

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

MICHELLE IRIZARRY; VALERIE
WILLIAMS; JOANNE NIXON; JOANN
ROBINSON; and BRANDON LITT,

Plaintiffs,

v.

ORLANDO UTILITIES COMMISSION;
LENNAR CORPORATION; LENNAR
HOMES, LLC; U.S. HOME
CORPORATION; AVALON PARK GROUP
MANAGEMENT, INC., d/b/a/ AVALON
PARK GROUP; BEAT KAHLI; BORAL
RESOURCES, LLC; and PREFERRED
MATERIALS, INC.,

Defendants.

Case No. 6:19-cv-00268-RBD-TBS

**OUC’S RESPONSE TO PLAINTIFFS’ MOTION FOR VOLUNTARY DISMISSAL
UNDER FEDERAL RULE OF CIVIL PROCEDURE 41(a)(2)**

Pursuant to Local Rule 3.01(b), Defendant Orlando Utilities Commission (“OUC”) responds as follows to Plaintiffs’ Motion for Voluntary Dismissal Under Federal Rule of Civil Procedure 41(a)(2) (Doc. __). As a threshold matter, OUC did not stipulate to a voluntary dismissal by Plaintiffs because of the pending interlocutory appeal of this Court’s order on sovereign immunity (Doc. 139). However, OUC does not oppose dismissal, provided that it is with prejudice and that the record reflects Plaintiffs’ voluntary and unilateral decision to dismiss.

In short, since Plaintiffs declined to pursue class certification (Doc. 137), OUC’s primary goal in this action has been to secure appellate review or vacatur of this Court’s order

denying OUC sovereign immunity (Doc. 131). OUC respectfully disagrees with this Court's decision. In particular, this Court's application of the functional test to determine a municipal agency's sovereign immunity could be cited against OUC in other contexts. (*See id.* at 3–8.) Largely for that reason, OUC filed an interlocutory appeal of this Court's sovereign immunity order last July (Doc. 139), and the appellate proceedings are ongoing in the Eleventh Circuit.

Granting Plaintiffs' motion for voluntary dismissal would moot the appellate proceedings. *See Whitfield v. Radian Guar., Inc.*, 539 F.3d 165, 166 (3d Cir. 2008) (dismissing case as moot pursuant to instructions from U.S. Supreme Court following Rule 41(a)(2) dismissal with prejudice). In that event, the Eleventh Circuit would be required to dismiss the appeal and vacate this Court's sovereign immunity order pursuant to the *Munsingwear* doctrine, under which "vacatur must be granted where mootness results from the unilateral action of the party who prevailed in the lower court." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 23 (1994) (discussing *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39–40 (1950)).

That outcome would serve the interests of the parties, the Court, and the public. Plaintiffs' interests will be served by permitting "the voluntary disposition of this case," OUC's interests will be served through vacatur of the sovereign immunity order, and the interests of this Court and the public will be served by freeing "previously committed judicial resources . . . to deal with other matters, advancing the efficiency of the federal courts." *Cf. Hartford Cas. Ins. Co. v. Crum & Forster Specialty Ins. Co.*, 828 F.3d 1331, 1337 (11th Cir. 2016) (vacating an underlying summary-judgment order pursuant to a settlement by the parties).

Although voluntary dismissal would serve everyone's interests, it is important to note that Plaintiffs unilaterally chose to cease pursuing their claims. Plaintiffs and OUC have not

entered into a settlement or any other type of agreement. That fact has procedural consequences, as vacatur of an order pursuant to a settlement requires a showing of “exceptional circumstances.” *Id.* at 1332. While such circumstances exist here for the reasons expressed above, *see id.* at 1336–37, the exceptional-circumstances inquiry is unnecessary given Plaintiffs’ unilateral decision to request a voluntary dismissal.

Accordingly, OUC does not oppose dismissal, provided that it is with prejudice and that the record reflects Plaintiffs’ voluntary and unilateral decision.

November 16, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 16, 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to counsel of record.

/s/ David Weinstein
Attorney

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