

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

O. John Benisek, et al.,  
  
Plaintiffs

Case No. 13-cv-3233-JKB  
  
Three-Judge Court

vs.

Linda H. Lamone, et al.,  
*in their official capacities,*  
  
Defendants.

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U.S. BANKRUPTCY COURT  
DISTRICT OF MARYLAND

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**STEPHEN M. SHAPIRO'S MOTION FOR RECONSIDERATION  
OF THIS COURT'S ORDER DENYING HIS MOTION TO INTERVENE**

In accordance with Local Rule 105(10) and Rule 60(b), Stephen M. Shapiro respectfully moves that this Court reconsider its order (ECF 130) denying Shapiro's motion to intervene (ECF 109) under Rule 24. In the alternative, Shapiro respectfully requests to participate in the more limited capacity as amicus curiae.

Reconsideration is justified as the Court's order denying intervention largely follows Defendants' response in opposition to the motion (ECF 122). Defendants' response erroneously implies, and very nearly states, that prior case law precludes a plaintiff who has been dismissed by stipulation under Rule 41(a)(1)(ii) from intervening under Rule 24 in the case from which dismissed, and that such a

plaintiff may only seek to revoke the stipulation by motion under Rule 60. Case law offered by Defendants leads to the opposite conclusion.

Reconsideration is also warranted as Shapiro was not afforded the opportunity to file his attached reply to Defendants' January 17, 2017 response in opposition within the 14 days provided by Local Rule 105(2)(a). The Court denied the motion to intervene on January 27, 2017. Shapiro respectfully requests leave to file the attached reply, refuting Defendants' legal analysis.<sup>1</sup>

**A. Rule 60 is Inapplicable to a Prior Plaintiff's Motion to Intervene after a Dismissal by Stipulation Without Prejudice under Rule 41(a)(1)(A)(ii)**

Defendants strongly imply that a motion to intervene after a dismissal by stipulation under Rule 41(a)(1)(A)(ii) "should be addressed under Rule 60(b)." Defs.' Resp. at 1. None of the cases cited by Defendants address let alone support this contention. The cases cited by Defendants address whether a Court has jurisdiction to grant a Rule 60 motion to reopen a case that ceased to exist after a Rule 41(a)(1) dismissal, where the case or controversy affording jurisdiction has been terminated. *See e.g., Nelson v. Napolitano*, 657 F.3d 586, 589 (7th Cir. 2011) ("A voluntary dismissal pursuant to Rule 41(a)(1)(A)(i), therefore, does not deprive a district court of jurisdiction for all purposes. . . . [A] district court retains jurisdiction to consider a Rule 60(b) motion following a voluntary dismissal." *Nelson* made clear that a plaintiff who is voluntarily dismissed under Rule 41(a)(1)(A) is dismissed without

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<sup>1</sup> The attached reply also addresses Plaintiffs' response in opposition (ECF 121), which the Court did not consider in reaching its decision on the motion. *See* Order (ECF 130), at 1 n.1.

prejudice and retains the right to file a new complaint in the matter. *Nelson*, 657 F.3d at 587–88 (“[T]he effect of a voluntary dismissal is to turn back the clock; it is as if the plaintiff’s lawsuit had never been brought. . . [T]he plaintiff may bring the suit again by filing a new complaint.”). This is precisely Movant Shapiro’s status.<sup>2</sup>

**B. Dismissal under Rule 41(a)(1)(A)(ii) Does Not Waive Continuing Interest**

By its design, Rule 41(a)(1) specifies that a plaintiff so dismissed for the first time is dismissed without prejudice. *See* Fed. R. Civ. P. 41(a)(1)(B). Such a plaintiff may bring his suit again, and can be reasonably expected to do so. This does not imply any waiver of interest. The Court’s finding that a Rule 41(a)(1) dismissal waives the dismissed plaintiff’s interest imposes prejudice inconsistent with Rule 41(a)(1)(B). It does not follow that a former plaintiff who is clearly free to file a new action should somehow be reasonably expected to have waived interest or otherwise be precluded from moving to intervene under Rule 24. If Defendants had wanted to preclude further action, they could have declined to agree to the stipulated dismissal and moved for dismissal with prejudice under another provision.

**C. Interest and Other Intervention Factors Should be Determined per Rule 24**

The Motion to Intervene (ECF 109) should be determined through Rule 24. Neither *Nelson* nor the other cases cited by Defendants address intervention under Rule 24 since those cases all ceased to exist with the dismissals. Rule 24 was

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<sup>2</sup> See ECF 122, Pls.’ Resp. 2, 8 (stating that Shapiro may challenge the Eighth District in a separate action). This consistent with former counsel’s advice to Shapiro that the dismissal would be without prejudice, contrary to the presumption on such advice in the Court’s Order, ECF 130. Intervention was not specifically considered or discussed in the course of the dismissal.

irrelevant in *Nelson* and the other cases as there were no continuing main actions to intervene into. None of the cases offered by Defendants suggest that Shapiro must file a new action rather than move to intervene. Indeed, the right to file a new action implies a right to also move to intervene—provided the requirements of Rule 24 are met. Rule 24 provides the exclusive requirements for intervention, including a requirement of interest for intervention of right under Rule 24(a), but not for permissive intervention under Rule (24)(b). *See NAACP v. Duplin Cty.*, 88-cv-00005, 2012 WL 360018, at \*3–4 (E.D.N.C. Feb. 2, 2012) (analyzing, in a voting rights case, how interest should be determined for intervention of right under Rule 24(a)(2)). Shapiro addresses how he meets each of the Rule 24 requirements for intervention of right and for permissive intervention in the motion (ECF 109).

**D. In the Alternative, Participation as Amicus Curiae is Warranted**

If the Court finds that the conditions for intervention of right under Rule 24(a) are not met and that permissive intervention under Rule 24(b) is not warranted, Shapiro respectfully requests leave to serve as amicus curiae. See *Northern Sec. Co. v. United States*, 191 U.S. 555, 555 (1903) (promoting liberal granting of amicus curiae status where such participation supports resolution of other cases posing similar questions); *Bryant v. Better Bus. Bureau of Greater Md.*, 923 F. Supp. 720, 728 (noting that amici curiae have been allowed at the trial level where they provide helpful analysis of the law, or have a special interest in the subject matter of the suit); *Fletcher v. Lamone*, 11-cv-3220, ECF 37 (D. Md. Dec. 5, 2011) (denying intervention but granting leave to participate as amici curiae). *But*


*see Alexander v. Hall*, 64 F.R.D. 152, 152–53 (D.S.C. 1974) (denying participation as amicus curiae but alternatively granting participation as intervenor so that the party would be bound by the judgment).

Shapiro has demonstrated longstanding interest in identifying and resolving the constitutional harms of partisan gerrymandering as he filed the original main action pro se in 2013. His participation, similar to his proposed complaint-in-intervention,<sup>3</sup> would further demonstrate the harm accruing to plaintiffs and voters similarly situated in other districts, and how the Court might manageably address these harms. This is consistent with *Northern Securities* and *Bryant*.

#### CONCLUSION

For the reasons noted above and in the Motion to Intervene, ECF 109, the Court should grant the Motion. Alternatively, the Court should grant leave to participate as amicus curiae.

Respectfully submitted,

  
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<sup>3</sup> revised to be consistent with the more limited role of an amicus curiae

**CERTIFICATE OF SERVICE**

I certify that I have served by electronic mail on February 10, 2017, a copy of the foregoing Motion for Reconsideration and its attached Reply to Plaintiffs' and Defendants' Responses in Opposition to the Motion to Intervene to the electronic mail address in the docket for the attorneys to be noticed for plaintiffs and defendants:

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