UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

FREEDOM FROM RELIGION FOUNDATION, INC.,	)	
Plaintiff,	)	
v.	)	Case No. 12-CV-818
JOHN KOSKINEN, COMMISSIONER OF THE INTERNAL REVENUE SERVICE,	)	
Defendant	)	
and	)	
HOLY CROSS ANGLICAN CHURCH, FATHER PATRICK MALONE	)	
Intervenor Defendants.	)	

UNITED STATES' REPLY IN SUPPORT OF THE JOINT MOTION FOR DISMISSAL

All parties agree that this case should be dismissed. Because plaintiff has agreed to voluntarily dismiss its claims, as the Court has already noted, this case is "over" and intervenors "have nothing to do." (Docket No. 33, p. 6). The Court's previous order explains that because intervenors have never filed any claim for relief in this case, they now "have no occasion to advance their legal arguments." (*Id*. at pp. 5-6). As a result, plaintiff and defendant sought to resolve this case by a stipulation of dismissal. However, intervenors refused to sign a stipulation, and instead assert that the dismissal should be with prejudice because they contend "this nearly two-year-old case has proceeded well past the motion to dismiss stage and deep into discovery." (Docket No. 40, p. 7). The actual history of this case is much more simple.

Plaintiff filed a lawsuit. Defendant moved to dismiss it. The court denied that motion. Plaintiff served some requests for production. Defendant searched for and produced the

documents to plaintiff. Plaintiff quickly reviewed the documents, and then agreed to dismiss its case without prejudice when it determined "that the IRS does not have a policy at this time of non-enforcement specific to churches and religious organizations." (Docket No. 38, p. 3). This is one of the most common ways that federal litigation ensues, unfolds and is resolved. To be sure, litigants commonly dismiss cases without prejudice after motions to dismiss and minimal formal or informal discovery. That's efficient, cost-effective, and common.

Contrary to intervenors' Opposition, there is nothing strange, collusive, or concealed here. When plaintiff agreed to dismiss its claims, plaintiff and defendant explained that the grounds for dismissal was the IRS's lack of a policy of "non-enforcement specific to churches and religious organizations." (*See* Docket No. 38, p. 3). Plaintiff and defendant believed this case was over because the intervenors have no independent claim or defense in this case. Intervenors attempt to make much of the fact that they haven't received discovery documents, but since plaintiff has stated its desire to dismiss, the intervenors' no longer "have any need to present their legal arguments." Intervenors have no claim on their own to advance, and simply "have nothing to do." (*See* Docket No. 33, p. 6). There is no need for additional production of documents, litigation, or other wasted efforts.[1] Immediately after plaintiff decided to dismiss the case, plaintiff and defendant informed intervenors that the litigation was effectively over and requested that intervenors simply sign a stipulation for dismissal.

Intervenors are upset that they now "have no occasion to advance their legal arguments." Instead, intervenors cite the four *Pace* factors and assert that a dismissal with prejudice is

[1] Nor have we refused to turn over any documents to this Court, as intervenors falsely assert not one but three times in their Opposition. There is simply no rule, requirement or other reason for any party to send its document production to the Court. Even written responses to discovery are not filed with most courts. Indeed, years ago the courts eliminated even the need to file with courts the written responses to discovery.

appropriate here with nearly no evidence to support their thin allegation that they will suffer "plain legal prejudice" in the absence of a dismissal with prejudice. *See Pace v. Southern Express Co.*, 409 F.2d 331, 334 (7th Cir. 1969).

Intervenors claim that plaintiff and defendant have not provided a sufficient explanation for the need to take a dismissal. However, a simple explanation that the plaintiff does not believe that it can support its burden of proof is sufficient. *See Woodzicka v. Artifex Ltd.* 25 F. Supp. 2d 930, 935-36 (E.D. Wis. 1998). Thus, plaintiff and defendant provided a sufficient explanation in the Joint Motion to Dismiss: "FFRF is satisfied that the IRS does not have a policy at this time of non-enforcement specific to churches and religious organizations." Intervenors claim, without support or explanation, that intervenors "would suffer prejudice if [they are] 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." (Docket No. 38, p. 9). That argument is nonsensical and conclusory, and intervenors do not even attempt to explain it. Moreover, a district court may order dismissal without prejudice where a plaintiff explains by motion that it cannot obtain relief if its claim was litigated, even if that plaintiff seeks to preserve the right to litigate its claims should circumstances change. *See F.D.I.C. v. Knostman*, 966 F.2d 1133, 1142-43 (7th Cir. 1992); *see also In re Bridgestone/Firestone, Inc., ATX, ATX II, and Wilderness Tires Products Liability Litigation*, 199 F.R.D. 304, 307 (S.D. Ind. 2001).

Intervenors advance the same rationale for the first and fourth factors, essentially asserting that they have expended "significant" resources in this case. But intervenors have merely sent eight requests for production of documents, filed one motion, and purportedly "prepar[ed] for a merits determination," though they have never filed any motion on the merits of this case. (Docket No. 40, p. 8). Intervenors' unsubstantiated allegations do not constitute legal

prejudice. *See Quad/Graphics, Inc. v. Fass*, 724 F.2d 1230, 1233 (7th Cir. 1983) ("[A] non-settling party must demonstrate plain legal prejudice in order to have standing to challenge a partial settlement. . . . a showing of injury in fact, such as the prospect of a second lawsuit or the creation of a tactical advantage, is insufficient to justify denying the plaintiff's motion to dismiss.") (citations omitted); *Stern v. Barnett*, 452 F.2d 211, 214 (7th Cir. 1971) (noting that "the prospect of a second lawsuit should not [in and of itself] bar a voluntary dismissal...."); *Puerto Rico Maritime Shipping Authority*, 668 F.2d 46, 50 (1st Cir. 1981). Intervenors have not explained the extent of the resources they expended preparing eight requests for production and one motion to intervene, nor do they explain how such an expenditure has legally prejudiced their ability to defend this or any subsequent suit. If counsel for the intervenors has indeed produced any work product in "preparing for a merits determination," the issues raised in future litigation, if any, would be so similar that counsel's work product did not go to waste and a dismissal without prejudice here would not subsequently legally prejudice the intervenors. *See Woodzicka*, 25 F. Supp. 2d at 936 ("were the plaintiffs to refile these same claims, the defendant would have a motion for summary judgment at the ready, which could be filed the day after the defendant was served with plaintiffs' complaint") Moreover, the prospect of subsequent litigation does not constitute legal prejudice, contrary to intervenors' assertion. *Stern*, 452 F.2d at 213.

There is simply no chance of prejudice to the intervenors, and their Opposition entirely

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lacks merit. This case should simply be dismissed without prejudice.

Dated: July 22, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2014, I caused the foregoing UNITED STATES' REPLY IN SUPPORT OF THE JOINT MOTION FOR DISMISSAL was made upon all parties by filing it with the Clerk of Court using the CM/ECF system.

s/ Richard A. Schwartz
RICHARD A. SCHWARTZ