IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:20-cv-02992-PAB-KLM

JUDICIAL WATCH, INC., et al.,
Plaintiffs,
v.

JENA GRISWOLD, Colorado Secretary of State in her official capacities,
Defendant.

RESPONSE TO MOTION TO ALTER OR AMEND THE JUDGMENT IN LIGHT OF NEWLY DISCOVERED EVIDENCE

In this Motion, Plaintiffs ask the Court to reconsider its decision declining to retain jurisdiction over this matter to enforce the Parties' settlement agreement. Nothing in the Motion warrants such relief. Even if the Court had jurisdiction to consider the Motion, which it does not, the "newly discovered evidence" cited as grounds for reconsideration is unrelated to why the Court declined to retain jurisdiction in the first place. As the Court concluded earlier this year, Colorado courts are more than competent to adjudicate any contractual disputes that may arise from the Parties' performance under their Settlement Agreement. The Motion should be denied.

BACKGROUND

Although the issues underpinning Plaintiffs' original claim in this lawsuit are complex, the facts relevant to Plaintiffs' Motion for Reconsideration are straight-forward.

Earlier this year, the Parties to this action filed a joint Notice of Dismissal under Fed. R. Civ. P. 41(a)(1)(A)(ii). [Docket No. 105]. That dismissal was the result of a Settlement Agreement entered into by the Parties, and pursuant to the Agreement, the Notice of Dismissal

asked this Court to retain jurisdiction to enforce the settlement. *See* [Docket No. 105-1] at 1. On May 8, 2023, the Court declined that request, and dismissed the case. [Docket No. 107].

The terms of the Agreement are simple. In exchange for dismissal of this action, the Secretary and the State of Colorado agreed to provide certain data to one of the Plaintiffs, Judicial Watch, Inc., on an annual basis through April 2028. *See* Ex. 1 to Notice of Dismissal [Docket No. 105-1] at 1–2. The Agreement contains no provisions concerning how Colorado or the Secretary can or will comply with the National Voter Registration Act ("NVRA").

In early-June 2023, Plaintiffs filed a Motion to Alter or Amend the Judgment in Light of Newly Discovered Evidence under Fed. R. Civ. P. 59(e). [Docket No. 108] ("Mot."). According to Plaintiff, "new evidence" warrants reconsideration, and that "new evidence" involves the number of voters removed by Colorado counties pursuant to a specific subsection of the NVRA. Ex. 1 to Mot. [Docket No. 108-1] ¶ 3. These removals, known as "Section 8(d)(1)(B) removals," involve voters who have failed to respond to an address confirmation card sent by the county, and also failed to appear to vote in two general federal elections. 52 U.S.C. § 20507(d)(1)(B).

During discovery, Plaintiffs requested the total number of voters removed in each Colorado county pursuant to this subsection between the 2020 general election and September 27, 2022. Ex. 2 to Mot. [Docket No. 108-2] at 2. The Secretary responded on November 3, 2022, noting that discovery was still ongoing, and reserving the right to supplement or amend the discovery responses "upon receipt or discovery of additional or different information." *Id.* at 1.

In February of this year, after further discovery had occurred, the Parties requested a 60-day stay of the matter to discuss settlement. [Docket No. 102]. The Court granted that motion, [Docket No. 104], and on March 30, 2023, the Parties filed a Notice of Dismissal and Request to

Retain Jurisdiction under Fed. R. Civ. P. 41(a)(1)(A)(ii). [Docket No. 105]. As indicated, the Court declined to retain jurisdiction but dismissed the case. [Docket No. 107].

While complying with the Settlement Agreement, it became clear that the Responses to Plaintiffs' First Set of Discovery were over-inclusive. Rather than reporting only Section 8(d)(1)(B) removals, the Responses included all voters that had been removed during the relevant time period, for any reason. Through counsel, the Secretary's office communicated this information to Judicial Watch, and voluntarily provided additional data above what was required by the Parties' Agreement. *See* Ex. 1 to Mot. [Docket No. 108-1] ¶¶ 17, 19.

Judicial Watch now asks the Court to reconsider its decision not to retain jurisdiction to enforce the Parties' Settlement Agreement.

ARGUMENT

While litigating this matter, the Secretary's office inadvertently provided overinclusive data to Plaintiffs in response to one discovery request. The error would have been caught while preparing the Department of State's 30(b)(6) witnesses, and was not caught only because the Parties agreed to stay discovery (including the 30(b)(6) depositions) pending their settlement discussions.

The Secretary's office regrets the error, but nothing in Plaintiffs' Motion connects the discovery error to the extraordinary relief they request. The Parties are already complying with their Agreement, and in fact the Secretary's office has provided additional data beyond what was contractually agreed-upon. The Court should decline to reconsider its decision.

I. Rule 59(e) applies only to final, appealable orders, which the Order declining to retain jurisdiction was not.

As a threshold matter, the Court lacks jurisdiction to consider Plaintiffs' Motion. Plaintiffs' Motion invokes Fed. R. Civ. P. 59(e), but that rule "applies only to final, appealable orders." *Peterson v. Alaska Commc'n Sys. Group, Inc.*, No. 3:12-cv-00090-TMB, 2017 WL 11675157, at *1 (D. Alaska Sept. 7, 2017). "A motion will be considered to fall under Fed. R. Civ. P. 59(e) . . . when it involves reconsideration of matters properly encompassed in a decision on the merits." *Martinez v. Sullivan*, 874 F.2d 751, 753 (10th Cir. 1989) (quotations omitted), *superseded by rule on other grounds as recognized in Grantham v. Ohio Cas. Co.*, 97 F.3d 434, 435 (10th Cir. 1996). This requirement derives from the text of Rule 59(e), which on its face applies to motions to alter or amend "a judgment." Fed. R. Civ. P. 59(e); *see also* Fed. R. Civ. P. 54(a) (defining judgment as an "order from which an appeal lies").

The Court's May 8, 2023, Order declining to retaining jurisdiction was not a final, appealable order. It decided nothing on the merits, *Martinez*, 874 F.3d at 753, but rather reflected the Court's conclusion that this case did not present the "extraordinary circumstances" warranting retention of jurisdiction. *See* Practice Standards (Civil Cases), Judge Philip A. Brimmer § I.H.5.

Were the Parties still in litigation, consideration of Plaintiffs' Motion would be appropriate under the Court's inherent authority to reconsider previous decisions. *See generally* Fed. R. Civ. P. 54(b) (permitting courts to revise "at any time before the entry of judgment" "any order or other decision" other than a full judgment on the merits). However, once the Parties agreed to dismiss the case under Fed. R. Civ. P. 41(a)(1)(A)(ii), the action terminated. "A stipulation of dismissal filed under Rule 41(a)(1)(A)(i) or (ii) is self-executing and immediately

strips the district court of jurisdiction over the merits." *De Leon v. Marcos*, 659 F.3d 1276, 1283 (10th Cir. 2011).

To be sure, federal courts retain jurisdiction to "consider collateral issues after an action is no longer pending." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990). But, even if Plaintiffs had invoked the collateral issues doctrine, which they do not, "collateral issues" are those that relate to Rule 41(a)(1)'s purpose of limiting the circumstances under which a plaintiff may voluntarily dismiss an action. *See Absolute Activist Value Master Fund Ltd. v. Devine*, 998 F.3d 1258, 1266 (11th Cir. 2021). These include motions to award costs or fees, or motions for sanctions, *Cooter & Gell*, 496 U.S. at 395–96, all of which are intended to prevent "an enterprising plaintiff [from] abus[ing] the judicial system but nevertheless get[ting] off scot free by voluntarily dismissing its case," *Absolute Activist Value Master Fund Ltd.*, 998 F.3d at 1266. The collateral issues doctrine does not extend to motions to reconsider a request to retain jurisdiction. *Cf. id*. (declining to expand collateral issues doctrine to cover request to modify a protective order).

Because the May 8, 2023, Order was not a final, appealable, order on the merits, Fed. R. Civ. P. 59(e) does not apply. The Court thus lacks jurisdiction to reconsider that Order.

II. The discovery error is unrelated to the question raised by Plaintiffs' request to retain jurisdiction.

Even if the Court did have jurisdiction to reconsider its Order, Plaintiffs' Motion should still be denied. Plaintiffs' Motion is subject to overlapping extraordinary burdens. First, "[t]he granting of a motion to alter or amend is an extraordinary remedy which is used sparingly in order to further the strong public policy interest in finalizing litigation and conserving judicial resources." *Sala v. United States*, 251 F.R.D. 614, 619 (D. Colo. 2008) (quotations omitted).

Moreover, that high bar sits atop the already heightened burden necessary to demonstrate the"extraordinary circumstances" this Court requires before retaining jurisdiction to oversee compliance with a settlement agreement. Practice Standards (Civil Cases), Judge Philip A. Brimmer § I.H.5.

The Motion itself makes clear that Plaintiffs cannot satisfy this double burden. As grounds warranting reconsideration, Plaintiffs identify an error in discovery that has "forced Plaintiffs to reassess the value of the Settlement Agreement." Mot. at 6. But Plaintiffs fail to connect that error to the question at issue: whether this Court, instead of other courts of competent jurisdiction, is needed to enforce the Agreement. Nothing relevant to that question has changed since May 8, 2023, when the Court declined to retain jurisdiction. Colorado courts are equally competent to enforce the Agreement as they were in early-May, and the Parties are equally likely to comply with their obligations. In fact, as Plaintiffs note, the Secretary's office has provided additional data to Plaintiffs beyond what is required under the Agreement, as a show of good faith. *See* Mot. at 7.

"Mistakes happen" in discovery, and in most cases "can be corrected." *Webster v. Premier Foot Clinic, P.C.*, 3:19-CV-529-DP-FKB, 2020 WL 3453744, at *4 n. 1 (S.D. Miss. June 24, 2020). The Secretary's office has already corrected the mistake here by informing Plaintiffs' counsel of the error and providing the correct information.

But nothing about this mistake bears on whether, as Plaintiffs claim, "it is important to be able to enforce [a settlement agreement] in federal court." Mot. at 6. Plaintiffs claim that continuing jurisdiction is important because "the NVRA is a complex, 30-year-old federal statute, and federal case law concerning it continues to evolve." Mot. at 7. But federal caselaw,

and the NVRA, would be irrelevant to enforcement of the Parties' Agreement. The Agreement is governed by Colorado law, and any dispute as to performance under the Agreement would sound in contract law, not under the NVRA. *See* Ex. 1 to Notice of Dismissal [Docket No. 105-1] ¶ 13.

Moreover, the nature of the Parties' Agreement further underscores why Colorado courts are not only competent to address any concerns that might arise, but best-positioned to do so. The Agreement requires nothing of Colorado from an NVRA perspective. Instead, it requires the Secretary to share certain information with a single Plaintiff on an annual basis. *Id.* ¶ 7. If judicial intervention is necessary, the question will be limited to whether the Secretary provided the relevant data. That is not a question that requires expertise regarding the NVRA, or even knowledge of the "complex facts and history of this case." Mot. at 7.

The Secretary's office regrets the error that was made in discovery, but is committed to fully performing its obligations under the Parties' Agreement. And events since the Court's original Order have only underscored that commitment. Even if the Court had jurisdiction to reconsider its previous Order, which it does not, nothing in Plaintiffs' Motion connects the discovery error to why this case presents the "extraordinary circumstances" necessary to have disputes under the Agreement adjudicated in this Court, applying Colorado law, instead of in a Colorado court.

CONCLUSION

The Court should deny the Motion for Reconsideration.

Dated: June 26, 2023

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