

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

LIBERTARIAN PARTY OF OHIO, et al.,

Plaintiffs,

and

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.

**PLAINTIFFS' REPLY TO INTERVENOR-DEFENDANT-FELSOCI'S RESPONSE (Doc.
No. 320) TO PLAINTIFFS' MOTION FOR LEAVE TO DEPOSE
AND MOTION TO COMPEL (Doc. No. 316)**

I. Plaintiffs Have Agreed To Depose Felsoci Telephonically at His Convenience.

Intervenor-Defendant-Felsoci ("Felsoci") first argues that he "expected to resolve the issue [of whether he should be deposed a second time]" by "agreeing to Judge Kemp's proposal ... of resolving the instant motion." Consolidated Memorandum of Intervening Defendant Gregory Felsoci (1) In Opposition to Plaintiffs' Motion for Leave to Re-Depose Intervening

Defendant Felsoci and (2) In Opposition to Plaintiffs' Motion to Compel Felsoci's Second Deposition, Doc. No. 320 (hereinafter "Felsoci's Response") at PAGEID # 8151. Even though he has apparently decided not to go through with a telephonic deposition, he then asserts that "[i]n all likelihood, the second deposition of Mr. Felsoci will have already occurred by the time the Court decides the instant motion" *Id.* at PAGEID # 8152. Plaintiffs are not sure what this means.

For their part, Plaintiffs remain willing to depose Felsoci telephonically. Plaintiffs have supplied a large number of dates and times before September 18, 2015. The deposition would likely only last one-half hour or so. It would save time for all involved.

Plaintiffs, after all, agreed in the first instance to go forward with a telephone deposition of Mr. Felsoci. *See* Exhibit 1 (e-mail exchange between Brown and Mead). Plaintiffs provided a wide range of dates and agreed that the deposition would not likely exceed one-half hour. *Id.* Felsoci, however, also demanded that Plaintiffs, in addition to agreeing to accommodate Felsoci by conducting his deposition telephonically, also agree to waive their right under Federal Rule 37(a)(5) and this Court's holding in *Fresenius Medical Care Holdings, Inc. v. Roxanne Laboratories, Inc.*, 2007 WL 764302 at *2 (S.D. Ohio 2007) (Kemp, M.J.), to seek expenses. Plaintiffs rejected this condition. *See* Exhibit 1.

Expenses are a separate matter. Plaintiffs provided Felsoci every opportunity in early August to participate in a phone conference with the Court to discuss Felsoci's deposition. *See* Felsoci's Response, Doc. No. 320-2 (e-mail exchange between Brown and Felsoci's lawyers). Had he cooperated at that time, Plaintiffs would not have needed to file their motion. But he refused. Plaintiffs remain more than willing to accommodate his location and work schedule by proceeding telephonically, but they will not accommodate his continuing refusal to properly

cooperate in discovery. This was not the first time he has refused to cooperate. It has been his standard practice throughout this litigation. His refusal here was unjustified. He should be held responsible for paying Plaintiffs' expenses.¹

II. Plaintiffs Did Not Know About The Ohio Republican Party's Payments Until Long After Felsoci's First Deposition.

Felsoci argues that Plaintiffs knew about Casey's involvement before Felsoci was deposed on August 12, 2014. Felsoci's Response at PAGEID # 8152. *See also id.* at PAGEID # 8159 n.3 ("there is every reason to believe that Plaintiffs already knew about Casey and the Kasich Campaign even before they took Felsoci's deposition").² He makes the same argument in relation to the Kasich Campaign's involvement. *Id.* at PAGEID # 8160.

Felsoci's surmise, even if true (which it is not), is beside the point. Plaintiffs seek to depose Felsoci again not to discover the identities of Casey, the Kasich Campaign, and the Ohio Republican Party. Plaintiffs seek to depose Felsoci again because on July 6, 2015 (11 months after Felsoci's deposition) he finally produced documents establishing that the Ohio Republican Party had paid his lawyers. These documents -- including copies of invoices and canceled checks -- establish that the Ohio Republican Party beginning on or about November 19, 2014 made

¹ Rule 37(a)(5) states that if either (1) a motion to compel is granted, or (2) "if the ... requested discovery is provided after the motion was filed," expenses can be sought. Rule 37(a)(5), like all Rules designed to encourage cooperation in discovery matters, fully envisions that compromises after filings of motions to compel (and before court orders are issued) will occur, and that compromises do not terminate a party's right to seek expenses.

² Felsoci points to Plaintiffs' answers, dated August 7, 2014, to Interrogatories as proving Plaintiffs "knew" all along about Casey and the Kasich Campaign. Felsoci's Response at PAGEID # 8152. Plaintiffs suspected many individuals and organizations at that time. Felsoci asked who and Plaintiffs responded. But they did not "know" anything, and more importantly they could not prove anything. Felsoci, for his part, denied knowing whether Plaintiffs' hunches were even correct. In the end, of course, many of these suspicions proved true; Casey was involved, the Ohio Republican Party was involved; the Kasich Campaign was involved. Now that he has been caught and can no longer deny it, Felsoci (finally) admits all of this is true.

payments totaling \$300,000 to Felsoci's lawyers on Felsoci's behalf. Plaintiffs could not have known anything about this when Felsoci was deposed on August 12, 2014.³

III. Plaintiffs Did Not Unreasonably Delay Seeking to Depose Felsoci Again.

That Felsoci's documents establishing the Ohio Republican Party's payments were not produced until July 6, 2015 -- 11 months after his deposition and 8 months after payments commenced -- disposes of Felsoci's third argument that Plaintiffs unreasonably delayed seeking another deposition of Felsoci. *See* Felsoci's Response at PAGEID # 8152 - 8153. Plaintiffs had no reason to depose Felsoci again until they learned that the Ohio Republican Party was making significant payments to his lawyers on his behalf. This was not uncovered until May 19, 2015. The documents were not produced until July 6, 2015. There was no delay in Plaintiffs' request.⁴

IV. Felsoci's Not Sending Casey's E-Mails is Irrelevant to Felsoci's Second Deposition.

Felsoci in his third and fifth arguments asserts that he is not responsible for his secret co-client's (Casey) e-mails to the Kasich Campaign, and therefore need not be deposed. Felsoci's

³ Felsoci's insistence that Plaintiffs somehow "knew" all along that Casey and the Kasich Campaign were involved is ironic to say the least. Putting aside that it is not relevant to whether Felsoci should be deposed about subsequent payments made by the Ohio Republican Party, it contradicts his adamant refusal to disclose to Plaintiffs the identity of his secret co-client(s). Felsoci's position throughout this litigation has been that Plaintiffs do not know and are not entitled to know the identities of the others involved. His lawyers went to tremendous lengths to keep Casey's and the Kasich Campaign's involvement a secret. They testified via declaration that their secret client(s) demanded confidentiality. *See Libertarian Party of Ohio v. Husted*, 2014 WL 3928293 (S.D. Ohio 2014). (They refused to be deposed on this subject, however.) This Court was required to issue two separate orders directing Felsoci to present himself for a deposition (which was conducted on August 12, 2014), *see Libertarian Party of Ohio v. Husted*, 302 F.R.D. 472, 475 (S.D. Ohio 2014) and then to produce documents (which were produced on August 15, 2014), *see Libertarian Party of Ohio v. Husted*, 2014 WL 3928293 (S.D. Ohio 2014), because of Felsoci's refusal to identify Casey or anyone else who was behind his protest. Months of effort went into uncovering Casey's and the Kasich Campaign's involvements.

⁴ Felsoci asserts that "Felsoci's involvement was viewed as so irrelevant by Plaintiffs that they did not even ask him to be available to testify at the [September 2014 preliminary injunction] hearing. Felsoci's Response at 8159 n.3. This is not true. Plaintiffs included Felsoci on their Witness List, *see* Doc. No. 219 (Felsoci is No. 7 on the list), and were prepared to call him if necessary.

Response at PAGEID # 8153 - 8154. This is irrelevant. Felsoci belatedly, on July 6, 2015, produced documents proving that the Ohio Republican Party has made several payments to his lawyers on his behalf. Plaintiffs are entitled to question him about these documents.

Further, Casey and Felsoci are conspirators. This makes them each responsible for the other's actions. As this Court has already concluded, moreover, Felsoci should have been advised who was paying his lawyers and who was behind his protest. *See Libertarian Party of Ohio v. Husted*, 2014 WL 3928293 at *2 - *3 (S.D. Ohio 2014). He should have been made aware of all the e-mails sent by Casey to the Kasich Campaign and the Ohio Republican Party. He should have been advised what was going on. Felsoci's argument that he and Casey are two separate clients involved in two separate cases -- like ships passing in the night -- has already been rejected by this Court. *See Libertarian Party of Ohio v. Husted*, 2014 WL 3928293 (S.D. Ohio 2014).

Even if the only question here involved Casey's belated e-mails, Plaintiffs would consequently still be entitled to depose Felsoci again. Felsoci should have known about them on August 12, 2014. He did not. They were not "available" to him, and therefore to Plaintiffs, because he was never told that Casey, the Kasich Campaign and the Ohio Republican Party were the true parties in interest. He was never told that Casey and the Ohio Republican Party were paying his bills. Had Felsoci been properly informed by his lawyers, his deposition would have led directly to Casey, the Kasich Campaign, and the Ohio Republican Party. The e-mails would have then been quickly uncovered. This would have happened long before July 6, 2015.

V. Felsoci's Benefactor's Identity And His Knowledge Thereof Are Relevant.

Felsoci in his sixth argument asserts that the "payment documents" produced by Felsoci "have nothing to do with Mr. Felsoci; he was neither a sender nor recipient of any of them."

Felsoci's Response at PAGEID # 8154. Further, he argues, his denial on August 12, 2014 of knowing who was paying his lawyers proves he knows nothing now. *Id.*

Obviously, who is paying Felsoci's lawyers and when payments were arranged have everything to do with Felsoci's case. Felsoci's charge to the contrary is incredible. This Court has already concluded that this information belongs to Felsoci and is relevant to this case. *See Libertarian Party of Ohio v. Husted*, 2014 WL 3928293 (S.D. Ohio 2014) (ordering that Felsoci produce at least one document identifying who was paying his lawyers); *Libertarian Party of Ohio v. Husted*, 302 F.R.D. 472, 475 (S.D. Ohio 2014) (directing that Felsoci sit for his first deposition).

In addition, even though he may not have known on August 12, 2014 who was paying his lawyers, Felsoci should know by now. No payments had taken place on August 12, 2014 when Felsoci was first deposed. Several -- totaling \$300,000 -- have taken place since then. One should be allowed to assume that a lawyer will eventually comply with Ohio's Rules of Professional Conduct and notify his client that someone has paid him (the lawyer) on the client's behalf. *See Libertarian Party of Ohio v. Husted*, 2014 WL 3928293 (S.D. Ohio 2014). Now that the Ohio Republican Party has made payments, Felsoci should be in possession of more information.

VI. Felsoci Is To Blame.

Felsoci asserts that "it is markedly unfair for Plaintiffs to accuse Casey (or, for that matter, Felsoci) of withholding documents" Felsoci's Response at PAGEID # 8158. He even goes so far to argue that "Plaintiffs have no one but themselves to blame." *Id.* He is wrong on both points.

The blame for Felsoci's not producing the documentation evidencing payments by the Ohio Republican Party rests squarely on Felsoci. He was under a continuing duty to supplement his document production; he did not. The first payment was made on or about November 19, 2014. Had Felsoci timely produced the documents surrounding this payment -- as he was required to do -- Plaintiffs would have immediately moved to depose him as well as seeking additional documents surrounding the financial transaction from Casey and Borges. But Felsoci did not timely produce the documents, and Plaintiffs had no reason to pursue the matter sooner.

Going back even farther into the record, had Felsoci's lawyers informed him who was paying their bill at the beginning of the case -- as they are required to do under Ohio's Rules of Professional Conduct, *see Libertarian Party of Ohio v. Husted*, 2014 WL 3928293 (S.D. Ohio 2014) -- Plaintiffs could have successfully pursued the matter in March of 2014. Felsoci, remember, appeared at the Court's preliminary injunction hearing in March of 2014 and claimed he did not know anything. He still did not know anything at his deposition on August 12, 2014. Had Felsoci known that Casey, the Kasich Campaign and the Ohio Republican Party were involved, Plaintiffs would have discovered that information last year. There would be no need for a second deposition.

Borges likewise testified in March of 2014 that the Ohio Republican Party played no part in Plaintiff-Earl's protest. The obvious plan by all involved, of course, was to keep this information from Plaintiffs. Felsoci was not told anything so that Plaintiffs could not discover through him the involvement of others. Plaintiffs had to pursue the information through unknown others, eventually Casey. Even then, Felsoci fought tooth and nail to keep Casey's identity a secret. Felsoci's team devoted significant effort to keeping it all a secret. Felsoci is to blame.

VII. Plaintiffs Accurately Describe Casey's Failures.

Felsoci contests Plaintiffs' description of Casey's responsibility for withholding information. Felsoci's Response at PAGEID # 8156 - 8159. He claims that Casey (Felsoci's secret co-client) bears no blame for failing to produce additional documents before July 6, 2015.

The truth is that Casey is fully responsible. He knew when he was deposed on August 28, 2014 that the Kasich Campaign, Matt Borges and the Ohio Republican Party were involved. He knew then the e-mails he finally produced on July 6, 2015 existed. Still, notwithstanding a number of pointed questions about the Kasich Campaign's, the Ohio Republican Party's and Matt Borges's involvement, Casey obfuscated. He objected. He disrupted.⁵ And when he did answer, many of his material responses (to put it mildly) strayed from the 'whole truth'.

For example, Casey denied having engaged in any specific discussions with the Kasich Campaign about Plaintiff-Earl's removal. *See, e.g.*, Deposition of Terry Casey, Aug. 28, 2014, Doc. No. 241-1 at PAGEID # 6223, 6352, 6368. (Notably, while Felsoci takes issue over some of Plaintiffs' descriptions of Casey's testimony,⁶ he does not challenge this.) Casey, also testified

⁵ Judge Watson has already specifically found that Felsoci's attorneys purposely engaged in "harassing and obstructive conduct ... throughout discovery." Doc. No. 260 at PAGEID # 7104. Much of this disruption occurred at Casey's and Felsoci's respective depositions in August of 2014.

⁶ Felsoci challenges two of Plaintiffs' descriptions of Casey's testimony. In footnote 4 on page 10 of their Motion, Plaintiffs state that Casey "claimed under oath that he did not know if he communicated with Chris Schrimpf (an Ohio Republican Party official) in February of 2014." (Citing Doc. No. 241-1 at PAGEID # 6345 - 6347.) What Plaintiffs meant was that Casey claimed that he did not know if he communicated with Chris Schrimpf in February 2014 **about the protest**. Casey, after all, claimed he talked to Schrimpf but did not "remember topics and discussions." Felsoci also asserts that Plaintiffs' description in that same footnote of his testimony about the non-involvement of the Ohio Republican Party is not accurate. Plaintiffs' stated that Casey "denied that anyone in the Ohio Republican Party or anyone in Franklin County

he did not know whether Borges knew about his efforts. *Id.* at 6367. (Felsoci does not contest this either.)

The documents produced on July 6, 2015 (included as Exhibit 1 to Plaintiffs' Motion for Leave), raise serious problems with these two claims by Casey. *See* Doc. No. 316-1. This is why Casey went to such lengths to keep them secret. Felsoci was told nothing. The documents were never produced. Had Casey been forthcoming,⁷ Plaintiffs would have then known to pursue through additional document requests the connection with the Kasich Campaign and the Ohio Republican Party. The documents finally produced on July 6, 2015 would have been uncovered last year.

In the event, whether Casey is to blame for not producing documents is not the issue here. Felsoci himself failed to timely produce documentation surrounding payments made by the Ohio Republican Party. He should have begun production of these documents in November of 2014. He did not. Plaintiffs received the documents on July 6, 2015. Plaintiffs are entitled to depose Felsoci about those belatedly produced documents.

VIII. Plaintiffs' Motion is Not Premature.

In his seventh justification for refusing to sit for a second deposition, Felsoci asserts that "Plaintiffs jumped the gun" Felsoci's Response at PAGEID # 8154. Their motion is premature, he claims. But in his next sentence he admits that Plaintiffs must first obtain leave of

assisted him." Plaintiffs' Motion, Doc. No. 316, at page 10 n.4. This is an accurate description of Casey's testimony. *See* Doc. No. 241-1 at PAGEID # at 6364 - 6366. Casey mentioned that he spoke to Preisse, but never mentioned that Preisse or anyone in the Franklin County Republican Party assisted him. The documents produced by Casey on July 6, 2015 prove that Schrimpf (who works for the Ohio Republican Party) assisted Casey.

⁷ Plaintiffs believe that their first subpoena to Casey should have elicited the documents that were eventually produced on July 6, 2015. But even if Casey has wiggle room in that regard, his lack of candor at his deposition is still the proximate cause of Plaintiffs not uncovering these documents before July 6, 2015.

court in order to depose Felsoci again. Although not clear, he apparently claims that Plaintiffs should have, contrary to Federal Rule of Civil Procedure 30(a), noticed Felsoci's deposition and then waited for him not to appear. Only then could Plaintiffs have properly appealed to the Court for relief, according to Felsoci.

Felsoci cites no authority for this awkward interpretation of Rule 30(a). His argument, moreover, ignores this Court's advice in *Fresenius Medical Care Holdings, Inc. v. Roxanne Laboratories, Inc.*, 2007 WL 764302 at *2 (S.D. Ohio 2007) (Kemp, M.J.). Plaintiffs' request for leave and its accompanying motion for sanctions here were not premature. Plaintiffs are required to first seek leave of court. That is what Plaintiffs have done.

IX. Plaintiffs Did Not Seek to Take Advantage of Mr. Tigges's Vacation.

Felsoci asserts that Plaintiffs only claimed that time was of the essence when they learned that one of his lawyers, Mr. Tigges, was on vacation. *See* Felsoci's Response at PAGEID 8160. The charge is specious.

Felsoci has four lawyers who have made formal appearances in this case. John Zeiger is the lead attorney and has represented Felsoci throughout this litigation. Steve Tigges has also been heavily involved. Dan Mead, whose name appears on the most recent series of e-mails relied upon by Felsoci, *see* Felsoci's Response, Doc. No. 320-2, has also frequently been involved.

Plaintiffs first approached Mr. Zeiger, Mr. Tigges and Mr. Mead on August 1, 2015 about deposing Felsoci. Plaintiffs made clear that they wanted to depose Felsoci the week of August 3, 2015. Plaintiffs stated:

Judge Watson, of course, has placed summary judgment on hold; so timing is not an immediate problem (though it could become a problem as the next election cycle progresses).

I suspect the deposition will not be long; one or two hours max. Can you have Mr. Felsoci in my office sometime this week? Whatever is convenient for you and him?

Felsoci's Response, Doc. No. 320-2 at PAGEID # 8195.

Mr. Tigges responded on August 3, 2015 that Felsoci would not agree to a second deposition and stated he would not be available to discuss it until after August 17, 2015. Upon learning that Mr. Tigges would not be available to even discuss the matter until August 17, 2015, Plaintiffs repeatedly reiterated to Felsoci's lead attorney, Mr. Zeiger, as well as Mr. Tigges and Mr. Mead, that "time is of the essence." *See, e.g.*, Felsoci's Reponse, Doc. No. 320-2 at PAGEID # 8189, 8191. Plaintiffs insisted that they meet to discuss the matter immediately or Plaintiffs would have no choice but to file a motion to compel on August 7, 2015.

Plaintiffs' initial request that the deposition be held "this week," meaning the week of August 3, 2015, proves that Plaintiffs sought to depose Felsoci immediately even before learning that Mr. Tigges was going on vacation. Upon learning of his vacation, moreover, Plaintiffs offered to postpone Felsoci's deposition until after Mr. Tigges's return (the week of August 17, 2015). Felsoci's claim that Plaintiffs sought to take advantage of Mr. Tigges's vacation is absurd.

X. Plaintiffs Have Established Good Cause to Depose Felsoci.

Felsoci argues for the many reasons he discusses in his Response that Plaintiffs have not established good cause to depose him again. *See* Felsoci's Response at PAGEID # 8160 - 8165. Felsoci is wrong. Plaintiffs' Motion, Doc. No. 316, establishes that Felsoci's second deposition is fully justified. Felsoci belatedly produced documents on July 6, 2015 establishing that the Ohio Republican Party has paid his lawyers \$300,000. These documents should have been produced as early as November 19, 2014, when the first payment was made. These documents were not available to Plaintiffs at the time of Felsoci's first deposition. Plaintiffs are entitled to question Felsoci about them.

CONCLUSION

Plaintiffs' Motion for Leave and their accompanying Motion to Compel should be
GRANTED.

Respectfully submitted,

s/ Mark R. Brown

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CERTIFICATE OF SERVICE

I certify that copies of this Response 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

Mark R. Brown