

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

)	Civil Action Nos.
)	02-CV-0299 (CKK), 02-CV-0828 (CKK),
)	02-CV-1130 (CKK), 04-CV-1135 (ESH),
)	04-CV-1136 (JDB), 04-CV-1137 (RMC),
<i>In re</i> Guantánamo Detainee Cases))	04-CV-1142 (RJL), 04-CV-1144 (RWR),
)	04-CV-1164 (RBW), 04-CV-1166 (RJL),
)	04-CV-1194 (HHK), 04-CV-1227 (RBW)
)	04-CV-1254 (HHK), 04-CV-1519 (JR)
)	

**PETITIONERS' NOTICE OF DISMISSAL OF CLAIMS BROUGHT AGAINST
RESPONDENTS NAMED IN THEIR INDIVIDUAL CAPACITIES OR, IN THE
ALTERNATIVE, MOTION TO DISMISS THOSE CLAIMS WITHOUT PREJUDICE**

Pursuant to Fed. R. Civ. P. 41(a)(1), Petitioners represented by the undersigned counsel hereby file notice that they voluntarily dismiss, without prejudice to renew, (1) any habeas claims brought against the individual Respondents in their individual capacities; (2) any claims for damages brought against the individual Respondents in their individual capacities under either the Alien Tort Statute, 28 U.S.C. § 1350, or the United States Constitution, *see Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971); and (3) any claims for equitable relief brought against individual Respondents in their individual capacities.

Proceeding by notice of dismissal is proper where, as here, notice is filed “before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs.” Fed. R. Civ. P. 41(a)(1). Respondents have filed a “Motion to Dismiss or for Judgment as Matter of Law” and an “Individual Respondents’ Motion to Dismiss.” Neither of these filings is an answer or a motion for summary judgment. As a result, Respondents’ filings have not terminated Petitioners’ unconditional right to a voluntary dismissal without prejudice of the claims enumerated in the first paragraph, *supra*. *See Carter v. United States*, 547 F.2d 258 (5th

Cir. 1977) (holding that Rule 41(a)(1) applied where the defendant had filed a motion to dismiss but had not filed an answer or a motion for summary judgment); *Chambers v. Gesell*, 120 F.R.D. 1, 2 n.4 (D.D.C. 1988) (“[A]lthough defendant has presented several grounds for dismissal of this suit, only defendant’s motion to dismiss for failure to state a claim [which was converted into a motion for summary judgment because it relied upon matters outside of the pleadings] defeats plaintiff’s right to voluntary dismissal under Fed. R. Civ. P. 41(a)(1).”); Wright & Miller, *Federal Practice & Procedure* § 2363 (“A motion to dismiss is neither an answer nor, unless accompanied by affidavits discussing matters outside the pleadings that are not excluded by the court, a motion for summary judgment; thus, unless formally converted into a motion for summary judgment under Rule 56, a motion to dismiss under Rule 12 does not terminate the right of dismissal by notice.”).

In the event this Court deems Rule 41(a) inapplicable in the present circumstances, Petitioners in the alternative move under Fed. R. Civ. P. 41(a)(2) for an order dismissing, without prejudice to renew, the claims enumerated in the first paragraph, *supra*. Counsel for Petitioners discussed the instant motion with counsel for Respondents, as required under Loc. Civ. R. 7.1(m). Respondents’ counsel stated that Respondents do not oppose the motion.

Dismissals without prejudice pursuant to Rule 41(a)(2) “are generally granted in the federal courts unless the defendant would suffer prejudice other than the prospect of a second lawsuit or some tactical disadvantage.” *Conafay v. Wyeth Labs.*, 793 F.2d 350, 353 (D.C. Cir. 1986). This standard was recently addressed by this Court in *Hisler v. Gallaudet University*:

A court applying Rule 41(a)(2) . . . must consider whether the plaintiff seeks the motion for voluntary dismissal in good faith, and whether the dismissal would cause the defendant “legal prejudice” based on factors such as the defendant’s trial preparation efforts, any excessive delay or lack of diligence by the plaintiff in prosecuting the action, an insufficient explanation by the plaintiff for

taking nonsuit, and the filing of motions for summary judgment by the defendant.

No. 99-2387, 2004 U.S. Dist. LEXIS 20996, at *15 (D.D.C. Oct. 21, 2004) (quoting *In re Vitamins Antitrust Litigation*, 198 F.R.D. 296, 304 (D.D.C.2000)). Petitioners seek dismissal of the above-stated claims in good faith and Respondents will suffer no legal prejudice if dismissal without prejudice is granted.

For the reasons stated above, Petitioners ask that their notice of dismissal be accepted by the Court or that, in the alternative, the Court grant their motion to dismiss the enumerated claims without prejudice to renew at a later date.

Dated: November 5, 2004
Washington, D.C.

Respectfully submitted,

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