UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

The Ohio Organizing Collaborative, *et al.*,

Plaintiffs,

v.

Jon Husted, *et al.*,

Defendants.

Case No. 2:15–cv–1802

Judge Michael H. Watson

Magistrate Judge King

OPINION AND ORDER

The Ohio Organizing Collaborative ("OOC") moves to amend the Complaint in this case to (1) withdraw as a plaintiff and substitute other entities in its place, and (2) withdraw certain claims. ECF No. 33. For the following reasons, the Court **GRANTS IN PART AND DENIES IN PART** OOC's motion.

I. BACKGROUND

OOC is a non-profit organization involved in voter registration and get-out-the-vote activities throughout Ohio.

Jordan Isern, Carol Biehle, and Bruce Butcher are individuals who are registered to vote in Ohio and/or have been involved in voting registration and get-out-the-vote efforts throughout Ohio.

On May 8, 2015, OOC and these three individuals (collectively, "Plaintiffs") filed the instant Complaint challenging various Ohio election laws, directives, and policies. Plaintiffs allege that those policies infringe upon the rights, privileges,

and immunities guaranteed to Ohio citizens under the First, Fourteenth, and Fifteenth Amendments to the United States Constitution and violate Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. Plaintiffs bring these claims against Ohio Secretary of State Jon Husted and Ohio Attorney General Mike DeWine (collectively, "Defendants") in their official capacities.

Among Plaintiffs' claims are challenges to Ohio Senate Bill 205 ("S.B. 205") and Ohio Senate Bill 216 ("S.B. 216"), which concern regulations regarding the casting and counting of absentee and provisional ballots, respectively.

The case is currently proceeding on an expedited case schedule with a bench trial set to commence on November 16, 2015.

Meanwhile, on August 7, 2015, the Honorable Algenon L. Marbley granted the plaintiffs in another election case leave to file a second supplemental complaint adding similar challenges to S.B. 205 and S.B. 216. *See The Northeast Ohio Coalition for the Homeless v. Husted*, Case No. 2:06–cv–896 (S.D. Ohio) ("NEOCH"), ECF No. 452.

OOC now moves to amend Plaintiffs' Complaint in this case to withdraw the S.B. 205 and S.B. 216 claims that overlap with the newly added claims in *NEOCH*. It also moves to withdraw as a plaintiff in this case and substitute three entities in its place.

II. STANDARD OF REVIEW

OOC brings the instant motion pursuant to Federal Rules of Civil Procedure 15 and 21.

Federal Rule of Civil Procedure 15(a)(2) provides that where a party seeks leave of court to amend a pleading, courts should freely grant such leave when justice so requires. Fed. R. Civ. P. 15(a)(2). However, courts have "considerable discretion in deciding whether to grant a Rule 15(a)(2) motion." *Stark v. Mars, Inc.*, 790 F. Supp. 2d 658, 662 (S.D. Ohio 2011) (internal quotation marks and citation omitted). "A motion to amend a complaint should be denied if the amendment is brought in bad faith, for dilatory purposes, results in undue delay or prejudice to the opposing party, or would be futile." *Id.* (internal quotation marks and citation omitted). In considering what constitutes undue delay and undue prejudice, courts consider, *inter alia*, whether amendments would significantly delay resolution of the dispute. *Brown v. Florida Coastal Partners*, No. 2:13–cv–1225, 2015 WL 4205157, at *6 (S.D. Ohio July 10, 2015) (citing *Phelps v. McClellan*, 30 F.3d 658, 662–63 (6th Cir. 1994)).

Federal Rule of Civil Procedure 21 permits a court to, "[o]n motion or on its own, [ ] at any time, on just terms, add or drop a party." Fed. R. Civ. P. 21. While Rule 21 generally governs the misjoinder and nonjoinder of parties, it may also be employed to substitute parties. *Owens v. Dolgencorp, LLC*, No. 3:12–cv–313, 2013 WL 6795415, at *2 (S.D. Ohio Dec. 19, 2013) (citation omitted). Rule 15 and Rule 21 are governed by the same standard. *Thorn v. Bob Evans Farms, LLC*, No. 2:12–cv–768, 2013 WL 2456336, at *2 (S.D. Ohio June 6, 2013) (citation omitted). As such, the decision whether to grant leave to substitute is within the courts' discretion. *Id.*

III. ANALYSIS

A. Motion to Substitute Parties

OOC moves to withdraw as a plaintiff and substitute in its place the Ohio Democratic Party ("ODC"), the Democratic Party of Cuyahoga County ("DPCC"), and the Montgomery County Democratic Party ("MCDP"), submitting that it lacks the institutional capacity to remain a plaintiff and that the new parties are willing to take its place.

Defendants do not oppose the substitution but request that to mitigate the discovery delays it will cause, the Court require the new plaintiffs to: (1) comply with all existing deadlines, (2) respond to Defendants' interrogatories and requests for admission within fourteen days of service, and (3) expeditiously produce all documents responsive to Defendants' document requests.

OOC objects to the imposition of a fourteen-day written discovery deadline on the new plaintiffs, arguing that it would be overly burdensome. As OOC states in its Reply, however, OOC's counsel has shared Defendants' discovery requests with the new plaintiffs, who have already started preparing for discovery. Reply 11 n.2, ECF No. 37. Thus, responding to interrogatories and requests for admissions within fourteen days should not be overly burdensome, and given the expedited case schedule, is warranted.

Accordingly, the Court **GRANTS** OOC's motion to withdraw as a plaintiff and substitute ODC, DPCC, and MCDP in its place. It further **ORDERS** that Defendants and the new plaintiffs respond to interrogatories and requests for

admissions **within fourteen days of service of such requests**. While the thirty-day timeline for responses to document requests remains unchanged, the parties are expected to produce documents expeditiously. All parties shall comply with the other existing discovery deadlines.

B. Motion to Amend

OOC also seeks to amend its Complaint to withdraw claims based on the following three categories:

> (1) S.B. 205's and S.B. 216's new informational requirements for casting and having counted absentee and provisional ballots; (2) the state's failure to provide adequate opportunities to cure mistakes on the provisional ballot affirmation form; and (3) the arbitrary system resulting from S.B. 216's grant to each county of the discretion whether to consolidate poll books at multi-precinct voting locations.

Mot. to Amend. 6, ECF No. 33-1.[1] OOC asserts that these claims are identical to the newly-added claims in *NEOCH* and argues that allowing the same claims to proceed before two different Judges in this Court would unnecessarily waste judicial resources. It further submits that withdrawal of the claims would not prejudice Defendants because it simplifies the instant suit and because Defendants can use the existing discovery in this case to oppose the same claims in *NEOCH*.

[1] Withdrawal of these categories of claims would remove from Plaintiffs' Complaint all claims based on S.B. 216. Plaintiffs' proposed amended complaint would still, however, contain a challenge to S.B. 205's restrictions on the mailing of unsolicited absentee ballot applications. *See* Proposed Amend. Compl. ¶¶ 125–132, 146, ECF No. 33-2.

Defendants oppose the amendment on three grounds: (1) it would unduly prejudice the public; (2) it would unduly prejudice Defendants; and (3) it would reward an improper attempt to forum shop.

1. Undue Prejudice to the Public

Defendants first argue that withdrawal of the instant S.B. 205 and S.B. 216 claims in favor of proceeding on the claims in *NEOCH* would delay adjudication of the S.B. 205 and S.B. 216 issues, which would prejudice boards of election, government officials, and voters.

As an initial matter, Defendants have failed to establish the propriety of considering prejudice to non-parties as part of the Rule 15 inquiry. The two authorities on which they rely in support of such consideration—*Cooper v. American Employers' Insurance Company*, 296 F.2d 303, 306 (6th Cir. 1961) and *Ohio Valley Environmental Coalition v. United States Army Corps*, 243 F.R.D. 253 (S.D. W. Va. 2007)—are inapposite.

First, while the court of appeals in *Cooper* recognized that the district court denied leave to amend based on the resulting prejudice to a non-party, the appellate court *declined to decide* whether such consideration is proper under Rule 15(a). *Cooper*, 296 F.2d at 306. Second, while *Ohio Valley* considered prejudice to entities that were initially non-parties, those entities were central to the claims that the plaintiffs sought to add under Rule 15, and in fact, the court granted the non-parties leave to intervene in that case in the same opinion and

order granting the plaintiff's motion to supplement. *Ohio Valley Envtl. Coal.*, 243 F.R.D. at 255–257.[2]

Nonetheless, given the unique circumstances of this case, the Court cannot ignore the widespread ramifications of OOC's proposed amendment. Discovery is well under way in this case, and the trial is set to begin November 16, 2015. Because of this timeline, proceeding with the S.B. 205 and S.B. 216 claims in the instant suit will allow for timely adjudication of the issues, giving election officials a greater opportunity to implement any changes to election procedures as early as possible before the primary and general elections. It also provides for an earlier opportunity to appeal to the United States Court of Appeals for the Sixth Circuit, from whom a decision would be binding on all Ohio district courts.

NEOCH, on the other hand, does not yet have a case schedule, and a preliminary conference has not yet been scheduled. Withdrawal of Plaintiffs' S.B. 205 and S.B. 216 claims in favor of allowing them to proceed in *NEOCH* would therefore delay adjudication of the issues, which would in turn delay the Secretary of State's ability to administer the State's voting laws. For example, for the 2016 primary election, the county boards of election will begin accepting

[2] Defendants also point to 6 Charles Alan Wright et al., Federal Practice & Procedure § 1487, which states that "[p]rejudice to a person who is not a party to the action also may be relevant to the decision whether to grant or deny leave to amend." 6 Charles Alan Wright et al., Federal Practice & Procedure § 1487 (3rd ed. April 2015). This statement is based primarily on *Cooper*, however, which again does not stand for that proposition.

absentee ballot applications on December 16, 2015, and early in-person voting begins on February 17, 2016. Walsh Aff. ¶¶ 4–5, ECF No. 35-2. Absent timely adjudication of the S.B. 205 and S.B. 216 issues, boards of election and state government officials will have less time to implement any changes arising out of litigation, and the closer to the election that changes are made, the greater the risk of voter confusion. The finality achieved by an adjudication on the merits early enough to implement any election-law changes will reduce voter confusion and help ensure that votes are properly cast. Accordingly, the delay in resolving the S.B. 205 and S.B. 216 claims, and the consequences of that delay, counsel against granting leave to amend.

In so finding, the Court is mindful that the Rule 15 inquiry generally considers the proposed amendment's potential for delay to defendants and delaying resolution of the claims in the specific case at issue. *See, e.g.*, *Brown*, 2015 WL 4205157, at *6. For example, in this case, the Court would normally consider whether the amendment withdrawing the S.B. 205 and S.B. 216 claims would delay resolution of the remaining four claims in this case. However, as OOC seeks to withdraw its S.B. 205 and S.B. 216 claims in favor of allowing identical claims to proceed in a different case before the same Court, the Court finds it appropriate to consider the amendment's potential for delaying resolution of the S.B. 205 and S.B. 216 dispute generally.

2. Undue Prejudice to Defendants

Defendants next argue that OOC's proposed amendment would cause undue prejudice to Defendants in four ways.

a. Defendants' Decision-Making Authority Regarding Experts

Defendants first contend that withdrawal of Plaintiffs' S.B. 205 and S.B. 216 claims will prejudice Defendants' expert discovery decision-making in two ways. First, in response to Plaintiffs' suggestion that Defendants can use the discovery completed in the instant case to defend the claims in *NEOCH*, Defendants argue that they should not be required to do so with respect to expert discovery, as their defense strategy may differ between the two cases. They assert that they should be permitted to decide what experts to use in which litigation, and requiring them to use the expert discovery obtained in this case to defend the claims in *NEOCH* strips them of that prerogative.

Defendants' argument is unpersuasive, as it incorrectly presupposes that they would be *required* to use the expert discovery obtained in this case to defend against the claims brought in *NEOCH*. As Defendants point out, they will be allocated a separate budget to litigate the claims in *NEOCH*, and they have not yet made decisions about expert testimony in that case. Again, a discovery schedule has not even been set. Accordingly, Defendants will have the time, a budget, and the choice to select whichever experts they choose to help defend against the *NEOCH* claims, and the withdrawal of the similar claims in this case will have no bearing on that discretion.

Defendants' second argument regarding prejudice to expert discovery—that withdrawal would weaken their ability to defend against the remaining claims—is more compelling. They represent that they have already expended a significant portion of their defense budget on expert work related to the claims OOC seeks to withdraw, and had those claims been omitted from the litigation from the case's inception, Defendants would have allocated their resources differently. Given the number and complexity of the constitutional claims in this case, as well as the expedited schedule on which it is proceeding, this constitutes significant prejudice. *See, e.g.*, *Bear v. Delaware Cnty., Ohio*, No. 2:14–cv–43, 2015 WL 1954451, at *3 (S.D. Ohio Apr. 28, 2015) ("Deciding if any prejudice to the opposing party is 'undue' requires the Court to . . . ask if the defending party would have conducted the defense in a substantially different manner had the amendment been tendered previously.") (citing *Gen. Elec. Co. v. Sargent & Lundy*, 916 F.2d 1119, 1130 (6th Cir. 1990); *Davis v. Therm–O–Disc, Inc.*, 791 F.Supp. 693, 695 (N.D. Ohio 1992)).

b. Defendants' Document Production Efforts

Defendants next argue that withdrawal would disrupt their document production efforts. They assert that they have expended significant time and resources responding to Plaintiffs' document requests, many of which relate to the claims OOC seeks to withdraw. Defendants assert that they have been producing these documents as they are kept in the usual course of business and thus have not been separating them according to Plaintiffs' requests or claims.

They argue that if Plaintiffs' S.B. 205 and S.B. 216 claims are withdrawn, many of the documents that they have already produced would become irrelevant, and Defendants would be required to remove originally responsive documents from a production set that is ready to be served, thereby disrupting Defendants' efforts to expedite production.

OOC responds that discovery regarding S.B. 205 and S.B. 216 would still be relevant to the amended complaint because it is relevant to the issue of "the intent with which the other challenged provisions were passed and the burdens they will impose." Reply 8, ECF No. 37. It further asserts that the discovery will not go to waste, as it would be relevant to the *NEOCH* claims.

While the Court agrees that some discovery will still be relevant if the claims are withdrawn, it is not convinced that all discovery regarding the S.B. 205 and S.B. 216 claims that OOC seeks to withdraw will be relevant to the question of intent. Defendants would thus be required to reassess their prepared responsive documents to identify and remove those that would be no longer responsive to Plaintiffs' original request. And the potential use of the discovery in *NEOCH* does not negate the fact that Defendants will need to expend additional resources reassessing their response to Plaintiffs' document request in this case.

Given this case's unique procedural posture and expedited schedule, this additional hardship constitutes undue prejudice. Typically, when plaintiffs seek to amend a complaint to *add* claims, courts consider whether "the new allegations would require the opponent to expend significant additional resources to conduct

discovery and prepare for trial." *Brown*, 2015 WL 4205157, at *6 (citing *Phelps v. McClellan*, 30 F.3d 658, 662–63 (6th Cir. 1994)). The same principle applies here even though Plaintiffs seek to omit claims, as the amendment would cause Defendants to expend significant additional resources to properly respond to discovery requests under the expedited discovery schedule. *See* Walsh Aff. ¶¶ 7–11, ECF No. 35-2 (detailing the nature and amount of time spent responding to Plaintiffs' discovery request as of August 19, 2015). This prejudice therefore weighs against granting leave to amend.

c. Other Discovery

Defendants next argue that withdrawal would render other completed discovery obsolete. They specifically point to non-party subpoenas that Plaintiffs have served on nineteen boards of election. They assert that the boards have expended significant resources responding to document requests in those subpoenas that relate to the claims that Plaintiffs seek to withdraw. They further assert that these efforts may prove to be wasted, as it is unclear whether the *NEOCH* plaintiffs could admit such discovery in the *NEOCH* case.

OOC responds that this discovery would not be wasted, as it will be relevant to the claims in *NEOCH* and can be admitted by an agreement among the parties and the county boards of election.

Without evidence of such an agreement at this time, however, the potential for a significant waste of discovery efforts remains troubling. Nevertheless, the

Court recognizes the potential that this concern may be alleviated, and thus the Court will not consider this as grounds to deny leave to amend.

d. Change in Plaintiffs' Case Theory

Last, Defendants argue that withdrawal of the S.B. 205 and S.B. 216 claims would alter Plaintiffs' theory of their case. They submit that Plaintiffs' theory is that S.B. 205 and S.B. 216 work alone *and in combination* with the other challenged laws and policies to disenfranchise certain categories of voters. As such, they argue, withdrawing any of Plaintiffs' claims would necessarily change Plaintiffs' overall case theory.

Defendants' argument is not well taken. First, as noted above, Plaintiffs' proposed amended complaint retains their challenge to S.B. 205's restrictions on the mailing of unsolicited absentee ballots and the alleged discrimination that results from its implementation in conjunction with other laws and directives. Second, the absence of explicit challenges to the legality of other S.B. 205 requirements and S.B. 216 would not preclude Plaintiffs from arguing that voters are disenfranchised by the combination of those bills and other laws. Indeed, Plaintiffs may support their challenges to the legality of *other laws* with evidence of the allegedly discriminatory effects that result from their implementation in conjunction with S.B. 205 and S.B. 216. In other words, Plaintiffs may still argue that in light of S.B. 205's and S.B. 216's requirements, other laws, such as S.B. 200, violate Plaintiffs' rights. *See* Compl. ¶¶ 109–119 (alleging that the discriminatory effects arising out of S.B. 200's new formula for calculating the

number of DRE's allocated to each county is exacerbated by the new restrictions imposed by S.B. 205). Moreover, even assuming the amendment would change Plaintiffs' overall case theory, Defendants have not articulated how the change itself would be unduly prejudicial, particularly as no dispositive motions have been filed.

In sum, while the Court does not find Defendants' arguments with respect to third-party discovery and Plaintiffs' case theory availing, Defendants have shown that OOC's proposed amendment would significantly prejudice them with respect to their ability to defend the remainder of their case and their efforts to respond to document production requests expeditiously.

3. Forum Shopping

Defendants last argue that the procedural history of this case establishes that OOC's motion is an effort to forum shop.

Plaintiffs filed the instant case on May 8, 2015. On May 12, 2015, they filed a Notice of Related Case notifying the Court of the *NEOCH* plaintiffs' pending motion for leave to file a second supplemental complaint, arguing that the cases should be found related pursuant to Local Rule 3.1(b). ECF No. 7. The *NEOCH* plaintiffs' motion had been pending since October 30, 2014. On June 1, 2015, this Court agreed that the cases are related but determined that the instant case should nevertheless remain before the Undersigned. ECF No. 16.

On July 9, 2015, Plaintiffs moved for reconsideration of the case schedule, requesting that the Court continue the trial date to December 2015 or January 2016 to allow for more time to develop the factual bases for their claims. ECF No. 25. On August 7, 2015, the *NEOCH* plaintiffs were granted leave to file their second supplemental complaint. On August 13, 2015, the Court denied Plaintiffs' request to continue the trial date. ECF No. 32. Plaintiffs filed the instant motion to amend the same day.

Defendants argue that given this procedural history, OOC's request is but an improper renewed attempt to forum shop in an effort to, among other things, circumvent the expedited trial schedule in this case.

OOC denies that it is forum shopping and asserts that its request is based on the interest of judicial economy. It emphasizes that when Plaintiffs filed the instant case, it was unclear whether the *NEOCH* plaintiffs' motion for leave to supplement their complaint, which at that point had been pending for approximately seven months, would be granted. Reply 9, ECF No. 37. Notably, however, OOC filed its Notice seeking to relate the two cases *before* the ruling on the *NEOCH* motion was issued. Notice of Related Case, ECF No. 7.

While notifying the Court of the related case was certainly justified, the fact that OOC attempted to relate this case to *NEOCH* before it was known if the claims in *NEOCH* would proceed at least creates the appearance of forum shopping. Indeed, one would assume that Plaintiffs would prefer the timeliest resolution of their claims, given that they seek to prevent disenfranchisement in

the 2016 presidential election, and that relating the instant case to one that was unclear to proceed would not advance their interests.

Moreover, ODP, who OOC seeks to add as a plaintiff in this case, is an intervenor plaintiff in *NEOCH* and one of the plaintiffs who sought leave to supplement the complaint in that case. McTigue & McGinnis LLC represents the Plaintiffs in this case and ODP in *NEOCH*. As Plaintiffs will be litigating their S.B. 205 and S.B. 216 claims on an expedited case schedule in the instant case, the request to withdraw those claims in favor of allowing them to be litigated in *NEOCH* by the same law firm contributes to the appearance of strategic forum shopping for a more favorable case schedule. It is axiomatic that forum shopping is not grounds for granting leave to amend and counsels against granting OOC leave to amend in this case.

In sum, upon consideration of the parties arguments, the Court finds that the delay in resolving the S.B. 205 and S.B. 216 issues, the prejudice to Defendants, and the appearance of forum shopping warrants denial of OOC's motion to amend its Complaint to withdraw its S.B. 205 and S.B. 216 claims. The Court recognizes that the amendment would promote judicial economy by eliminating duplicative litigation. The Court points out, however, that it was aware of the potential for the S.B. 205 and S.B. 216 claims to proceed in both cases when it determined that the instant case should remain before the Undersigned. Moreover, because *NEOCH* does not yet have a case schedule, it is possible that the instant case, including an appeal to the United States Court of

Appeals for the Sixth Circuit, would be resolved before any significant discovery occurred in *NEOCH*, thereby diminishing concerns about wasted resources.

The Court also recognizes that reducing the number of claims in this case would simplify the action and reduce the number of claims against which Defendants must defend. The Court finds, however, that this interest is outweighed by the fact that the amendment would significantly prejudice Defendants in both their discovery efforts and in their ability to craft a defense to the claims that would remain after the amendment. Moreover, complexity of the case is typically considered in light of the burden on the non-moving party, and here, Defendants do not object on complexity grounds. Furthermore, this is a unique situation where it is in all relevant players' best interests to adjudicate the claims as soon as possible. For all of these reasons, the Court **DENIES** OOC leave to amend its Complaint to withdraw its S.B. 205 and S.B. 216 claims.

IV. CONCUSION

For the foregoing reasons, the Court **GRANTS IN PART AND DENIES IN PART** OOC's motion, ECF No. 33. The Court **GRANTS** OOC's motion to amend to reflect the substitution of parties and **DENIES** OOC's motion to amend to reflect the withdrawal of claims. Plaintiffs shall, **within seven days of the date of this Opinion and Order**, file an amended complaint reflecting the substitution.

Additionally, the parties are advised that due to the Court's schedule, the trial in this case, which is scheduled to begin November 16, 2015, will adjourn on November 18, 2015 and resume on November 19, 2015.

IT IS SO ORDERED.

Michael H. Watson

MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT

General Information

Court	United States District Court for the Southern District of Ohio; United States District Court for the Southern District of Ohio
Federal Nature of Suit	Civil Rights - Voting[441]
Docket Number	2:15-cv-01802