IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. JOHN BENISEK, *et al.*,	*	
Plaintiffs,	*	
v.	*	Case No. 13-cv-3233
LINDA H. LAMONE, *et al.*,	*	
Defendants.	*	

* * * * * * * * *

DEFENDANTS' RESPONSE TO
FORMER PLAINTIFF STEPHEN M. SHAPIRO'S MOTION TO INTERVENE

The motion to intervene filed by former plaintiff Stephen M. Shapiro, ECF No. 109, following the parties' stipulation of voluntary dismissal of Mr. Shapiro from this lawsuit, ECF No. 105, raises questions other than those presented by a more typical motion to intervene filed by a stranger to the lawsuit. That is, as a practical matter Mr. Shapiro is seeking relief from the consequences of the stipulation of voluntary dismissal, relief that has been held to be available only by way of a motion under Rule 60(b). Mr. Shapiro does not assert any of the grounds for relief listed in Rule 60(b). In any case, if the Court determines to treat Mr. Shapiro's motion as a request to intervene, it should be denied because his intervention at this juncture would cause disruption and delay of proceedings and would prejudice defendants by adding to the already considerable burdens of this litigation.

1. Courts have held that a request to reinstate a plaintiff's suit after voluntary dismissal should be addressed under Rule 60(b). *Nelson v. Napolitano*, 657 F.3d 586, 589

(7th Cir. 2011) ("[A] district court may grant relief under Rule 60(b) to a plaintiff who has voluntarily dismissed the action" pursuant to Rule 41(a)(1), if "all other requirements of Rule 60(b) were met."); *accord White v. National Football League*, 756 F.3d 585, 594–96 (8th Cir. 2014); *Yesh Music v. Lakewood Church*, 727 F.3d 356, 362–63 (5th Cir. 2013); *In re Hunter*, 66 F.3d 1002, 1004–05 (9th Cir. 1995); *Smith v. Phillips*, 881 F.2d 902, 904 (10th Cir. 1989); *see also GO Computer, Inc. v. Microsoft Corp.*, 508 F.3d 170, 177 (4th Cir. 2007) (holding that under Rule 59(e) and Rule 60(b) district court had authority to correct a mistakenly overbroad order granting a Rule 41(a)(2) motion for voluntary dismissal).

2. Rule 60(b) provides that, "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . .; (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief."

3. "Rule 60(b) authorizes relief in only the most exceptional of cases," *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig*., 496 F.3d 863, 866 (8th Cir.2007) (citation omitted), and the person seeking relief under Rule 60(b) "bears a heavy burden," *White*, 756 F.3d at 596. As a prerequisite to seeking Rule 60(b) relief, the movant

"first must show 'timeliness, a meritorious defense, a lack of unfair prejudice to the opposing party, and exceptional circumstances,'" and "[a]fter [he] has crossed this initial threshold, he then must satisfy one of the six specific sections of Rule 60(b)." *Dowell v. State Farm Fire & Cas. Auto. Ins. Co*., 993 F.2d 46, 48 (4th Cir. 1993) (citations omitted). Although the sixth section under Rule 60(b) has been described as a "catchall," Rule 60(b)(6) "may be invoked in only 'extraordinary circumstances' when the reason for relief from judgment does not fall within the list of enumerated reasons given in Rule 60(b)(1)-(5)." *Aikens v. Ingram*, 652 F.3d 496, 500 (4th Cir. 2011) (en banc).

4. Mr. Shapiro's motion satisfies neither the prerequisites to 60(b) relief nor any of the grounds for relief stated in the Rule. He fails to show that the defendants would suffer no "unfair prejudice" from invalidating the parties' stipulation of voluntary dismissal. *Dowell*, 993 F.2d at 48. At most, his motion claims that prejudice will be "unlikely" because his "claims 'so largely overlap with the legal and factual issues that are already present'" in the case, ECF No. 109 at 8, but elsewhere his motion acknowledges that he seeks to litigate claims and theories that have been abandoned by the remaining plaintiffs, *id.* at 5–6. In a case where the plaintiffs have amended their complaint multiple times and, in the process, transformed their theories to the point that they bear little resemblance to those in the original complaint, granting Mr. Shapiro's request to resurrect abandoned claims and theories would undoubtedly prejudice the defendants, by requiring them to respond to filings and discovery requests directed toward those presently nonexistent claims and theories. Mr. Shapiro identifies no "exceptional circumstances"

that would justify his about-face after stipulating to voluntary dismissal of his claims. *Dowell*, 993 F.2d at 48.

5. As for the six bases for relief provided in Rule 60(b), Mr. Shapiro does not purport to satisfy any of them. He does not claim that the stipulation of voluntary dismissal resulted from "(1) mistake, inadvertence, surprise, or excusable neglect," or "(3) fraud . . ., misrepresentation, or misconduct by an opposing party." Even if one were to infer that Mr. Shapiro now considers the voluntary dismissal to have been, in some sense, a "mistake," he could not satisfy Rule 60(b)(1). It has been held that "having explicitly asked for a voluntary dismissal of [himself] from the federal lawsuit," a former plaintiff "could not claim that this dismissal resulted from 'mistake' or 'inadvertence,'" within the meaning of Rule 60(b)(1), irrespective of whether the voluntary dismissal might have been attributable to his "counsel's 'procedural misplay'" or '"mistake of law.'" *Eskridge v. Cook County*, 577 F.3d 806, 810, 809 (7th Cir. 2009). Under such circumstances, relief could not be justified, given that "reinstating the [movant's] lawsuit under Rule 60(b) would only shift the burden of [his] counsel's error to the district court and the defendant." *Id.* at 810.[1]

[1] The *Eskridge* court suggested that in such circumstances the movant "may have the alternative remedy of an attorney malpractice action, which, unlike a successive Rule 60(b) motion, would limit the additional litigation costs to the clients and attorney accountable for the error." 577 F.3d at 810 (citing *Tango Music, LLC v. DeadQuick Music, Inc.*, 348 F.3d 244, 247 (7th Cir. 2003); *Easley v. Kirmsee*, 382 F.3d 693, 699-700 & n.6 (7th Cir. 2004)).

6. Mr. Shapiro does not attempt to justify reviving his claims by citing any "newly discovered evidence." Rule 60(b)(2). Grounds (4) and (5) under Rule 60(b) concern features of judgments that do not pertain to Mr. Shapiro's circumstances. That leaves only the "catchall" provision of Rule 60(b)(6), but Mr. Shapiro has not identified any "extraordinary circumstances" of the sort required "when the reason for relief . . . does not fall within the list of enumerated reasons given in Rule 60(b)(1)-(5)." *Aikens*, 652 F.3d at 500.

7. Therefore, relief is unavailable under Rule 60(b). If the Court nonetheless determines to consider Mr. Shapiro's request for intervention, it should be denied. At this point when the parties are well into a compressed discovery schedule, which was proposed by the plaintiffs before Mr. Shapiro's voluntary dismissal (ECF No. 103), allowing Mr. Shapiro to reenter the case to pursue abandoned claims and theories based on many newly-alleged facts would inevitably and unfairly prejudice the defendants.

8. Notably, while still a party to this litigation, Mr. Shapiro, through counsel, could have sought to amend the pleadings to add these newly-alleged facts, *see* ECF. 99-1 (draft scheduling order setting November 14, 2016 as the deadline to move to amend pleadings); ECF No. 103 (joint status report, proposing November 21, 2016 as the deadline to move to amend pleadings). His motion to intervene based on facts that could have been added through a properly-sought motion to amend the pleadings, is prejudicial to the defendants at this late stage of the proceeding and should be denied.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

Dated: January 17, 2017

___/s/__Jennifer L. Katz_____
JENNIFER L. KATZ (Bar No. 28973)
SARAH W. RICE (Bar No. 29113)
Assistant Attorneys General
Office of the Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-7005 (tel.); (410) 576-6955 (fax)
jkatz@oag.state.md.us

Attorneys for Defendants

CERTIFICATE OF SERVICE

I certify that on this 17th day of January, 2017, the foregoing Defendants' Opposition to Former Plaintiff Stephen M. Shapiro's Motion to Intervene was served by electronic mail on Stephen M. Shapiro, *pro se*, at SteveS@md.net.

___/s/__Jennifer L. Katz_____
Jennifer L. Katz
Assistant Attorney General