

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DISTRICT**

EDEN ROGERS and
BRANDY WELCH,

Plaintiffs,

-against-

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES;

XAVIER BECERRA, in his official capacity as
Secretary of the UNITED STATES
DEPARTMENT OF HEALTH AND HUMAN
SERVICES;

ADMINISTRATION FOR CHILDREN AND
FAMILIES;

JANUARY CONTRERAS, in her official
capacity as the Senior Official Performing the
Duties of the Assistant Secretary of the
ADMINISTRATION
FOR CHILDREN AND FAMILIES;

JEFF HILD, in his official capacity as Principal
Deputy Assistant Secretary of the
ADMINISTRATION FOR CHILDREN AND
FAMILIES;

HENRY MCMASTER, in his official capacity
as Governor of the STATE OF SOUTH
CAROLINA; and

MICHAEL LEACH, in his official capacity as
State Director of the SOUTH CAROLINA
DEPARTMENT OF SOCIAL SERVICES,

Defendants.

Case No.: 6:19-cv-01567-JD

**PLAINTIFFS' REPLY IN SUPPORT
OF MOTION FOR VOLUNTARY
DISMISSAL OF CLAIMS AGAINST
FEDERAL DEFENDANTS PURSUANT
TO FED. R. CIV. P. 41(a)(2)**

Plaintiffs' claims against the Federal Defendants in this case turn on HHS's issuance of a waiver, which HHS has since withdrawn. Unlike the *Maddonna* case, this case does not involve any challenge to HHS's nonenforcement policy. Accordingly, in light of the withdrawal of the waiver, Plaintiffs voluntarily agreed to dismiss Federal Defendants in order to avoid any possible burden on the Court or the parties associated with continued litigation of Plaintiffs' claims against Federal Defendants. Federal Defendants consented.

State Defendants' opposition to Plaintiffs' motion to dismiss their claims against Federal Defendants is baseless. State Defendants misconstrue the facts and the law in an effort to persuade this Court to retain jurisdiction over parties that simply no longer belong in this suit. Because Plaintiffs wish to dismiss their claims against Federal Defendants, Federal Defendants consent to such dismissal and State Defendants would suffer no prejudice as a result of Federal Defendants' dismissal, Plaintiffs' motion should be granted.

ARGUMENT

I. State Defendants Will Suffer No Prejudice from the Dismissal of Federal Defendants.

State Defendants offer a litany of reasons to keep Federal Defendants in this suit, but they ignore the key inquiry when assessing a voluntary dismissal under Rule 41(a)(2): whether dismissal will cause "legal prejudice" to any party. "The purpose of Rule 41(a)(2) is freely to allow voluntary dismissals unless the parties will be unfairly prejudiced." *Davis v. USX Corp.*, 819 F.2d 1270, 1273 (4th Cir. 1987). "[T]hus, a district court should grant a Rule 41(a)(2) motion 'absent plain legal prejudice to the defendant.'" *Bridge Oil, Ltd. v. Green Pac. A/S*, 321 F. App'x 244, 245 (4th Cir. 2008) (quoting *Ellett Bros. v. U.S. Fid. & Guar. Co.*, 275 F.3d 384, 388 (4th Cir. 2001)). Legal prejudice means "prejudice to some legal interest, some legal claim, some legal argument". *Mayer v. Fujimoto*, 181 F.R.D. 453, 456 (D. Haw. 1998), *aff'd*, 173 F.3d 861 (9th Cir.

1999) (quoting *Westlands Water Dist. v. United States*, 100 F.3d 94, 97 (9th Cir. 1996)). “In other words, legal prejudice is shown ‘where actual legal rights are threatened or where monetary or other burdens appear to be extreme or unreasonable.’” *Id.*

State Defendants do not come close to making such a showing here. State Defendants’ only arguments as to prejudice are (1) Plaintiffs’ motion was filed “after the close of discovery and on the eve of summary judgment” (Opp’n at 7), and (2) dismissing Federal Defendants might put State Defendants “back in the same position they were in where the controversy began: accommodating religious CPAs under state law, but facing the threat of federal enforcement because the federal government deems that accommodation contrary to federal regulation” (Opp’n at 9). But “[a] defendant cannot establish prejudice sufficient to defeat a Rule 41(a)(2) motion merely by showing that it has filed a summary judgment motion, or that it faces the prospect of a subsequent lawsuit.” *Bridge Oil*, 31 F. App’x at 245; *see also Davis*, 819 F.2d at 1274-75 (“[P]rejudice to the defendant does not result from the prospect of a second lawsuit,” nor will “the possibility that the plaintiff will gain a tactical advantage over the defendant in future litigation . . . serve to bar a second suit.”). State Defendants’ failure to show any legal prejudice is alone grounds to grant Plaintiffs’ motion to dismiss Federal Defendants from the case.

II. State Defendants’ Arguments in Opposition to the Motion to Dismiss Are Without Merit.

Even setting aside the lack of legal prejudice, State Defendants’ arguments against dismissal carry no weight.

First, Plaintiffs’ motion under Rule 41(a)(2) is procedurally proper. “[M]ost federal courts”—including courts in the Fourth Circuit—“agree that parties may voluntarily dismiss from a case only certain defendants.” *Duke Progress Energy LLC v. 3M Co.*, No. 5:08-CV-460-FL, 2015 WL 5603344, at *2 (E.D.N.C. Sept. 23, 2015) (quoting *United States v. All*

Assets Held at Bank Julius Baer & Co., Ltd., 307 F.R.D. 249, 252 (D.D.C. 2014)); *see also I.P. ex rel. Newsome v. Pierce*, No. 19-CV-228, 2020 WL 5535428, at *2 (E.D.N.C. Sept. 15, 2020) (finding that “Rule 41(a) permits the voluntary dismissal of all claims against a particular defendant” and granting dismissal under Rule 41(a)(2) as to a subset of defendants); *S. Bank & Tr. Co. v. Laburnum Hotel Partners, LLC*, No. 13CV216, 2014 WL 3052535, at *5-6 (E.D. Va. July 3, 2014) (same); *Synovus Bank v. Bokke IV L.L.C.*, No. 11-CV-00071, 2014 WL 440244, at *2 (W.D.N.C. Feb. 4, 2014) (same). Indeed, the Fourth Circuit has expressly recognized that “whether plaintiff’s motion is made under Rule 15 or under Rule 41(a)(2), the choice of rules is largely a formal matter” because “the structure of the two rules is similar”, and “the district court’s discretion is involved” under either Rule. *Skinner v. First Am. Bank of Va.*, 64 F.3d 659, 1995 WL 507264, at *2 (4th Cir. 1995) (unpublished table decision) (quoting J. Moore et al., *Moore’s Federal Practice*, at 41-92 (1995)); *see also Dee-K Enters., Inc. v. Heveafil Sdn. Bhd.*, 177 F.R.D. 351, 355-56 (E.D. Va. 1998) (“An amendment pursuant to Rule 15 that eliminates (or proposes to eliminate) all causes of action against a particular defendant is the same as a motion to dismiss under Rule 41(a)(2) as to that defendant.”). Thus, State Defendants’ argument would simply require this Court to consider the issue through the lens of Rule 15 rather than Rule 41 even though the standard is essentially the same, and State Defendants’ opposition would still fail because there is no possible prejudice. *See Skinner*, 1995 WL 507264, at *2 (noting that “similar standards govern the exercise of discretion under” Rule 15 and Rule 41(a)(2)).

Notably, all the cases on which State Defendants rely are inapposite. None addresses the issue at hand because all involved efforts by plaintiffs to use Rule 41(a)(2) to dismiss certain claims against some or all defendants, without fully dismissing those defendants from the case. *See Miller v. Terramite Corp.*, 114 F. App’x 536, 2004 WL 2245135, at *2 (4th Cir. 2004)

(plaintiff seeking to dismissal federal claims against sole defendant and have state claims remanded to state court); *Skinner*, 1995 WL 507264 at *1 (same); *Beaumont v. Fed. Nat'l Mortg. Corp.*, No. 918CV03142BHHMGB, 2019 WL 13197015, at *2 (D.S.C. Oct. 23, 2019) (plaintiff seeking to withdraw one of his claims against both defendants); *see also Fagnant v. K-Mart Corp.*, No. 4:11-CV-00302-RBH, 2013 WL 6901907, at *2 (D.S.C. Dec. 31, 2013) (noting that “*Skinner* did not touch on the dismissal of individual defendants”). State Defendants’ “procedural impropriety” argument is without merit.

Second, Plaintiffs’ motion is not “belated.” In assessing undue delay in the context of voluntary dismissals, courts consider whether plaintiffs “demonstrated excessive delay and lack of diligence in prosecuting th[e] action *as a whole*.” *See In re Vitamins Antitrust Litig.*, 198 F.R.D. 296, 305 (D.D.C. 2000) (emphasis added); *see also Hisler v. Gallaudet*, 344 F. Supp. 2d 29, 37-38 (D.D.C. 2004) (“[T]he court must look at whether the plaintiff has demonstrated excessive delay and lack of diligence in prosecuting this action *as a whole*.” (emphasis added)). Here, State Defendants cannot seriously argue that Plaintiffs have demonstrated negligence in prosecuting this action “as a whole” given that it has been State Defendants—not Plaintiffs—who have dragged their feet throughout the case. (*See* Dkt. 235 at 3 n.1 (detailing State Defendants’ dilatory behavior). Regardless, the timing of Plaintiffs’ motion lacks any artifice or gamesmanship. Since shortly after the withdrawal of the waiver, Plaintiffs have been engaged in efforts to reach resolution with the Federal Defendants. Those efforts did not succeed, but in light of Federal Defendants having taken the action Plaintiffs’ complaint sought in its request for injunctive relief—the rescinding of the waiver—Plaintiffs deemed continued litigation against HHS to be inappropriate at this time. In any event, as noted above, the only issue with respect to delay is whether it has prejudiced other parties; here, there is no prejudice to State Defendants. Specifically,

Plaintiffs' motion changes nothing about either the expenses State Defendants have incurred related to discovery and preparation of summary judgment briefing or the ability of the Court to assess the merits of Plaintiffs' claims against State Defendants. *See Skinner*, 1995 WL 507264 at *2. To the extent any party could claim prejudice in this regard, it would be the Federal Defendants, who have consented to Plaintiffs' motion.

Third, State Defendants' insistence that "Plaintiffs' Motion is based on a distinction that makes no difference" and is "illogical" reflects a fundamental misunderstanding of this case. (*See Opp'n* at 5-6, 9-10.) Plaintiffs' claims against Federal Defendants have always been based on Federal Defendants' issuance of a waiver to State Defendants, which Federal Defendants have since rescinded. (*See Dkt. 1* at 32-34, 36-39; *Dkt. 238* at 2.) Although HHS still has a nonenforcement policy in place, Plaintiffs in this case never brought any claims against HHS on the basis of that nonenforcement policy.¹ Plaintiffs have, however, challenged State Defendants' independent violations of the Establishment Clause and Plaintiffs' Equal Protection rights, including through the Governor's issuance of the Executive Order (which was issued *before* HHS's waiver) and State Defendants' continued authorization and enablement of state-contracted CPAs to use religious criteria to exclude and discriminate against prospective foster parents.² State

¹ There are other suits challenging HHS's nonenforcement policy, *see Family Equality v. Becerra*, No. 22-1174 (2d Cir.), *Maddonna v. U.S. Department of Health and Human Services*, No. 19-cv-3551 (D.S.C.), and dismissal of the Federal Defendants from this case will have no bearing on those actions.

² State Defendants focus on allegations in Plaintiffs' Complaint stating that, "[b]ut for the HHS Waiver, the State Defendants would not have provided Miracle Hill with a standard CPA license authorized its continued use of religious criteria in recruiting and screening prospective foster parents." (*Opp'n* at 7.) There is nothing inconsistent, however, with alleging that State Defendants relied on the waiver to authorize discrimination and Establishment Clause violations in the first instance and are continuing to engage in First Amendment and Fourteenth Amendment violations now that the waiver has been rescinded and the nonenforcement policy is in place.

Defendants' misconduct thus persists notwithstanding HHS's withdrawal of its waiver, and there is nothing "illogical" about Plaintiffs continuing to seek redress for these constitutional harms.

Fourth, State Defendants' claim that Federal Defendants are a "necessary and indispensable party" under Rule 19 of the Federal Rules of Civil Procedure is simply wrong. State Defendants contend that Federal Defendants are "necessary" because "[i]f the Federal Defendants are dismissed from this lawsuit, the State Defendants could be subject to conflicting legal obligations." (Opp'n at 8-9.) According to State Defendants, such "conflicting legal obligations" might arise if State Defendants "prevail in their argument that they may, or even must, accommodate religious CPAs," but "the federal government deems that accommodation contrary to federal regulation." (*Id.* at 9.) This argument misapprehends Rule 19. A party is necessary only if there is "a substantial risk of incurring' conflicting legal obligations" in its absence, such that a party would be "whipsawed by inconsistent judgments." *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Rite Aid of S.C., Inc.*, 210 F.3d 246, 252 (4th Cir. 2000). There is no risk of inconsistent judgments here. To the contrary, State Defendants are not seeking to avoid inconsistent judgments—they are seeking an advisory opinion from this Court concerning some hypothetical enforcement action that HHS may or may not bring in the future. That would be inappropriate regardless of whether HHS is dismissed. Indeed, as noted above, the law is clear that the possibility of a subsequent lawsuit is not a sufficient basis to deny a motion to dismiss under Rule 41(a)(2).

CONCLUSION

Plaintiffs respectfully request, with Federal Defendants' consent, that Federal Defendants be dismissed from this case under Rule 41(a)(2).

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