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' REPLY TO FELSOCI'S RESPONSE TO PLAINTIFFS' MOTION TO QUASH AND FOR PROTECTIVE ORDER

Pursuant to Local Rule 54.2, Plaintiffs were required to file their Motion for Attorney's Fees within 45 days of this Court's "judgment." Plaintiffs understand that term to include all orders that may support awards of attorney's fees, including those made under the Federal Rules

of Civil Procedure. Plaintiffs filed their Motion on August 19, 2014, *see* Doc. No. 170, in order to insure that it was timely filed.

Plaintiffs' Motion for Attorney's Fees was not expedited. Plaintiffs did not represent to the Court or to Intervenor-Defendant-Felsoci ("Felsoci") that the Motion needed to be resolved quickly. Unlike the merits of the case, time has never been of the essence in regard to Plaintiffs' two requests (the other one being against the Defendant-Secretary) for attorney's fees.

Once Plaintiffs' Motion for Attorney's Fees was filed, Felsoci had a full 21 days to respond under Local Rule 7.2(a)(2). If he needed additional time, Local Rule 7.3 encourages counsel to discuss and agree to extensions. Plaintiffs would have gladly consented to any reasonable extension. Indeed, Plaintiffs in this case have offered Felsoci (as well as the Secretary) as much time as they need to respond to Plaintiffs' Motion for Attorney's Fees. Unlike with the merits, time is not of the essence.

Plaintiffs' fully accept the fact that they bear the burden of supporting their fees with proper documentation. This burden hardly justifies, however, Mr. Tigges's subpoenas duces tecum demanding that Plaintiffs' attorneys (Brown and Kafanaris) turn over voluminous (and irrelevant) billing records in seven days' time. If Felsoci contests Plaintiffs' lawyers hours and rates, the proper course is to use the discovery rules for parties spelled out in the Federal Rules of Civil Procedure. Rule 34, in particular, can be used to obtain needed documents from a party, including the party's attorneys' time sheets.[1] Had Felsoci made a proper request, Plaintiffs would

[1] Felsoci's argument that he could not use Rule 34 because Plaintiffs' billing records are not in Plaintiffs' possession is specious. This Court has already ruled that the documents in a client's file, including invoices, are in the client's possession and discoverable under Rule 34. *See* Doc. No. 162 (Opinion and Order), at 2-4.

have responded in due course, keeping in mind, of course, that discovery in fee litigation is not supposed to devolve into a "second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("A request for attorney's fees should not result in a second major litigation.")

Of course, Rule 34's time for production is a bit longer than 21 days. Local Rule 7.2(d) solves this problem. It states:

> If evidence is not available to meet this schedule or circumstances exist as addressed by Fed. R. Civ. P. 56(d), counsel shall consult one another and attempt to stipulate to a joint motion for extension of the schedule established by this Rule; failing agreement, counsel shall promptly bring the matter to the attention of the Court. Assignment of any motion for oral argument or a conference with the Court shall not extend these deadlines for the submission of evidence.

Had Felsoci consulted with Plaintiffs, Plaintiffs would have gladly agreed to an appropriate extension to allow Felsoci time to discover any needed evidence to contest the fee motion. Plaintiffs, after all, are interested in expediting the merits, not their motions for attorneys' fees. Plaintiffs's focus is on the merits. Rather than consult with Plaintiffs in an effort to arrange an acceptable schedule, the day after Plaintiffs filed their motion for fees Tigges immediately subpoenaed Brown and Kafantaris demanding the production of voluminous billing records -- within seven days.

Felsoci and Tigges believe that they are entitled to Plaintiffs' attorneys' billing records on demand. They continue to insist that they are entitled to them on their own terms, offering some undefined extension and perhaps foregoing part of the demand. The argument and gesture are both frivolous. Felsoci cannot cite a single case for the proposition that a losing party is immediately entitled to the winning party's attorneys' billing records. He cannot cite a single precedent for the proposition that one party is entitled to another party's lawyers' billing records

on demand. His only right is to properly used the Federal Rules of Civil Procedure, which he has not even attempted.

Felsoci's discovery directly from opposing counsel, though perhaps not completely unheard of, is extremely rare. Plaintiffs have only found one case where a subpoena duces tecum has been used against opposing counsel in an attorney's fee dispute, and there the subpoena was quashed. *See Wells Fargo Bank NA v. LaSalle Bank National Ass'n*, 2010 WL 4384254 (S.D. Ohio 2010) (quashing subpoena to law firm for its billing records in attorney-fee dispute). As this Court and the Sixth Circuit have explained, Felsoci must have an extremely good reason for directing his discovery request directly at opposing counsel. *See also Gruenbaum v. Werner Enterprises, Inc.*, 270 F.R.D. 298, 310 (S.D. Ohio 2010) (King, M.J.) ("[d]iscovery from an opposing counsel is 'limited to where the party seeking to take the deposition has shown that (1) no other means exist to obtain the information ...; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case.'") (quoting *Nationwide Mutual Insurance Co. v. Home Insurance Co.*, 278 F.3d 621, 628 (6th Cir. 2002)).

Even more astounding is that Tigges demanded an enormous number of documents, both relevant and irrelevant, from Plaintiffs' lawyers in seven days. There is simply no explanation for this, other than simple harassment.[2] While Brown's practice is limited, Kafantaris is a sole-practitioner who runs a busy law office. Rifling through his records with a seven-day-subpoena-duces-tecum, without even first attempting more civil methods of discovery, is unheard of.

[2] Tigges's vexatious and harassing behavior continued at Terry Casey's deposition conducted on the afternoon of August 28, 2014. Following repeated interruptions and accusations by Tigges that Brown was 'making faces' at Casey, Brown was forced to stop the deposition and phone chambers. Although Judge Kemp was not available, Brown promised to preserve the record and raise the matter at a later time. In that regard, Brown has requested a discovery conference to discuss the matter. Plaintiffs cite this as an additional example here because it demonstrates a pattern of harassment engaged in by Tigges.

As explained in Plaintiffs' Motion to Quash, the great bulk of the billing information Felsoci demands is irrelevant. Much of it is protected by attorney-client privilege, which would require that Plaintiffs' lawyers sift through hundreds of documents in order to redact privileged information. All within seven days. The demand is outrageous. It is vexatious. It is designed to harass. It should be quashed.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion to quash, their motion for a protective order, and their motion for expenses should be **GRANTED.**

Respectfully submitted,

/s/ Mark R. Brown
Mark R. Brown, Trial Counsel
303 East Broad Street
Columbus, OH 43215
(614) 236-6590
(614) 236-6956 (fax)
mbrown@law.capital.edu

Mark Kafantaris
625 City Park Avenue
Columbus, Ohio 43206
(614) 223-1444
(614) 300-5123 (fax)
mark@kafantaris.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

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

/s/ Mark R. Brown