

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 OPPOSITION TO LUZERNE COUNTY
DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT**

INTRODUCTION

Plaintiff Judicial Watch respectfully submits this brief in opposition to the motion of Defendants Luzerne County Council, Tim McGinley, Chair of the Luzerne County Council, and Shelby Watchilla, Luzerne County Director of Elections (collectively, “Luzerne County Defendants”) to dismiss Plaintiff’s First Amended Complaint. Doc. 108.

Luzerne County Defendants assert that they corrected any noncompliance with the National Voter Registration Act (NVRA) during the 90-day pre-suit waiting period prescribed by the statute. Doc. 115 at 11; *see* 52 U.S.C. § 20510(b)(2). Specifically, they claim that they removed 17,000 voters in response to Plaintiff’s NVRA notice-of-violation letter. *Id.* Their sole basis for making this claim is a reference to a news article in the First Amended Complaint. Doc. 85, ¶ 79. Luzerne County Defendants never corroborate the statements in that article by affidavit or other evidence, nor do they cite any public record that supports it. Rather, based solely on that reference, they argue that its allegation concerning “*possible* voluntary compliance” is sufficient to show *actual* compliance as a matter of fact, and they conclude that the claims against them should be dismissed. Doc. 115 at 12-15.

Luzerne County Defendants’ argument fails for much the same reason that this Court rejected similar arguments made by the Commonwealth Defendants. In opposing Plaintiff’s motion for leave to amend its complaint, they argued that they

cured any violations of the NVRA after receipt of Plaintiff's pre-suit notice letter, and that, because of this alleged cure, Plaintiff lacked statutory standing under the NVRA. *See* Doc. 80 at 9, 11. This Court rejected the Commonwealth's argument as not appropriate in a motion to dismiss. Doc. 84 at 3-4 n.2.

Given the standards governing this motion, there is no basis for considering the factual claims Luzerne County Defendants now make. When viewing the facts alleged under any conceivable light, Plaintiff did *not* allege that Luzerne County Defendants cured any noncompliance with the NVRA prior to its amended complaint. Plaintiff never alleged that Luzerne County Defendants did, in fact, remove over 17,000 registrations in response to Plaintiff's letter and never alleged the truth of the article Plaintiff cited. Rather, Plaintiff only alleged that it was "reported," and it did so in order to note that any "possible voluntary compliance" does not moot the claims against Luzerne County Defendants. Doc. 85, ¶¶ 79-80. Luzerne County Defendants ask this Court to accept the report as fact, which is improper when viewing the facts most favorable to Plaintiff on a motion to dismiss. Accordingly, Luzerne County Defendants' motion to dismiss should be denied.

COUNTER STATEMENT OF FACTS

In the First Amended Complaint, Plaintiff alleges:

43. If a jurisdiction removes few or no registration records belonging to electors who fail to respond to an address confirmation notice and fail to vote in two consecutive federal elections, that jurisdiction is not complying with Section 8(d)(1)(B) of the NVRA.

Doc. 85, ¶ 43. With respect to Luzerne County in particular, Plaintiff alleges:

44. EAVS Data shows that Defendant Luzerne County, with a total of 219,675 voter registrations, removed 61 registrations pursuant to Section 8(d)(1)(B) of the NVRA from 2018 to 2020, and removed 96 registrations pursuant to that provision from 2016 to 2018.

Id., ¶ 44. In other words, according to data Defendants certified to the federal Election Assistance Commission (EAC), Luzerne County removed a total of 157 registrations under the NVRA provision at issue in this case over four years.

The First Amended Complaint alleges that the four-year removal totals for Luzerne County “equal or round to zero percent” of its voter registrations, and that it is “not possible as a practical matter to comply with the NVRA while removing” so few registrations under Section 8(d)(1)(B). *Id.*, ¶ 49-50. For context, the First Amended Complaint notes that “Clinton County, with a total of 22,110 voter registrations, removed 2,034 registrations pursuant to Section 8(d)(1)(B) of the NVRA in the four years from November 2016 through November 2020.” *Id.*, ¶ 53. In other words, Clinton County, with about *one tenth* the total number of registered

voters as Luzerne County,¹ removed almost *thirteen times* as many registrations under Section 8(d)(1)(B).²

The First Amended Complaint also refers to an article that reported that Luzerne County “removed over 17,000 registrations on or about June 1, 2021, about four weeks after it received” Plaintiff’s notice letter. *Id.*, ¶ 79. The First Amended Complaint does not express any approval of, or faith in, that report, but cites it solely in order to argue that “Luzerne County’s possible voluntary compliance does not moot the claims against it.” *Id.*, ¶ 80.

Luzerne County Defendants now premise their entire motion to dismiss on that reference to that news article. They do not attach any exhibits to their motion (let alone any affidavits) explaining or confirming that article or any claim in it, nor do they cite any public records, nor do they assert that the EAC’s data regarding Luzerne County has been updated.³ In these respects, their current motion is *unlike* the motion to dismiss the original complaint filed by Bucks County, Chester County, and Delaware County. *See* Doc. 35, Exs. 1-3; Doc. 57 (Memorandum granting

¹ Clinton County’s 22,110 registrations are 10.06% of Luzerne County’s 219,675 registrations.

² The 2,034 registrations removed by Clinton County are 12.95 times as many as the 157 removed by Luzerne County over the same four-year period.

³ Nor could they. To this day the EAC data shows 157 relevant removals by Luzerne County over the identified four-year period. *See* <https://www.eac.gov/research-and-data/datasets-codebooks-and-surveys>, 2020 EAVS Datasets Version 1.1 (released October 8, 2021), Col. CZ, Row 3556; 2018 EAVS Datasets Version 1.3 (released July 15, 2020), Col. CX, Row 3558.

motion to dismiss original county defendants) at 10 & n.7, 11. For the reasons set forth below, the instant motion should be denied.

QUESTION PRESENTED

Whether the First Amended Complaint states a claim under Section 8(d)(1)(B) of the NVRA against Luzerne County Defendants.

Suggested answer: Yes.

LEGAL STANDARD

In reviewing motions to dismiss under Rule 12(b)(6), the court must construe the factual allegations in the complaint “in the light most favorable to the plaintiff.” *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 220 (3d Cir. 2011) (citing *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 314 (3d Cir. 2010)). Where “there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). If the complaint plausibly alleges sufficient facts to show the defendant is liable for the conduct, then the motion to dismiss should be denied. *Burtch*, 662 F.3d at 220-21 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

ARGUMENT

The Allegations in the First Amended Complaint Regarding Luzerne County Defendants State a Claim under the NVRA.

Throughout Plaintiff's amended complaint, Plaintiff alleges sufficient factual allegations to plausibly show a violation of the NVRA with respect to Luzerne County Defendants. According to the two most recent EAC reports, they removed 96 voter registrations under the NVRA's change of address removal procedure from 2016 to 2018 and 61 registrations from 2018 to 2020. Doc. 85, ¶ 44. The four-year removal totals for Luzerne County Defendants equal or round to zero percent of the county's total number of voter registrations, which is comparatively lower than the removal totals of other Commonwealth counties—like Lackawanna County and Clinton County—that have far fewer registrations than Luzerne County. *Id.*, ¶¶ 49, 52-53. Luzerne County Defendants do not dispute these low removal numbers for the four-year reporting period from 2016 to 2020.

Tellingly, when notified of these issues, Luzerne County Defendants failed to respond to Plaintiff's NVRA notice-of-violation letter. Doc. 85, ¶ 78. Luzerne County Defendants tacitly admit this fact by claiming “there is nothing in the NVRA that obligated Luzerne County to respond directly to [Plaintiff].” Doc. 115 at 11. Fair enough. But there is also nothing in the NVRA's statutory notice provision that requires an aggrieved party to accept as true third-party public reports of post-hoc removals in response to notice letters.

Congress only provided states with an *opportunity* to satisfy an aggrieved party's concerns prior to litigation. Certainly, if an official ignores an aggrieved party's letter the likelihood that the party will be satisfied with the response is quite low. In any case it is ultimately up to the "aggrieved persons" as potential plaintiffs to decide whether they believe that any actions taken have actually fixed the violations they identified. *See Delgado v. Galvin*, No. 12-cv-10872, 2014 U.S. Dist. LEXIS 33476, at *22 (D. Mass. March 14, 2014) (plaintiffs were entitled to file suit "because *they concluded* that the remedy the Defendants initially offered after the notice letter was not sufficient to resolve *what they believe* to be systemic flaws in the manner in which the NVRA is being implemented") (emphasis added); *Judicial Watch v. King*, 993 F. Supp. 2d 919, 922 (S.D. Ind. 2012) (notice is sufficient which, "read as a whole, makes it clear" that plaintiff "is asserting a violation of the NVRA and plans to initiate litigation if *its concerns* are not addressed in a timely manner") (emphasis added). Whether plaintiffs who do file a complaint are correct in their view of the facts is, as this Court held, a factual matter "not appropriately raised in opposition to a motion" adjudicated under the rules applying to a motion to dismiss. *See* Doc. 84 at 3-4 n.2 (applying standards of motion to dismiss, citing, *inter alia*, *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir. 1997)).

On this motion, the Court should not accept as true the factual contentions by Luzerne County Defendants that they removed over 17,000 voters from the

registration list. Plaintiff never alleged that the facts contained in the cited article were accurate or true, and Luzerne County Defendants have offered nothing in the way of corroborating or supporting them. The allegations that have been made regarding Luzerne County Defendants' startling neglect of the NVRA over an extended period of time are based on admissions in official government documents. These allegations clearly state a claim under the NVRA.

The allegations of NVRA noncompliance in the amended complaint are strong. Under the standards applying to motions to dismiss, Plaintiff respectfully submits that Luzerne County Defendants' motion should be denied.

CONCLUSION

For the foregoing reasons, Luzerne County Defendants' motion should be denied.

March 28, 2022

Respectfully submitted,

/s Robert D. Popper

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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 1733 words, as calculated by the word-processing system used in preparing the brief.

March 28, 2022

/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.

March 28, 2022

/s Robert D. Popper
Robert D. Popper