IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
HARRISBURG DIVISION

JUDICIAL WATCH, INC., Plaintiff, v. COMMONWEALTH of PENNSYLVANIA, et al., Defendants.	Civ. Action No. 1:20-cv-00708-CCC (Judge Christopher C. Conner)

PLAINTIFF JUDICIAL WATCH'S MEMORANDUM OF LAW
IN SUPPORT OF FIRST MOTION TO AMEND THE COMPLAINT

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INTRODUCTION

Plaintiff respectfully submits this memorandum of law in support of its first motion for leave to amend the complaint. (Doc. 78.)

QUESTION PRESENTED

Whether leave to amend a complaint is warranted where Plaintiff has diligently sought to obtain, and has obtained, new evidence that did not exist when the original complaint was filed, which evidence was created and relied on by Defendants and concerns the most critical issue in the case.

Suggested Answer: Yes.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Relevant Requirements of the NVRA.

Section 8 of the National Voter Registration Act of 1993 ("NVRA") provides that registrants may not be removed from federal voter rolls except at their own request; on account of a disqualifying criminal conviction or mental incapacity; or because the registrant has died or has moved away. 52 U.S.C. § 20507(a)(3). With respect to the last two categories, Section 8 requires each state to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from

the official lists of eligible voters by reason of … the death of the registrant; or … a change in the residence of the registrant." *Id.*, § 20507(a)(4).

The registration of a voter who may have moved, but who has not confirmed this fact in writing to election officials may only be cancelled if that voter is first sent a specific notice requesting address confirmation (the "Confirmation Notice"). If the voter then "fail[s] to respond to [that] notice" and does "not vote[] or appear[] to vote" for two consecutive general federal elections, the name of that voter is removed from the rolls. *Id.*, § 20507(d)(1)(B). Once a registrant "satisf[ies] these requirements … federal law makes this removal mandatory." *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1841-42 (2018), citing 52 U.S.C. § 20507(d)(3); 52 U.S.C. § 21083(a)(4)(A).

The NVRA also requires the federal Election Assistance Commission ("EAC") to submit to Congress, by June 30 of each odd-numbered year, "a report assessing the impact" of the law "on the administration of elections for Federal office during the preceding 2-year period." 52 U.S.C. § 20508(a)(3). Federal regulations require states to submit registration-related data for use in this biennial report by March 31 of each odd-numbered year, on a survey form provided by the EAC. 11 C.F.R. § 9428.7(a). This survey instrument, which is posted online at the EAC's

website, requests data "at the level of the local jurisdiction."[1] As a result of this process, every other year the EAC publishes dozens of data points for thousands of United States counties, independent municipalities, and townships concerning the most recent two-year reporting period.

2. The Original Complaint and the Counties' Motion to Dismiss.

Plaintiff filed the original complaint in this action on April 28, 2020. The complaint alleged that Pennsylvania and the Secretary of State ("State Defendants") and officials in Bucks, Chester, and Delaware Counties ("County Defendants") failed to conduct a general program that makes the reasonable effort required by the NVRA to remove ineligible voters from the rolls. (Doc. 1 ¶ 98 (Count I).)

The primary factual allegations in the complaint were that County Defendants had been removing almost no registrations pursuant to Section 8(d)(1)(B) of the NVRA. Relying on data Defendants themselves provided to the EAC for its June 2019 survey, the complaint alleged that Bucks County, Chester County, and Delaware County reported removing, respectively, eight (8), five (5), and four (4) registrations under that provision during a two-year reporting period. Given that these counties possessed a combined registration of over 1.2 million voters, the complaint alleged that Defendants could not possibly have complied with the NVRA

[1] *See* U.S. ELECTION ASSISTANCE COMMISSION (EAC) 2020 ELECTION ADMINISTRATION AND VOTING SURVEY (EAVS) at 1, available at https://www.eac.gov/sites/default/files/Research/2020EAVS.pdf.

during that time while removing so few registrations belonging to voters who had moved without notifying the state. (Doc. 1 ¶¶ 34-46.)

All Defendants, however, admitted that they misreported their data to the EAC, and substituted new figures for Section 8(d) removals for County Defendants. These new figures, which were appended to State Defendants' July 10, 2020 answer, were exponentially (literally thousands of times) higher: 15,714 relevant removals for Bucks County; 11,519 for Chester County; and 20,968 for Delaware County. (Doc. 33-1.) State Defendants also stated that they "submitted an amended survey response to the EAC" correcting these "inaccurac[ies]." (Doc. 33 ¶¶ 39-41.)

While the updated numbers were significantly higher for the originally named County Defendants, the same data confirmed that many other Pennsylvania counties had neglected their NVRA duties and corroborated allegations relating to State Defendants. Specifically, the spreadsheet State Defendants submitted with their answer and sent on to the EAC listed *fourteen* counties which reported removing *zero* registrations under Section 8(d)(1)(B) during the period from 2016 to 2018; three counties that removed *one* registration during that period; and others that removed just a few such registrations. (Doc. 33-1, column "A9e.")

Primarily on the basis of the updated data, the named County Defendants moved to dismiss the complaint against them. Holding that the new numbers were "[f]atal to Judicial Watch's claim against the county defendants" and "effectively

torpedo its central theory," the Court dismissed the claims against County Defendants on March 8, 2021. (Doc. 57 at 9-10, 12.) This dismissal was without prejudice, with leave to amend within 30 days, and with leave to seek an extension to account for a new 90-day notice period. (Docs. 57, 58.)[2]

3. Plaintiff Obtains New Data for the 2018 to 2020 Reporting Period.

The original complaint was based on EAC data concerning the period from 2016 to 2018, which was publicly released in June 2019. From the outset of discovery, however, Plaintiff sought to obtain the data for the period from November 2018 through November 2020, which Pennsylvania was supposed to provide to the EAC no later than March 2021.

Discovery in this case was initially stayed until November 2020. (Doc. 43.) In that month, Plaintiff first served discovery requests for Defendants' Section 8(d)(1)(B) removals from 2018 to 2020. (ECF No. 64-1, request no. 2; ECF No. 64-2, interrogatory no. 1.) Defendants requested and Plaintiff agreed to extensions of their time to respond through February 15, 2021. On that date, State Defendants failed to provide the requested data, but indicated that they would "supplement" their

[2] The Court also dismissed as "conclusory" Plaintiff's allegations that County Defendants' registration rates of 96-97% were too high, and it rejected a claim for a violation of the NVRA's disclosure requirements on the ground that a demand for documents "within two weeks" did not constitute sufficient pre-suit notice because no violation had yet occurred. (Doc. 57 at 14-15; 17-18.) The proposed amended complaint does not contain these allegations or claims.

answer "upon the numbers and data being finalized and submitted to the EAC (the responses are due in March 2021)." (ECF No. 64 at 1.) When Defendants failed to turn over the responses in March 2021, informing Plaintiff of their intent to withhold the data until "as late as June" (*id.* at 2), Plaintiff commenced the process to move to compel. After a discovery conference before Magistrate Judge Arbuckle, State Defendants finally produced the requested data to Plaintiff on April 12, 2021.

As discussed more fully below, the new data paints a stark picture of NVRA non-compliance. It reveals that dozens of Pennsylvania counties removed either zero or a relative handful of registrations pursuant to Section 8(d)(1)(B) in the most recent two-year reporting period. (Doc. 75-1.) Further, the new data, along with the data for 2016-2018, show that several Pennsylvania counties removed zero or close to zero registrations pursuant to the NVRA in the last *four years*. (*Id.*)

On April 22, 2021, ten days after receiving and reviewing the new data, Plaintiff sent written notification of NVRA violations in as many as 27 Pennsylvania counties to Acting Secretary Degraffenreid, copying each county on the letter. (Doc. 75-1.) On May 3, 2021, Plaintiff sent each county an individualized notice letter identifying the specific violations that pertained to it. (*E.g.*, Doc. 75-2.)

Plaintiff later asked for and received extensions of its time to amend the complaint and to respond to other litigation deadlines, including State Defendants'

motion for judgment on the pleadings regarding the original complaint. (Doc. 54.) In its last request for an extension, Plaintiff explained that the

> Court's previous orders had anticipated that Plaintiff might send new notice letters before moving to amend. Plaintiff now has sent these letters, and respectfully requests sufficient time to allow the statutory notice periods to run and to evaluate any responses.

(Doc. 75 at 2.) State Defendants subsequently concurred in this motion. (Doc. 76.) The Court granted it, allowing Plaintiff until August 11, 2021 to move to amend the complaint, and suspending other pending motions and dates in the Case Management Order until that motion is resolved. (Doc. 77.)

The NVRA's 90-day pre-suit notice period for the new notice letters concluded on August 1, 2021. 52 U.S.C. § 20510(b)(2). On August 11, 2021, Plaintiff moved to amend the complaint. (Doc. 78.)

4. Allegations in the Proposed Amended Complaint.

The proposed Amended Complaint contains a single count, alleging that Defendants have violated Section 8(a)(4) of the NVRA (52 U.S.C. § 20507(a)(4)) by failing to conduct a general program that makes a reasonable effort to cancel ineligible registrants from the federal rolls. (Doc. 78-1 ¶¶ 92-97 (Count I).) In making its allegations, the Amended Complaint uses two sets of registration data upon which State Defendants themselves fully rely. First, the Amended Complaint uses the updated registration data State Defendants attached to their original answer, which they later included in the most recent updates for 2016-18 on the EAC's

website. (Doc. 78-1 ¶ 38.) Doc. 33-1; *see* "EAVS Datasets Version 1.3 (released July 15, 2020)," available at https://www.eac.gov/research-and-data/datasets-codebooks-and-surveys. Second, the Amended Complaint cites the registration data State Defendants submitted to the EAC in response to its most recent survey for 2018-20, which State Defendants ultimately provided to Plaintiff following a discovery dispute. (Doc. 78-1 ¶ 41.) This data was formally incorporated into the EAC's most recent dataset, released just nine days ago. *See* "EAVS Datasets Version 1.0 (released August 16, 2021)," available on the same webpage.[3]

Based on this data, the Amended Complaint alleges that Luzerne County, Cumberland County, Washington County, Indiana County, and Carbon County (collectively, "New County Defendants") removed extremely low numbers of registrations pursuant to Section 8(d)(1)(B) of the NVRA, both relatively and absolutely, over a four-year period extending from November 2016 through November 2020. In each county the number so removed rounds to zero percent of its registration list. (Doc. 78-1 ¶ 49.) Indeed, the data shows that Carbon County *literally* removed zero such registrations during those four years. (*Id*. ¶ 48.) Indiana County removed 17 such registrations. (*Id*. ¶ 47.) Washington County, with over 150,000 voter registrations, removed three such registrations. (*Id*. ¶ 46.)[4]

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[3] The usual release date of June 30 was missed due to the COVID pandemic.

[4] The original County Defendants are not named as defendants in the Amended Complaint.

The Amended Complaint provides ample context for these low numbers. For example, it alleges that Clinton County, Pennsylvania—with a registration base that is a fraction of any one of the New County Defendants—removed more than twice as many registrations pursuant to Section 8(d)(1)(B) during those four years as the five New County Defendants *combined*. (Doc. 78-1 ¶¶ 51, 53.) In other words, a county with 22,000 registrants removed more than twice as many registrations under that statute as five counties with over 650,000 registrants. (*Id*.) The Amended Complaint also alleges (and testimony will show) that Section 8(d)(1)(B) typically encompasses the largest category of NVRA removals. (*Id*. ¶ 54.) This allegation is supported by examples from other Pennsylvania counties. (*Id*. ¶¶ 55, 56.) This shows that a shortfall in this category is relevant to determining compliance.

The Amended Complaint alleges that NVRA non-compliance is evident throughout Pennsylvania. The data shows that other counties had extremely low removal rates under Section 8(d)(1)(B) during the last four years, including Jefferson County (two such removals), Warren County (one removal), Wyoming County (six removals), and Forest County (zero removals). (Doc. 78-1 ¶ 60.) The same holds true for a number of counties over the past two years, including Northumberland County (two removals), Armstrong County (nine removals), Bedford County (15 removals), Clarion County (zero removals), and Snyder County (zero removals). (*Id*. ¶ 61.) Lest there be any doubt such low removal numbers are caused by non-

compliance, the Amended Complaint identifies several *other* Pennsylvania counties who either implied or flatly admitted to Plaintiff that they had not been removing registrants as required until they received a notice letter. (*Id*. ¶¶ 63-67.)

Finally, the Amended Complaint notes that State Defendants renounced their own data for 2016-18, significantly correcting what they had collected and previously sent to the EAC. (Doc. 78-1 ¶ 70.) In addition, hoping to avoid producing their own responses to the EAC's 2018-20 survey, State Defendants recently argued that they would "give rise to the peril of reliance on wrong numbers, again." (*Id*. ¶ 71.) The Amended Complaint alleges that this "chronic failure to maintain and report accurate list maintenance data" is itself a violation of the NVRA. (*Id*. ¶ 72.)

On July 16, 2021, counsel for State Defendants responded briefly to Plaintiff's April 22, 2021 notice letter. The response attached a one-page chart labeled "Continuous Inactive Voters as of July 16, 2021." (Doc. 78-1 ¶ 74.) Nothing in that letter or chart denied, contradicted, or even spoke to the data alleging extremely low numbers of removals pursuant to Section 8(d)(1)(B). (*Id*. ¶ 75.) In any case, the State Defendants' data was contradicted by their own sources. (*Id*. ¶ 76.)

The New County Defendants have never made any written response to the letters sent to them. (Doc 78-1 ¶ 78.)

LEGAL STANDARD

Rule 15(a) is intended "to enable a party to assert matters that were overlooked or were unknown at the time the party interposed the original complaint." *Garrett v. Wexford Health*, 938 F.3d 69, 82 (3d. Cir. 2019) (quoting 6 C. Wright & A. Miller, *Federal Practice and Procedure*, § 1473 (3d ed. 2019)). It embodies "the federal courts' policy of liberal pleading amendment by ensuring that an inadvertent error in, or omission from, an original pleading will not preclude a party from securing relief on the merits." *Id.* (citing *Arthur v. Maersk, Inc.*, 434 F.3d 196, 202 (3d. Cir. 2006)).

This "liberal pleading philosophy … limits the district court's discretion to deny leave to amend." *Adams v. Gould, Inc.*, 739 F.2d 858, 864 (3d. Cir. 1984) (citations omitted). Accordingly, leave to amend the complaint under Fed. R. Civ. P. 15(a) "shall be freely given, in the absence of circumstances such as undue delay, bad faith or dilatory motive, undue prejudice to the opposing party, or futility of amendment." *Jablonski v. Pan Am. World Airways, Inc.*, 863 F.2d 289, 292 (3d. Cir. 1988) (citation omitted); *Adams*, 739 F.2d at 864 (citations omitted).

ARGUMENT

LEAVE TO AMEND THE COMPLAINT IS APPROPRIATE HERE.

Leave to amend the complaint is clearly warranted under the circumstances of this case. The new data which Plaintiff seeks to use to amend the complaint—

registration data aggregated through November 2020—did not even exist at the time the original complaint was filed in April 2020. Once it had been collected by Defendants in advance of the EAC's latest report, Plaintiff moved with the utmost dispatch to acquire it.

Plaintiff requested this new data as soon as the Court permitted discovery in this case, which was after the November 2020 general election. Defendants, not Plaintiff, delayed responding to this discovery and requested additional time. Defendants then sought further delay until March 2021, when this data was due to the EAC. Defendants then sought *further* delay until June—and only turned over the requested data when Plaintiff initiated the process to move to compel.

Plaintiff moved quickly after State Defendants finally complied. Ten days after receiving the new registration data Plaintiff had reviewed it and sent a notice letter to State Defendants. Eleven days after that, Plaintiff sent individualized notice letters to 27 Pennsylvania counties. Plaintiff then moved to extend its time to seek to amend the complaint. Plaintiff was always explicit about its reasons for doing so, noting that the "Court's previous orders had anticipated that Plaintiff might send new notice letters," and requesting "sufficient time to allow the statutory notice periods to run and to evaluate any responses." (Doc. 75 at 2.) State Defendants concurred in this last motion (Doc. 76), which makes it impossible for them to argue that they

were prejudiced by it. On August 11, 2021, only ten days after the NVRA's 90-day statutory waiting period had run, Plaintiff moved to amend. (Doc. 78.)

Absent "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, [or] futility of amendment," leave to amend shall be granted. *Foman v. Davis*, 371 U.S. 178, 182 (1962). As is apparent, none of these factors is present here.

The Third Circuit has determined that prejudice to the nonmoving party is the "touchstone" of the denial of a motion to amend a complaint. *Cornell & Co. v. Occupational Safety & Health Review Comm'n*, 573 F.2d 820, 823 (3d. Cir. 1978). Merely claiming prejudice, however, does not give a court discretion to deny leave to amend. *Heyl v. Patterson Int'l, Inc. v. F.D. Rich Housing of the Virgin Islands, Inc.*, 663 F.2d 419, 426 (3d. Cir. 1981). Rather, the party opposing the motion to amend "must show that it was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered" had the moving party's motion been timely. *Id.* (citing *Deakyne v. Comm'rs of Lewes*, 416 F.2d 290, 300 n.19 (3d. Cir. 1969)).

As set forth above, nothing the Plaintiff has done or refrained from doing has "unfairly disadvantaged" any Defendants. State Defendants concurred in Plaintiff's motion for additional time in which to allow the statutory period to run. Moreover,

the fact that extensive discovery has not commenced (there has not been a single deposition and only limited written requests) counsels against a finding of prejudice. *See Bechtel v. Robinson*, 886 F.2d 644, 652 (3d. Cir. 1989) (finding no undue prejudice to the nonmoving party when the case was still in the initial stages of discovery).

"[T]he question of bad faith requires the Court to 'focus on [the movant's] motives for not amending [the] complaint … earlier[.]" *Raymo v. Civitas Media LLC*, 2020 U.S. Dist. LEXIS 123827, at *12 (M.D. Pa. July 15, 2020) (quoting *Adams*, 739 F.2d at 868). Similarly, delay may be undue where the moving party "has had previous opportunities to amend a complaint" without "reason[] for not amending sooner." *Cureton v. NCAA*, 252 F.3d 267, 273 (3d. Cir. 2001) ("delay alone is an insufficient ground to deny leave to amend") (citation omitted). Here, the data Plaintiff used to amend the complaint did not even exist at the time the lawsuit was commenced. Once it did exist, Plaintiff expeditiously sought to acquire it. It was State Defendants who delayed.

An amendment is futile if it "will not cure the deficiency in the original complaint or if the amended complaint cannot withstand a renewed motion to dismiss." *Jablonski*, 863 F.2d at 292 (citation omitted). "The Court must therefore 'accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of

the complaint, the plaintiff may be entitled to relief.'" *Raymo*, 2020 U.S. Dist. LEXIS 123827, at *17 (quoting *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d. Cir. 2008)).

In dismissing the list-maintenance claim against County Defendants in the original complaint, the Court noted that "the deficiencies in this claim are factual rather than legal in nature, and thus capable of being cured." (Doc. 57 at 15.) The defect in the original claim arose from the fact that Defendants renounced data they previously had certified as true to the EAC (and eventually to Congress) and substituted new data more favorable to Defendants in its place. Plaintiff has clearly remedied this defect in the Amended Complaint by relying exclusively on data that State Defendants filed with their answer or produced in discovery.

The resulting allegations abundantly allege non-compliance with the list-maintenance provisions of the NVRA. As set forth above, the Amended Complaint alleges that the New County Defendants removed extremely low numbers of registrations pursuant to Section 8(d)(1)(B), relatively and absolutely. The Amended Complaint provides context for this claim by comparing these removals with those of other Pennsylvania counties, and by alleging, and demonstrating by example, a typical profile for NVRA removals.

Statewide non-compliance is shown by allegations that other counties have reported low removal numbers over both a two-year and a four-year window. The

Amended Complaint also includes significant allegations concerning Pennsylvania counties who have admitted to Plaintiff that they had not been complying with the NVRA. Finally, the Amended Complaint alleges that State Defendants' willingness to question the accuracy of their own data suggests a "chronic failure to maintain and report accurate list maintenance data," which is itself a violation of the NVRA. (Doc. 78-1 72.)

In sum, the foregoing allegations make a powerful case that State and New County Defendants are failing to comply with Section 8 of the NVRA.

CONCLUSION

For the foregoing reasons, Plaintiff's first motion for leave to amend its complaint should be granted.

August 25, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief was filed in accordance with the word-count limitation provided in Local Rule 7.8(b)(2), containing 3,589 words, as calculated by the word-processing system used in preparing the brief.

August 25, 2021

/s Robert D. Popper
Robert D. Popper

CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically and served on counsel of record via the ECF system of the U.S. District Court for the Middle District of Pennsylvania.

August 25, 2021

/s Robert D. Popper
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