

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

LIBERTARIAN PARTY OF OHIO, et al,	:	Case No. 2:13-cv-00953
	:	
Plaintiffs,	:	Judge Watson
	:	
-vs-	:	Magistrate Judge Kemp
	:	
JON HUSTED, in his Official Capacity as	:	
Ohio Secretary of State,	:	
	:	
Defendant,	:	
and	:	
	:	
STATE OF OHIO,	:	
	:	
Intervenor-Defendant.	:	

INTERVENING DEFENDANT GREGORY FELSOCI'S
MOTION FOR PROTECTIVE ORDER

Pursuant to Civil Rule 26(c)(1), Intervening Defendant Gregory Felsoci moves for an Order prohibiting Plaintiffs from proceeding with the discovery they seek from him, which relates solely to Plaintiffs' new claims set forth in their proposed Third Amended Complaint. The Court has not granted Plaintiffs leave to amend their pleadings; the discovery Plaintiffs seek impacts a proposed new Defendant that is not a party to this action; and Plaintiffs' proposed new claims are both legally and factually baseless. The additional reasons for this motion are set forth in the accompanying memorandum.

As required by Civ.R. 26(c) and Local Rule 37.2, the undersigned counsel certifies that, on Sunday evening, March 23, Plaintiffs' counsel, Mark Brown, emailed the undersigned to schedule Mr. Felsoci's deposition. The undersigned informed Mr. Brown that he was out of the state and that he would contact Mr. Brown about the deposition upon returning to Ohio on

Tuesday morning, March 25. Mr. Brown's immediate response (at 9:58 p.m. on Sunday) was to unilaterally notice the deposition for Tuesday March 25 at 1:00 p.m. without any attempt to contact the undersigned further. On Tuesday morning, the undersigned telephoned Mr. Brown at 9:56 a.m. but Mr. Brown was not in his office. The undersigned immediately emailed Mr. Brown as promised and asked him to call, but the undersigned has received no response. Counsel for Mr. Felsoci will continue to confer in good faith with Plaintiffs' counsel to resolve the discovery dispute but has been unsuccessful to date.

Respectfully submitted,

/s/ John W. Zeiger

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Attorneys for Intervening Defendant
Gregory Felsoci

MEMORANDUM IN SUPPORT

I. Pertinent Background

A. Procedural Context

On March 7, 2014, Plaintiffs filed a proposed Second Amended Complaint asserting three new claims that challenge the constitutionality of Ohio Rev. Code § 3501.38(E)(1): (i)

Count Six – a facial First Amendment challenge, (ii) Count Seven – an as-applied First Amendment challenge, and (iii) Count Eight – a Due Process and First Amendment challenge arising from Secretary of State Jon Husted’s supposed retroactive application of a “new interpretation” of § 3501.38(E)(1) against Plaintiff Charles Earl. [Doc. 56-1] That same day, Plaintiffs also filed a motion for a preliminary injunction to prohibit Secretary Husted from applying § 3501.38(E)(1) against Plaintiff Earl and all other candidates of the Libertarian Party of Ohio (“LPO”). [Doc. 57]

After a three-day evidentiary hearing, this Court, on March 19, 2014, denied Plaintiffs’ motion for preliminary injunction as to all three of their constitutional claims – primarily because Plaintiffs failed to establish a likelihood of success on the merits. [Doc. 80] Plaintiffs immediately appealed this Court’s decision and also sought an “emergency” injunction pending appeal. [Doc. 81] After this Court denied the injunction pending appeal, [Doc. 85], the Sixth Circuit, on March 21, 2014, denied a similar motion filed by Plaintiffs and also established an expedited briefing schedule that will be completed by April 15, 2014.

On March 16, 2014 – the eve of the last day of the preliminary injunction hearing on Plaintiffs’ Seconded Amended Complaint – Plaintiffs sought leave to file a Third Amended Complaint. [Doc. 72] The proposed new complaint purports to allege two new claims against Secretary Husted, Felsoci, and non-party, the Ohio Republican Party: First Amendment and Equal Protection claims for alleged “selective enforcement” of Ohio Rev. Code § 3501.38(E)(1). [Doc. 72-1, Counts Nine and Ten]

Shortly after Plaintiffs filed their proposed Third Amended Complaint, Felsoci opposed it on three grounds. [Doc. 73] First, Plaintiffs’ new proposed complaint is legally futile because Felsoci’s voluntary choice to protest Plaintiff Earl’s candidacy does not constitute state action,

regardless of whether Felsoci himself or someone associated with the Republican Party will pay his attorneys for handling his underlying protest action. Without state action, Plaintiffs admittedly have no constitutional claim for “selective enforcement.” Second, Plaintiffs’ proposed new claims are futile from a factual standpoint. Even if state action did exist in connection with Felsoci’s protest (and it clearly doesn’t), Plaintiffs cannot establish an actual discriminatory effect resulting from Secretary Husted’s enforcement of § 3501.38(E)(1) against Plaintiff Earl. Specifically, Plaintiffs don’t have a shred of evidence that known material violations of § 3501.38(E)(1)’s disclosure requirements by others have not been challenged – *i.e.*, Plaintiffs cannot establish that similarly situated violators are getting away with it. Third, Plaintiffs’ effort to “move the proverbial goalpost in the midst of a game” is unduly prejudicial to Defendants, who have already expended substantial time and resources briefing and presenting evidence on Plaintiffs’ existing claims and would be forced to go through the same process a second time if Plaintiffs’ new claims are permitted.¹

Because of these three legal impediments to Plaintiffs’ new claims, the evidence they seek to obtain from Felsoci in support of their proposed Third Amended Complaint is completely irrelevant, unnecessary, and a waste of both the Court’s and Defendants’ time and resources.

B. Plaintiffs’ Unreasonable Discovery Demands

On Saturday, March 22, 2014 at 1:33 p.m., Plaintiffs’ counsel emailed a First Set of Interrogatories to Mr. Felsoci. [Exhibit 1] All five interrogatories, which inquire whether Felsoci received money to file his protest against Plaintiff Earl, seek information that is

¹ On March 24, 2014, Secretary Husted also filed a memorandum contra Plaintiffs’ proposed Third Amended Complaint on futility grounds.

completely irrelevant to Plaintiffs' currently pending claims set forth in their Second Amended Complaint and, if relevant at all, relate solely to Plaintiffs' proposed Third Amended Complaint.

Less than 30 hours after serving the interrogatories, Plaintiffs' counsel, on Sunday, March 23, 2014 at 7:29 p.m., demanded to depose Felsoci within the next five days to answer the questions posed in Plaintiffs' interrogatories. Mr. Brown's email states, in pertinent part:

I sent you a set of interrogatories for your client.

Given that ... your client has not answered the questions posed in my Interrogatories, I suggest we set up a quick deposition to answer the questions.

How about Monday, Tuesday, Wednesday, Thursday, or Friday of this week? In your office of course.

[Exhibit 2]

Even though Plaintiffs' demand for a deposition was made on a Sunday evening, Felsoci's counsel promptly responded within the hour, stating: "I am out of state until Tuesday. I will respond to you then." [Exhibit 3]

But Plaintiffs' counsel wouldn't wait a single business day to receive a response to his demand to depose Felsoci. On Sunday, March 23, 2014 at 9:58 p.m., Plaintiffs' counsel emailed a deposition notice, unilaterally setting Felsoci's deposition for Tuesday, March 25, 2014 at 1:00 p.m. [Exhibit 4] The email simply states: "I am noticing M. [sic] Felsoci's deposition for Tuesday at 1 PM in my office." Knowing that Felsoci's trial counsel was still out of state, Plaintiffs' counsel forwarded his unilateral deposition notice to Felsoci's co-counsel on the morning of Monday, March 24, 2014, stating: "Just in case John has not sent this along, I will depose Mr. Felsoci at 1 tomorrow in my office." [Exhibit 5]

In view of Plaintiffs' immovable insistence on deposing Felsoci – and doing so this Tuesday irrespective of anyone else's schedule – Felsoci has no choice but to seek an appropriate protective order from the Court.

II. Law And Argument

Rule 26(c)(1) states:

A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending.... The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery; ...

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters....

Here, the most fundamental reason why Plaintiffs should be barred from taking Felsoci's deposition is that, by Plaintiffs' own admission, they seek to depose Felsoci about matters that relate only to their proposed new claims for which Plaintiffs have not obtained leave to file.

The issue of who will pay Felsoci's attorneys for their work in connection with his protest action and whether Felsoci received any money for bringing his protest are **completely irrelevant** to Plaintiffs' existing claims in the Second Amended Complaint. This Court has already acknowledged – both in its March 19, 2014 Order and to all counsel – that these types of issues aren't really relevant to Plaintiffs' existing claims, but merely serve as background “color commentary.” [Doc. 80 at 4] Rather, as Plaintiffs' own counsel has noted to both the Court and Defendants' counsel, these discovery matters relate to Plaintiffs' proposed new claims in their Third Amended Complaint.

Even where a plaintiff has actually filed claims, “[l]imitations on pretrial discovery are appropriate where claims may be dismissed ‘based on legal determinations that could not have

been altered by any further discovery.” *Gettings v. Bldg. Laborers Local 310 Fringe Benefits Fund*, 349 F.3d 300, 304 (6th Cir. 2003). *Accord: Hahn v. Star Bank*, 190 F.3d 708, 719 (6th Cir. 1999) (“[t]rial courts have broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined”).

Here, granting a protective order to limit discovery is even more appropriate than it was in *Gettings* because Plaintiffs haven’t even been granted leave to file the claims for which they seek discovery. A plaintiff is “not permitted to use or exploit [a] deposition simply as a ruse to obtain evidence to support their motion to amend the complaint.” *Ray v. Bluehippo Fund., LLC*, 2008 WL 4830747, at *2 (N.D. Cal. 2008). But that’s exactly what Plaintiffs are trying to do.

In *Zeinali v. Raytheon Co.*, 2008 WL 4820993 (S.D. Cal. 2008), the plaintiff’s existing complaint alleged a Title VII discrimination claim stemming from his termination, and the plaintiff also had filed a motion to amend the complaint to add new claims. Before the court ruled on the pending motion, the plaintiff sought to take depositions that “suggest[] strongly that he is probing for information to assert new claims rather than obtaining evidence related to claims at issue in this litigation.” *Id.* at *2. The court ruled that the plaintiff was not permitted to proceed with these depositions because he had “not demonstrated the necessity of these depositions **based on the operative complaint.**” *Id.* (emphasis added) (overruled on other grounds).

Accord: U.S. ex rel. Piscitelli v. Kaba Ilco Corp., 2012 WL 6553274, *4 (N.D. Ohio 2012) (additional discovery is not appropriate where proposed amended complaint is futile: “In that plaintiff is unable to properly plead a claim, discovery is not appropriate.”); *Devlin v. Transportation Communications Intern’l Union*, 2000 WL 28173, *4-6 (S.D.N.Y. 2000) (granting defendants’ motion for protective order and prohibiting plaintiffs from taking

discovery on issue relevant only to claim that was “not within the pleadings currently before the Court” but was the subject of plaintiffs’ proposed amended complaint); *Bluehippo Fund*, 2008 WL 4830747, *1-2 (N.D. Cal. 2008) (barring all deposition questions related to the plaintiff’s proposed new alter ego claim against the deponent, the defendant corporation’s CEO).

Barring discovery on proposed new claims is particularly appropriate where, as here, those claims are legally futile and the proposed discovery would not overcome the proposed new claims’ dispositive legal deficiencies. *See Pezoa v. Cty. of Santa Clara*, 2007 WL 4287532, *5 (N.D. Cal. 2007) (plaintiff’s proposed amended complaint was “sought for an improper purpose” where plaintiff was “seeking to amend her complaint ... to obtain discovery that arguably has no relevance to her original claims” and the proposed new claims were futile); *Telecom Decision Makers, Inc. v. Birch Comm’ns, Inc.* 2011 WL 2634064, *4 (W.D. Ky. 2011) (denying motion to amend that would “improperly burden this action with legally unsupportable claims and would lead to a course of discovery which would prove ultimately to be irrelevant”).

As in these cases, Plaintiffs should not be permitted to take discovery that is admittedly relevant only to new proposed claims that are not (and should not be) part of this litigation.

Plaintiffs’ efforts to take discovery in support of their proposed new claims are particularly troubling because they seek to do so **before** the proposed new Defendant named in the Third Amended Complaint, the Ohio Republican Party, is even added as a party. It would be highly prejudicial and unfair for Plaintiffs to take depositions in support of their new claims against the Republican Party without the ability of the Republican Party to defend itself and participate in that discovery. *Cf. Doe v. City of San Diego*, 2013 WL 3989193, *7 (S.D. Cal. 2013) (issuing a protective order pending the court’s ruling on a motion to amend a complaint

that added the proposed deponent as a defendant). And, it would be prejudicial to Mr. Felsoci to be subject to deposition by the Republican Party a second time.

Even if Plaintiffs had a legal basis for pursuing the discovery they seek from Felsoci (and they don't), it is patently improper and unreasonable for their counsel to unilaterally notice the deposition to occur in less than 48 hours – particularly where, as here, Plaintiffs' counsel was notified that Felsoci's counsel was out of state for most of that small window of time. Courts not only hold that providing such little notice of a deposition is unreasonable, they also have imposed sanctions for doing so. *C&F Packing Co., Inc. v. Doskocil Companies, Inc.*, 126 F.R.D. 662, 678-79, 681 (N.D. Ill. 1989) (imposing monetary sanctions on party that gave less than three days' notice of deposition); *Lloyd v. Cessna Aircraft Co.*, 430 F. Supp. 25, 26 (E.D. Tenn. 1976) (two business days' notice was "patently unreasonable, improper and invalid"); *Gulf Production Co., Inc. v. Hoover Oilfield Supply, Inc.*, 2011 WL 891027, *3 (E.D. La. 2011) ("a week or less is not sufficient notice pursuant to the rules"); *Al-Kidd v. Gonzales*, 2008 WL 2788418, *5 (D. Idaho 2008) (notice given after business hours on a Friday just five days before deposition was unreasonable).

III. Conclusion

For these reasons, Intervening Defendant Gregory Felsoci requests the Court to issue an Order prohibiting Plaintiffs from proceeding with the discovery they seek from him, which relates solely to the baseless claims Plaintiffs seek to bring in their proposed Third Amended Complaint.

Respectfully submitted,

/s/ John W. Zeiger

John W. Zeiger (0010707), Trial Attorney

Steven W. Tigges (0019288)

Stuart G. Parsell (0063510)

Daniel P. Mead (0083854)

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Counsel for Intervening Defendant

Gregory Felsoci

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of March, 2014, the foregoing document was filed electronically with the Clerk of Court using CM/ECF system, and notice of this filing will be sent to all attorneys of record by operation of the Court's electronic filing system.

/s/ John W. Zeiger
John W. Zeiger (0010707)

1018-001:483236v2

EXHIBIT 1

Jan Strickland

From: Brown, Mark <MBrown@law.capital.edu>
Sent: Saturday, March 22, 2014 1:33 PM
To: John W. Zeiger
Cc: Mark Kafantaris
Subject: First Set of Interrogatories to Felsoci
Attachments: Microsoft_Word__LPO2013FirstInterrogatories.pdf; LPO2013FirstInterrogatories.doc

Hi John,

Attached is the First Set of Interrogatories to Mr. Felsoci in the LPO v. Husted, No. 13-953, matter. I have also attached the Word version pursuant to Local Rule 26.1's suggestion to make it simpler to respond.

Thanks.

Mark

Mark R. Brown
Newton D. Baker/Baker & Hostetler Chair
Capital University Law School

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

LIBERTARIAN PARTY OF OHIO, et al.,

Plaintiffs,

and

ROBERT HART, et al.,

Intervenor-Plaintiffs,

Case No. 2:13-cv-00953

v.

JUDGE WATSON

**JON HUSTED,
in his Official Capacity as Secretary of State,**

Defendant,

**THE STATE OF OHIO,
Intervenor-Defendant,**

and

GREGORY A. FELSOCI,

Intervenor-Defendant.

_____ /

PLAINTIFFS' FIRST SET OF INTERROGATORIES

TO INTERVENOR-DEFENDANT-FELSOCI

Pursuant to Fed. R. Civ. P. 33, Fed. R. Civ. P. 26(a)(1)(B)(i), Fed. R. Civ. P. 26(d), and Local Rule 26.1, Plaintiffs hereby submit the following Interrogatories to Intervenor-Defendant-Felsoci. Plaintiffs request that Intervenor-Defendant-Felsoci serve his answers, in writing and

under oath, to the undersigned counsel for Plaintiffs at 303 E. Broad Street, Columbus, OH 4315, within 30 days of service of these Interrogatories.

No. 1. Did you receive any money in any form from Mr. John Zeiger to file your administrative protest against Charles Earl with the Ohio Secretary of State?


No. 2. Did you receive any money in any form from the law firm of Zeiger, Tigges & Little to file your administrative protest against Charles Earl with the Ohio Secretary of State?

No. 3. Did you receive any money in any form from John Musca to file your administrative protest against Charles Earl with the Ohio Secretary of State?

No. 4. Did you receive any money in any form from any person, entity or source to file your administrative protest against Charles Earl with the Ohio Secretary?

No. 5. If the answer to any of Interrogatories No. 1, No. 2, No. 3, or No. 4 is affirmative, please identify the exact source of the money or payment, the date payment was received by you, and the amount of the payment.

Respectfully submitted,



By: Mark R. Brown

Mark R. Brown, Trial Counsel
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(614) 236-6956 (fax)
mbrown@law.capital.edu

Mark Kafantaris
625 City Park Avenue
Columbus, Ohio 43206
(614) 223-1444
(614) 221-3713 (fax)
mark@kafantaris.com

Attorneys for Plaintiffs

EXHIBIT 2

Jan Strickland

From: Brown, Mark <MBrown@law.capital.edu>
Sent: Sunday, March 23, 2014 7:29 PM
To: John W. Zeiger
Cc: Mark Kafantaris
Subject: Mr. Felsoci

Hi John,

I sent you a set of interrogatories for your client.

Given that you failed to produce your client at the evidentiary hearing on Monday (notwithstanding my request), you stood silent as Judge Watson surmised that your client had denied receiving any payment (which he did not), and your client has not answered the questions posed in my Interrogatories, I suggest that we set up a quick deposition to answer the questions.

How about Monday, Tuesday, Wednesday, Thursday, or Friday of this week? In your office of course.

Thanks.

Mark

Mark R. Brown
Newton D. Baker/Baker & Hostetler Chair
Capital University Law School

EXHIBIT 3

Jan Strickland

From: John W. Zeiger
Sent: Sunday, March 23, 2014 8:22 PM
To: Brown, Mark
Cc: Steven W. Tigges; Stuart G. Parsell; Daniel P. Mead
Subject: Re: Mr. Felsoci

I am out of state until Tuesday. I will respond to you then.

Sent from my iPhone

On Mar 23, 2014, at 7:29 PM, "Brown, Mark" <MBrown@law.capital.edu> wrote:

Hi John,

I sent you a set of interrogatories for your client.

Given that you failed to produce your client at the evidentiary hearing on Monday (notwithstanding my request), you stood silent as Judge Watson surmised that your client had denied receiving any payment (which he did not), and your client has not answered the questions posed in my Interrogatories, I suggest that we set up a quick deposition to answer the questions.

How about Monday, Tuesday, Wednesday, Thursday, or Friday of this week? In your office of course.

Thanks.

Mark

Mark R. Brown
Newton D. Baker/Baker & Hostetler Chair
Capital University Law School

EXHIBIT 4

Jan Strickland

From: Brown, Mark <MBrown@law.capital.edu>
Sent: Sunday, March 23, 2014 9:58 PM
To: John W. Zeiger
Cc: richard.coglianesese@ohioattorneygeneral.gov; Mark Kafantaris
Subject: Notice of Deposition of Gregoray Felsoci
Attachments: Microsoft_Word_LPO2013Deposition.pdf

Hi John,

I am noticing M. Felsoci's deposition for Tuesday at 1 PM in my office.

Thanks.

Mark

Mark R. Brown
Newton D. Baker/Baker & Hostetler Chair
Capital University Law School

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

LIBERTARIAN PARTY OF OHIO, et al.,

Plaintiffs,

Case No. 2:13-cv-00953

v.

JUDGE WATSON

**JON HUSTED,
in his Official Capacity as Secretary of State,**

Defendant,

and

GREGORY A. FELSOCI,

Intervenor-Defendant.

_____ /


NOTICE OF DEPOSITION OF INTERVENOR-DEFENDANT-FELSOCI

PLEASE TAKE NOTICE that, pursuant to Federal Rules of Civil Procedure 26, 30 and 33, Plaintiffs will take the deposition upon oral examination of Intervenor-Defendant Gregory Felsoci at the office of Mark R. Brown, 303 E. Broad Street, Columbus, OH 43215, at 1 PM on Tuesday, March 25, 2014.

The deposition shall continue from day to day until completed and will be stenographically recorded.

Dated: March 23, 2014.

Respectfully submitted,


By: Mark R. Brown

Mark R. Brown, Trial Counsel
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(614) 236-6956 (fax)
mbrown@law.capital.edu

Mark Kafantaris
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Columbus, Ohio 43206
(614) 223-1444
(614) 221-3713 (fax)
mark@kafantaris.com

Attorneys for Plaintiffs

EXHIBIT 5

Stuart G. Parsell

From: Brown, Mark [MBrown@law.capital.edu]
Sent: Monday, March 24, 2014 10:49 AM
To: Stuart G. Parsell; Daniel P. Mead; Steven W. Tigges
Subject: FW: Notice of Deposition of Gregoray Felsoci
Attachments: Microsoft_Word__LPO2013Deposition.pdf

Just in case John has not sent this along, I will depose Mr. Felsoci at 1 tomorrow in my office.

Thanks.

Mark

Mark R. Brown
Newton D. Baker/Baker & Hostetler Chair
Capital University Law School

From: Brown, Mark
Sent: Sunday, March 23, 2014 9:58 PM
To: John W. Zeiger
Cc: richard.coglianesse@ohioattorneygeneral.gov; mark@kafantaris.com
Subject: Notice of Deposition of Gregoray Felsoci

Hi John,

I am noticing M. Felsoci's deposition for Tuesday at 1 PM in my office.

Thanks.

Mark

Mark R. Brown
Newton D. Baker/Baker & Hostetler Chair
Capital University Law School