

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

OHIO DEMOCRATIC PARTY,	:	
	:	
Plaintiff,	:	Case No. 2:04-CV-1055
	:	
v.	:	JUDGE ALGENON MARBLEY
	:	
J. KENNETH BLACKWELL <i>et al.</i>,	:	Magistrate Judge Kemp
	:	
Defendants.	:	

OPINION AND ORDER

I. INTRODUCTION

This matter came before the Court on Ohio Democratic Party’s (“Plaintiff”) Motion for Voluntary Dismissal without Prejudice and Motion to Strike or Dismiss Purported Counterclaim. For the reasons set forth herein, Plaintiff’s Motion [Docket No. 15] is **GRANTED**.

II. BACKGROUND

The Ohio Democratic Party is an organization that operates under the laws of Ohio. The Franklin County Board of Elections and Knox County Board of Elections administer voting in Franklin and Knox Counties, and are responsible for providing sufficient mechanisms and supplies for voting under Ohio law. J. Kenneth Blackwell is the Ohio Secretary of State and as such is the chief elections officer of the state pursuant to OHIO REV. CODE ANN. § 3501.04. Voting in precincts located in Franklin and Knox Counties is by electronic machine.

On November 2, 2004, voting was “grinding to a halt” in Franklin and Knox Counties. (Compl. ¶ 1). Voters in certain precincts within these counties were standing in line for up to five hours as they awaited their opportunity to vote. Plaintiff perceived that the massive voting

lines were deterring voters from waiting to cast their ballots. According to Plaintiff, some voters at the end of the lines began exiting the polling places upon learning of the expected wait, and others were refusing to line up altogether. Plaintiff also contends that there were fewer voting machines than there have been in previous elections. Plaintiff sought relief from the Franklin County Board of Elections to ensure that every eligible voter in Franklin County was able to cast a ballot. Plaintiff requested that paper ballots be supplied to supplement the inadequate number of machines. Those ballots were being used by the polling places for absentee ballots. The Franklin County Board of Elections, however, refused to provide this alternative method for casting votes.

Plaintiff, determining that the voting situation in Franklin and Knox Counties was “dire,” filed suit against J. Kenneth Blackwell, in his official capacity, the Franklin County Board of Elections, and the Knox County Board of Elections (collectively, the “Defendants”) pursuant to 42 U.S.C. § 1983, and sought immediate injunctive relief. (Compl. ¶ 10). In its complaint (the “Complaint”), Plaintiff alleged that there was an insufficient number of voting machines at certain precincts in Franklin and Knox Counties, and consequently thousands of Ohio voters were likely to be disenfranchised if this Court did not take “immediate action to ensure an alternative means for [voters] to cast their votes.”¹ (Compl. ¶ 1). Also on November 2, 2004, Plaintiff moved for a temporary restraining order in which it urged this Court to enjoin and to

¹Plaintiff also averred that Defendants’ refusal to provide necessary and adequate voting machines or paper ballots unduly burdens the affected voters’ right to vote under the United States Constitution and the Ohio Constitution, Defendant’s refusal to provide adequate voting machines or paper ballots violates OHIO REV. CODE § 3501.29(A), and Defendants’ refusal to provide necessary voting machines or paper ballots violated OHIO REV. CODE § 3501.30(A). (Compl. (Cause of Action) ¶¶ 1-4).

compel Defendants to “make sufficient voting machines, paper ballots, or other means of casting ballots available” in Franklin and Knox Counties so that an individual’s right to vote would not be “irreparably lost or impaired.” (T.R.O. Mot. at 1-2).

On the evening of November 2, 2004, this Court heard oral arguments on Plaintiff’s Motion for a Temporary Restraining Order. The Court provisionally granted verbal motions to intervene to counsel for the Ohio Republican Party and counsel for the State of Ohio (the “State”). The Court ordered the Defendants to provide paper ballots or another mechanism to afford voters an adequate opportunity to vote. The Court also directed the Defendants to keep the polls open for voters who were waiting in line as of 7:30 p.m. The same evening, the Franklin County Board of Elections appealed this Court’s Order to the United States Court of Appeals for the Sixth Circuit and petitioned the appellate court for an emergency stay of this Court’s grant of Plaintiff’s Motion for Temporary Restraining Order.² The Sixth Circuit denied the Franklin County Board of Election’s motion for an emergency stay.

Also, on November 2, 2004, Defendant Blackwell filed an answer to Plaintiff’s Complaint. On November 3, 2004, the Franklin County Board of Elections filed an answer to Plaintiff’s Complaint. Also on that day, the Ohio Republican Party filed a Motion to Intervene in this case. Plaintiff never served its Complaint on the Knox County Board of Elections, and it issued no summons to that entity. On November 9, 2004, the State of Ohio filed an answer and

²On December 7, 2004, the Franklin County Board of Elections voluntarily dismissed its appeal to the Sixth Circuit pursuant to FED. R. APP. P. 42(b). On November 30, 2004, Defendant Blackwell appealed this Court’s grant of Plaintiff’s Temporary Restraining Order to the Court of Appeals for the Sixth Circuit, but on February 24, 2004, he voluntarily dismissed his appeal pursuant to FED. R. APP. P. 42(b). Similarly, the Ohio Republican Party voluntarily dismissed its Sixth Circuit appeal on February 14, 2005.

counterclaim in the present action. Finally, on December 2, 2004, Plaintiff and the Franklin County Board of Elections filed a Stipulation of Dismissal of Claims against the Franklin County Board of Elections, in which Plaintiff dismissed its claims against that entity without prejudice.

This matter is now before the Court on Plaintiff's Motion for Voluntary Dismissal Without Prejudice and Motion to Strike or Dismiss Purported Counterclaim. Plaintiff alleges that: (1) the claims that it asserted in its Complaint are moot, the Court's Temporary Restraining Order has expired by its terms, and thus, there is no justiciable controversy pending before this Court; and (2) this Court should either dismiss or strike the State of Ohio's "purported" counterclaim because (a) the State of Ohio has not sought leave to intervene before filing its counterclaim, (b) the purported claim is not a "proper" counterclaim, and (c) this Court lacks jurisdiction over the State of Ohio's purported counterclaim. The State of Ohio responds that: (1) this Court should not dismiss its counterclaim against Plaintiff because it presents a justiciable controversy; (2) the Court should determine if it may exercise jurisdiction over this litigation, and (3) the Court should determine whether it is empowered to "order pieces of paper to be substituted for legal ballots in the State of Ohio." (State's Mem. Contra at 2).

III. STANDARD OF REVIEW

A. FED. R. CIV. P. 41(a)(2)

Rule 41(a)(2) of the Federal Rules of Civil Procedure provides in relevant part:

Except as provided in paragraph (1) . . . 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. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

FED. R. CIV. P. 41(a)(2). Essentially, Rule 41(a)(2) permits a plaintiff to dismiss voluntarily a claim with the permission of the court if he requests dismissal after the defendant has filed an answer. *Warfield v. AlliedSignal TBS Holdings, Inc.*, 267 F.3d 538, 541 (6th Cir. 2001). It is within the “sound discretion” of the district court to grant a Rule 41(a)(2) motion for a voluntary dismissal. *Grover by Grover v. Eli Lilly and Co.*, 33 F.3d 716, 718 (6th Cir. 1994) (citing *Banque de Depots v. Nat’l Bank of Detroit*, 491 F.2d 753, 757 (6th Cir. 1974)). Generally, a court’s decision to grant a plaintiff’s Rule 41(a)(2) motion is improper only if, as a result of a dismissal without prejudice, a defendant will suffer “plain legal prejudice,” as opposed to facing the mere prospect of a second lawsuit.” *Id.* (citing *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217 (1947); *Kovalic v. DEC Int’l, Inc.*, 855 F.2d 471, 473 (7th Cir. 1988)) (internal quotation marks omitted). A court determines whether a defendant would suffer “plain legal prejudice” by considering factors such as (1) the defendant’s effort and expense of preparation for trial; (2) excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action; (3) the plaintiff’s insufficient explanation for the need to take a dismissal; and (4) whether the defendant has filed a motion for summary judgment. *Id.* (citing *Kovalic*, 855 F.2d at 474).

B. FED. R. CIV. P. 12(b)(1)

Rule 12(b)(1) of the Federal Rules of Civil Procedure permits a party to move a court to dismiss a counterclaim on the basis that the court lacks jurisdiction over the subject matter. FED. R. CIV. P. 12(b)(1); *United States v. Menominee*, 727 F.Supp. 1110, 1116 (W.D. Mich. 1989). Under Rule 12(b)(1), a motion to dismiss based on subject matter jurisdiction can fall into two categories: facial attacks and factual attacks. *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994). Facial attacks question the sufficiency of the pleading. *Id.* Review of such a motion

must take the allegations in the complaint as true and construe them in the light most favorable to the nonmoving party. *Id.* A factual attack, however, is a challenge to the factual existence of jurisdiction. *Id.* In considering a motion that questions the factual existence of subject matter jurisdiction, “no presumptive truthfulness applies to the factual allegations” set forth in the pleading. *Ohio Nat’l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990).

A court reviewing a factual attack must resolve any factual disputes by weighing the evidence that gives rise to the controversy to determine whether a factual predicate for subject matter jurisdiction does or does not exist. *Moir v. Greater Cleveland Reg’l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990); *Ohio Nat’l Life Ins. Co.*, 922 F.2d at 325. To resolve disputed jurisdictional facts, the Court may, in its discretion, allow affidavits, documents, and even a limited evidentiary hearing. *Ohio Nat’l Life Ins. Co.*, 922 F.2d at 325. The party opposing a factual Rule 12(b)(1) motion has the burden of proving jurisdiction and may not rest on factual assertions in its pleadings. *Moir*, 895 F.2d at 269.

C. FED. R. CIV. P. 12(f)

Rule 12(f) of the Federal Rules of Civil Procedure permits a court to strike “any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter” from any pleading.³ FED. R. CIV. P. 12(f). Under Rule 12(f), a party must move to strike a pleading before responding to a pleading or, if no response is permitted, a party must move to strike within 20

³Rule 7(a) of the Federal Rules of Civil Procedure defines “pleadings” as follows: [A] complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. FED. R. CIV. P. 7(a).

days after service of the pleading. *Id.* Yet, Rule 12(f) authorizes a court to order sua sponte that the “insufficient defense or any redundant, immaterial, impertinent, or scandalous matter” be stricken at any time. *Id.*

While motions to strike are “generally disfavored,” and should be used “sparingly,” such motions are within the “sound discretion” of the district court. *Ameriwood Indus. Int’l Corp. v. Arthur Anderson & Co.*, 961 F. Supp. 1078, 1083 (W.D. Mich. 1997) (citations omitted); *Federal Deposit Ins. Corp. v. Berry*, 659 F. Supp. 1475, 1479 (E.D. Tenn. 1987) (citing *Brown v. Williamson Tobacco Corp. v. United States*, 201 F.2d 819, 822 (6th Cir. 1953)) (citations omitted). Furthermore, a defense is “insufficient if, as a matter of law, the defense cannot succeed under any circumstances.” *Ameriwood*, 961 F. Supp. at 1083 (citing *Brown*, 201 F.2d 819 at 822). A defense is “immaterial” if it has “no essential or important relationship to the claim for relief or the defenses being pleaded,” and it is “impertinent” if the “matter consists of statements that do not pertain, and are not necessary, to the issues in question.” *Id.* (citations omitted). Finally, a Rule 12(f) motion to strike is appropriate where it will “eliminate spurious issues before trial and streamline the litigation.” *Id.* (citation omitted).

IV. ANALYSIS

A. Whether the State of Ohio is a “Defendant” within the Meaning of Rule 41(a)(2) of the Federal Rules of Civil Procedure

In its Motion, Plaintiff argues that the State has not sought leave of court to intervene in this action, and therefore, it was never a proper intervenor-defendant with authority to assert a counterclaim. According to Plaintiff, notwithstanding the State’s claim that it has a statutory

right to intervene in this case pursuant to 28 U.S.C. § 2402,⁴ the State does not have a statutory right to intervene because Section 2402, which authorizes jury trials in actions against the United States in certain circumstances, is inapposite to this case. Plaintiff also states that 28 U.S.C. § 2403,⁵ would not afford the State a statutory right to intervene because Section 2403 permits a state to intervene in a federal case where the constitutionality of a state statute has been challenged, and no state officer is a party to the case. In the case sub judice, Plaintiff claims that it did not attack the constitutionality of any Ohio statute and it named Defendant Blackwell in his official capacity as the Ohio Secretary of State. Ultimately, Plaintiff asserts that even if the State has a statutory right to intervene in this case, the State is still obligated to comply with the procedural requirements of intervention pursuant to FED. R. CIV. P. 24.

The State responds that because it verbally moved to intervene in this lawsuit at the evidentiary hearing that this Court held on November 2, 2004, and filed a counterclaim against

⁴Section 2402 of Title 28 of the United States Code provides:

Subject to chapter 179 of this title, any action against the United States under section 1346 shall be tried by the court without a jury, except that any action against the United States under section 1346(a)(1) shall, at the request of either party to such action, be tried with a jury.

28 U.S.C. § 2402.

⁵Section 2403 of Title 28 of the United States Code provides, in relevant part:

In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

28 U.S.C. § 2403(b).

Plaintiff, it has properly intervened in this action. Also, the State contends that Plaintiff has not stated any grounds upon which the State has not properly intervened.

In its Reply Memorandum, Plaintiff asserts that this Court merely provisionally allowed the State to intervene for purposes of argument, and the Court required the State to address its basis for intervention at the Court's November 2, 2004 evidentiary hearing, but the State failed to do so.⁶ Furthermore, Plaintiff points out that the State never filed a motion for intervention in this case.

Rule 24 of the Federal Rules of Civil Procedure permits "intervention of right" and "permissive intervention" under specified conditions. FED. R. CIV. P. 24. In this case, the State claims that it has a "statutory right" of intervention pursuant to Rule 24 and 28 U.S.C. § 2402. Subsection (a) of Rule 24 provides, in relevant part, "[u]pon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene."⁷ FED. R. CIV. P. 24(a)(1). Subsection (c) further provides,

⁶Plaintiff also states that Mr. Coglianese, as counsel for both the State and Defendant Blackwell, never indicated any divergent interests between the State and Defendant Blackwell that would necessitate the State's presence in this litigation.

⁷Rule 24(a)(2) of the Federal Rules of Civil Procedure also permits intervention of right when:

[T]he applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. FED. R. CIV. P. 24(a)(2). *See Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997) (describing a four-part inquiry regarding when intervention of right under Rule 24(a)(2) will be granted) (citing *Cuyahoga Valley Ry. Co. v. Tracy*, 6 F.3d 389, 395 (6th Cir. 1993)).

To the extent that the State is relying on Rule 24(a) as its basis of intervention, because the State claims that it has a statutory right of intervention, and it does not make any arguments respecting intervention of right under Rule 24(a)(2), the Court construes this to mean that the State's alleged right of intervention is premised solely on Rule 24(a)(1).

inter alia, that a person who desires to intervene, must do so within the strictures of Rule 5 of the Federal Rules of Civil Procedure; a motion to intervene must state the basis for intervention; and “a pleading setting forth the claim or defense for which intervention is sought” must accompany the motion to intervene. FED. R. CIV. P. 24(c). Finally, Rule 24 requires a purported intervenor to comply with the intervention procedures of subsection (c) when a statute of the United States confers a right of intervention. *Id.*

Although in its Counterclaim the State has alleged that it has a statutory right to intervene pursuant to 28 U.S.C. § 2402, Plaintiff has rebutted the State’s contention, and persuaded this Court that the State does not, in fact, have a right of intervention under Section 2402 because that section specifies when a jury trial is appropriate in an action against the United States, and such an action is not before this Court. Additionally, the State does not dispute the fact that Section 2403 does not provide the basis for its intervention in this case.

Furthermore, Plaintiff is correct in stating that even if the State has a statutory right of intervention, Rule 24(c) nonetheless requires the State to comply with specific intervention procedures, which the State has failed to fully satisfy in this action. While the State has filed its Answer, in which it seeks intervention pursuant to 28 U.S.C. § 2402, and as a purported intervenor-defendant it asserts a counterclaim in which it seeks declaratory judgment, the State

Moreover, it is unclear whether the State is relying on permissive statutory intervention under Rule 24(b)(1). Subsection (b) provides, in relevant part, “[u]pon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene.” FED. R. CIV. P. 24(b)(1) (emphasis added). Nevertheless, to the extent that the State is relying on Rule 24(b)(1), that provision does not provide the appropriate basis for intervention in this case because 28 U.S.C. § 2402 does not address whether the State may permissively intervene in an action of this nature.

offers no argument to show that the filing of its Answer, which contains its counterclaim, is tantamount to its service of a motion to intervene on all parties in accordance with Rule 5. *See* FED. R. CIV. P. 24(c) (stating “[a] person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5,” and such motion “shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought”). Indeed, at oral argument, the State conceded that it never filed a formal, written motion to intervene in this case. Instead, the State posits that its mere oral motion to intervene coupled with the filing of its counterclaim is sufficient to confer upon it intervenor status. Yet, the State offers no authority to support its assertion that the Court’s provisional grant of the State’s oral motion to intervene for the purposes of argument, confers upon it intervenor status, or that the Court’s provisional grant of intervention for purposes of argument, in addition to the State’s filing of a counterclaim, otherwise excuses the State from complying with the intervention procedures of Rule 24(c).

Accordingly, because the State is neither a named defendant in this action nor a proper intervenor-defendant, it is not a “defendant” within the meaning of Rule 41(a)(2), and therefore, it cannot obstruct Plaintiff’s petition for dismissal of its action pursuant to Rule 41(a)(2). *See* FED. R. CIV. P. 41(a)(2) (prohibiting dismissal of an action if a “defendant” has pled a counterclaim before being served with the plaintiff’s motion to dismiss unless such counterclaim “can remain pending for independent adjudication by the court”).

B. Whether the State of Ohio Filed a “Counterclaim” over which This Court May Exercise Jurisdiction

Assuming *arguendo* that the State is a proper intervenor-defendant in this action, Plaintiff argues that this Court should dismiss or strike the State’s “purported” counterclaim for a number

of reasons. As a threshold matter, however, the Court deems it necessary to set forth the State's basis for its counterclaim prior to any further analysis.

1. The State's Counterclaim

The State asserts the following counterclaim against Plaintiff:

The refusal of the State of Ohio, Defendant Secretary of State Blackwell, Defendant Franklin County Board of Elections, or Defendant Knox County Board of Elections to provide paper ballots or 'adequate voting machines' as alleged in the Plaintiff's complaint does not violate the right to vote of any person as secured by the United States Constitution as alleged in the Plaintiff's complaint.

(State of Ohio's Countercl. at ¶ 4). As factual predicates for its counterclaim, the State alleges that (1) this Court ordered the Defendants to issue "non-sanctioned paper ballot[s]" to anyone waiting in line to vote on November 2, 2004; and (2) Ohio voters who may have used these alleged non-sanctioned paper ballots, in an effort to cast their votes, were disenfranchised because such ballots are illegal under Ohio law, and thus, the ballots could not be counted. The State further alleges that a live controversy exists between the parties because, although it recognizes that it is impermissible "to . . . tell people to write their votes down on a legal pad with a pen if they are waiting in line to vote," Plaintiff does not agree. (State of Ohio's Mem. Contra at 2). The State describes the alleged controversy as one that is capable of repetition, yet evading review because the election has passed. Finally, the State urges this Court to decide its counterclaim because the alleged illegal ballots issue will "undoubtedly arise in the future" and Defendants will benefit from this Court's resolution of this matter. (State of Ohio's Mem. Contra at 2-3).

2. The Propriety of the State of Ohio's "Purported" Counterclaim

Plaintiff attacks the propriety of the State of Ohio's counterclaim on three bases, two of which entail justiciability doctrines. First, Plaintiff asserts that the State's "purported" counterclaim is improper because it is based upon "pure speculation," which alone is not a basis for invoking the capable of repetition, yet evading review exception to the mootness doctrine. (Pl.'s Reply Mem. at 1). Second, according to Plaintiff, the State of Ohio seeks an impermissible advisory opinion, though federal courts are strictly prohibited from rendering such opinions, and consequently, this Court lacks jurisdiction to adjudicate the State's counterclaim. Finally, Plaintiff argues that the State's "purported" counterclaim is really an affirmative defense, which would not preclude voluntary dismissal of this action under Rule 41(a)(2) of the Federal Rules of Civil Procedure. The Court first considers whether the State's counterclaim falls within the confines of the capable of repetition, yet evading review exception to the mootness doctrine.

a. The Mootness Doctrine Generally and within the Declaratory Judgment Context

Prior to a discussion of whether the capable of repetition, yet evading review exception to the mootness doctrine finds a place in this litigation, it is appropriate to address the mootness doctrine generally, and to examine the types of inquiries that arise when the doctrine is applied in the declaratory judgment context.

Article III, § 2 of the United States Constitution vests federal courts with jurisdiction to address "actual cases and controversies." *Coalition for Gov't Procurement v. Fed. Prison Indus., Inc.*, 365 F.3d 435, 458 (6th Cir. 2004) (citing U.S. CONST. art III, § 2). Federal courts are prohibited from rendering decisions that "do not affect the rights of the litigants." *Id.* (citing *Southwest Williamson County Cmty. Assoc. v. Slater*, 243 F.3d 270, 276 (6th Cir. 2001)). In this Circuit, "the test for mootness is whether the relief sought would, if granted, make a difference to

the legal interests of the parties.” *McPherson v. Michigan High Sch. Athletic Ass’n Inc.*, 119 F.3d 453, 458 (6th Cir. 1997) (internal quotation marks and citations omitted); *cf. Forbes v. Bd. of Dir. for the NAACP*, No. 02-3960, 2003 U.S. App. LEXIS 8867, at *2 (6th Cir. May 8, 2003) (holding that a case is moot “when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome”) (quoting *Gottfried v. Med. Planning Servs.*, 280 F.3d 684, 691 (6th Cir. 2002)) (internal quotation marks omitted). Furthermore, “completion of activity is not the hallmark of mootness[;] [r]ather, a case is moot only where no effective relief for the alleged violation can be given.” *Coalition for Gov’t Procurement*, 365 F.3d at 458. Finally, the “heavy burden” of demonstrating mootness falls on the party asserting it. *Id.* (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs (TOC), Inc.*, 528 U.S. 167, 189 (2000)).

The mootness doctrine applies with equal force in the declaratory judgment context, but it entails a more particularized inquiry. The Declaratory Judgment Act of 1934, (codified as amended at 28 U.S.C. §§ 2201-2202), enables a federal court, “in a case of actual controversy,” to “declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” 28 U.S.C. § 2201. Thus, when a party asserts a claim for declaratory judgment relief, “[t]here still must be a case or controversy before a federal court can assume jurisdiction and reach the merits of [a declaratory judgment action].” *Coalition for Gov’t Procurement*, 365 F.3d at 459 (quoting *Brennan v. Rhodes*, 423 F.2d 706, 706-07 (6th Cir. 1970)) (internal quotation marks omitted). The Sixth Circuit has previously recognized that declaratory judgment actions “often require courts to face the difficult task of distinguishing ‘between actual controversies and attempts to obtain advisory opinions on the

basis of hypothetical controversies.’’ *Id.* at 458 (quoting *Kardules v. City of Columbus*, 95 F.3d 1335, 1343-44 (6th Cir. 1996)) (citations omitted).

While there is no “bright-line” test that assists courts in determining whether a party seeks a declaratory judgment premised on an actual controversy, and not an advisory opinion, the Supreme Court provides guidance. *TCI/TKR Cable of N. Ky. v. Johnson*, No. 00-6449, 2002 U.S. App. LEXIS 4251, at *6-7 (6th Cir. Mar. 12, 2002). The Supreme Court has held that when courts consider the mootness doctrine within the context of a claim for declaratory relief, “the question is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Super Tire Eng’g Co. v. McCorkle*, 416 U.S. 115, 122 (1974) (internal quotation marks and citation omitted); *see Coalition for Gov’t Procurement*, 365 F.3d at 459 (citing *McCorkle* with approval) (citation omitted). Such a controversy “must be definite and concrete” and it must provide for “specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical set of facts.” *Johnson*, 2002 U.S. App. LEXIS 4251, at *7 (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937)) (internal quotation marks omitted).

b. The State Does Not Present a “Case of Actual Controversy” for the Court’s Review

Because Plaintiff is no longer challenging the ratio of voting machines to registered voters in this action, there does not appear to be an actual controversy of “sufficient immediacy and reality” warranting this Court’s issuance of a declaratory judgment in favor of the State. (Oral Argument Tr. of 3/2/05 at 21); *Coalition for Gov’t Procurement*, 365 F.3d at 459; *see also* 28 U.S.C. § 2201 (requiring a “case of actual controversy”). Therefore, this Court may not

exercise jurisdiction over this moot counterclaim unless it determines that the counterclaim is capable of repetition, yet evading review.⁸

c. The Parties' Arguments in Support of and in Opposition to Application of the Capable of Repetition, Yet Evading Review Exception to the Mootness Doctrine

At oral argument, although the State maintained that its counterclaim is capable of repetition, yet evading review, it slightly modified its argument respecting its counterclaim.

⁸The Court notes that in its Memorandum Contra, the State identified the following as the “real live controversy” between it, Defendant Blackwell, and Plaintiff that is capable of repetition, yet evading review:

The State of Ohio and the Secretary of State recognize that it is not permissible to simply tell people to write their votes down on a legal pad with a pen if they are waiting in line to vote. . . . Because the ODP, apparently, believes that legal pads and pens are appropriate if voters have to wait in a line to vote, there is a real live controversy between the parties.

(State’s Mem. Contra at 2). The State further clarified that it seeks “a definitive court ruling” that would prevent a person or a party from “attempt[ing] to disenfranchise Ohioans by simply asking a court to allow people to vote on unapproved ballots.” (State’s Mem. Contra at 3).

At oral argument, however, in response to the Court’s question of what constitutes the case or controversy in this case, the State asserted, in unequivocal terms,

It is a live case or controversy, Your Honor, because we are asking for a declaratory judgment. If the Ohio Democratic Party is ready to come into this Court and acknowledge that the placement of voting machines in Franklin County and in Knox County in 2004 was not illegal, then there would not be a live case or controversy.

(Oral Argument Tr. of 3/2/05 at 19). The State proclaimed, with equal clarity, that it seeks “a declaration that the [voting machine] placement in 2004 does not violate federal law.” (Oral Argument Tr. of 3/2/05 at 18).

At oral argument, while the State made a few references to the issue of the alleged illegal ballots as the live case or controversy, the State later singled out its voting machine placement ratio argument as the sole reason as to why this case is not moot. *See* Oral Argument Tr. of 3/2/05 at 20 (asserting that there is “one simple reason” as to why the issues giving rise to Plaintiff’s T.R.O. are not moot: “We know what the ratio of machines to registered voters are in Franklin County and Knox County by precinct. We are saying that those deployments, those ratios, are legal”). Because the State relies on its voting machine placement ratio argument as the only reason as to why this case is not moot, the Court does not reach the issue of whether the alleged illegal ballots constitutes a live case or controversy that is capable of repetition, yet evading review.

Specifically, counsel for the State asserted that the State seeks a declaration that the placement of voting machines in Franklin and Knox Counties in the November 2004 national election does not violate federal law. *Cf.* State of Ohio's Countercl. at ¶ 4 (requesting, *inter alia*, that this Court declare that the State's "refusal to provide paper ballots or 'adequate voting machines' does not violate the right to vote of any person as secured by the United States Constitution"). The State acknowledged that Plaintiff claims that it is no longer challenging the voting placement ratios in this action. Yet, at oral argument, the State contended that because the minimum ratio of voting machines to registered voters has "been around," "will continue to be around," and is likely to be challenged in future elections, the capable of repetition, yet evading review exception to the mootness doctrine provides the mechanism through which its counterclaim may be litigated in this Court. (Oral Argument Tr. of 3/2/05 at 21-25).

Plaintiff exhorts this Court not to apply the capable of repetition, yet evading review exception for two principal reasons. First, Plaintiff argues that the State's mere speculation that a similar dispute over "excessively long lines" could recur in the future is an insufficient basis to justify application of the capable of repetition, yet evading review exception. (Pl.'s Reply Mem. at 6). Second, Plaintiff asserts that the State does not explain why "there is a reasonable expectation that the complaining party will be subject to the same action again." *Forbes*, 2003 U.S. App. LEXIS 8867, at *3 (citation omitted). Relying on *Los Angeles v. Lyons*, 461 U.S. 95 (1983), Plaintiff states that the capable of repetition, yet evading review exception to the mootness doctrine is reserved for "exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality." *Id.* at 110. Finally, Plaintiff asserts that the State has not established that in future elections, a

“confluence of events” will result in the same voting problems and long lines of the November 2004 national election, and therefore, the State cannot avail itself of the capable of repetition, yet evading review exception to the mootness doctrine in this case. (Oral Argument Tr. of 3/2/05 at 30).

3. Is the State of Ohio’s Counterclaim Capable of Repetition, Yet Evading Review?

The capable of repetition, yet evading review exception to the mootness doctrine applies where, “(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again.” *Coalition for Gov’t Procurement*, 365 F.3d at 473 (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)). The Supreme Court has further stated that it has been “unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury.” *Honig v. Doe*, 484 U.S. 305, 320 (1988) (citing *Lyons*, 461 U.S. at 105-06). It is also noteworthy, that the Sixth Circuit has declined, at least on one occasion, to apply the capable of repetition, yet evading review exception in the election context. *See Dean v. Austin*, 602 F.2d 121, 124 (6th Cir. 1979) (holding that Michigan election officials “may have made mistakes in the instructions pertaining to Public Act 94 in the 1978 election but that there is no reason to believe from this record that any inadequacy of the ballot instructions in 1978 will be repeated in future elections”).

Applying this Circuit’s capable of repetition, yet evading review test, the Court holds that the exception does not apply in this case. Neither party disputes the fact that controversies arising from long voting lines and perhaps the alleged inadequate number of voting machines are likely to be too short in duration to be fully litigated prior to “cessation or expiration.” *Coalition*

for Gov't Procurement, 365 F.3d at 473. Thus, the State has satisfied the first element of the test. Consequently, whether the State can avail itself of the capable of repetition, yet evading review exception turns completely on element two.

The State argues that as long as the minimum ratio of voting machines to registered voters remains at 1-to-200,⁹ it is probable that challenges to this ratio will continue to arise in the future. Yet, the State has not demonstrated that it has a reasonable expectation that the circumstances giving rise to Plaintiff's suit will likely arise in future elections such that Plaintiff will again challenge the 1-to-200 voting machine placement ratio.

From the record, it appears that the large voter turn-out and the bad weather, among other possible contributing factors, culminated in the inordinately long lines that led Plaintiff to file suit against the Defendants. The State has not demonstrated that it has a reasonable expectation that a combination of these factors will likely recur, such that Plaintiff will file actions in which it will challenge the 1-to-200 voting machine placement ratio in future elections.

Furthermore, at oral argument, the State contended that not only does the Ohio Secretary of State's office determine the ratio of voting machines to registered voters, but also local county boards of elections, which determine the placement of voting machines within their respective counties, have discretion to purchase more voting machines so as to decrease the ratio between voting machines and registered voters. The Court finds that given the fact that, in future elections, local county boards of elections could opt to purchase additional voting machines,

⁹At oral argument, counsel for the State asserted that the current ratio for voting machines purchased with Help America Vote Act of 2002 ("HAVA") funds, is one machine per 200 registered voters. (Oral Argument Tr. of 3/2/05 at 16). Furthermore, the Ohio Secretary of State office determines the 1-to-200 ratio for purposes of reimbursing local county boards of elections that purchase their voting machines with HAVA funds. (Oral Argument Tr. of 3/2/05 at 16).

such that there would be less registered voters assigned to one voting machine, the State has failed to show that it has a reasonable expectation that disputes over long voting lines, the alleged inadequate number of voting machines, or other perceived attacks upon the legitimacy of the 1-to-200 voting machine placement ratio, are likely to arise in future elections.¹⁰

Finally, the State argues that because of limited local government funds and budgets, it may “safely predict” that many Ohio counties will be forced to adhere to the 1-to-200 ratio in future elections because they cannot afford to purchase additional voting machines with their own funds. (Oral Argument Tr. of 3/2/05 at 27). The Court finds that it is too speculative at this time to determine whether the Franklin County and Knox County budgets will be able to support the expenditure of funds to increase the number of voting machines, and whether the populations of those counties will increase or decrease so as to affect the 1-to-200 minimum ratio of voting machines to registered voters.

Because the Court is not persuaded that the State’s counterclaim is indeed capable of repetition, yet evading review, the State’s counterclaim is hereby rendered moot, and consequently, it is not justiciable. Having determined that even if the State is a proper intervenor-defendant in this case, it does not present a justiciable counterclaim, the Court next turns to whether it is appropriate to dismiss Plaintiff’s action pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure.

¹⁰Arguably, the Ohio Secretary of State’s office could also redetermine the minimum ratio of voting machines to registered voters, which could either increase or decrease the ratio of voting machines to registered voters in future elections.

C. Plaintiff's Motion for Voluntary Dismissal Without Prejudice

Even if the State is an intervenor-defendant which has pled a counterclaim that is capable of independent adjudication by this Court, Plaintiff argues that the State will suffer no legal prejudice as a result of the dismissal of this action under Rule 41(a)(2). To bolster its claim that the Complaint is proper for voluntary dismissal under Rule 41(a)(2), Plaintiff asserts that “[c]ourts generally exercise their discretion under [Rule 41(a)(2)] by granting dismissal without prejudice absent demonstrable legal prejudice to the defendant.” (Pl.’s Mot. Voluntary Dismissal at 3). According to Plaintiff, courts typically consider the following factors when a plaintiff has moved for voluntary dismissal under Rule 41(a)(2):

(1) the extent to which the suit has progressed, including the defendant’s effort and expense in preparing for trial, (2) the plaintiff’s diligence in prosecuting the action or in bringing the motion, (3) the duplicative expense of relitigation, and (4) the adequacy of plaintiff’s explanation for the need to dismiss.

See Pl.’s Mot. Voluntary Dismissal at 3-4 (quoting 8 Moore’s Federal Practice 3d, § 41.40 [6]) and citing *Grover By Grover v. Eli Lilly and Co.*, 33 F.3d 716, 718 (6th Cir. 1994); *Catanzano v. Wing*, 277 F.3d 99, 110 (2d Cir. 2001); *Ellett Bros. Ins. v. United States Fidelity & Guar. Co.*, 275 F.3d 384, 388 (4th Cir. 2001)). Plaintiff next contends that the aforementioned factors warrant this Court’s grant of its Rule 41(a)(2) Motion.

With respect to the first factor, Plaintiff claims that, at the time it filed the Rule 41(a)(2) Motion, the case was pending for one month; no summons was ever served in the case, though two of the three named Defendants “voluntarily” filed answers to the Complaint; and the Defendants have not incurred expense in preparing for trial. (Pl.’s Mot. Voluntary Dismissal at 4). In addressing factor two, Plaintiff avers that it and Defendant Franklin County Board of

Elections have filed a stipulated dismissal because they recognize that this action is moot. With regard to factor three, Plaintiff alleges that the Defendants will not incur any duplicative expense of re-litigation, because the controversy necessitating the case sub judice is moot, Plaintiff has no intention of re-filing this action, and the State of Ohio concedes that the controversy that provides the driving force behind this action is moot. Finally, with respect to factor four, Plaintiff claims that because there is no longer a live controversy in this case, its Rule 41(a)(2) Motion “is intended to facilitate an end to the litigation without preclusive effect or prejudice to any party.” See Pl.’s Mot. Voluntary Dismissal at 4 (citing *Nat’l R.R. Passenger Corp. v. Iaman*, 915 F.2d 43, 48 (1st Cir. 1990)).

In its Memorandum Contra, the State asserts that there is a real live controversy between it, Defendant Blackwell, and Plaintiff, which requires resolution by this Court. The controversy to which the State refers, pertains solely to its counterclaim.¹¹ Indeed, in its Answer, the State conceded that Plaintiff’s claims in this case are moot. (State of Ohio’s Answer at ¶ 17). Finally, though the State addresses the specter of re-litigation, it does not argue that it would suffer “plain legal prejudice” if this Court grants Plaintiff’s Rule 41(a)(2) motion.

¹¹In its Memorandum Contra, the State urges this Court not to dismiss the “counterclaims” filed against Plaintiff. (State of Ohio’s Mem. Contra at 1-2). In his answer to Plaintiff’s Complaint, Defendant Blackwell does not assert a counterclaim nor does the Franklin County Board of Elections in its answer. In the State of Ohio’s answer it asserted the following counterclaim: “The refusal of the State of Ohio, Defendant Secretary of State Blackwell, Defendant Franklin County Board of Elections, or Defendant Knox County Board of Elections to provide paper ballots or ‘adequate voting machines’ . . . does not violate the right to vote of any person as secured by the United States Constitution. . . .” (State of Ohio’s Answer at 3-4). While the Court notes that the same counsel represents both the State and Defendant Blackwell, from the record it is evident that only the State asserts a counterclaim against Plaintiff.

In its Reply Memorandum, Plaintiff argues that the State has not adduced evidence that any party has been prejudiced by this Court's issuance of the Order, or that it would be prejudiced if this Court permits dismissal of this action, especially since the action, as of the date that Plaintiff filed its Rule 41(a)(2) motion, had been pending for a short time, the parties have not incurred trial preparation expenses, and they will incur no duplicative expenses related to re-litigation. Plaintiff also maintains that the State has failed to address or to explain the fact that it conceded that this action is moot in paragraph 17 of its Answer.

The Sixth Circuit has declared that whether a district court should grant a voluntary dismissal of an action under Rule 41(a)(2), is within the "sound discretion" of that court. *Grover By Grover*, 33 F.3d at 718 (citing *Banque de Depots v. Nat'l Bank of Detroit*, 491 F.2d 753, 757 (6th Cir. 1974)). The district court's grant of voluntary dismissal, however, is not without bounds. In this Circuit, a district court abuses its discretion where a defendant would endure "plain legal prejudice," if the plaintiff's action is dismissed without prejudice, "as opposed to facing the mere prospect of a second lawsuit." *Id.* (citing *Kovalic v. DEC Int'l, Inc.*, 855 F.2d 471, 473 (7th Cir. 1988)) (citation omitted). As set forth above, when determining whether the State, as an intervenor-defendant, will suffer "plain legal prejudice" this Court will inquire into, (1) whether the State has put forth effort and expense of preparation for trial; (2) whether Plaintiff has engaged in excessive delay and a lack of diligence in prosecuting this action; (3) whether Plaintiff has offered an insufficient explanation for its need for case dismissal; and (4) the State has filed a motion for summary judgment. *Id.*

As applied to this case, these four factors weigh in favor of granting Plaintiff's Rule 41(a)(2) motion. First, from the record, it does not appear that any party has either put forth

efforts in preparation for trial or incurred any expenses in preparation for trial. The fact that Plaintiff initially petitioned this Court for a Temporary Restraining Order, the Court granted that Order, the Order expired by its terms on the day on which it was requested, and various named Defendants and the Ohio Republican Party, as proposed intervenor-defendant have dismissed their Sixth Circuit appeals, would suggest that the parties to this action have not been put forth great effort and expense in preparation for trial.

Second, there is nothing in the record to intimate that Plaintiff has engaged in excessive delay and a lack of diligence in prosecuting this case. Plaintiff has proffered evidence that it agreed to a stipulated dismissal of the claims against Defendant Franklin County Board of Elections, and after concluding that the controversy which gave rise to this action is moot, Plaintiff filed the pending Motion for Voluntary Dismissal Without Prejudice one month after it filed its election night petition for a temporary restraining order.

Third, Plaintiff's primary reason for requesting court dismissal of this action is due to its belief that the case is moot, a fact that the State conceded in its Answer, and it claims that it has no intention to refile the action. To buttress its assertion that this case is moot, Plaintiff points out the fact that the controversy giving rise to this action, stemming from "the unprecedented and extremely long lines and delays at certain polling places in Franklin and Knox Counties," no longer exists, the Court's Order expired by its terms on election night at the close of the voting, and that a temporary restraining order was its sole requested relief. (Pl.'s Reply Mem. at 1-2). Plaintiff has demonstrated that this Court can offer it no further relief beyond the Order, which expired by its own terms at the close of voting on November 2, 2004, and Plaintiff has not sought relief from this Court concerning the long voting lines and alleged inadequate number of

voting machines after the expiry of the Order. *See McPherson v. Michigan High Sch. Athletic Ass'n Inc.*, 119 F.3d 453, 458 (6th Cir. 1997) (“The test for mootness is whether the relief sought would, if granted, make a difference to the legal interests of the parties.”) (internal quotation marks and citation omitted); *see also Coalition for Gov't Procurement v. Fed. Prison Indus., Inc.*, 365 F.3d 435, 460 (6th Cir. 2004) (“As we repeatedly have stated, the determinative factor in the mootness inquiry is whether the court possesses the authority to afford the [plaintiff] any effectual relief.”). Thus, it is incontrovertible that the underlying controversy that spurred Plaintiff to sue Defendants is moot.

Additionally, Plaintiff claims that its Rule 41(a)(2) motion “is intended to facilitate an end to the litigation without preclusive effect or prejudice to any party.” *See* Pl.’s Mot. Voluntary Dismissal at 4 (citing *Iaman*, 915 F.2d at 48). Although the State argues that based on Plaintiff’s statement in the preceding sentence, there is a possibility that in future elections, Plaintiff will attempt to file suit again and implore a court to authorize the distribution of paper ballots to voters waiting in line, such a possibility does not lead to a conclusion that the State will suffer “plain legal prejudice” if the Court dismisses this action. *See Grover by Grover*, 33 F.3d at 718 (stating that generally a court’s decision to grant a plaintiff’s Rule 41(a)(2) motion is improper only if, as a result of a dismissal without prejudice, a defendant will suffer “‘plain legal prejudice,’ *as opposed to facing the mere prospect of a second lawsuit*”) (emphasis added) (citations omitted). It is also noteworthy that the State fails to mention any other conceivable basis to support a finding that it would suffer “plain legal prejudice” if this Court grants Plaintiff’s Rule 41(a)(2) motion.

Finally, the record does not reflect that the State has filed a motion for summary judgment. There is also no evidence to suggest that such a filing would be forthcoming.

Accordingly, Plaintiff's Rule 41(a)(2) Motion is **GRANTED**.

D. Whether the Court Has Subject Matter Jurisdiction over the State of Ohio's Counterclaim

Because the Court determines that the State's counterclaim is moot, and the capable of repetition, yet evading review exception to the mootness doctrine is not applicable to this case, the Court holds that it does not have subject matter jurisdiction over the State's counterclaim. *See Forbes v. Bd. of Dirs. for the NAACP*, No. 02-3960, 2003 U.S. App. LEXIS 8867, at *3-4 (6th Cir. May 8, 2003) (directing the district court on remand to dismiss the action for lack of subject matter jurisdiction because the court held that the plaintiffs' action was moot and it rejected the defendant's argument that the capable of repetition, yet evading review exception applied).

Therefore, Plaintiff's request for dismissal of the State's counterclaim for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) is **GRANTED**.

E. Whether the Court Should Strike the State of Ohio's Counterclaim

Because Plaintiff requests that this Court dismiss the State of Ohio's counterclaim pursuant to Rule 12(b)(1) or, in the alternative, strike the counterclaim pursuant to Rule 12(f), the Court need not evaluate Plaintiff's motion to strike because it determines that dismissal of the State's counterclaim for lack of subject matter jurisdiction is proper.

V. CONCLUSION

Based on the foregoing, Plaintiff's Motion for Voluntary Dismissal without Prejudice and Motion to Dismiss Purported Counterclaim [Docket No. 15] is **GRANTED**. Because the Court grants Plaintiff's Motion to Dismiss Purported Counterclaim it does not decide Plaintiff's Motion to Strike Purported Counterclaim. This case is dismissed.

IT IS SO ORDERED.

s/ Algenon L. Marbley
ALGENON L. MARBLEY
UNITED STATES DISTRICT JUDGE

DATE: August 26, 2005