

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

DAVID COBB, et al.)
)
 Counter-Plaintiffs,)
)
and)
)
KERRY-EDWARDS 2004, INC.,)
)
 Intervenor-Counter-Plaintiff,)
)
 vs.)
)
DELAWARE COUNTY BOARD)
OF ELECTIONS,)
)
and)
)
J. KENNETH BLACKWELL,)
Ohio Secretary of State,)
)
 Counter-Defendants.)

**Case. No. 2:04-cv-1139
Honorable Judge Edmund Sargus**

**COUNTER-PLAINTIFFS’
STATEMENT OF POSITION ON TRANSFER QUESTION**

In accordance with this Court’s order dated February 14, 2005, the Counter-Plaintiffs hereby submit this Statement of Position as to whether this action should be transferred to the Northern District of Ohio and joined with the case of *Rios v. Blackwell*, 3:04-CV-7724.

Under 28 U.S.C. §1404(a), “[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” The purpose of the statute is “the

individualized, case-by-case consideration of convenience and fairness.” *Van Dusen v. Barrack*, 376 U.S. 612 (1964). “A motion to transfer under §1404(a) [] calls on the District Court to weigh in the balance a number of case-specific factors.” *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988). *See also Kerobo v. Southwestern Clean Fuels, Corp.*, 285 F.3d 531, 536-539 (6th Cir. 2002).

In considering the factors relevant to the transfer question here, it is worth reviewing how this case arose in the first place. On November 22, 2004, Counter-Plaintiffs David Cobb and Michael Badnarik, along with individual Ohio voters and Common Cause/Ohio, filed *Rios v. Blackwell* in the U.S. District Court for the Northern District of Ohio. The *Rios* plaintiffs sought to expedite the start of the recount of the 2004 presidential vote in Ohio so that it might be completed prior to the meeting of the Ohio Electoral College on December 13, 2004. On November 23, 2004, U.S. District Court Judge James G. Carr denied the *Rios* plaintiffs’ motion for a preliminary injunction, finding that the plaintiffs would not be irreparably harmed if the recount were not expedited.

On that same day, November 23, 2004, one day after the filing of the *Rios* action, the Delaware County Board of Elections and the Delaware County Prosecuting Attorney filed a lawsuit in the Delaware County Court of Common Pleas against Counter-Plaintiffs Cobb and Badnarik and against their counsel, the National Voting Rights Institute.¹ The Delaware County Board of Elections and the Delaware County Prosecuting Attorney sought and received an *ex parte* temporary restraining order enjoining the defendants in

¹ With this Court’s February 14, 2005 order dismissing the Plaintiffs’ original complaint, the National Voting Rights Institute no longer serves as a party in this action. It removed itself as a Counter-Plaintiff in the filing of the Amended Counterclaims. The caption appearing on this filing reflects that change. The National Voting Rights Institute remains, however, co-counsel for Counter-Plaintiffs Cobb and Badnarik.

that action from seeking a recount in Delaware County.² The order issued by the Delaware County Court of Common Pleas was to expire at noon on December 1, 2004, at which time the court was scheduled to hold a hearing on whether to extend the temporary restraining order into a preliminary injunction.

On November 30, 2004, the Counter-Plaintiffs removed the Delaware County case to this Court on federal question and diversity jurisdiction grounds. On that same day, Kerry-Edwards 2004, Inc. filed a motion to intervene in the case as a defendant-intervenor. On December 2, 2004, the Counter-Plaintiffs filed counterclaims against the Delaware County Board of Elections and the Delaware County Prosecuting Attorney and against Ohio Secretary of State J. Kenneth Blackwell, along with a motion for a preliminary injunction seeking to expedite the start of the recount. The proposed defendant-intervenor, Kerry-Edwards 2004, Inc., joined in support of the counterclaims and motion.³

The Counter-Plaintiffs are, therefore, before this Court, not because they chose this forum, but because they were sued in state court in a county covered by the jurisdiction of this Court.

In his December 3, 2004 Motion to Remand, Counter-Defendant Secretary Blackwell raised, for the first time (in the alternative), the argument that this Court “should transfer this case to the Northern District of Ohio in order to be consolidated with *Rios v. Blackwell*, Case No. 3:04-CV-7724.” While that request has remained pending

² Counsel for the Counter-Plaintiffs Cobb and Badnarik received no prior notice of this filing nor of any hearing on the motion for a temporary restraining order.

³ In contrast, Kerry-Edwards 2004, Inc. did not make an appearance in the *Rios* case in support of the *Rios* plaintiffs’ motion for a preliminary injunction, and it has yet to make any appearance in that case.

since that time, this case has, nevertheless, proceeded before this Court to a far more advanced posture than the *Rios* case.⁴

- On December 3, 2004, this Court heard argument and ruled on various motions pending at that time, including: the Counter-Defendants' Motion to Remand (denied); the Proposed Defendant-Intervenor's Motion to Intervene (granted); the Delaware County Counter-Defendants' Motion for Preliminary Injunction (denied); and the Counter-Plaintiffs' Motion for a Preliminary Injunction (denied).
- On December 10, 2004, this Court heard argument on the Counter-Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, "requiring counter-defendant Ohio Secretary of State Blackwell to prescribe and require the eighty-eight Boards of Election to use adequate, fair and uniform standards and instructions for conducting the state-wide recount in Ohio to ensure that they accurately, fairly and finally determine the results of the 2004 election for the President of the United States." The Court denied the Counter-Plaintiffs' request for a temporary restraining order, but stated that if the Counter-Plaintiffs were to find that the recount was not conducted in accordance with uniform standards, they remained free to seek relief from the Court, including a potential court order requiring new recounts.

⁴ Since Judge Carr's November 23, 2004 ruling, the only action in the *Rios* case has been Secretary Blackwell's filing of a motion to dismiss the plaintiffs' complaint and the plaintiffs' filing of their opposition to that motion. In their opposition papers, the *Rios* plaintiffs highlight that Secretary Blackwell has sought to transfer this case to the Northern District of Ohio, and, in light of that, they argue that Judge Carr ought to await a decision on that request prior to ruling on the motion to dismiss.

- On December 15, 2004, Counter-Plaintiffs submitted newly discovered evidence raising serious questions as to whether a manufacturer of voting machines was tampering with the recount.
- On December 23, 2004, Counter-Plaintiffs filed a motion for a court order to preserve materials from the 2004 presidential election based on the emergence of evidence of the destruction of voting materials and a motion for limited expedited discovery to further develop that evidence.
- On December 30, 2004, Counter-Plaintiffs filed Amended Counterclaims documenting a series of inconsistent standards employed by county boards of elections in conducting the recount and alleging that by failing to prescribe and require the use of fair, accurate and adequate, uniform statewide recount procedures, Counter-Defendant Secretary Blackwell had violated the Counter-Plaintiffs' equal protection and due process rights under the United States Constitution.

In light of the advanced posture of this case, the case-specific factor of efficiency and fairness would weigh in favor of this Court maintaining jurisdiction. This Court has already heard initial argument on the question of inconsistent standards in the conduct of the recount and has received several key filings related to this issue. In contrast, the only action occurring in the *Rios* case, since Judge Carr's November 23, 2004 ruling, has been the filing of Secretary Blackwell's motion to dismiss and the *Rios* plaintiffs' opposition to that motion.

With respect to the convenience-of-the-parties factor, the Counter-Plaintiffs take no position. However, it would seem that this Court is more convenient for Counter-

Defendant Secretary Blackwell since his principal office is based in Columbus, within the jurisdiction of this Court.

With respect to the convenience-of-the-witnesses factor, this Court would appear more convenient given its central location in the State of Ohio and that witnesses are located throughout the state.

Counter-Plaintiffs recognize that there are factors which weigh in favor of this Court maintaining jurisdiction of this case and factors which may weigh in favor of transferring this case to the Northern District of Ohio. Counter-Plaintiffs also recognize that “[u]nder 28 U.S.C. §1404(a), a district court ‘has broad discretion to grant or deny a motion to transfer [a] case.’” *Phelps v. McClellan*, 30 F.3d 658 (6th Cir. 1994), quoting *Cote v. Wadel*, 796 F.2d 981, 985 (7th Cir. 1986).⁵

Dated: February 23, 2005

Respectfully submitted,

/s/ Richard M. Kerger

Richard M. Kerger, Ohio Bar # 0015864
Kerger & Associates
33 South Michigan Street, Suite 201
Toledo, OH 43602
(419) 255-5990 Telephone
(419) 255-5997 Facsimile

John C. Bonifaz, admitted *pro hac vice*
National Voting Rights Institute
27 School Street, Suite 500
Boston, MA 02108
(617) 624-3900 Telephone
(617) 624-3911 Facsimile

Counsel for Counter-Plaintiffs

⁵ This statement should not be taken as suggesting any reluctance to proceed in the Northern District of Ohio, but, rather, as matters have developed, the present factors of judicial economy and convenience of the parties and witnesses seem to weigh in favor of the Southern District.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was electronically filed this 23rd day of February, 2005. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Richard M. Kerger