UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

LIBERTARIAN PARTY OF OHIO, et al.
Plaintiffs,

v.

CASE NO. 13-953
JUDGE WATSON
MAGISTRATE JUDGE KEMP

JON HUSTED, et al.,
Defendants.
_____/

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT UNDER COUNT SEVEN AND REPLY TO DEFENDANTS' RESPONSES TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT UNDER COUNT SEVEN

I. Plaintiffs Have Proved a Proper Selective Enforcement Claim Under Count Seven.

This Court has already ruled that Plaintiffs have stated a proper claim for relief under Count Seven. *See* Opinion and Order, Doc. No. 260, at PAGEID # 7088. Casey, for his part, has stated that his objective was a political one. *See, e.g.*, Casey Dep., Aug. 28, 2014, Doc. No. 241-1 at PAGEID #6255. The documentary evidence proves that Casey's animus was shared by others in the conspiracy -- notably members of the Kasich Campaign, the Ohio Republican Party, and even in the Secretary's Office. *See, e.g.*, Preliminary Injunction Hearing, Sept. 29, 2014, Doc. No. 247 (hereinafter "PI Hearing"), Ex. 8; *see also* Doc No. 335-1 at PAGEID # 8320-37 (summarizing supplemental evidence).

The plan's politically-based objective, if implemented by a single state actor, would plainly violate the First Amendment. *See, e.g., Mt. Healthy School District v. Doyle*, 429 U.S. 274, 285 (1977). Defendants do not challenge this fact. Rather, they argue that because the Secretary himself was innocent, a selective enforcement claim cannot exist. They are wrong.

Selective enforcement claims by definition presume the application of constitutionally valid, neutral laws. They assume that these laws may have even been enforced by neutral, innocent decision-makers. *See Reno v. American-Arab Anti-Discrimination Commn*., 525 U.S. 471, 497 (1999) (Ginsburg, J., concurring). Police officers, for example, often face selective enforcement claims even though the judges decided their arrests were proper. A judge's innocence does not protect a police officer or prosecutor from a selective enforcement claim. *See, e.g., Wayte v. United States,* 470 U.S. 594, 614 (1985). Defendants' claim that the Secretary was innocent is meaningless.[1] The question is whether the police officer (here, Casey and his band of conspirators) selectively chose Earl for prosecution. If so, they are liable.

Felsoci cites to *Romanelli v. DeWeese*, 2011 WL 2149857 (M.D. Pa. 2011),[2] and *Nader v. McAuliffe*, 593 F. Supp.2d 95 (D.D.C. 2009),[3] for support. Neither case helps his cause. Even if they did they do not survive *Staub v. Proctor Hospital*, 562 U.S. 411 (2011), which neither Defendant even bothers to address. In *Staub* the Supreme Court ruled, consistent with its selective enforcement theory, that an innocent decision-maker's action does not absolve the one who instigates illegal action of liability. Only if the ultimate decision-maker's action would have

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[1] Felsoci repeatedly cites *Northern Kentucky Right to Life Committee, Inc. v. Kentucky Registry of Election Finance*, 1998 WL 13405 (6th Cir. 1998), for support. It involved a campaign finance complaint filed by a local party chair against a PAC. The PAC attempted to abort the state-law proceeding by filing a § 1983 claim against the local chair and the state agency hearing the complaint for damages. The District Court dismissed the action under *Younger* and was affirmed by the Sixth Circuit. It has no application to the present case.

[2] *Romanelli* merely ruled that because of preclusion principles a Pennsylvania state court's ruling that a candidate had been properly removed from the ballot could not be litigated again in federal court; "That determination is conclusive in this suit." *Id*. at *7.

[3] Like *Romanelli*, the case was dismissed in part based on preclusion principles, which are not a problem in the present case. To the extent it reached the merits, the court dismissed for lack of proper pleading. The plaintiffs did not even allege that "state officials entered into a conspiracy with the defendants to violate the plaintiffs' constitutional rights." *Id.* at 103.

occurred anyway, without instigation, is the causal chain broken. *See Bishop v. Ohio Department of Rehabilitation and Corrections*, 529 Fed. Appx. 685, 696 (6th Cir. 2013) ("a causal nexus is lacking [under *Staub*] if the ultimate decision 'was based on an independent investigation'"). The Sixth Circuit, like many courts, has applied *Staub* to § 1983 litigation under the Fourteenth Amendment's Equal Protection Clause. *See DeNoma v. Hamilton County Court of Common Pleas*, 2015 WL 5332486 (6th Cir., Sept. 14, 2015); *Nagle v. Marron*, 663 F.3d 100, 117 (6th Cir. 2011) ("several Circuits have either held or assumed that cat's paw liability would be available under § 1983") (citing *Arendale v. Memphis*, 519 F.3d 587, 604 n.13 (6th Cir. 2008)).

II. Officials in The Secretary's Office Joined the Conspiracy.

The crux of Plaintiffs' renewed Motion for Summary Judgment under Count Seven converges on two issues: (1) whether a factual conspiracy existed; and (2) whether anyone involved was a state actor. Regarding the first question, the evidence leaves little doubt; even the Defendants appear to concede (after eighteen months of denials and several discovery violations) that Casey acted together with either the Kasich Campaign, the Ohio Republican Party, or both.

That leaves the second question -- whether a state actor was involved in the conspiracy. The Secretary goes to great lengths to exonerate Damschroder, the most obvious state actor. Contrary to the Secretary's claim, the documentary evidence leaves little doubt that Damschroder knew about, assisted, and became a member of the conspiracy within the definition of that term.[4]

On December 16, 2014, Damschroder was contacted by Luketic, a former political director of ORP who by that time was working for the Kasich Campaign for Governor. *See* PI

[4] The Secretary criticizes Plaintiffs for not detailing the evidence presented against Damschroder (and others). *See* Doc. No. 344, at PAGEID # 8752. Plaintiffs' renewed motion was limited to ten pages and Plaintiffs took this Court's instruction to avoid redundancy seriously. *See* Doc. No. 337 at PAGEID # 8716. Because the Secretary has devoted a significant portion of its motion to explain how Damschroder knew nothing until August of 2014, *see* Doc. No. 344 at PAGEID # 8758-60, Plaintiffs again summarize the evidence proving what he knew months before.

Hearing, Doc. No. 247, Ex. 56 (SOS Redacted 0148). Luketic questioned whether there was "any petitions gathering from the (sic) Charlie Earl the LIB candidate?" *Id*. Damschroder responded that he would "keep [his] ear to ground." *Id*. After the candidates filed their part-petitions on February 5, 2014, Luketic texted Damschroder: "Any filing from Charlie Earl - libertarian running for Gov." *Id*. at 0146. Damschroder reported that Earl had filed. *Id*. at 0147. Luketic then stated that "ORP is sending a records request to you via email for all of them." *Id*. The records request was soon filed by Schrimpf, a fact immediately made known to Damschroder.

Casey was in contact with Damschroder as early as February 11, 2014. On that day, after copying Damschroder on an e-mail he sent to others, Casey received a reply from Damschroder welcoming him home from his trip abroad. *See* PI Hearing, Ex. 64 (SOS Redacted 0072). On February 17, 2014, Casey and Damschroder exchanged texts about a Democratic lawyer, Don McTigue, "mov[ing]" money to Chris Redfern, the Ohio Democratic Party Chair. *Id*. Ex. 57 (SOS Redacted 0076).

On February 17, 2014, Casey contacted Damschroder "about filing a protest" against Earl. Casey Dep., Aug. 28, 2014, Doc. No. 241-1, at PAGEID # 6261. That same day, Damschroder e-mailed Halle Pelger, Husted's assistant, that he "got a call tonight that a protest is likely to come by Friday against Earl, probably from an unaffiliated voter (so our hearing officer or panel will also have to decide standing) and will be based on Form 14 stuff (alleging a circulator was compensated but no Form 14 was filed and the special box on the p-petitions was not completed)." PI Hearing, Ex. 49 (emphasis added). *See also* Testimony of Damschroder (hereinafter "Damschroder Testimony"), PI Hearing, Doc. No. 247, at PAGEID # 6609. Damschroder's source was Casey. *Id*. Damschroder knew by February 17, 2014 that a protest was going to be filed against Earl, probably by a non-Libertarian, and focusing on the employer-

statement requirement. This information was provided to him by Casey in that night-time phone call. Damschroder then knew that Casey was involved.

Damschroder repeatedly denied during his August 2014 deposition knowing that Casey had been involved. At his deposition, Damschroder testified that although he had generally learned that a protest was going to be filed, he did not know who would file it and did not even know who the protest was going to be filed against! Damschroder Dep., Aug. 26, 2014, Doc. No. 227-1, at PAGEID # 5278-79. Damschroder "did not recall" whether Casey had told him about the protest before it was filed. *Id*. at 5279, 5281. Only when confronted with his e-mail did he finally admit that he knew on February 17, 2014 that Earl was the target. *Id*. at 5282.

Casey testified that before the protest was filed on February 21, 2014, he likely told Damschroder that he (Casey) had hired the Zeiger law firm to protest Earl. Casey Dep., Aug. 28, 2014, Doc. No. 241-1, PAGEID #6267. Damschroder therefore, according to Casey, likely knew that he and the Zeiger firm were involved in the protest of Earl before it was filed. Not only was Damschroder's denial of knowing who was the target not true, his denial of knowing that Casey told him and that Casey was involved was also not true.

Christopher Shea reported to Damschroder at 11:26 AM on February 18, 2014 that Chris Schrimpf (Communications Director for ORP) and Avi Zaffini had filed records requests for LPO candidates. PI Hearing, Ex. 66 at (SOS Redacted 0775-0076). Schrimpf's request was for "validity reports" on the part-petitions of Earl. *Id*. at 0075. Schrimpf, as Damschroder already knew, had previously acquired Earl's part-petitions.

On February 18, 2014, Damschroder sent an e-mail (which has been redacted) to Christopher (Husted's Chief legal officer) about the "Protest," which had not yet been filed. PI

Hearing, Ex. 50 (SOS Redacted 0012). Christopher responded, "Awesome" on February 23, 2014. *Id.* The "protest" could only have been either Earl's or Linnabary's, both LPO candidates.

On February 21, 2014, at 3:32 PM, just before the 4 PM statutory deadline, Damschroder e-mailed his staff that "[i]f any protests are filed, please let me know as soon as they come in." *Id*. Ex. 51. *See* Damschroder Testimony, Doc. No. 247, at PAGEID # 6611. Earlier that day, at 1:34 PM, just over two hours before the statutory deadline was to expire, Damschroder instructed his staff to accept a protest "even if it is after 4 pm." PI Hearing, Ex. 52; Damschroder Testimony, Doc. No. 247, at 6612. Damschroder had never done this before. Damschroder Dep., Aug. 26, 2014, Doc. No. 227-1, at PAGEID # 5299. Felsoci did not sign the protest in Rocky River until sometime after 12:39 PM on February 21, 2014 (the precise time Chris Klym was given his name by Casey). *See* Doc. No. 335-1 at PAGEID #8332. Damschroder at 1:34 PM that day knew that Felsoci's protest was finally being delivered. Because he knew it was coming from northern Ohio he instructed his staff to accept it even if late. He worried so much that he double-checked at 3:32 PM. These overt acts prove his part in the conspiracy.

On February 21, 2014 at 3:50 PM, Damschroder was texted by Zaffini that Preisse and the "AG Campaign" were "coming over with a protest for a libertarian." PI Hearing, Ex. 56 (SOS Redacted 0149). Damschroder responded, "AG just filed. Time stamp 3:57." *Id*. (emphasis original). The protest against Earl was filed at 3:27 PM that same day. PI Hearing, Ex. 2; Damschroder Testimony, Doc. 247, at PAGEID # 6623. Damschroder made sure to inform his confederates that all was well; they made the deadline even without his help.

Casey testified that he asked Damschroder to investigate Earl's circulator, Oscar Hatchett. *See* Casey Dep., Aug. 26, 2014, Doc. No. 241-1, at PAGEID # 6259-60. By 6:08 am on Monday morning, February 24, 2014, Damschroder was investigating Hatchett's signature collection. PI

Hearing, Ex. 67 (SOS Redacted 0763); Damschroder Testimony, Doc. No. 247, at PAGEID # 6629. Brandi Seskes in the Secretary's Office was doing a background check on Hatchett looking for criminal convictions that same day, even though the formal protest said nothing about Hatchett being a convicted criminal. *See* PI Hearing, Ex. 19. This information could have only come from Casey. Damschroder knew by February 24, 2014 that Casey was involved.

On March 4, 2014, during the administrative hearing, Christopher texted Damschroder, "I hope nobody asks Zeiger who is paying them to do this!!" Ex. 56 (SOS Redacted 0156). Damschroder responded, "It's a pretty penny I'm sure." *Id.* at PAGEID # 6648-49. Damschroder knew that it was not Felsoci. He knew someone else was involved. That same day in an e-mail where Casey worried about Borges' statement that ORP was behind Earl's protest, Casey blind-copied Damschroder. Plaintiffs' Dep. Ex. 1 for Casey Dep., Sept. 16, 2015 (hereinafter "Casey Dep. Ex.1"), Doc. No. 335-3 (TC000212). Damschroder was copied again later that day when Casey discussed with Schrimpf, Polesovsky, and Luketic the leaked "Borges Tie-in." *Id.* TC000215. Because of these e-mails, finally disclosed by Casey this summer (2015), it is clear that Damschroder was fully aware by March 4, 2014 of exactly what was going on. He knew all who were involved and that Borges's comment was considered to be a problem.

Damschroder's communications with Casey continued throughout the protest period. *See* PI Hearing, Ex. 57 (SOS Redacted 0080-0089). Even if he did not know before that Casey was involved with the Zeiger law firm, he learned of the connection just days before the administrative hearing. This is established by blind copies sent by Casey to Damschroder on February 27 and 28, 2014 of Casey's communications with the Zeiger law firm. *See* PI Hearing, Ex. 6 & 7. The latter included a statement from Casey to the Zeiger firm that he (Casey) intended to go to the Secretary's office "and finish pulling the records (certified copies) needed by you for

Monday am's hearing." *Id.* Ex. 7. Damschroder knew on this date that Casey was working with the Zeiger law firm to protest Earl.[5]

Damschroder and Casey remained in contact after March 4, 2014, often through e-mails that were also sent to the Kasich Campaign, Schrimpf and Borges. *See*, *e.g.*, PI Hearing, Ex. 5 (SOS Redacted 0093, 0097). If he did not know before, he knew by March of 2014 that Casey was involved. He even knew that the Kasich Campaign and the ORP were involved. And all of this puts to one side the phone calls with Casey that he could not remember. The Secretary's claim that Damschroder did not learn of Casey's involvement with Zeiger and the protest of Earl until "August of 2014," *see* Doc. No. 344, at PAGEID # 8759, is (to put it mildly) beyond belief. Until he was confronted with e-mails at his deposition proving his knowledge, Damschroder conveniently denied or forgot everything. Damschroder not only knew, he helped the conspiracy by instructing his staff to accept late filings. He investigated Hatchett at Casey's request. Casey, notwithstanding his many evasions, even admitted he likely told Damschroder that he (Casey) was involved before August of 2014.

III. State Action Has Been Established.

Defendants argue that the Kasich Campaign and the Ohio Republican Party are not state actors. They are wrong. The cases they cite only stand for the unremarkable proposition that a candidate's campaign and a political party are not ordinarily engaged in state action. Plaintiffs have never claimed to the contrary.[6] Plaintiffs claim that where a campaign for an incumbent

[5] Text-messages demonstrate that both Damschroder and Christopher favored the Zeiger firm and its protestor over Earl -- proving their animus. Christopher texted Damschroder that "Zeiger just won't bend, will he?" PI Hearing, Ex. 56 (SOS Redacted 0154). Damschroder responded, "I like unbending." *Id*. Christopher texted, "Not a bad idea to have Zeiger in court!" *Id*. 0155.

[6] Putting aside that Plaintiffs do not disagree with this general proposition, none of the cases Felsoci has uncovered closely approach the blanket rule he attempts to establish. In *Schneller v. Philadelphia Newspapers, Inc*., 577 Fed. Appx. 139 (3d Cir. 2014), for example, a pro se

governor, with the governor's knowledge, acts with the assistance of the state's Republican Party to regulate a primary ballot they are engaged in state action. *See* Doc. No. 335-1 at PAGEID # 8319-20. Casey, a state officer engaged in state action, and Damschroder, a state agent engaged in state action, were also involved with ORP and the Campaign. *Id.* at 8320-37.

IV. *Noerr-Pennington* Was Not Timely Raised and Does Not Apply.

Felsoci attempts to raise in his motion a defense under the *Noerr-Pennington* doctrine. Even when applicable (which is not the case here), *Noerr-Pennington* provides an affirmative defense from damages liability. *See, e.g., Acoustic Systems, Inc. v. Wenger Corp.*, 207 F.3d 287, 296 (5th Cir. 2000). Felsoci did not raise *Noerr-Pennington* in his answer and has waived it. *See Veneklase v. Bridgewater Condos, L.C.*, 670 F.3d 705, 715 (6th Cir. 2012).[7]

V. Felsoci Waived Any Objection to Supplemental Evidence.

This Court directed Defendants to respond to Plaintiffs' omnibus motion to supplement the record by October 29, 2015. *See* Doc. No. 336, at PAGEID #8714. Felsoci's belated objections to Plaintiffs' supplemental evidence are untimely and have been waived.

VI. Plaintiffs Have Requested Appropriate Relief.

At this stage, it is not apparent that the matter of appropriate relief is at issue. The Secretary, however, once again argues mootness and complains that Plaintiffs seek relief they are

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plaintiff's complaint was dismissed at the pleading stage because he failed to allege any kind of state action. In *Federer v. Gephardt*, 363 F.3d 754 (8th Cir. 2004), a § 1985(3) complaint was likewise dismissed at the pleading stage. *Johnson v. Suffolk University*, 2002 WL 31426734 (D. Mass. 2002), involved a preposterous claim that an incumbent's participation in a debate rendered the whole matter state action. And the comment mined from *Berg v. Obama*, 574 F. Supp. 2d 509, 523 n.14 (E.D. Pa.2008), was made in relation to one in a long line of "birther" arguments against President Obama.

[7] Further, attorney's fees under § 1988(b) have never been considered damages, which is what *Noerr-Pennington* defends against. *See Hutto v. Finney*, 437 U.S. 678 (1978); *Missouri v. Jenkins*, 491 U.S. 274 (1989).

not entitled to and never have sought. Plaintiffs have already responded to these claims. *See* Doc. No. 268 at PAGEID # 7233-41. The relief Plaintiffs seek under Count Seven, the right to compete for ballot access on an "equal footing," is appropriate. *See Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666 (1993). It does not require success. It merely allows Plaintiffs an opportunity to compete on an equal footing in an election in order to satisfy S.B. 193. This is what was stolen from them by the conspirators. But for Defendants' delay tactics, moreover, this matter would have been finally resolved before the 2014 election. Defendants' dilatory tactics should not redound to their benefit. Plaintiffs are entitled to an opportunity to satisfy S.B. 193.

Conclusion

Plaintiffs' renewed Motion for Summary Judgment under Count Seven should be **GRANTED.** Defendants' Motions for Summary Judgment should be **DENIED.**

Respectfully submitted,

s/ Mark R. Brown

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CERTIFICATE OF SERVICE

I certify that copies of this joint Response and Reply were 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