

**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, _____ /

**PLAINTIFFS' MOTION FOR EXPENSES UNDER RULES 30 AND 37 FROM
INTERVENOR-DEFENDANT-FELSOCI FOR THIS COURT'S ORDERS
COMPELLING HIS DEPOSITION AND HIS PRODUCTION**

This Court on July 11, 2014 issued an Opinion and Order recommending that Intervenor-Defendant-Felsoci ("Felsoci") be compelled to sit for his initial deposition in the above-styled case. *See* Doc. No. 133. Felsoci timely filed objections. On July 24, 2014, the District Court overruled Felsoci's objections. *See* Doc. No. 150. Felsoci was deposed on August 12, 2014.

This Court on August 12, 2014 issued an Opinion and Order recommending that Felsoci produce a document indicating who was paying his lawyers to represent him. *See* Doc. No. 162. Felsoci did not object to that Opinion and Order and delivered to Plaintiffs a document indicating that Terry Casey has paid his (Felsoci's) lawyers. *See* Exhibit 1 (attached).

Plaintiffs' previous requests in their two Motions to Compel for expenses under Federal Rules of Civil Procedure 30 and 37 are now ripe for resolution. Plaintiffs respectfully ask that the Court award to Plaintiffs compensation under Federal Rules of Civil Procedure 30 and 37 for the expenses they incurred in (1) successfully moving to compel the deposition of Felsoci, and (2) successfully moving to compel his production of documents.¹

The accompanying Declarations and Time Sheets, attached as Exhibits 2 (Declaration of Mark Brown), 3 (Declaration of Mark Kafantaris), and 5 (Declaration of Mark Kafantaris) establish that Plaintiffs' two attorneys incurred expenses, including attorney's fees, totaling \$31,542.50. In sum, Mark Brown reports 67.1 hours multiplied by his reasonable hourly rate of \$400, totaling \$26,840.00. Mark Kafantaris reports 17.1 hours multiplied by his reasonable hourly rate of \$275, totaling \$4702.50. Together, they total \$31,542.50.

Plaintiffs certify that they have attempted to confer with Felsoci in a good faith effort to resolve this expense request. No resolution has been reached. Plaintiffs tender the following Memorandum of Law in support of their Motion.

¹ Plaintiffs previously made a separate motion for an award of expenses from the Secretary for the Court's ordering the depositions of Bradley Smith and Jack Christopher. *See* Doc. No. 166.

Respectfully submitted,

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MEMORANDUM OF LAW

FACTS

Plaintiffs on May 27, 2014 noticed Felsoci to produce documents identifying the person who was paying his lawyers to represent him in the above-styled case. *See* Doc. No. 109. That production was due by June 30, 2014.

Because of the anticipated production of Felsoci's documents by June 30, 2014, the Plaintiffs on June 10, 2014 contacted Felsoci and stated that they intended to depose Felsoci the week of July 7, 2014. Plaintiffs stated that they would like to depose him on some day and time that week, but left to Felsoci the precise time, date and location. Plaintiffs made clear that if the Felsoci did not express a preference, they would notice the depositions for Monday, July 7, 2014 beginning at 9 AM in their attorney's office.

Felsoci demanded to know the precise "subject matter" of the deposition. Plaintiffs repeatedly, in an effort to placate Felsoci, informed him that they sought to depose him in

connection with Counts Six, Seven, and Eight of the Second Amended Complaint, which remains the operative complaint in this case. Felsoci responded that he would attend his deposition only if apprised to his satisfaction of its precise subject matter.

Given Felsoci's recalcitrance, on June 16, 2014 Plaintiffs filed a Motion to Compel Felsoci's deposition. *See* Doc. No. 116. Plaintiffs included in their Motion to Compel a request for expenses. This Court on July 11, 2014 issued an Opinion and Order recommending that Felsoci be compelled to sit for his deposition. *See* Doc. No. 133.

Felsoci timely filed objections. On July 24, 2014, the District Court overruled Felsoci's objections. *See* Doc. No. 150. Felsoci was deposed on August 12, 2014. Plaintiffs' request for expenses under Rules 30(d)(2) and 37(a)(5)(A) of the Federal Rules of Civil Procedure is therefore now ripe for resolution.

Several days after the June 30, 2014 deadline for Felsoci's production had passed, Plaintiffs learned that Felsoci had objected to Plaintiffs' Rule 34 request for production. In particular, Felsoci refused to produce documents identifying the person who was paying his lawyers. Plaintiffs made a good-faith effort to have Felsoci produce the documents that he admitted existed. Felsoci refused.

On July 8, 2014, Plaintiffs filed a Motion to Compel production of the documents. *See* Doc. No.130. This Court on August 12, 2014 issued an Opinion and Order recommending that Felsoci be compelled to produce the requested document. *See* Doc. No. 162. Felsoci did not timely object to the Opinion and Order. On August 15, 2014, Felsoci produced the document identifying Terry Casey, a former chair of the Franklin County Republican Party, current appointee of Governor Kasich, and a reported advisor of the Kasich for Governor campaign, as

the source of his lawyer's payments. *See* Exhibit 1.² Plaintiffs' request for expenses under Rule 37(a)(5)(A) of the Federal Rules of Civil Procedure is therefore now ripe for resolution.

ARGUMENT

Federal Rule of Civil Procedure 37(a)(5)(A) states:

(A) *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing)*. If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

- (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;
- (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or
- (iii) other circumstances make an award of expenses unjust.

Rule 30(d)(2) states: "The court may impose an appropriate sanction—including the reasonable expenses and attorney's fees incurred by any party—on a person who impedes, delays, or frustrates the fair examination of the deponent." Rule 30(d)(3)(C) states: "Rule 37(a)(5) applies to the award of expenses." Thus, Rule 37(a)(5)(A) provides for awards of reasonable expenses, including attorney's fees, to moving parties who win orders compelling parties' depositions. *See also* C. WRIGHT, ET AL., FED. PRAC. & PROC. § 2288 (3d ed. 2014) (stating that Rule 37(a)(5) "applies by its own terms to any motion to compel disclosure or discovery under Rule 37(a)" and that "an award of expenses and fees was provided if there is a motion to compel an answer to a question at a deposition, or to compel a corporation or other entity to designate a person or persons to testify for it at a deposition").

² Plaintiffs have scheduled Casey's deposition for August 28, 2014. *See* Doc. No. 167.

"The great operative principle of Rule 37(a)(5) is that the loser pays." *Id.* "If a motion under Rule 37(a)(3)—or any of the other rules incorporating it or similar to it—is granted, or if the requested discovery or disclosure is only provided after the motion has been filed, the party or deponent whose conduct necessitated the motion shall be required to pay to the moving party the reasonable expenses, including attorney's fees, incurred in obtaining the order." *Id.* (footnotes omitted).

The payment of expenses is mandatory "unless the court finds that its opposition to, or making of, the motion was substantially justified or that other circumstances make an award of expenses unjust." *Id.* (footnotes omitted). *See Youn v. Track, Inc.*, 324 F.3d 409, 421 (6th Cir. 2003) ("once the court grants a motion to compel and provides the responding party an opportunity to be heard, it 'shall' require the responding party to pay the moving party's expenses unless the responding party had a 'substantial justification' or some other circumstance makes such an award unjust. Rule 37 has no bad faith requirement."); *Kehoe Component Sales, Inc. v. Best Lighting Products, Inc.*, 2012 WL 113429 at *2 (S.D. Ohio 2012) ("[w]here a motion to compel is granted, Rule 37(a)(5)(A) of the Federal Rules of Civil Procedure *mandates* payment of the moving party's reasonable expenses, including attorney's fees, incurred in connection with its motion to compel unless (i) the movant filed the motion before attempting in good faith to obtain the disclosure without court action, (ii) the opposing party's nondisclosure, response, or objection was substantially justified, or (iii) other circumstances make an award of expenses unjust.")

Shifting expenses encourages parties to reach voluntary resolutions of their discovery disputes and curtails the ability of litigants to use legal processes to heap detriments on their adversaries without regard to the merits of their positions. *See LM Insurance Corp. v. ACEO*,

Inc., 276 F.R.D. 592 (N.D. Ill. 2011). The burden of proving that one's opposition to discovery was substantially justified is on the losing party who opposed discovery. See *Addington v. Mid-American Lines*, 77 F.R.D. 750, 751 (W.D. Mo. 1978). "Making a motion, or opposing a motion, is 'substantially justified' if the motion raised an issue about which reasonable people could genuinely differ on whether a party was bound to comply with a discovery rule." C. Wright, et al, *supra*, § 2288 (footnotes omitted).³ See *Doe v. Lexington-Lafayette Urban County Government*, 407 F.3d 755, 765 (6th Cir. 2005) ("A motion is 'substantially justified' if it raises an issue about which there is a genuine dispute, or if reasonable people could differ as to the appropriateness of the contested action. As noted by the Supreme Court, 'the one [connotation] most naturally conveyed by the phrase before us here ['substantially justified'] is not 'justified to a high degree,' but rather 'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person.") (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)).

As explained in Plaintiffs' Motion to Compel the Deposition of Felsoci, *see* Doc. No. 116, and their Reply (Doc. No. 124) to Felsoci's Response, Plaintiffs went to great lengths in their good faith effort to convince Felsoci to sit for his deposition. The exception in Rule 37(a)(5)(A)(i) therefore does not apply.

Nor was Felsoci's objection to his deposition "substantially justified." Felsoci is a party to the proceeding who had yet to be deposed. Plaintiffs had the right to depose him. Felsoci's objection first was that Plaintiffs did not adequately describe the subject matter of the questioning. As this Court stated, Plaintiffs were under no obligation to do so. Felsoci's next

³ Even in the absence of a court order compelling discovery, where the filing of a motion to compel serves as a 'catalyst' for production or compliance, an award of expenses is justified. See *Underdog Trucking, LLC v. Verizon Services Corp.*, 273 F.R.D. 372 (S.D. N.Y. 2011).

objection was that the deposition did not relate to Plaintiffs' operative complaint. This objection, too, was specious. Felsoci's third objection was that Plaintiffs had agreed not to depose him. This Court rejected that argument on several grounds, including that it was factually unsubstantiated. Felsoci last attempted to argue that Judge Watson had already ruled on the matter. The Court rejected that factual claim as well.⁴

In sum, Felsoci's numerous, evolving objections were either frivolous or factually unsupported. He had no justification, let alone a substantial one, to refuse his deposition.

Nor were Felsoci's objections to Plaintiffs' Rule 34 request for documents identifying who was paying Felsoci's lawyers' fees substantially justified. Indeed, Felsoci's resistance to Plaintiffs' Rule 34 request was abusive of the Federal Rules of Civil Procedure and calls into question his lawyers' compliance with Ohio's Rules of Professional Conduct.

Plaintiffs did not receive Felsoci's objections until July 3, 2014. On that day, Plaintiffs inquired of Felsoci whether the discovery dispute could be settled. Felsoci did not respond. On July 5, 2014, Plaintiffs' counsel sent another e-mail to Felsoci's lawyer in an effort to demonstrate why production was required and inviting a response. Felsoci's lawyers did not respond. Faced with no response, Plaintiffs filed their Motion to Compel on July 8, 2014. *See* Doc. No. 130.

Notwithstanding that he claimed attorney-client privilege protected the identity of the person paying his lawyers, Felsoci did not file a privilege log until July 29, 2014, *see* Doc. No. 155, long after Plaintiffs filed their Motion to Compel and over a week after Felsoci had

⁴ Felsoci was deposed on August 12, 2014. At his deposition, he continued to claim that he did not know who was paying his lawyers. He further testified that he did not know if anyone was paying his lawyers.

responded to the motion. This log, moreover, noticeably omitted mentioning any documents that might have been responsive to Plaintiffs' Rule 34 request. The Court questioned Felsoci's submitted log and ordered Felsoci's lawyers to meet with Plaintiffs' lawyers and clarify whether responsive documents actually did exist. *See* Doc. No. 157.⁵ During this meeting it was revealed that the requested documents did exist.

Still, Felsoci argued that the documents were protected by attorney-client privilege. He insisted that it was proper for his lawyers to keep from him the fact and identity of the person who was paying his lawyers. He claimed that lawyers can ethically and properly have separate, unknown and confidential clients who pay the fees of another client, without that other client's knowledge or informed consent. Felsoci incredibly claimed that the arrangement -- that is, his lawyers keeping the source of their payment from him -- was perfectly proper under Ohio's Rules of Professional Conduct. Indeed, Felsoci argued that Ohio's Rules of Professional Conduct required that his lawyers keep secret the identity of the source paying his lawyer's fees. As this Court recognized, the argument has absolutely no merit.⁶

In sum, the Secretary's legal objections were untenable and his factual objections unsupported. He had no justification, let alone a substantial one, to refuse to produce the requested documents.

⁵ Plaintiffs again at this time engaged in a good-faith discussion with Felsoci in an effort to have the documents produced. Felsoci refused.

⁶ As a result of this Court's Opinion and Order compelling production, Plaintiffs have identified Terry Casey, a former chair of the Franklin County Republican Party, current appointee of Governor Kasich, and reported advisor of the Kasich for Governor campaign, as the source of Felsoci's lawyer's payments. This production will go a long way toward establishing the Plaintiffs' case.

The accompanying Declarations and Time Sheets, attached as Exhibits 2 (Declaration of Mark Brown), 3 (Declaration of Mark Kafantaris), and 5 (Declaration of Mark Kafantaris) establish that Plaintiffs' two attorneys incurred expenses, including attorney's fees, totaling \$31,542.50. In sum, Mark Brown reports 67.1 hours multiplied by his reasonable hourly rate of \$400, totaling \$26,840.00. Mark Kafantaris reports 17.1 hours multiplied by his reasonable hourly rate of \$275, totaling \$4702.50. Together, they total \$31,542.50.

Plaintiffs certify that they have attempted to confer with Felsoci in a good faith effort to resolve this expense request. No resolution has been reached.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion to award expenses against Felsoci should be **GRANTED**.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this Motion, incorporated Memorandum and attachments were filed using the Court's electronic filing system and will thereby be served on all parties to these proceedings.

/s/ Mark R. Brown
Mark R. Brown