

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

**SURREPLY IN OPPOSITION TO JOINT
MOTION TO DISMISS WITHOUT PREJUDICE**

Defendant-Intervenors Father Patrick Malone and Holy Cross Anglican Church (“the Church”) oppose the motion to dismiss because (a) justice requires dismissal with prejudice, and (b) the Church cannot stipulate to dismissal based on information it does not have, particularly since that information has been improperly withheld from the Church. The reply briefs from Plaintiff Freedom From Religion Foundation (“FFRF”) and Defendant Koskinen (“IRS”) support the Church’s position.

Both FFRF and IRS admitted that IRS gave FFRF documents and information while refusing to fulfill its discovery obligations to the Church. *See* IRS Reply at 1-2; FFRF Reply at 2 and Ex. A. IRS continues to refuse to produce those documents to the Church, and FFRF seems to think the Church should be satisfied with a self-serving production of *one* of those documents, Exhibit A to its reply brief.

This continued secrecy increases the injustice of forcing the Church to relitigate its defenses in the future. That is especially so since FFRF's reply confirms that it seeks dismissal without prejudice precisely to allow it to refile the same legal claims on the same basic facts against same parties. FFRF Reply at 3. This, in turn, will subject the Church to the same expenditures of time and energy that it has faced in this case: seeking intervention; filing an answer; providing, propounding, and haggling with FFRF and IRS about discovery; and preparing dispositive motions. And it will subject the Court to the re-expenditure of resources consumed by two years of litigation. Opp. at 8.

But that waste is not necessary. This Court has discretion to allow voluntary dismissal on "whatever terms and conditions" it "deems necessary to offset the possible prejudice defendant may . . . suffer." *Marlow v. Winston Strawn*, 19 F. 3d 300, 302 (7th Cir. 1994). Because dismissal with prejudice "has the same effect as an adverse judgment on the merits," granting it protects the Church and this Court from seeing two years of efforts made worthless. *Id.* at 305; *Upthegrove v. Health Professionals, Ltd.*, 2009 WL 151598, at *5 (W.D. Wis. 2009) (dismissing with prejudice because the request to dismiss "comes more than a year after plaintiff's original complaint was filed. . . . Plaintiff cannot expect to subject defendant . . . to a year of litigation and walk away with no consequences."); *Muehl v. Lind*, 2009 WL 139384, at *1 (W.D. 2009) (same, but after *eight* months of litigation).

Admittedly, the Church's cost associated with its efforts should not be at issue, since—unlike prejudicial dismissals—"dismissals *without* prejudice are usually

granted *only* if the plaintiff pays the expenses incurred by the defendant in defending the suit up to that point.” *Babcock v. McDaniel*, 148 F.3d 797 (7th Cir. 1998) (first emphasis in original); *accord Marlow*, 19 F.3d at 303. But while the Church should be compensated for expenses like counsel’s trips to Wisconsin to meet with the Church, that will not cover the time and effort Father Malone and Church leadership have personally spent defending against FFRF’s claims and discovery requests nor the public abuse the Church suffered from FFRF during its defense.¹

Finally, granting dismissal with prejudice would not work unfair surprise on FFRF. Should this Court decide to require dismissal with prejudice, FFRF “must be given a reasonable opportunity to withdraw [its] motion.” *Id.* at 305.

The Church therefore respectfully requests that the case be dismissed with prejudice.

Dated: August 1, 2014

Respectfully submitted,

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¹ See <http://ffrf.org/news/news-releases/item/19778-ffrf-opposes-anti-abortion-church%E2%80%99s-intervention> (attacking “Fr. Patrick Malone” and “Holy Cross Anglican Church” as “obscure” and “fanatical”); <https://twitter.com/FFRF/status/413057071727120385> (same).