

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

GEOFFREY N. FIEGER, NANCY FISHER  
and FIEGER, FIEGER, KENNEY AND  
JOHNSON, P.C.,

Plaintiffs,

-vs-

CIVIL NO. 07-10533

HON. LAWRENCE P. ZATKOFF  
MAG. JUDGE MONA K. MAJZOUN

ALBERTO GONZALES, United States  
Attorney General, and MICHAEL E. TONER,  
Federal Election Commission Chairman,

Defendants.

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**DEFENDANT ALBERTO GONZALES'S BRIEF IN RESPONSE  
TO MOTION TO VOLUNTARILY DISMISS WITHOUT PREJUDICE**

**INTRODUCTION**

In this lawsuit, plaintiffs – a Southfield, Michigan attorney, the law firm of which he is president, and that firm's office manager – allege that they are targets or subjects of an improper FBI and IRS criminal campaign finance investigation. They claim that the investigation is improper because it was undertaken without a referral from the Federal Election Commission – a necessary prerequisite to such an investigation, according to plaintiffs. They seek a declaratory judgment finding the investigation to be contrary to the Federal Election Campaign Act and a writ of mandamus compelling the FEC to comply with the prescriptions of the Act.

At various times during this litigation, plaintiffs have engaged in questionable conduct. For instance, when filed, the suit initially was assigned to Judge Zatkoff. (Civil No. 07-10403)

Soon thereafter, plaintiffs added a couple of parties, asserted new jurisdictional grounds, and rather than amending the action then pending before Judge Zatkoff, filed a new suit and voluntarily dismissed the first one. The second action, which is the instant case, was assigned to Judge Edmunds and was reassigned by the court to Judge Zatkoff, it being a matter related to the case that had been voluntarily dismissed.

Plaintiffs next attempted to use this lawsuit to perform discovery relating to the criminal investigation. On March 28, 2007, six weeks after they filed a dispositive motion representing to the court that no factual issues existed in this case – but before defendants had served any responsive pleadings – plaintiffs filed a Motion to Conduct Limited Discovery. In that motion, they asked the court for leave to serve discovery designed to elicit information regarding whether National Security Letters had been issued to obtain plaintiffs' financial or telephone records. They did not even attempt to explain to the court why such discovery had to be conducted on an expedited basis or, more importantly, how the requested information was relevant to the issues presented in this suit.

Defendants have now filed dispositive motions, which explain to the court that the legal theory underpinning this law suit is utterly lacking in merit. Plaintiffs have responded and defendants have filed replies. Thus, this case is ripe for a ruling on the merits. Two of the three plaintiffs – Mr. Fieger and the law firm – now have filed a one-page motion asking the court to allow them to voluntarily dismiss their suit without prejudice. The Attorney General opposes this motion. If the case is to be dismissed as to any plaintiff, it should be with prejudice. If the court dismisses any or all plaintiffs, it should consider imposing sanctions.

ARGUMENT

**AT THIS JUNCTURE, WITH THE CASE FULLY BRIEFED  
ON THE MERITS, PLAINTIFFS SHOULD NOT BE  
PERMITTED TO DISMISS WITHOUT PREJUDICE.**

Fed.R.Civ.P. 41(a)(1) allows for a voluntary dismissal by plaintiff, 1) through the filing of an appropriate notice, if the adverse party has not filed an answer or motion for summary judgment, or 2) by stipulation of the parties. The Rule provides that, unless otherwise indicated, such dismissals are without prejudice. Because the parties to this action do not stipulate to a dismissal without prejudice, and because defendants have filed motions to dismiss and for summary judgment, two of the three plaintiffs request that the court issue an order of dismissal without prejudice, presumably pursuant to Rule 41(a)(2). This request should be denied.

As to plaintiff Geoffrey Fieger, the Rules require that the dismissal be with prejudice.

The last sentence of Rule 41(a)(1), provides:

Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

Mr. Fieger was the named plaintiff in Case No. 07-10403, which asserted precisely the same claim as that which is made in this action. That case was voluntarily dismissed. According to the Rule, this second dismissal works as an adjudication on the merits. Therefore, as to Mr. Fieger, this dismissal should be with prejudice.

As to the law firm, “[w]hether dismissal should be granted under the authority of Rule 41(a)(2) is within the sound discretion of the district court.” *Grover v. Eli Lilly and Co.*, 33 F.3d

716, 718 (6<sup>th</sup> Cir. 1994). The primary purpose of this Rule, and its requirement for court approval, is to protect the non-moving party from unfair treatment. *Id.* Among the more important factors that a court should consider when entertaining such a request is the defendant's effort and expense of preparation for trial, excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action, insufficient explanation for the need to take a dismissal, and whether a motion for summary judgment has been filed by the defendant. *Id.* In this case, motions to dismiss and for summary judgment are pending, both of which attack the merits of plaintiffs' claims, and the movants have not provided any explanation as to why they seek a dismissal. Such factors militate against granting of the request to dismiss without prejudice.

In addressing this motion, the court should weigh a couple of other factors. First, most of the work in this case is done. Both defendants have filed dispositive motions, which address the merits of plaintiffs' claim in this lawsuit. Responsive briefs and replies thereto have been filed, and the matter is ripe for a ruling by the court. At this juncture, the parties are entitled to a decision on the merits; a dismissal without prejudice, allowing the dismissed plaintiffs an opportunity to relitigate the issues presented here, will prevent such a binding determination as to Mr. Fieger and the firm. Second, dismissal of less-than-all of the plaintiffs will not save the court any effort or resources, either. As long as a single plaintiff remains, the court will have to decide the pending motions, and the issue for resolution will be precisely the same regardless of whether there is one plaintiff or fifty. Hence, a granting of the instant motion will not save an ounce of judicial resources.

If the court allows the movants to be dismissed, with or without prejudice, it should consider imposing sanctions on them. Rule 41(a)(2) provides that, where a court order is

necessary to effect dismissal, “an action shall not be dismissed at the plaintiff’s instance save upon order of the court *and upon such terms and conditions as the court deems proper.*”

[Emphasis added] Here, should the court issue an order of dismissal, the imposition of monetary sanctions on plaintiffs would be an appropriate term and condition of such dismissal. As the substantive briefing demonstrates, this case is utterly without merit. In addition, plaintiffs have engaged in improper litigation tactics from the start. Using the pretext of the addition of new parties and new jurisdictional theories, they did a quick dismissal-and-refiling, without an explanation as to why a simple amendment was not filed. Plaintiffs also attempted to abuse the discovery process. After first filing a motion representing to the court that there are no genuine issues of material fact, they then endeavored to perform discovery on an expedited basis, hoping to obtain information before their case succumbed. The information that they sought has no relevance to this action, and it is apparent that plaintiffs were using this civil action to gather information relating to the criminal investigation.<sup>1</sup> The court should not permit such abuse of the civil litigation system to take place unsanctioned. Monetary sanctions are in order.

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<sup>1</sup> In this vein, it should be noted that plaintiffs’ counsel has filed virtually the same lawsuit as this one in at least three other courts around the country. In one of those suits – pending in the Northern District of Illinois – plaintiffs’ counsel has endeavored to serve discovery similar to that which he tried to serve in the instant case. *Beam v. Gonzales, et al.*, Case No. 07-CV-1227 (Pallmeyer, J.).

CONCLUSION

For the foregoing reasons, the court should not allow movants to be dismissed without prejudice. Should the court grant the movants' request, or should it dismiss with prejudice, it should impose monetary sanctions.

Respectfully yours,

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P30643

DATED: June 18, 2007

**CERTIFICATE OF SERVICE**

I hereby certify that on June 18, 2007, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

**Michael R. Dezsi**  
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I further hereby certify that I have mailed by United States Postal Service the foregoing paper to the following non-ECF participants:

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