

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

LIBERTARIAN PARTY OF OHIO, et al.,

Plaintiffs,

ROBERT HART, et al.,

Intervenor-Plaintiffs,

Case No. 2:13-cv-00953

v.

**JUDGE WATSON
MAGISTRATE JUDGE KEMP**

**JON HUSTED,
in his Official Capacity as Secretary of State,**

Defendant,

THE STATE OF OHIO,

Intervenor-Defendant,

and

GREGORY A. FELSOCI,

Intervenor-Defendant, _____/

REQUEST FOR STATUS CONFERENCE

INTRODUCTION

On June 26, 2015, Plaintiffs' counsel inquired of the Court's clerk via e-mail whether a status conference in the above-styled case could be held. Plaintiffs' concern at that time was newly-discovered evidence that is relevant to Count Seven of Plaintiffs' Third Amended Complaint. This evidence supports Plaintiffs' claim that both the Kasich Campaign and the Ohio Republican Party were involved in Intervenor-Defendant-Felsoci's ("Felsoci") protest of

Plaintiff-Earl. The evidence had not been provided to Plaintiffs' by Felsoci before the close of briefing on the cross-motions for summary judgment on or about December 7, 2014, even though most of the documents existed at that time.

Because dispositive cross-motions for summary judgment remain pending before the Court on Count Seven, along with the rest of Plaintiffs' Third Amended Complaint (including Count Five), Plaintiffs requested the status conference to discuss how to proceed. On June 30, 2015 Plaintiffs' withdrew their inquiry into a Status Conference when they were informed by the Court's clerk that the Court was aware of the discovery problem and would not issue a dispositive ruling on the Third Amended Complaint until discovery was complete.

On July 6, 2015, *see* Doc. No. 305, the Court issued an Order instructing the parties to continue discovery surrounding the newly uncovered documents and not "file any motions unrelated to discovery until further notice." *Id.* at PAGEID # 7879. The Court further instructed Plaintiffs to report to it when discovery was completed, and the Court would then entertain Plaintiffs' omnibus motion to supplement the record. *Id.*

For the reasons stated below, Plaintiffs now formally renew their Request for a Status Conference. In sum, Ohio's qualifying deadline for its 2016 primary election is December 16, 2015. Candidates must gather hundreds of signatures before this date to qualify. Candidates must begin collecting signatures now, or in the near future, to qualify by December 16, 2015. Plaintiff-LPO has, because of S.B. 193, lost its qualified status in Ohio. It appears that discovery under Count Seven may not be completed soon. Timely resolution of Count Five of Plaintiffs' Third Amended Complaint -- which challenges S.B. 193 under Ohio's Constitution -- is required in order to prevent Plaintiff-LPO from suffering further irreparable injury.

ARGUMENT

I. Timely Resolution of Count Five is Necessary Because Candidates Must Qualify for Ohio's 2016 Primary By December 16, 2015.

Plaintiffs' case is designed to insure that Plaintiff-LPO maintains its hard-won ballot access. Plaintiff-LPO was removed from Ohio's ballot by S.B. 193, which was passed in November of 2013 and was designed to take effect in February of 2014. Plaintiffs' Second Motion for Preliminary Injunction, filed on November 10, 2013, *see* Doc. No. 17, challenged S.B. 193 under the federal and state Constitutions. Counts Three and Four proceeded under the federal Constitution, while Count Five sought relief preliminary and permanent injunctive relief under Ohio's Constitution. These three Counts, including Count Five, are against only Defendant-Secretary and the Intervenor-Defendant State of Ohio. They require no more discovery, and have nothing to do with Count Seven (which is the Count experiencing continuing discovery).

This Court's second of two preliminary injunctions, *see* Doc. No. 47, restored Plaintiff-LPO to the 2014 primary ballot. The Court, on January 7, 2014, ruled in Plaintiffs' favor under Counts Three and Four of what is now Plaintiffs' Third Amended Complaint. *See* Doc. No. 47. The Court, however, did not resolve Count Five, which contains Plaintiffs' Ohio constitutional challenge to S.B. 193. The Court stated that it "need not at this juncture" resolve the Ohio constitutional questions raised under Count Five. *See* Doc. No. 47 at PAGEID # 836.

Defendant-Secretary now claims that this Court's preliminary injunction entered on January 7, 2014, does not restore Plaintiff-LPO to Ohio's ballot beyond the 2014 election cycle. The Secretary insists that Plaintiff-LPO is no longer a qualified political party in Ohio. The Secretary will therefore not allow Plaintiff-LPO to participate in Ohio's 2016 primary.

Ohio's 2016 primary is scheduled for March 15, 2016. The filing deadline for candidates seeking to run in the March 2016 primary is December 16, 2015. In order to qualify on December 16, 2015, statewide candidates must collect hundreds of signatures. Collecting this quantity of signatures requires time. A conservative estimate is that candidates will, or at least should, begin collecting signatures in the coming days.

Resolution of Count Five in Plaintiffs' favor would invalidate S.B. 193 and restore to Plaintiff-LPO its right to participate in Ohio's 2016 primary. Success under Count Five, which is not dependent on continuing discovery, would require that Defendant-Secretary and Intervenor-Defendant-State of Ohio restore Plaintiff-LPO to Ohio's 2016 primary and general election ballots. Count Five is not relevant to Count Seven. Discovery from Felsoci or anyone else is not relevant to Count Five.

II. Ongoing Discovery Under Count Seven Has Been Pursued Diligently and Expeditiously By Plaintiffs.

At the time Plaintiffs first inquired of a status conference on June 26, 2015, Plaintiffs believed they could timely conclude the needed discovery surrounding Count Seven. Plaintiffs assumed that it could be concluded by September 1, 2015, thus allowing the Court the time needed to fully resolve not only Count Seven, to which the ongoing discovery is relevant, but also Count Five. Subsequent events, however, have rendered Plaintiffs' estimate of the time needed to complete discovery relevant to Count Seven overly optimistic.

Plaintiffs have diligently sought to complete discovery by September 1, 2015. After learning on May 19, 2015 that the Ohio Republican Party had paid Felsoci's lawyers \$300,000, Plaintiffs immediately demanded from Felsoci all invoices and documentary evidence surrounding the payments. Felsoci refused, saying he would only produce the documents if Plaintiffs signed a confidentiality agreement.

At the same time they sought documents from Felsoci, Plaintiffs on June 1, 2015 served as subpoena duces tecum on Matt Borges, the Chair of the Ohio Republican Party who had testified at this Court's preliminary injunction hearing in March 2014.

Plaintiffs refused to sign Felsoci's confidentiality agreement, and on June 12, 2015 filed a Motion to Compel their production. *See* Doc. No. 299. On June 20, 2015, following one of several telephone conferences with Magistrate Judge Kemp, Plaintiffs filed a motion for merits-based sanctions under Rule 37(c) against Felsoci based on his withholding these documents. *See* Doc. No. 300. Briefing on that Motion was completed on July 13, 2015. *See* Doc. No. 306 (Felsoci's Response filed on July 6, 2015); Doc. No. 307 (Plaintiffs' Reply filed on July 8, 2015); Doc. No. 308 (Husted's Response filed on July 13, 2015); Doc. No. 309 (Plaintiffs' Reply filed on July 13, 2015). Plaintiffs' Motion for Sanctions remains pending.

Meanwhile, Plaintiffs engaged in lengthy discussions with Mr. Borges about his responding to Plaintiffs' subpoena. On June 26, 2015, after Plaintiffs had repeatedly narrowed their request, Borges announced he would not respond. Plaintiffs filed a Motion to Compel later that day. *See* Doc. No. 302. Following another phone conference with Magistrate Judge Kemp, Judge Kemp ordered that briefing be completed on this Motion by July 20, 2015. *See* Doc. No. 304. Briefing was essentially completed on July 18, 2015. *See* Doc. No. 311 (Borges's Response filed on July 17, 2015); Doc. No. 313 (Plaintiffs' Reply filed on July 18, 2015). Plaintiffs' Motion to Compel Borges' production remains pending.

On June 22, 2015, Plaintiffs served on Terry Casey a subpoena duces tecum demanding documents surrounding the payments made by the Ohio Republican Party and communications surrounding the protest of Plaintiff-Earl.

On July 6, 2015, Felsoci finally produced the documents demanded by Plaintiff in their Motion to Compel, Doc. No. 299. Casey produced documents that same day.

On August 1, 2015, after having completed briefing on the Borges matter, Plaintiffs informed Felsoci that they wished to depose him. Plaintiffs had hoped to have document production completed from Borges before deposing Felsoci, but Borges's refusal to comply and the press of time caused Plaintiffs to proceed with Felsoci's deposition with the documents already in their possession. Felsoci refused to agree to what would be his second deposition.

On August 7, 2015, Plaintiffs moved to compel Felsoci's deposition. *See* Doc. No. 316. Plaintiffs requested expedited briefing on the Motion. Felsoci has yet to respond.

In summary, at this time Plaintiffs have received several documents from Felsoci and Casey, but still have three outstanding discovery motions pending against Felsoci and Borges. The motion for merits-based sanctions pending against Felsoci under Count Seven has been fully briefed. The motion to compel his deposition has not. The motion to compel Borges to produce documents has been fully briefed.

III. Time of Completing Discovery and Supplementing the Record Under Count Seven is Uncertain.

At this time, it is not clear when Plaintiffs will complete discovery under Count Seven. Felsoci refuses to be deposed and Borges refuses to produce documents. Those matters are now pending before the Court.

Even when discovery is completed, Plaintiffs will then need to supplement the record, which will likely be opposed by Defendants. It is not clear how long supplementing the record under Count Seven will take. Timely resolution of Count Seven before candidates must begin collecting signatures in order to qualify by December 16, 2015 is uncertain.

IV. Count Five Can Be Resolved Independently of the Remaining Counts.

Ongoing discovery efforts are not relevant to Count Five of the Third Amended Complaint. Count Five challenges S.B. 193 under Ohio's Constitution. Preliminary relief was sought under Count Five on November 10, 2013. This Court's January 7, 2014 preliminary injunction stated that it was unnecessary at that time to resolve Count Five. Because of the closely approaching qualifying deadline, December 16, 2015, for the 2016 primary, Plaintiffs believe that resolution of Count Five is now necessary. Should the Court rule in Plaintiffs favor, Plaintiff-LPO will be able to timely field its candidates for the 2016 primary. Should Plaintiffs not prevail, they will then have time to pursue an appeal.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request a **Status Conference**.

Respectfully submitted,

s/ Mark R. Brown

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CERTIFICATE OF SERVICE

I certify that this Request was filed using the Court's electronic filing system and will thereby be electronically delivered to all parties through their counsel of record.

s/ Mark R. Brown

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