IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

JUDICIAL WATCH, INC., et al.,

Plaintiffs,

v.

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

Defendant.

REPLY BRIEF IN FURTHER SUPPORT OF
MOTION TO ALTER OR AMEND THE JUDGMENT

Plaintiffs respectfully submit this reply brief in further support of their motion pursuant to Fed. R. Civ. P. 59(e) to alter or amend the judgment in this case in light of newly discovered evidence (Doc. 108).

ARGUMENT

I. Because this Motion Requests Reconsideration of a Final Court Order Issued Pursuant to Rule 41(a)(2), the Court Has Jurisdiction to Determine It.

Defendant claims that "once the Parties agreed to dismiss the case under Fed. R. Civ. P. 41(a)(1)(A)(ii), the action terminated" and the Court was stripped of its jurisdiction to consider the merits. Doc. 109 at 4-5. Defendant then argues that, because the "May 8, 2023, Order [Doc. 107] 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." *Id*. at 5. The most basic flaw with Defendant's theory is that it is contrary to the facts. As the Court's May 8, 2023, Order makes clear, this case

was dismissed by court order pursuant to Rule 41(a)(2)—not, as Defendant now claims, by stipulation pursuant to Rule 41(a)(1)(A)(ii). Doc. 107 at 2.

It is true that the settlement agreement referred to the filing of a stipulation of dismissal under Rule 41(a)(1)(A)(ii), to be "accompanied by a request from the Parties that the District Court retain jurisdiction to enforce this Agreement if necessary." Doc. 105-1 at 1, ¶ 6. Plaintiffs duly filed a document entitled "Notice of Dismissal and Request to Retain Jurisdiction" that sought both kinds of relief. Doc. 105. Among other things, the Notice stated that "the Parties respectfully request that the Court issue the attached [proposed] order dismissing this action while retaining jurisdiction to enforce the settlement agreement." *Id*. at 1. That proposed order provided both that the action would be dismissed and that the Court would retain jurisdiction to enforce the settlement agreement. Doc. 105-2.

With the benefit of hindsight—and the Court's May 8, 2023, Order—it is apparent that the parties relied on the wrong vehicle to accomplish their purposes. Asking the Court to retain jurisdiction over the settlement agreement required a separate motion. *See* Doc. 107 at 1 ("This request [is] construed as a motion for the Court to retain jurisdiction over the case…"). And asking the Court to sign a proposed order dismissing the case was inconsistent with a stipulated dismissal. For both reasons, Doc. 105 was not a proper stipulation of dismissal under Rule 41(a)(1)(A)(ii). As a result, the case could only be dismissed by court order. Fed. R. Civ. P. 41(a)(2) ("Except as provided in Rule 41(a)(1)(A), an action may be dismissed at the plaintiff's request only by court order…"); *see also Brannen v. First Coastal/All Coast Intermodal Servs.*, No. 405CV142, 2006 U.S. Dist. LEXIS 103422, at *11-*12 (S.D. Ga. Aug. 11, 2006) (construing stipulation of dismissal that did not comply with Rule 41(a)(1)(A)(ii) as a motion for dismissal under Rule 41(a)(2)).

Accordingly, the Court issued its May 8, 2023, Order, which both denied the request to retain jurisdiction *and* dismissed the case. Doc. 107. The Order could not have been more clear: "The case is dismissed pursuant to Fed. R. Civ. P. 41(a)(2)." *Id*. at 2. Because this is the Order that actually dismissed the case, it is the Order for which Plaintiffs seek reconsideration. Defendant's speculations about the legal consequences of a stipulation of dismissal pursuant to Rule 41(a)(1)(A)(ii) are all hypothetical, because that was not the method used to dismiss this case.

In any case, Defendant's analysis of these legal consequences is misguided. Assume, as Defendant argues, that the case was dismissed by virtue of a stipulation made pursuant to Rule 41(a)(1)(A)(ii), presumably on March 30, 2023, the day Doc. 105 was filed. As Defendant concedes (Doc. 109 at 5), the Supreme Court has held that "a federal court may consider collateral issues after an action is no longer pending." *Cooter & Gell v. Hartmarx Corp*., 496 U.S. 384, 395 (1990). Defendant cites no case holding that a motion to retain jurisdiction to enforce a settlement agreement does not qualify as such a collateral matter, nor have Plaintiffs found one.

Moreover, *Butt v. United Bhd. of Carpenters*, 999 F.3d 882 (3d Cir. 2021), provides good reasons for concluding that a motion to retain jurisdiction is such a collateral issue. The Third Circuit in that case referred to a federal court's "ancillary enforcement jurisdiction based on its inherent powers rooted in the common law and unrelated to [a] statutory grant of authority." *Id*. at 886. Ancillary enforcement jurisdiction

> focuses on "the power [of federal courts] to enforce their judgments and ensur[es] that they are not dependent on state courts to enforce their decrees." … It stems from the proposition that "[a] district court acquires jurisdiction over a case or controversy in its entirety and, as an incident to the disposition of a dispute properly before it, may exercise jurisdiction to decide other matters raised by the case over which it would not have jurisdiction were they independently presented." … [*Sandlin v. Corp. Interiors, Inc*., 972 F.2d 1212, 1216 (10th Cir. 1992).] Put differently, ancillary enforcement jurisdiction exists "to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and

> effectuate its decrees." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 380 [] (1994).

Id. at 887 (citations omitted).

It is particularly telling that the Third Circuit cited *Kokkonen*, which set forth how federal courts can retain jurisdiction over settlement agreements resolving cases before them. *Butt*, 999 F.3d at 887. Indeed, retaining federal jurisdiction to enforce the terms of a settlement agreement is a perfect example of "the power [of federal courts] to enforce their judgments and ensur[e] that they are not dependent on state courts to enforce their decrees," to "manage [their] proceedings," and to "vindicate [their] authority." *Id.* (citations and internal quotations omitted). Because a motion to retain jurisdiction to enforce a settlement agreement concerns the Court's ancillary enforcement power, the Court would have jurisdiction to consider it even after a case has been automatically dismissed by stipulation.[1]

II. The Recently Disclosed Data Error Is an Extraordinary Circumstance Warranting Reconsideration.

Defendant flatly concedes the data error described by Plaintiffs. Despite employing scare quotes around the phrase "newly discovered evidence" (Doc. 109 at 1), Defendant does not, in fact, dispute that Plaintiffs have identified newly discovered evidence. Defendant's occasional efforts to belittle the extent of the error are unconvincing. The assertions that the error "would have been caught while preparing the Department of State's 30(b)(6) witnesses," and was not

[1] *Absolute Activist Value Master Fund Ltd. v. Devine*, 998 F.3d 1258 (11th Cir. 2021), cited by Defendant, also supports the conclusion that a court would retain jurisdiction over this motion. The Eleventh Circuit noted that collateral issues usually concern "the power to enforce compliance with the rules … that keep the judiciary running smoothly" and to prevent "an enterprising plaintiff" from "abus[ing] the judicial system." *Id*. at 1266 (citations and internal quotations omitted). Retaining federal jurisdiction over settlements concerns the same kinds of issues, albeit in cases where *defendants* hope to abuse the judicial system—typically by seeking favorable state forums in which to adjudicate disputes over agreements resolving federal claims.

caught "only" because of a discovery stay (*id*. at 3) are pure speculation. Defendant's observations that "mistakes happen" and that the error was "corrected" (*id*. at 6) fail to address Plaintiffs' contention that this particular error came before, and was material to, their decision to settle the case. Doc. 108 at 5-6. Nor does Defendant respond to Plaintiffs' contentions that the error was "egregious," "badly incorrect, on the most critical issue in the case, for every county … uniformly in the 'wrong' direction … and by a very wide margin." *Id*. at 5.

Regardless of the circumstances that led to this error, such an egregious data failure suggests that it is more likely that court intervention will become necessary in this case. As set forth in Plaintiffs' motion, other public statements by Defendant suggest the same thing. *Id*. at 6-7. Further, Defendant's opposition to this motion suggests this as well. The parties negotiated and signed a settlement agreement that provided for a "request from the Parties that the District Court retain jurisdiction to enforce this Agreement if necessary." Doc. 105-1 at 1, ¶ 6. Defendant's opposition to a motion to reconsider a denial of that request is, at least, contrary to the spirit of the agreement, if not a breach of the agreement. *See generally City of Golden v. Parker*, 138 P.3d 285, 292 (Colo. 2006) ("Under Colorado law, every contract contains an implied duty of good faith and fair dealing." (citations omitted)); *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo. 1995) ("The good faith performance doctrine is generally used to effectuate the intentions of the parties or to honor their reasonable expectations." (citations omitted)).

If the agreement resolving this case must be adjudicated, it should be in a federal court familiar with the facts of this case and with the NVRA. Defendant is wrong when she argues that the agreement requires nothing "from an NVRA perspective." Doc. 109 at 7. Consider that the agreement requires Defendant to provide "the most recent data described in questions Al, A8, and A9e, including subparts," of the 2022 Election Administration and Voting Survey (EAVS). Doc.

105-1 at 2, ¶ 7. In determining, for example, the legal issue of substantial compliance with the agreement, it is vital to know which kinds of data are at issue. It matters a great deal, for example, if Defendant failed to separately provide A1c data concerning inactive registrants, because such registrants can still vote under the NVRA. It matters as well if Defendant provided A8d data on undeliverable notices, but not A8e data on non-responses, because both categories trigger the NVRA's statutory waiting period. The data from A9e matters more than any other category. In biennial EAVS reporting years (odd years), reporting in April rather than June is important. But reporting in "off" (even) years is more important than in odd years. Circumstances where knowledge of the NVRA matters could be multiplied. Such issues should not be litigated in courts that have never heard of the statute.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for reconsideration.

Respectfully submitted this 10th day of July, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2023, I served a true and complete copy of the foregoing **REPLY BRIEF IN FURTHER SUPPORT OF MOTION TO ALTER OR AMEND THE JUDGMENT** upon all parties through ECF:

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