

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

FREEDOM FROM RELIGION
FOUNDATION, INC.,

Plaintiff,

v.

JOHN KOSKINEN, Commissioner of
the Internal Revenue Service,

Defendant,

HOLY CROSS ANGLICAN CHURCH
and FATHER PATRICK MALONE,

Defendant-Intervenors.

Case No. 12-CV-0818

OPPOSITION TO MOTION TO DISMISS WITHOUT PREJUDICE

Defendant-Intervenors Father Patrick Malone and Holy Cross Anglican Church (collectively, “the Church”) oppose the joint motion of Plaintiff Freedom From Religion Foundation (“FFRF”) and Defendant Koskinen (“IRS”) because it seeks dismissal without prejudice. Dismissal without prejudice would be unjust at this stage in the case: it has been almost two years since the case was filed, the parties are well into document discovery, and both the Court and the Church have expended significant resources in the case. FFRF should not be in a position to drop this lawsuit and file an identical lawsuit (and again put the Church’s interests in jeopardy) a week, a month, or a year in the future.

Dismissal with prejudice is especially appropriate because of the odd factual predicate for the motion. IRS has apparently shown FFRF documents that FFRF says

convince it that the Court “would be unable in any event to fashion relief at this time.” Exhibit 1 at 2-3. But both IRS and FFRF refuse to show these apparently outcome-dispositive documents to the Church or to the Court. Indeed, IRS signed a certification that it was sending the Church those documents, but then refused to do so. Thus one is left to wonder what has passed between IRS and FFRF that would cause FFRF—which fought hard to establish standing—to declare suddenly that its claimed injury is unredressable.¹ This apparent collusion between FFRF and IRS, while withholding from the Church relevant information to which is entitled by the Rules and IRS’s certification, only underscores that dismissal at this late stage should not be granted, unless with prejudice.

Given the injustice of allowing a case to be half-litigated and then dropped without consequence, and the concealed motive for dropping the lawsuit, this case should be dismissed with prejudice.

FACTUAL BACKGROUND

In their motion, FFRF and IRS claim that they made “numerous attempts” to obtain the Church’s stipulation to dismissal. Mot. at 2. This account leaves out most of the interaction between the parties. Indeed, the Church has repeatedly told IRS and FFRF that it *would* likely stipulate to a dismissal *with prejudice*, especially after seeing the documents that changed FFRF’s mind about redressability. But neither FFRF nor IRS agreed to a dismissal with prejudice. And a fair appraisal of the factual and procedural background of this case demonstrate that this case has consumed

¹ The Court could of course order that the apparently outcome-dispositive documents be filed under seal so the Court and the Church could review them.

significant Church resources, particularly in the discovery process, only for the case to be dropped for reasons that remain as yet concealed.

Ironically, about a month after this Court's intervention order suggesting that the Church's intervention should not create a need for any additional discovery, Dkt. 33 at 6, FFRF served the Church, in addition to IRS, with requests for document production. And until Friday (when FFRF produced documents), the Church was the only party to have produced any documents.² IRS has not produced any documents to the Church, though it has apparently produced documents to FFRF.

And the documents that are being withheld by IRS are apparently very important: FFRF and IRS demand that the Church stipulate to a dismissal without prejudice based on those documents, even while IRS refuses to show them to the Church or the Court. IRS's odd behavior in responding to discovery—including a false certification that it was sending the documents to the Church, Exhibit 2 at 4—is all the more reason to question FFRF's new-found belief that it lacks standing to bring its Establishment Clause claim.

FFRF's July 17 press release concerning this case only reinforces these impressions. FFRF expressly states that "FFRF could refile the suit" later, that dismissal merely "resolves for the time being" the issues in this case, and that the Court's resolution of the present Motion "is expected to be without prejudice, which means that further legal action by FFRF to enforce anti-electioneering provisions is not precluded in the future." Exhibit 3 at 2. FFRF could not say more clearly that it

² FFRF said that it had previously attempted to send the production via email.

views dismissal as a temporary measure. Similarly, FFRF describes in its press release multiple details concerning IRS practices that have not been produced in discovery: (1) IRS has “resolved the signature authority issue necessary to initiate church examinations”; (2) “IRS also has adopted procedures for reviewing, evaluating and determining whether to initiate church investigations”; (3) “IRS no longer has a blanket policy or practice of non-enforcement of political activity restrictions as to churches”; and (4) “IRS has suspended all examinations of tax-exempt organizations for alleged political activities.” *Id.* IRS has apparently provided FFRF with information about these practices, but withheld it from the Church and the Court.

Given the injustice of a dismissal without prejudice, and based on IRS’s and FFRF’s secretive behavior, the Church declined to stipulate to a dismissal without prejudice, and without review of the withheld documents that should have been pursuant to Fed. R. Civ. P. 5(a)(1)(C) and 34.

Finally, it is difficult to review the progress of this lawsuit and say that nothing has happened. The following timeline describes what has happened thus far in the lawsuit:

2012

- *November 14*: FFRF files its complaint. Dkt. 1.

2013

- *April 8*: IRS moves to dismiss for lack of standing. Dkt. 12.
- *August 19*: After evaluating full briefing on the question, this Court denies IRS’s motion to dismiss for lack of standing. Dkt. 17.
- *December 12*: The Church moves to intervene. Dkt. 25.

- *December 18*: This Court denies IRS's motion for certificate of appealability. Dkt. 29.

2014

- *February 3*: This Court grants the Church's motion to intervene. Dkt. 33.
- *March 12*: FFRF serves the Church and IRS with document production requests. Exhibit 4.
- *April 14*: At the deadline for production responses, the Church serves its initial document production response on FFRF and IRS. IRS does not serve its responses, which were also due on this date.
- *May 17*: The Church serves a supplemental response to FFRF's document production requests. The Church also serves document production requests on FFRF and IRS. The Church's request to IRS seeks only those documents responsive to FFRF's March 12 document production requests.
- *May 20*: IRS admits that it still has not issued its production in response to FFRF's request, asks that the Church agree to a protective order for that overdue production, and states that IRS expects that once FFRF receives the production, FFRF will voluntarily dismiss the case. IRS further agrees that its discovery responses to the Church are due by June 19.
- *May 22*: IRS circulates a draft protective order. After review, the Church determines that the order plainly violates Seventh Circuit case law because it allows IRS to accord strict confidentiality to any document produced under the order without any description of the number or nature of the documents or any specific description of harm that could be caused by disclosure. *See, e.g., EEOC v. Synergy Health Inc.*, 265 F.R.D. 403 (E.D. Wis. 2009).
- *June 3, 5*: The Church informs IRS that it cannot agree to the protective order as written. The Church requests a listing of the categories of documents that IRS wishes to subject to the protective order. IRS agrees to provide the listing, but never subsequently does.
- *June 6*: Counsel for the Church calls counsel for FFRF to inquire about FFRF's alleged inclination to dismiss. FFRF's counsel states that this was just "wishful thinking" on behalf of IRS.
- *June 17*: Two days before its discovery responses are due, IRS asks the Church for a two-week extension until July 1. The Church agrees, while reminding IRS of its duty under Fed. R. Civ. P. 5(a)(1)(C) to serve the Church immediately with any discovery responses already served on FFRF.

- *June 24*: The Church receives FFRF's written response to the Church's document production requests, certified by FFRF's counsel as mailed on June 19, but no responsive documents are included.
- *July 1*: IRS fails to meet the deadline for production of documents that it had expressly agreed.
- *July 2, 12:25 AM*: IRS emails a document purporting to be a response to the Church's request for production. The document states that the production, Bates-stamped USPROD1-686, is being produced via Fed Ex. *See Exhibit 2 at 3*. The document contains a signed certification by IRS counsel Richard A. Schwartz stating that, "on July 1, 2014," IRS served the response on the Church. *Id.* at 4.
- *July 2, 12:35 PM*: IRS leaves a voicemail for the Church's counsel stating that FFRF has offered to dismiss the case, asking whether the Church will agree to dismissal, and requesting the Church's response "right away."
- *July 2, 1:06 PM*: The Church asks for, and receives, a copy of FFRF's email stating its desire to dismiss the case "[b]ased on the recent information [IRS's counsel] have provided." *See Exhibit 1 at 2-3*.
- *July 3*: The Church informs FFRF that it has not yet received the production that FFRF has evidently already received, and that it should be able to review that production before agreeing to a stipulated dismissal. *See Exhibit 1 at 2*.
- *July 7*: Still having not received IRS's production, the Church asks for the tracking number on the FedEx shipment with the documents. IRS responds that—despite its agreement to produce by July 1 and counsel's certification that production was made on July 1—it had not actually sent the production and now refused to do so.
- *July 9*: The Church states that it will likely stipulate to dismissal if dismissal is with prejudice and if the Church receives the promised production to allow it to evaluate the factual basis for the proposed dismissal.
- *July 10*: FFRF changes its mind and states that it cannot agree to dismiss and that the case must move forward to a determination on the merits. The Church reiterates to IRS that IRS's production should be served immediately.
- *July 17*: FFRF reverses its decision yet again and joins IRS in a joint motion to dismiss.
- *July 17*: FFRF issues a press release stating that it had "settled" the lawsuit. The press release includes details of IRS practices and also states FFRF's expectation that this Court will dismiss the case without prejudice. *Exhibit 3*.

- *July 18*: The Church receives FFRF's document production via email. To date, IRS has not fulfilled its discovery obligations to produce to the Church the same documents it produced to FFRF.

As is apparent from this timeline, this nearly two-year-old case has proceeded well past the motion to dismiss stage and deep into discovery. And after fighting hard for the right to bring this lawsuit, and demanding discovery from the Church and IRS, FFRF has suddenly "thr[own] in the towel." *Riviera Distributors, Inc. v. Jones*, 517 F.3d 926, 928 (7th Cir. 2008).

ARGUMENT

Under Fed. R. Civ. P. 41(a)(2), "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." The Seventh Circuit allows district courts to "impose such terms and conditions as it believes necessary to protect the other parties from prejudice and that 'terms and conditions are the quid pro quo of allowing the plaintiff to dismiss his suit.'" *Ratkovich By & Through Ratkovich v. Smith Kline*, 951 F.2d 155, 158 (7th Cir. 1991) (quoting *Brandt v. Schal Associates, Inc.*, 854 F.3d 948, 955 (7th Cir. 1988)). To guide the district court's decision, the Seventh Circuit has articulated four factors "that a district court may wish to consider in making its determination as to whether a defendant has suffered legal prejudice." *Id.* These are:

[1] the defendant's effort and expense of preparation for trial, [2] excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action, [3] insufficient explanation for the need to take a dismissal and [4] the fact that a motion for summary judgment has been filed by the defendant.

Id. (quoting *Pace v. Southern Express Co.*, 409 F.3d 331, 334 (7th Cir. 1969)). Because dismissal without prejudice would give rise to legal prejudice against the Church, as

assessed under these factors, the Church respectfully requests that this Court grant dismissal with prejudice.

First, under the first factor, both this Court and the Church have expended significant effort and expense in preparing for a merits determination of this case. This Court has already issued twelve orders in this case, two of which were accompanied by opinions, and held two conferences with the parties. *See, e.g.*, Dkt. Nos. 7, 8, 9, 11, 17, 19, 21, 22, 29, 33, 37, 39; *see also* Text-Only Orders on March 26, 2013 and March 12, 2014. And not only has the Church provided discovery in response to requests from FFRF, but it has repeatedly attempted to advance this litigation by trying to obtain discovery from its co-parties. Permitting FFRF to “throw in the towel” now and then refile its suit at a later date, in the “hop[e] to acquire better evidence in the future,” would simply compel the Church to engage once more in precisely the same tasks with precisely the same parties. *Riviera Distributors*, 517 F.3d at 927-28; *see also* Exhibit 3 at 2 (FFRF’s public statement that it is seeking dismissal “without prejudice” precisely so that “further legal action by FFRF to enforce anti-electioneering provisions is not precluded in the future.”).

Second, under the third factor, FFRF and IRS have not provided a sufficient explanation for the need to take a dismissal. Because IRS has continually refused to send the Church the documents that it promised to produce, its explanation for the need to take a dismissal falls short of the necessary mark. Although “FFRF is satisfied that IRS does not have a policy at this time of non-enforcement specific to churches and religious organizations,” IRS itself says nothing to confirm or deny that

fact. Dkt. 38 at 2-3. Further, the uncontroverted evidence in the record shows that IRS is *not* currently enforcing its speech restrictions on churches, *see* Dkt. 15 at ¶¶ 3-5 (Bolton Decl.); Dkt. 27 at ¶ 29 (Malone Decl.); *see also* Exhibit 3 at 2 (stating that “IRS has suspended all examinations of tax-exempt organizations for alleged political activities.”).³ And, given FFRF’s public statement about its apparent knowledge of IRS procedures and actions, Exhibit 3 at 2, it is bizarre for FFRF and IRS to be so secretive about the document production upon which FFRF is relying to make that public statement. The Church would suffer prejudice if it is forced to intervene again when this suit is refiled, never having been given a forthright and sufficient explanation of the actual basis for why the suit was dismissed the first time.

Finally, under the fourth factor, while the Church has not yet filed a motion for summary judgment, it has expended significant resources preparing to file that motion because the dispositive motions deadlines has twice come within weeks of being due and before being reset to a later date. *See* Dkt. 37; *see also* March 12, 2014 Text-Only Order; *Ratkovich*, 951 F.2d at 158 (noting the significance of summary judgment motion practice).

After so much time and effort has been invested by this Court and by the parties,

³ *See, e.g.*, Dkt. 15 at ¶ 3 (attesting that an IRS official admitted that “even egregious cases of violations of § 501(c)(3) by churches are not being pursued by the IRS”), ¶ 5 (attesting that “[s]ince at least 2009, in fact, churches and religious organizations have been blatantly engaging in political activity in violation of the restrictions of § 501(c)(3),” and that “perhaps hundreds of videotapes of such violations have been sent to the IRS, and . . . FFRF has also notified the IRS of numerous such violations by churches and religious organizations.”); *accord* Dkt. 27 at ¶ 29 (attesting that, despite IRS’s threats against church speech and the Church’s openly teaching its religious beliefs despite those threats, “the IRS has not enforced the[] threats”).

“the time for a voluntary dismissal, without prejudice . . . ha[s] passed.” *Riviera Distributors*, 517 F.3d at 927. The Church therefore respectfully requests that the case be dismissed with prejudice.

Dated: July 21, 2014

Respectfully submitted,

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