IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

OHIO DEMOCRATIC PARTY, et al.,	)	
	)	
Plaintiffs,	)	**Case No. 2:15-CV-1802**
	)	
v.	)	
	)	**Judge Michael H. Watson**
JOHN HUSTED, et al.,	)	**Magistrate Judge Norah McCann King**
	)	
Defendants.	)	

MOTION TO QUASH SUBPOENAS

Pursuant to Federal Rule of Civil Procedure 45(d)(3), non-party Douglas J. Preisse ("Preisse") moves to quash subpoenas Plaintiffs have attempted to serve upon him this week seeking his trial testimony in the above-captioned matter on Monday, November 23, at 9:00 AM. Preisse also respectfully requests the Court's speedy determination of this matter to provide clarity for all concerned regarding whether the subpoenas are invalid and/or should be quashed.

MEMORANDUM IN SUPPORT

INTRODUCTION

With trial already in progress, Plaintiffs have belatedly attempted to serve Preisse with subpoenas compelling him to testify – not for the purpose of securing his testimony, but for leverage in negotiations with the State over an evidentiary dispute. Plaintiffs have not properly served Preisse with any subpoenas. Furthermore, even if they had properly served them, the subpoenas should be quashed because they provide too little notice at a time when he is travelling out of state for work.

BACKGROUND

Plaintiffs first attempted to serve Preisse with a subpoena in this case on November 16, the day trial began, but Plaintiffs did not obtain service. That afternoon, Preisse's counsel

contacted Plaintiffs' counsel to inquire about the subpoena. When they spoke the next day, November 17, Plaintiffs' counsel revealed that the subpoena was a trial subpoena, that trial had already started, and that Plaintiffs wanted to call Preisse to testify in 48 hours.

At this point, Preisse had left Ohio on a previously-scheduled work trip. Plaintiffs' counsel was informed that Preisse was travelling for work and that an effort would be made to promptly determine his travel schedule.

During this conversation, Plaintiffs also revealed that, although they were seeking to subpoena Preisse, in reality their preference was that he not testify. Instead, they wanted the State to stipulate to the admission of a 2012 newspaper article at trial, which contained a statement attributed to Preisse, but the State would not agree to it. Plaintiffs' counsel stated that, if Preisse could convince the State to resolve this evidentiary dispute, Plaintiffs would not pursue the subpoena.

In an effort to resolve the matter, Plaintiffs' counsel were informed that the statement attributed to Preisse in the newspaper article was actually based on a written statement. In addition, Preisse had responded to a document subpoena earlier this year in *Ohio State Conference of the NAACP, et al. v. Husted, et al.*, Case No. 2:14-cv-00404 (S.D. Ohio), in which the ACLU sought documents relating to the same issues. Preisse was cooperating with the ACLU and gathering documents when the case settled. Preisse's counsel suggested that Preisse review the documents that had been gathered in that case to see if the written statement was among them. If it was, then Preisse could produce it, and perhaps this would help the parties resolve their evidentiary dispute.

The next day, November 18, Plaintiffs' counsel were informed that Preisse would be unavailable on the dates they proposed to have him testify because he would still be travelling out of state. Plaintiffs' counsel were also informed that Preisse had searched for the written statement referenced in the newspaper article and was unable to locate it. In light of these facts, Preisse's counsel sought proposals from Plaintiffs' counsel for addressing this issue.

Plaintiffs' counsel responded by stating that they would be serving Mr. Preisse with a new subpoena, for testimony on November 23, by leaving it at his place of residence – even though they knew he was out of state and would not be home. In doing so, Plaintiffs' counsel quoted as authority Ohio Rule of Civil Procedure 45(B), which permits service in this manner (but is inapplicable), not Federal Rule of Civil Procedural 45(b), which does not permit it (and governs here).

Plaintiffs' counsel also acknowledged again that their "goal" was "merely to admit the pertinent statement as substantive evidence at trial," and they again suggested that Preisse try to negotiate with the State to resolve the parties' evidentiary dispute.

Plaintiff's counsel informed Plaintiffs' counsel of their error in citing Ohio Rule of Procedure 45(B) and invited suggestions for resolving the dispute. Plaintiffs' counsel did not respond.

Instead, on November 18 and 19, Plaintiffs issued various additional subpoenas for Preisse – sending them to Preisse's home, his office, and the Franklin County Board of Elections, where he serves on the board – purporting to compel Preisse's attendance at trial on November 23 at 9:00 AM. Plaintiffs sent subpoenas to those locations even though they knew Preisse was not at any of them – they had already been informed that Preisse was out of state.

That evening, Preisse's counsel wrote Plaintiffs' counsel again, explaining, among other things, that Preisse could not resolve the parties' evidentiary dispute, but also asking whether a written statement from Preisse might help resolve the matter, at least as far as Preisse was concerned. Plaintiffs' counsel again did not respond.

It appears that Plaintiffs' counsel have no interest in working with Preisse to resolve this dispute and that they may attempt to enforce the subpoenas they issued, but did not properly serve, on November 18 and 19.

ARGUMENT

As an initial matter, Plaintiffs have not properly served Preisse with a subpoena. The Federal Rules of Civil Procedure provide that a subpoena may be served by delivering a copy to the named person. Fed. R. Civ. P. 45(b)(1); *see also Coldiron v. Farley*, 2010 U.S. Dist. LEXIS 12187 (S.D. Ohio Feb. 11, 2010) (holding that subpoena delivered by regular mail "cannot be enforced"). Plaintiffs have not done so.

The subpoena Plaintiffs attempted to serve on November 16, seeking Preisse's testimony on November 19, was never delivered to anyone. It is also moot, because it was supplanted by Plaintiff's November 18 and 19 subpoenas seeking to compel Preisse's testimony on November 23. As for the November 18 and 19 subpoenas, Plaintiffs did not deliver them to Preisse. In fact, the subpoenas were dropped off at various locations even though Plaintiffs knew Preisse was <u>not</u> at those locations. A party cannot deliver a subpoena to a person by leaving it a place the person is known <u>not</u> to be. *See* Fed. R. Civ. P. 45(b)(1); *see also Coldiron*, 2010 U.S. Dist. LEXIS 12187.

Furthermore, even if the subpoenas were properly served (and they were not), they should be quashed pursuant to Fed. R. Civ. P. 45(d)(3). The subpoenas fail to allow Preisse a reasonable time to comply and they subject him to undue burden. Fed. R. Civ. P. 45(d)(3)(A)(i),(iv). The November 16 subpoena, which is now moot, sought to compel Preisse to testify at trial on November 19, less than three days later. The November 18 and 19 subpoenas give Preisse similarly short notice.

This short notice is also burdensome. If Plaintiffs wanted to secure Preisse's testimony at trial, they should have subpoenaed him sooner so he could make the necessary arrangements. The ACLU subpoenaed him during discovery in the *Ohio State Conference of the NAACP* case, providing ample notice that they were interested in his participation, and things proceeded smoothly. It is unreasonable for Plaintiffs to expect Preisse to bear the burden of cancelling his travel plans and returning from out of state because Plaintiffs waited until trial was underway to try to subpoena him.

Preisse, therefore, moves the Court to quash the subpoenas issued by Plaintiffs' counsel in this case.

Respectfully submitted,

/s/ Daniel N. Jabe
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served upon counsel of record in this matter this 20th day of November, 2015, via the Court's ECF system.

/s/ Daniel N. Jabe
Attorney for Douglas J. Preisse