling order—for leave to drop Innis and NIFC as Plaintiffs. They did so out of an abundance of caution, given the FEC's surprising insistence on continuing to subject Innis and NIFC to the burdens of party

[3] "FEC Br." refers to Defendant Federal Election Commission's Combined Response in Partial Opposition to Plaintiffs' Motion for Voluntary Dismissal and Motion to Amend or Supplement the Complaint, Doc. #41 (July 17, 2014).

discovery, as well as the need to avoid unwarranted accusations of untimeliness or delay (which the FEC has proven all too willing to deploy, regardless of their legitimacy, *see, e.g.*, FEC Br. at 1 (arguing that Innis' and NIFC's Rule 41 motion is untimely because it was filed more than ***six (6) days*** after he lost his primary); *id*. at 7-8). Strictly speaking, Plaintiffs believe those motions are ***unnecessary***, as the Amended Complaint which they filed as of right already omits Innis and NIFC as Plaintiffs. If this Court nevertheless concludes that its permission is required to dismiss Innis and NIFC from the case, then it should do so immediately, without prejudice, and without imposing preconditions, including the FEC's prior request that those entities continue to be treated as party litigants for discovery purposes.

I. AN AMENDED COMPLAINT, FILED AS OF RIGHT UNDER RULE 15(a)(1)(A), MAY ELIMINATE AN ENTITY AS A PARTY LITIGANT WITHOUT ANY JUDICIAL ACTION

This Court should conclude that it is unnecessary to reach the merits of Plaintiffs' motions to amend the complaint under Rule 15(a)(2), or to dismiss Innis and NIFC as plaintiffs under Rule 41(a)(2), because the Amended Complaint they filed as of right under Fed. R. Civ. P. 15(a)(1)(A) was sufficient to eliminate the claims of Innis and NIFC, remove them as parties in this lawsuit without leave of court, and prevent the FEC from continuing to treat them as party litigants for discovery purposes.

Several courts have recognized that amendments as of right under Rule 15(a) are a proper vehicle for adding or dropping parties from a complaint. The Fifth Circuit, for example, has held that Rule 15(a)(1) "takes precedence if a party attempts to ***drop*** or add parties by an amended pleading," and such an amendment may be filed within the applicable deadline "as a matter of course," without "obtain[ing] leave." *McLellan v. Miss. Power & Light Co.*, 526 F.2d 870, 872-73 (5th Cir. 1976) (emphasis added), *aff'd in part and vacated in part on other grounds*, 545 F.2d

919 (5th Cir. 1977) (en banc); *Pretty Punch Shoppettes, Inc. v. Creative Wonders, Inc.*, 750 F. Supp. 487, 493 (M.D. Fla. 1990) ("Under Rule 15 . . . parties may be added or dropped when an amendment is made to a complaint as a matter of course."); *Adams v. Lederle Labs.*, 569 F. Supp. 234, 240 (W.D. Mo. 1983) ("[U]nder the federal rules the addition or dropping of parties, if accomplished by an amendment (or a new complaint) which is filed within the time frame covered by Rule 15(a), does not require an order of court.").[4]

Leading federal practice treatises endorse this approach. Wright & Miller contends, "[A]ny attempt to change parties by amendment before the time to amend as of course has expired should be governed by Rule 15(a)(1) and may be made without leave of court." 6 Charles A. Wright, et al., *Federal Practice & Procedure*, § 1479 (3d ed.). It explains:

> The theory behind the provision for amendments as of course is that the court should not be bothered with passing on amendments to the pleadings at an early stage in the proceedings when the other parties probably will not be prejudiced by any modification. There is no reason why these same considerations should not apply to a change in parties as well as to any other amendment as of course.

Id. Likewise, *Moore's Federal Practice* teaches:

> The better view . . . rejects the notion that a motion to amend is required to add or drop parties. The more persuasive cases hold that a party's right to amend as a matter of course, if accomplished within the deadlines set by Rule 15(a), extends to all amendments including amendments to add or drop parties.

3 James W. Moore et al., *Moore's Federal Practice - Civil*, § 15.16[1] (3d ed. 2010); *see also* 4 *id*. § 21.02[5][b] ("The majority opinion now appears to be that a party's right to amend as a matter

[4] *See also Maynard v. Bonta*, No. 02-06539 MMM (CTx), 2003 U.S. Dist. LEXIS 16201, at *23 (C.D. Cal. Sept. 3, 2003) ("The language of Rule 15(a) appears to establish an exception to the strict requirements of Rule 21."); *Ahmad v. Indep. Order of Foresters*, 81 F.R.D. 722, 728 n.5 (E.D. Pa. 1979) ("Rule 15 governs when parties are added or dropped before a responsive pleading has been filed," and "leave of the court is not required."). In *United States v. Sinclair*, 347 F. Supp. 1129, 1135-36 (D. Del. 1972), ***the Government itself*** successfully argued that Rule 15(a) permitted it to file an amended complaint adding new parties without leave of court.

of course, if accomplished within the deadlines set forth by Rule 15(a), extends to all amendments—including amendments to drop or add parties.").

Consistent with these authorities, the Fourth Circuit has held that a plaintiff has "an absolute right to amend his complaint once" within Rule 15(a)(1)(A)'s deadlines "and need not seek leave of court to do so," ***even*** where "the amendment seeks to add a party." *Galustian v. Peter*, 591 F.3d 724, 730 (4th Cir 2010). The defendant in *Galustian* argued that a new plaintiff could not be added to the case through an amended complaint, filed as of right under Rule 15(a)(1)(A), because Rule 21 specifically governs the joinder of new parties and requires leave of court. *Id*. Rejecting that argument, the Fourth Circuit held, "While some courts have concluded that Rule 15(a) does not apply to amendments seeking to add parties, most courts, including this one, have concluded otherwise . . . . [The defendant's] assertion that [the plaintiff] was not entitled under Rule 15(a) to amend his complaint is therefore without merit." *Id*. (citing *Mayes v. Rapoport*, 198 F.3d 457, 462 n.11 (4th Cir. 1999)).

The same reasoning applies here. Rule 15(a)(1)(A) grants plaintiffs the absolute right to amend their complaint, even if the amendment results in the addition or elimination of certain plaintiffs. Just as Rule 15(a)(1)(A) trumps Rule 21, which generally requires leave of court to add new parties, so too should it trump Rule 41(a)(2), which generally requires leave of court to dismiss actions.

The Southern District of West Virginia applied *Galustian* and adopted this reasoning in *Smith v. Green Tree Servs., LLC*, No. 2:09-CV-710, 2010 U.S. Dist. LEXIS 25784 (S.D. W. Va. Mar. 18, 2010). Two plaintiffs had filed a complaint against the defendant. After the defendant moved to compel arbitration of one plaintiff's claims, that plaintiff sought to voluntarily drop out of the suit by having the other plaintiff file an amended complaint as of right. *Id*. at *4. The

district court held, "There does not seem to be any basis for limiting the rule in *Galustian* to the situation where . . . only a party defendant is added. . . . [The plaintiff] is entitled as a matter of course to discontinue the prosecution of this action as to those claims belonging to him." *Id.* at *10-11. Likewise, here, Innis and NIFC are "entitled as a matter of course to discontinue the prosecution of this action as to those claims belonging to [them]." *Id.*; *cf. Produce Alliance LLC v. Let-Us Prod., Inc.*, No. 2:10-CV-198, 2010 U.S. Dist. LEXIS 143707, at *7-8 (E.D. Va. Nov. 22, 2010) (holding that, "pursuant to *Galustian*, [the plaintiff] had an absolute right under Rule 15(a)(1) to amend its complaint once without leave of court," including the addition of "several new plaintiffs and two new defendants").

The FEC relies on *Rutledge v. Town of Chatham*, No. 4:10-35, 2010 U.S. Dist. LEXIS 122273, at *20-22 (W.D. Va. Nov. 18, 2010) ("*Rutledge I*"), *aff'd sub nom. Rutledge v. Roach*, 414 F. App'x 568 (4th Cir. 2011) (per curiam) ("*Rutledge II*"), and *Mayes v. Rapoport*, 198 F.3d 457, 462 n.11 (4th Cir. 1999) (cited in FEC Br. at 15-16), to argue that an amended complaint, filed as of right, may not be used to drop plaintiffs from a lawsuit without leave of court. The *Rutledge* holdings are patently inapplicable to this case. The district court—whose opinion the Fourth Circuit adopted, *see Rutledge II*, 414 F. App'x at 568—held that 28 U.S.C. § 1915 (e)(2)(B) allowed it to prohibit a plaintiff proceeding *in forma pauperis* from amending its complaint as of right, *Rutledge I*, 2010 U.S. Dist. LEXIS 122273, at *21 ("Where in forma pauperis status is granted, the Court may at any time pre-screen and dismiss allegations that are frivolous or where the plaintiff fails to state a claim."). In this case, of course, Plaintiffs are not proceeding *in forma pauperis*, and the FEC does not contend that a federal statute exists which undermines their "absolute right to amend [their] complaint once," without "seek[ing] leave of court," within Rule 15(a)(1)(A)'s deadlines. *Galustian*, 591 F.3d at 730.

Likewise, *Mayes*, 198 F.3d at 462 n.11, held that 28 U.S.C. § 1447(e), which permits federal courts to deny joinder of nondiverse defendants in order to preserve their jurisdiction, trumps plaintiffs' general discretion to amend their complaint as of right under Rule 15(a)(1)(a). It held, "[A] district court has the authority to reject a post-removal joinder that implicates 28 U.S.C. § 1447(e), even if the joinder was without leave of court." *Mayes*, 198 F.3d at 462 n.11.

Thus, at most, *Rutludge* and *Mayes* hold that federal statutes may supersede a plaintiff's presumptive ability to amend her complaint as of right under Rule 15(a)(1)(A). The FEC does not point to any such statutes that apply to this case, or that otherwise prohibit amendments as of right from being used to drop unwilling plaintiffs from a lawsuit. The Amended Complaint filed as of right is the operative pleading; Innis and NIFC remain neither plaintiffs nor subject to the discovery obligations of party litigants. *See Galustian*, 519 F.3d at 730; *Green Tree Servs.*, 2010 U.S. Dist. LEXIS 25784, at *10-11.

II. ALTERNATIVELY, THIS COURT SHOULD DISMISS INNIS AND NIFC AS PLAINTIFFS WITHOUT PREJUDICE, PRECONDITION, OR CONTINUING TO TREAT THEM AS PARTY LITIGANTS.

If this Court concludes that the Amended Complaint filed as of right is legally insufficient to drop Innis and NIFC from this lawsuit, then it should grant Plaintiffs' motions seeking leave of court to do so.[5] The FEC relegates to a footnote the factors that govern motions for dismissal

[5] It may be that Rule 21 is a more appropriate vehicle than Rule 41 for dropping Innis and NIFC with leave of court. Rule 21 provides, in relevant part, "[T]he court may at any time, on just terms, add or drop a party." Fed. R. Civ. P. 21. Rule 41(a)(2), in contrast, applies only to dismissal of an "action," rather than particular claims within a still-pending lawsuit. Fed. R. Civ. P. 41(a)(2); *see Miller v. Terramite*, 114 F. App'x 536, 540 (4th Cir. 2004).

As this lawsuit remains pending, it is unclear that dismissal of Innis' and NIFC's claims would qualify as dismissal of an "action" under Rule 41(a)(2). This distinction does not have any substantive impact on the pending motions, however, because the same standards apply to amendments with leave of court under Rule 15(a)(2), dismissal of parties under Rule 21, and dismissal of actions under Rule 41(a)(2). *See Vernon Carlton Sales v. SSMC, N.V.*, No. 94-1670, 1995 U.S. App. LEXIS 10145, at *6 n.2 (4th Cir. May 5, 1995); *Miller*, 114 F. App'x at 540.

under Rule 41(a)(2), *see* FEC Br. at 5 n.1 (citing *Howard v. Inova Health Care Servs.*, 302 F. App'x 166, 178-79 (4th Cir. 2008)), and does not discuss most of them any further. The arguments upon which the FEC chooses to focus lack merit.

A. This Court Did Not Issue an Adverse Discovery Order for Innis and NIFC to "Avoid"

The FEC claims that Innis and NIFC lied to this Court by stating that that they wish to drop their claims because of Innis' loss in the June 10 primary. *See* FEC Br. at 1, 7. The FEC speculates that the real reason they seek to drop those claims is "for the improper purpose of evading this Court's June 18 ruling ***requiring them to provide discovery***." *Id*. at 1 (emphasis added); *see also id*. at 8 ("[O]n June 18, this Court held that plaintiffs must answer discovery.").

The FEC misunderstands the nature of this Court's June 18 order and exaggerates its impact.

After Plaintiffs moved for summary judgment, the FEC filed a motion under Fed. R. Civ. P. 56(d) "to deny plaintiffs' motion for summary judgment . . . to allow time for the Commission to take discovery necessary to its defense." FEC's Motion to Allow Time for Discovery Under Rule 56(d), Doc. #27 (May 23, 2014). On June 18, this Court denied Plaintiffs' summary judgment motion and granted the FEC's Rule 56(d) motion. *See* Order, Doc. #33 (June 18, 2014) [hereafter, "Order" or "Rule 56(d) Order"].

The Order stated:

> Upon consideration of plaintiff[s'] Motion for Summary Judgment and defendant's Rule 56(d) Motion . . . and it appearing to the Court that an adequate factual record is necessary for proper consideration of plaintiff[s'] constitutional claims, that the defendant is entitled to a reasonable opportunity to obtain discovery for that purpose, that there are no facts or circumstances that would justify adjudicating plaintiffs' constitutional claims in the absence of such a record and that the plaintiff's Motion for Summary Judgment is therefore premature, it is hereby
>
> ORDERED that defendant's Rule 56(d) Motion [Doc. No. 27] be, and the same hereby is GRANTED; and it is further

> ORDERED that plaintiffs Motion for Summary Judgment [Doc. No. 6] be, and the same hereby is, DENIED without prejudice to its being refiled at an appropriate time; and it is further
>
> ORDERED that the hearings on plaintiffs Motion for Summary Judgment and defendant's Rule 56(d) Motion, scheduled for June 20, 2014, be, and the same hereby are, CANCELLED.

As an initial matter, the Order did not "requir[e]," FEC Br. at 1, anyone to do anything, much less hold that Innis and NIFC "must answer discovery," *id*. at 8. The Order directed only that: (i) the FEC's Rule 56(d) motion (which asked only that Plaintiffs' summary judgment motion be denied to allow time for discovery) be granted; (ii) Plaintiffs' summary judgment motion be denied; and (iii) no hearing be held on June 20, 2014. Innis and NIFC and their counsel fully complied with this ruling by refraining from appearing before this Court on June 20, 2014. This Order essentially returned this case to the *status quo ante*, as if a summary judgment motion had not been filed. It did not "requir[e]" Innis, NIFC, or anyone else to affirmatively "answer discovery" or do anything else; indeed, there were no pending discovery requests to "answer," FEC Br. at. 1, 8. There is nothing here to "evad[e]." *Id*. at 1; *id*. at 7, 10.

At most, the Order simply provides that this Court will not adjudicate a plaintiff's constitutional claim in this case "in the absence" of "an adequate factual record." Rule 56(d) Order, Doc. #33, at 1. Innis and NIFC no longer wish to pursue any constitutional claims. Therefore, this Order does not require them to participate as party litigants in the creation of a factual record. Far from "evading" this Order, dropping out of this case is fully consistent with it; Innis and NIFC will not be having their constitutional claims "consider[ed]" or "adjudicat[ed]." *Id*. The fact that other Plaintiffs may wish to independently continue pursuing their own claims is not a basis for restricting Innis' and NIFC's rights, compelling them to remain involuntary plaintiffs, or otherwise treating them as such. The FEC will have a "reasonable opportunity to

obtain discovery" from Innis and NIFC, *id*., through the standard rules that govern non-party discovery.

Finally, this Court's Rule 56(d) Order is not comparable to the much more substantive types of "adverse court ruling[s]" that warranted denial of Rule 41(a)(2) motions in the cases the FEC cites. *See Francis v. Ingles*, 1 F. App'x 152, 154 (4th Cir. 2001) (per curiam) (prohibiting plaintiff from dismissing suit after discovery closed, one week before trial, to evade court order excluding plaintiff's expert) (cited in FEC Br. at 5); *Skinner v. First Am, Bank*, No. 93-2493, 1995 U.S. App. LEXIS 24237, at *8-9 (Aug. 28, 1995) (prohibiting plaintiff from dismissing claims after discovery closed to "avoid an adverse ruling" on an impending summary judgment motion) (cited in FEC Br. at 5); *Teck Gen. Pshp. v. Crown Cent. Petroleum Corp.*, 28 F. Supp. 2d 989, 992 (E.D. Va. 1998) (prohibiting plaintiff from dismissing near the close of discovery to evade court order striking its expert witnesses, who plaintiff disclosed late) (cited in FEC Br. at 6); *see also RMD Concessions, L.L.C. v. Westfield Corp.*, 194 F.R.D. 241, 243 (E.D. Va. 2000) (imposing conditions on dismissal where plaintiff sought to evade court ruling transferring case to a different district) (cited in FEC Br. at 5-6). The Order in this case, in contrast, did not compel Innis or NIFC to provide any information, admit or exclude any evidence, transfer or dismiss this case, or otherwise reach the merits of the underlying claims.

Likewise, in most of the cases the FEC cites in which a court required a plaintiff to provide discovery as a condition of being dismissed, the plaintiffs already had litigated discovery disputes over particular requests and were subject to an adverse order, ruling, or recommendation. *E.g.*, In re *Wellbutrin XL*, 268 F.R.D. 539, 543-44 (E.D. Pa. 2010) (requiring a plaintiff class representative to comply with an order directing it "to produce documents responsive to [the defendant's] requests," as a condition of dismissal) (cited in FEC Br. at 6); In re *Vitamin Litig.*, 198 F.R.D. 296,

303-04 (D.D.C. 2000) (holding that, where a Special Master recommended that plaintiffs comply with particular document requests that had been served, and the plaintiffs failed to object to that determination, they should not be permitted to drop out of the case "merely to avoid having to give defendants the discovery authorized by the Special Master's Report") (cited in FEC Br. at 6).[6] As discussed earlier, neither Innis nor NIFC are not subject to any outstanding discovery orders.

It is telling that the FEC could not find a single case from any jurisdiction in which a court denied a Rule 41(a)(2) motion to prevent a plaintiff from trying to "evade" an order granting a Rule 56(d) motion. This Court's Rule 56(d) Order directed only that this case shall proceed according to the normal course of virtually all cases before this Court. Because dismissing Innis and NIFC would not allow them to evade, nullify, or effectively undo any court orders, this Court should grant their motion without precondition and without prejudice.

B. Innis' and NIFC's Rule 41 Motion is Timely

The FEC also expresses dismay that "the Innis plaintiffs did nothing during the ***six days***" after the primary to dismiss their claims. FEC Br. at. 1 (emphasis added); *id*. at 7. Its suspicions are further aroused by the fact that Plaintiffs did not file their Amended Complaint and accompanying motions until after the Court's June 18 Order on the FEC's Rule 56(d) motion. *Id*. at 8. The FEC's argument fails for several reasons.

1. Most basically, Innis and NIFC cannot be blamed for failing to file their papers before this Court's June 18 order on the FEC's Rule 56(d) motion, because they had no way of knowing this Court would issue its ruling that day. To the contrary, this Court previously had

[6] Even though the court in *Vitamin Litig.*, 198 F.R.D. at 305 n.10 (cited in FEC Br. at 6), ordered plaintiffs to comply with interrogatories and document requests as a condition of dismissal, it specifically refused to "require [them] to appear for depositions," including those that were "already noticed." The FEC nevertheless seeks to compel Innis and NIFC to submit to depositions in this case. FEC Br. at 18.

scheduled a hearing on that motion (as well as Plaintiffs' summary judgment motion) two days later, on June 20, and reasonably could have been expected to take the matter under advisement. Thus, the FEC's contention that Innis and NIFC deliberately waited until after this Court adjudicated its Rule 56(d) motion is not only immaterial, but contrary to reality.

Moreover, even if this Court concludes that leave of court is required to drop plaintiffs from a lawsuit, Innis and NIFC surely were reasonable in believing they retained the ability to drop their claims as of right under Fed. R. Civ. P. 15(a)(1)(A), particularly in light of authorities such as *Galustian v. Peter*, 591 F.3d 724, 730 (4th Cir 2010), and *Smith v. Green Tree Servs., LLC*, No. 2:09-CV-710, 2010 U.S. Dist. LEXIS 25784 (S.D. W. Va. Mar. 18, 2010). The apparent availability of Rule 15(a)(1)(A) made the passing of Rule 41(a)(1)(A)'s deadline appear inconsequential, further undermining the notion that any bad faith was involved in the timing of Innis' and NIFC's motions.

2. Innis and NIFC previously pointed out that they waited to withdraw from this case until after they finished investigating their options for contesting the Nevada primary's anomalous results.[7] The FEC contends that Innis "conceded the election" on June 12. FEC Br. at 8. This

[7] As these articles demonstrate, the prevailing candidate received approximately 42.6% of the vote, Innis received 33.1%, Mike Monroe received 22.1%, and Carlo Poliak received 2.14%. Secretary of State Ross Miller, *Silver State Election Night Results 2014*, *available at* http://www.silverstateelection.com/USCongress/. These results were anomalous because Monroe was a generally unknown candidate who did not campaign; register a candidate committee with the FEC; raise or spend any funds; have a website, Twitter feed, Facebook page, or other online presence; or participate in any public debates. Virtually no press articles prior to the election even mentioned him, and the Secretary of State's website does not have a candidate picture of him. Although some speculated that votes for him might have been "protest votes," such a theory was unpersuasive because Monroe received 10 times as many votes as the other "unknown" candidate, Carlo Poliak.

The FEC argues that Innis' concerns about the election were not a basis for delaying withdrawal from the race (or this lawsuit) because he "only questioned the vote tally of an opponent who also lost the election." FEC Br. at. 9. As the Federal ***Election*** Commission should recognize, however, if votes in the primary were incorrectly attributed to or tallied for Monroe, a corrected tally

assertion is an overreading of a blog quote of a poorly worded press release, *see id*. (quoting Thomas Mitchell, *Candidate Innis Calls on Secretary of State to Investigate Unusual Results in CD4 Race*, 4TH ST8 [sic] (June 12, 2014)), and a distortion of the overall press coverage of the primary's aftermath. Press accounts make clear that Innis did not, in fact, concede until Monday, June 23. Indeed, one of the articles that the FEC itself cited, published June 24, 2014, states:

> A Nevada congressional candidate who came in second place in the Republican primary has conceded the race and abandoned a bid for a recount.
>
> Niger Innis' campaign issued a statement saying Innis called state Assemblyman Cresent Hardy on Monday, about two weeks after the election, and congratulated him on the win.

Innis Abandons Bid for Recount, CBS LAS VEGAS (***June 24, 2014***) (cited in FEC Br. at 9 n.3), *available at* http://lasvegas.cbslocal.com/2014/06/24/innis-abandons-bid-for-recount/; *see* Michelle Rindels, *Innis Concedes House Race, Abandons Recount Effort*, WASHINGTON TIMES (June 24, 2014) ("A Nevada congressional candidate who came in second place in the Republican primary earlier this month ***conceded the race Monday***.") (emphasis added), *available at* http://www.washingtontimes.com/news/2014/jun/24/innis-concedes-house-race-abandons-recount-effort/.[8]

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reasonably could be expected to increase Innis' total. As Monroe received 22.1% of the vote, while Innis lost by only 10.5%, inaccuracies in Monroe's vote tally could have changed the election's outcome.

[8] *See also Innis Concedes House Race, Abandons Recount Effort*, 13 ACTION NEWS (June 24, 2014) ("A Nevada congressional candidate who came in second place in the Republican primary has conceded the race and abandoned a bid for a recount."), *available at* http://www.jrn.com/ktnv/news/Innis-concedes-House-race-abandons-recount-effort-264507641.html; *accord* Michelle Rindels, *Niger Innis Concedes Congressional Primary Race to Cresent Hardy*, THE REPUBLIC (June 24, 2014), *available at* http://www.therepublic.com/view/story/fecfaf5d927b4c58ba04f26dede4bbeb/NV--Nevada-Primary-House-4-Audit.

Other press accounts confirm that, "[a]fter the results were in, Innis . . . ***refused to concede*** and said he might ask Nevada Secretary of State Ross Miller to investigate to determine how [an unknown candidate who did not campaign, have a website, or raise money] got so many votes." Laura Myers, *Congressional Candidate Won't Go for Recount, Says It's Time to "Move On"*, LAS VEGAS REV.-J. (June 23, 2014) (emphasis added), *available at* http://www.reviewjournal.com/news/congressional-candidate-won-t-go-recount-says-it-s-time-move; *see also* Laura Myers, *Hardy Nabs Win in 4th Congressional District's GOP Primary*, LAS VEGAS REV. J. (June 10, 2014) (FEC Br. at 9 n.4) (noting that Innis "refus[ed] to concede" based on the anomalous results), *available at* http://www.reviewjournal.com/politics/elections /hardy-nabs-win-4th-congressional-district-s-gop-primary.

3. The FEC's contention that Innis should have moved to withdraw from this case within the first six (6) days after the primary (before the expiration of Rule 41(a)(1)(A)'s period), or the seven (7) days between the primary and this Court's Rule 56(d) Order, also overlooks the fact that such short periods ended well before Nevada's deadlines for either seeking a recount, *see* Nev. Rev. Stat. §§ 293.387(3) (requiring county clerk to certify canvassed results within seven (7) working days of the primary); *id.* § 293.403(1) (setting deadline for requesting recount at three (3) working days after certification), ***or*** filing an election contest, *id.* § 293.413 (setting deadline for requesting election contest at 14 days after election or five (5) days after completion of recount). Innis justifiably waited until completing his highly publicized exploration of these options before choosing to withdraw from the instant lawsuit.

4. Finally, the caselaw provides no support whatsoever for the FEC's argument that Innis' and NIFC's motions were untimely because they were filed more than six (6) or seven (7) ***days*** after he lost the primary. Rule 41(a)(2) motions for dismissal have been held to be untimely

when filed after discovery was mostly or entirely complete, the parties had invested several months (if not years) in the case, dispositive motions were imminent or pending, and trial was only a few weeks away. *E.g.*, *Howard*, 302 F. App'x at 179 (affirming denial of Rule 41(a)(2) motion filed "more than three weeks after discovery closed, and after [the defendant] had filed its summary judgment motion"); *Seligman v. Tenzer*, 173 F. App'x 280, 283 (4th Cir. 2006) (affirming denial of Rule 41(a)(2) motion filed "after the close of discovery, after defendants had already filed their motion for summary judgment, and within three weeks of the scheduled trial date"); *Francis*, 1 F. App'x at 154 (affirming denial of Rule 41(a)(2) dismissal motion filed "after a lengthy discovery period and merely one week before the scheduled trial date"); *Andes v. Versant Corp.*, 788 F.2d 1033, 1036 (4th Cir. 1986) (affirming denial of Rule 41(a)(2) motion where the parties had incurred "substantial costs of discovery, through depositions, production of documents, and obtaining of expert opinions").

In this case, Innis' and NIFC's Rule 41(a)(2) motion was filed before any discovery requests were served or a scheduling order was entered, while no dispositive motions were pending, and well before any possible trial date. The motion is timely and non-prejudicial. *Fid. Bank PLC v. N. Fox Shipping N.V.*, 242 F. App'x 84, 89 (4th Cir. 2007) (affirming district court's dismissal of plaintiffs' claims under Rule 41(a)(2) where motion was filed while "no discovery whatsoever had been undertaken," even though a "pretrial order was filed by the parties," because the case remained at an "early stage") (quotation marks omitted); *Bridge Oil, Ltd. v. Green Pac A/S*, 321 F. App'x 244, 245-46 (4th Cir. 2008) (holding that Rule 41(a)(2) motion was timely because only "minimal" discovery had occurred, and it was pertinent to other claims the defendant faced); *Blanzy v. Griffin Pipe Prods. Co.*, No. 6:11-CV-50, 2012 U.S. Dist. LEXIS 42293, at *8-9 (W.D. Va. Mar. 28, 2012) (granting Rule 41(a)(2) motion because the "case is in the early stages

of litigation," as "no depositions have been noticed or taken, no hearings have been held . . . and [plaintiff] served no discovery requests upon Defendants").

Although the FEC filed its Answer on June 16, the mere filing of an answer does not render a Rule 41(a)(2) motion untimely or prejudicial. *See Andes*, 788 F.2d at 1036 n.4 ("Since Rule 41(a)(2) only applies when an answer or a motion for summary judgment has been filed by the defendants, the mere filing of an answer or a motion for summary judgment could not, without more, be a basis for refusing to dismiss without prejudice."); *accord Jones v. Hill*, No. 95-6356, 1995 U.S. App. LEXIS 34422, at *3-4 (4th Cir. Dec. 7, 1995).

Thus, Innis truthfully maintained that he waited to withdraw from this case until after deciding not to contest the results of the primary. His loss in the primary is a legitimate reason for seeking dismissal, and the timing of his request was reasonable.

C. The FEC's Arguments Are Flatly Contrary to Settled Precedent

The FEC's attempt to compel Innis and NIFC to remain plaintiffs in this case until discovery ends and summary judgment motions are due is flatly contrary to settled precedent. The Fourth Circuit has held that Rule 41(a)(2) dismissal motions become prejudicial after the parties have incurred "[t]he expenses of discovery" and prepared summary judgment motions. *Skinner*, 1995 U.S. App. LEXIS 24237, at *6; *see also Andes*, 788 F.2d at 1036.

Innis and NIFC filed their Rule 41(a)(2) motion ***before*** any discovery was served, nearly two months in advance of the deadline for dispositive motions. The FEC nevertheless asks this Court to refrain from dismissing Innis and NIFC until ***after*** the conclusion of discovery, concomitantly with the deadline for summary judgment motions. If Innis or NIFC had filed their Rule 41(a)(2) motion at that late point, the FEC undoubtedly would have accused them of wasting

its time and resources in discovery and attempting to "evade" a ruling on the merits of their claims. The proper time for dropping Innis and NIFC from this case is now, not when it is nearly over.

D. The FEC Does Not Face Any Prejudice

The FEC contends that it would be prejudiced by the dismissal of Innis and NIFC, because "they have information that will be important to the FEC's continuing defense against Stop PAC's claims." FEC Br. at 10-11; *id*. at 1. The fact that the FEC would rather treat Innis and NIFC as plaintiffs for discovery purposes, rather than non-parties, does not mean their dismissal would cause "substantial prejudice" to the FEC. *Andes*, 788 F.2d at 1036. Dismissing Innis and NIFC would place the FEC in the same position it would have occupied, had they never been included as plaintiffs in the first place. The FEC has failed to explain how its position in this case has been eroded by the temporary inclusion of Innis and NIFC as Plaintiffs on the handful of Plaintiffs' filings that occurred before the Rule 41(a)(2) motion. At most, the FEC faces the possibility of "mere inconvenience or tactical disadvantage"—not prejudice—from having to obtain discovery from Innis and NIFC under Rule 45. *RMD Concessions, L.L.C. v. Westfield Corp.*, 194 F.R.D. 241, 243 (E.D. Va. 2000); *Teck Gen. Pshp. v. Crown Cent. Petroleum Corp.*, 28 F. Supp. 2d 989, 991 (E.D. Va. 1998).

The FEC does not meaningfully attempt to distinguish *RMD Concessions*, noting only that the court held that a Rule 41(a)(2) dismissal may not be used to "unravel[] the effect of an earlier legal ruling." 194 F.R.D. at 243 (quoted in FEC Br. at 13-14). As discussed earlier, there is no such ruling in this case for Innis and NIFC to attempt to avoid.

The FEC also contends that the court in *Teck General Partnership* denied a Rule 41(a)(2) motion as unduly prejudicial at a "comparable" point in the proceedings. FEC Br. at 15. To the contrary, the plaintiff in *Teck General Partnership* filed its Rule 41(a)(2) motion on November 17,

1998, only ten days before the discovery cutoff, ***after*** serving discovery on the defendant ***and*** litigating two motions to compel. *Teck Gen. Pshp,* 28 F. Supp. 2d at 990. Most critically, the court had entered an order striking the testimony of the plaintiff's expert witness, who the plaintiff had disclosed after the deadline in the scheduling order. *Id*. The court held that the plaintiff should not be permitted to dismiss its claims to "avoid" that adverse ruling. *Id*. at 992. Here, in contrast, the Rule 41(a)(2) motion was filed at the outset of discovery, before either side served any requests; this Court has not adjudicated any discovery disputes; and, as discussed earlier, this Court has not issued any substantive orders for Innis or NIFC to attempt to "avoid." Thus, the FEC will not be prejudiced by immediate dismissal of Innis or NIFC.

E. Innis' and NIFC's Claims are Non-Justiciable and Therefore Must Be Dismissed Without Precondition

Even putting aside the potential mootness issues that arise from Innis' loss in the primary, as well as this Court's possible lack of subject-matter jurisdiction over Innis' claims under 2 U.S.C. § 437h, this Court should grant Innis' and NIFC's motion to dismiss their claims, without prejudice or precondition, because Innis' and NIFC's desire to drop them renders those claims nonjusticiable. Wright & Miller explains, "There can be no doubt that an action is mooted if the plaintiff voluntarily withdraws. . . . The conclusion is so clear that only rare circumstances will create a need to express it." 13B Charles A. Wright et al., *Federal Practice and Procedure*, "Jurisdiction and Related Matters," § 3533.2 (3d ed.).

In *Webster v. Reproductive Health Services*, 492 U.S. 490, 512-13 (1989), for example, the Supreme Court held that "Plaintiffs are masters of their complaints," and when they "no longer seek a declaratory judgment that [a law] is unconstitutional," the controversy becomes "moot," and the district court should "dismiss the relevant part of the complaint." *See also Maher v. Hyde*, 272 F.3d 83, 87 (1st Cir. 2001) (holding that claims which a plaintiff has "expressly disavowed

any interest" in pursuing are "necessarily moot"); *cf. Patriot Cinemas v. Gen. Cinema Corp.*, 834 F.2d 208, 215 (1st Cir. 1987) (holding that "an appeal from the dismissal of a count which the plaintiff no longer wishes to litigate . . . . does not present a live controversy"). Innis and NIFC no longer seek to pursue any constitutional challenges. Given the early stage of the litigation, a justiciable controversy no longer exists between them and the FEC, and Article III requires that their claims be dismissed.

F. The Fund's Actions in a Different Lawsuit Have Nothing to Do with the Legal Rights of Innis and NIFC

The FEC also asks this Court to retain Innis and NIFC as plaintiffs in this case because Plaintiff Tea Party Leadership Fund ("the Fund") dismissed similar claims in a different case in a different court last year. FEC Br. at 9. The FEC does not, and cannot, contend that either Innis or NIFC had anything to do with the Fund's previous case. Nor does it explain why the Fund's actions in that case should affect the scope of Innis' and NIFC's right to voluntarily dismiss their own claims in this case. Thus, this Court should disregard this makeweight argument.

G. The FEC Has Failed to Articulate a Valid Reason Why Dismissal of Innis' and NIFC's Claims Should Be With Prejudice.

The FEC urges that, after retaining Innis and NIFC as plaintiffs to allow the FEC to take discovery from them, this Court should dismiss their claims with prejudice, to ensure they cannot litigate those claims again in a different forum. FEC Br. at 1, 10. The Fourth Circuit has held, however, that a case may not be dismissed with prejudice to preclude "the prospect of a second lawsuit" in another court. *Davis v. USX Corp.*, 819 F.2d 1270, 1274 (4th Cir. 1987). Dismissal with prejudice would be inappropriate, even if the FEC has a valid defense (such as a statute of limitations) that it would be unable to invoke in a different forum. *Id*. at 1275. Thus, there is no basis for the FEC's request that Innis' and NIFC's claims be dismissed with prejudice.

CONCLUSION

The FEC's various arguments obscure the fundamental point underlying Plaintiffs' motions—Innis and NIFC seek to withdraw from this case because Innis lost his primary, and therefore is no longer a candidate for federal office. Innis and NIFC filed the appropriate papers before a scheduling order was entered, before any discovery requests were served, while no dispositive motions were pending, and well before the deadline for filing such motions (much less a trial date). This Court should not compel Innis and NIFC to involuntarily remain plaintiffs in this case, just so that the FEC may obtain discovery from them more easily.

For these reasons, this Court should hold that the Amended Complaint, filed as of right, was sufficient to drop Innis and NIFC from this lawsuit without leave of court, and that they may not be treated as party litigants for discovery purposes. In the alternative, this Court should grant Plaintiffs' motion under Rules 15(a)(2) and 41(a)(2) to dismiss Innis and NIFC from this case without prejudice, and permit them to be treated as non-parties for discovery purposes.

Respectfully submitted,

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Dated July 21, 2014

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

STOP RECKLESS ECONOMIC INSTABILITY CAUSED BY DEMOCRATS, *et al.*,	
Plaintiffs,	Civ. No. 1:14-397 (AJT-IDD)
v.	
FEDERAL ELECTION COMMISSION,	
Defendant.	

CERTIFICATE OF SERVICE

I, Dan Backer, hereby certify that on this 21st day of July 2014, I did cause a true and complete copy of the foregoing Plaintiffs' Consolidated Rebuttal Brief in Support of Motions to Amend Complaint and Dismiss Niger Innis' and Niger Innis for Congress' Claims to be electronically filed with the Clerk of Court using the CM/ECF system, which will effect service upon the following counsel for the plaintiff:

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