UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

LIBERTARIAN PARTY OF OHIO, et al.,	:	
Plaintiffs,	:	Case No. 2:13-cv-00953
-vs-	:	Judge Watson
JON HUSTED, Ohio Secretary of State,	:	Magistrate Judge Kemp
Defendant,	:	
-and-	:	
STATE OF OHIO, et al.,	:	
Intervening Defendants.	:	

CONSOLIDATED MEMORANDUM OF INTERVENING DEFENDANT FELSOCI IN OPPOSITION TO PLAINTIFFS' RENEWED MOTION FOR SUMMARY JUDGMENT ON COUNT SEVEN AND IN SUPPORT OF INTERVENING DEFENDANT FELSOCI'S RENEWED CROSS-MOTION FOR SUMMARY JUDGMENT

I. Introduction

In Count Seven of Plaintiffs' Third Amended Complaint, Plaintiffs allege that R.C. 3501.38(E)(1) is unconstitutional "as applied" because one or more "state actors" allegedly conspired to "selectively enforce" the statute against Plaintiffs. Plaintiffs' claim fails as a matter of law for five reasons.

First, Plaintiffs have failed to offer any evidence on the essential elements of a claim for selective enforcement. As this Court held when it denied Plaintiffs' fourth motion for preliminary injunction, in order to establish selective enforcement, Plaintiffs must show that "the subject law was not enforced against similarly situated individuals," or, alternatively, they must

offer "direct evidence" that Secretary of State Husted's decision on Felsoci's protest was "influenced or controlled" by a "source of improper political animus." [Doc. No. 260 at pgs. 7087-89] Plaintiffs have failed to prove either alternative. Plaintiffs have never submitted any evidence to suggest that the employer disclosure requirement in R.C. 3501.38(E)(1) has not been enforced against similarly situated persons. And, Plaintiffs still have not offered any evidence that Secretary Husted's decision was influenced or controlled by anyone other than the Secretary himself and his independent hearing officer, Professor Bradley Smith. What this Court found in October 2014 remains true today, and it is dispositive of Plaintiffs' selective enforcement claim:

> The Court agrees that Plaintiffs have failed to carry their burden of showing that Secretary Husted's decision was influenced or controlled by Casey, members of Governor Kasich's campaign, or any other source of improper political animus. For that reason alone, Plaintiffs cannot succeed on the merits of their selective enforcement claim.
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> [Doc. No. 260 at pg. 7089]

Second, for this same reason, Plaintiffs also cannot show that the alleged conspiracy proximately caused any injury to them. Under settled Sixth Circuit precedent, Felsoci's filing of his protest, standing alone, could not proximately cause any injury to Plaintiffs because an independent decision maker – Secretary Husted – first had to sustain the protest before Plaintiffs could suffer any harm. *Northern Kentucky Right to Life Committee, Inc. v. Kentucky Registry of Election Finance,* 1998 WL 13405 at *5 (6th Cir. 1998) ("[s]imply filing a complaint with the [Secretary of State] does not make [Felsoci] the proximate cause of any constitutional infringement"). In order to prove proximate cause, Plaintiffs must show that Secretary Husted and/or his hearing officer, Professor Smith, were somehow compromised by the alleged conspiracy. *See, e.g., Arnold v. IBM,* 637 F.2d 1350, 1355 (9th Cir. 1981) (proximate cause under § 1983 requires proof that a private actor exerted "control over the decision making" of the

state actor, because the "the proximate cause of the plaintiff's injury would ordinarily be the court order and not the various steps preliminary to the court order"). As noted above, however, Plaintiffs have offered no such evidence. As this Court previously found: "Plaintiffs have failed to demonstrate that Secretary Husted's decision … or Professor Smith's recommendation … were influenced or controlled by Terry Casey, Governor Kasich's campaign, Attorney General Dewine's campaign, or the Ohio Republican Party." [Doc. No. 260 at pg. 7092] Indeed, at Secretary Husted's deposition, Plaintiffs' counsel conceded: "Of course, Mr. Secretary. We are not attempting to cast any shadow of a doubt on your particular decision." [Husted Dep. (Doc. No. 203) at pg. 4250] Nothing in Plaintiffs' "supplemental evidence" changes this conclusion. And, without such evidence, Plaintiffs cannot prove proximate cause.

Third, there were no "state actors" involved with the alleged conspiracy. As this Court already found: "Felsoci's filing of the protest, even if it was on behalf of the Ohio Republican Party, did not constitute a state action under § 1983" because the Ohio Republican Party is not an arm of the state. [Doc. No. 262 at pg. 7095] This same reasoning precludes Plaintiffs' conspiracy theory directed towards agents of the Kasich campaign, because they also are private parties, not state actors. *See, e.g.*, *Federer v. Gephardt*, 363 F.3d 754, 759 (8th Cir. 2004) (persons who "acted on behalf of … *a political candidate*" were not state actors) (emphasis added); *Johnson v. Suffolk University*, 2002 WL 31426734 at *1 (D. Mass. 2002) (state officer's actions "*as a candidate*" do not "confer state action status") (emphasis added). It also lends no aid to Plaintiffs' case that Terry Casey holds a state office or that he sent a few unsolicited emails to persons in the Governor's Office, because Plaintiffs have offered no evidence of any nexus between Casey's state office and his actions in this case, nor have Plaintiffs shown that anyone in the Governor's Office did anything as a result of Casey's emails or otherwise had anything to do

with Felsoci's protest. *See, e.g., Waters v. Morristown,* 242 F.3d 353, 359 (6th Cir. 2001) ("[N]ot every action undertaken by a person who happens to be a state actor is attributable to the state…. [T]he acts of state officials in the ambit of their personal pursuits do not constitute state action…. [T]here can be no pretense of acting under color of state law if the challenged conduct is not related in some meaningful way either to the actor's governmental status or to the performance of his duties"). Put simply, on this record, there is no evidence of state action.

Fourth, Plaintiffs have failed to establish another essential element of their case: deprivation of a right protected by federal law. Under § 1983, there can be no deprivation of federal rights where a candidate is removed from the ballot because of *his own failure* to meet a valid state election law requirement. *See, e.g., Romanelli v. DeWeese,* 2011 WL 2149857 at *7 (M.D. Pa. 2011) ("because the rejection of his nomination paper was based on failure to meet a valid signature requirement, [plaintiff] was not denied any federal right of ballot access"). That's precisely what happened here. Every judicial officer who has reviewed this case – Hearing Officer Smith, Secretary Husted, this Court, the Sixth Circuit and the Ohio Supreme Court – has concluded that the employer disclosure requirement in R.C. 3501.38(E)(1) is a valid state election law with which Plaintiffs could have complied but, for whatever reason, they did not comply. To state the obvious, Plaintiffs were removed from the ballot, not because anyone deprived them of federal rights, but solely because of their own self-inflicted wound in failing to comply with a valid state law.

Finally, Felsoci cannot be liable under § 1983 for damages or attorney fees because his protest is protected by *Noerr-Pennington* immunity. *See, e.g., Eaton v. Newport Board of Education,* 975 F.2d 292, 298 (6th Cir. 1992) ("[u]nder the *Noerr-Pennington* doctrine, liability may not be assessed under § 1983 … except in very limited circumstances, for actions taken

when petitioning authorities to take official action, regardless of the motives of petitioners, even where the petitioning activity has the intent or effect of depriving another of property interest"). Whatever his motives, Felsoci prevailed in his protest, so he falls squarely within *Noerr-Pennington* protection. *See, e.g., Prof'l Real Estate Investors, Inc. v. Columbia Pictures, Inc.*, 508 U.S. 49, 61 (1993) ("[a] winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham").

For each of these reasons, Plaintiffs' motion for summary judgement on Count Seven of the Third Amended Complaint should be denied and summary judgment should be entered in favor of Intervening Defendant Felsoci.

II. Law And Argument

A. No Proof Of Selective Enforcement

Normally, a claim of selective enforcement under § 1983 requires proof that "someone similarly situated … was treated differently." *Bah v. Attorney General*, 610 Fed. Appx. 547, 554 (6th Cir. 2015). *Accord: Cunningham v. Sisk*, 136 Fed. Appx. 771, 774-75 (6th Cir. 2005); *Gardenhire v. Schurbert*, 205 F.3d 303, 319 (6th Cir. 2000) ("[i]t is an absolute requirement that the plaintiff make at least a prima facie showing that similarly situated persons outside [his] category were not prosecuted"). Alternatively, as this Court recognized in denying Plaintiffs' fourth motion for preliminary injunction, Plaintiffs could prove selective enforcement by "direct evidence" that the state decision maker – here, Secretary Husted – was "influenced or controlled" by a "source of improper political animus." [Doc. No. 260 at pgs. 7088-89]

Plaintiffs have failed to satisfy either alternative. They have offered no evidence that the employer disclosure requirement in R.C. 3501.38(E)(1) has not been enforced against other

similarly situated persons. To the contrary, the evidence in this record is that the requirement has been enforced whenever a violation has been brought to the Secretary's attention.[1]

Plaintiffs also have failed to prove any improper political animus or influence over Secretary Husted's decision. Despite the opportunity to take additional discovery and present supplemental evidence, Plaintiffs still have offered nothing to show that Secretary Husted's decision was tainted in any respect. Thus, what this Court found when it denied Plaintiffs' fourth motion for preliminary injunction remains true today: "Plaintiffs have failed to carry their burden of showing that Secretary Husted's decision was influenced or controlled by Casey, members of Governor Kasich's campaign, or any other source of improper political animus. *For that reason alone, Plaintiffs cannot succeed on the merits of their selective enforcement claim.*" [Doc. No. 260 at pg. 7089 (emphasis added)]

B. No Proximate Cause Of Constitutional Injury

Plaintiffs lose for a second reason: Plaintiffs have failed to prove that the alleged conspiracy proximately caused any injury to them. *Northern Kentucky Right to Life Committee, supra* at *5 ("a valid § 1983 claim requires that the defendant be the proximate cause of some constitutional injury").

This case is on all fours with *Northern Kentucky Right to Life*. There, a political action committee ("PAC") filed a § 1983 suit against the chair of the local Democratic Party. The § 1983 claim arose after the party chair filed a complaint with the state election agency alleging that the PAC had violated election laws. The PAC contended that the party chair engaged in a

[1] The record shows that in addition to Plaintiffs, the employer disclosure requirement has been enforced on two other occasions: In 2006, with respect to the ballot petition that gave rise to *In re Protest of Evans*, 2006 WL 2590613 (Ohio App. 2006); and in 2011, when Secretary Husted's office advised a local elections board to invalidate petitions because "a paid circulator failed to completely fill out the employer box on a petition form." [Doc. No. 247 at pg. 6605 (Seskes)] Plaintiffs have offered no evidence of any instance where Secretary Husted's office was aware of a violation of the employer disclosure requirement but declined to invalidate the petition.

conspiracy to violate the PAC's constitutional rights by filing a complaint with the local election agency that was meant only to harass the PAC. The Sixth Circuit concluded that the PAC's § 1983 claim failed for multiple reasons, including lack of proximate cause: "Simply filing a complaint with the Registry of Election Finance does not make [the party chair] the proximate cause of any constitutional infringement." *Id*. at *5.

The similarities between the facts alleged in *Northern Kentucky Right to Life* and Plaintiffs' conspiracy theory are obvious. Each case involves the allegation that political opponents used state administrative proceedings to challenge the actions of their adversaries. As in *Northern Kentucky Right to Life*, here, "[s]imply filing a [protest] with the [Secretary of State] does not make [Felsoci] the proximate cause of any constitutional infringement."

Plaintiffs must show more, that Felsoci or Casey (or their alleged co-conspirators) actually conspired with, or had influence or control over, the persons who decided Felsoci's protest. *Arnold*, *supra* at1355 (proximate cause in § 1983 claim requires proof that the private actor exerted "control over the decision making" of the state actor because "the proximate cause of the plaintiff's injury would ordinarily be the court order, and not the various steps preliminary to the court order"); *Nader v. McAuliffe*, 593 F. Supp. 2d 95, 102 (D.D.C. 2009) (plaintiffs must prove that "the judge presiding over the lawsuit was a co-conspirator or a joint actor with a private party"). In denying Plaintiffs' fourth motion for preliminary injunction, this Court found that "[t]here is no evidence that [Hearing Officer] Smith's final report and recommendation represented anything other than Smith's independent findings and legal analysis…. [T]here is no evidence that political bias affected the outcome of the protests." [Doc. No. 260 at pgs. 7090, 7092] Plaintiffs have offered nothing in their "supplemental evidence" to change these conclusions. Count Seven thus fails as a matter of law for lack of proximate cause.

C. No State Action

It hardly requires citation for the proposition that liability under § 1983 requires "state action." *Berger v. Mayfield Heights*, 265 F.3d 399, 405 (6th Cir. 2001). And where, as here, Plaintiffs allege a "conspiracy" to violate § 1983, they must prove that at least one of the alleged conspirators was (i) a state actor (ii) who was acting in his official (rather than personal) capacity when he participated in the alleged conspiracy. *See, e.g.*, *Waters v. Morristown*, 242 F.3d 353, 359 (6th Cir. 2001) ("the acts of state officials in the ambit of their personal pursuits do not constitute state action").

Plaintiffs throw multiple possibilities of alleged "state actors" against the wall, but none of them sticks.

- Felsoci: Clearly, Felsoci's prosecution of his protest with the Secretary of State did not constitute state action. In *Northern Kentucky Right to Life Committee*, *supra* at *5, the Court held that the "very special cases [in which] a private person act[s] under [color of state law] … [do] not exist when a private party merely files a lawsuit or instigates a state administrative action." *See also Prophet v. Prophet*, 73 F.3d 364 (7th Cir. 1995) ("one does not become a 'state actor' merely by resorting to the courts and being on the winning side").
- Casey: Plaintiffs make much of the fact that Terry Casey is chairman of the State Personnel Board of Review. But Plaintiffs have offered no evidence that Casey was acting in his official capacity when he took any action relating to Felsoci's protest.[2]

[2] Plaintiffs suggest that the "aura" of Casey's position as chairman of the State Personnel Board of Review allowed him to influence "classified employees" of the Secretary of State's office. But this is complete conjecture; Plaintiffs offer no evidence of any "classified employee" who was allegedly influenced by Casey's "aura," much less a "classified employee" who did anything specifically with respect to Felscoi's protest because of Casey's "aura." In any event, even under Plaintiffs' "aura" theory,

Casey repeatedly testified, without rebuttal by Plaintiffs, that he became involved in this matter because he is a "political junkie" who has a "substantial interest in electoral issues and election administration issues." [Doc. No. 335-2 at pg. 8388] [Doc. No. 247 at pg. 6548] But Casey's longstanding personal interest in politics, without proof of a nexus between his state office and his actions in this case, is not enough to establish state action. As the Sixth Circuit held in *Waters*, *supra* at 539: "[T]here can be no pretense of acting under color of state law if the challenged conduct is not related in some meaningful way either to the actor's government status or to the performance of his duties." *Accord: Burris v. Thorpe,* 166 Fed. Appx. 799, 802 (6th Cir. 2006) ("a defendant's private conduct, outside the course or scope of his duties and unaided by any indicia of actual or ostensible state authority, is not conduct occurring under color of state law"). It is Plaintiffs' burden to show that Casey's actions regarding Felsoci's protest were meaningfully related to his state office, as opposed to his personal avocation as a "political junkie," but Plaintiffs have offered nothing to meet this burden.

- Ohio Republican Party: This Court has already held that the Ohio Republican Party is not a state actor in this case. When the Court denied Plaintiffs' third motion for preliminary injunction, the Court found that the evidence "supports an inference that operatives or supporters of the Ohio Republican Party orchestrated the protest that Felsoci signed," but the Court dismissed this inference as irrelevant "color commentary." [Doc. No. 80 at pgs. 2148-49] The Court was even more direct when it denied Plaintiffs' fourth motion for preliminary injunction: "Felsoci's filing of the

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Casey could not and did not influence the two "unclassified" decision-makers who decided the protest – Secretary Husted and Hearing Officer Smith.

protest, even if it was on behalf of the Ohio Republican Party, did not constitute a state action under § 1983." [Doc. No. 260 at pg. 7095, *citing Nader v. McAuliffe, supra* and *Banchy v. Republican Party of Hamilton County*, 898 F.2d 1192 (6th Cir. 1990)][3] In an attempt to get around the Court's prior findings, Plaintiffs now argue that the Ohio Republican Party supposedly "ratified" the actions of those involved in Felsoci's protest by paying some of the legal fees. But the cases that Plaintiffs cite for this proposition merely hold that a municipality (*i.e.*, a state actor) may be liable for a municipal employee's (*i.e.*, another state actor's) violation of § 1983 under certain circumstances, none of which exists here. None of Plaintiffs' cases hold that the actions of private actors can be retroactively transformed into state action by something they do months later. And, to state the obvious, even if one private party (e.g., the Ohio Republican Party) "ratifies" the actions of other private parties (such as Felsoci or Casey), it's still just private action, not "state action."

- Kasich Campaign: Plaintiffs assert that a political campaign is a state actor for purposes of § 1983. But the cases that have addressed this issue have concluded otherwise. *Schneller v. Philadelphia Newspapers Inc.*, 577 Fed. Appx. 139, 143 (3d Cir. 2014) (affirming dismissal of § 1983 claim against campaign committee and others relating to challenge to plaintiff's nomination papers because there was no state action); *Federer v. Gephardt*, 363 F.3d 754, 759 (8th Cir. 2004) (defendants who "acted on behalf of [congressman] *as a political candidate* and private person" were not state actors) (emphasis added); *Johnson v. Suffolk University*, 2002 WL 31426734 at *1 (D. Mass. 2002) (state treasurer's participation in debate "*as a*

[3] Plaintiffs continue to cite the "white primary" cases even though the Court has already ruled that these cases do not apply. [Doc. No. 260 at pg. 7093-95]

candidate" held insufficient "to confer state action status") (emphasis added); *Berg v. Obama*, 574 F. Supp. 2d 509, 523 note 14 (E.D. Pa. 2008) ("We have found no cases where a presidential candidate has been treated as a state actor merely for running for office. To the contrary, the few cases that we have found suggest that presidential *candidates are not state actors or engaged in state action for purposes of § 1983*") (emphasis added).

- Governor's Office: If Plaintiffs have established anything, it is that Terry Casey is a prolific emailer, and he often sends his emails to multiple recipients. Plaintiffs have cherry-picked a few of Casey's emails (mostly dealing with political talking points for media purposes) in which employees of the Governor's Office were included as recipients. But Plaintiffs offer no evidence that anyone in the Governor's Office did anything in response to Casey's emails, much less took any action in their official state capacity that related to Felsoci's protest. *Compare Nader v. McAuliffe, supra* at 104 ("the sole remaining allegation on which the plaintiffs' joint activity theory rests – that some individuals employed by state legislatures assisted in drafting ballot access challenges – fails to establish a sufficiently close nexus between the state and [the defendant] ... so that the action of the latter may be fairly treated as that of the state itself"). Clearly, the mere fact that a state employee received an email from a private citizen, without proof that the state employee then took some action "related in some meaningful way either to [his] governmental status or to the performance to his duties," is not enough to show state action. *Waters, supra* at 359 ("there can be no pretense of acting under color of state law if the challenged conduct is not related in some meaningful way either to the actor's governmental status or to the performance

of his duties"). Nor do a private citizen's communications to a state employee turn the private citizen into a state actor. *Morpurgo v. Sag Harbor*, 697 F. Supp. 2d 309, 338 (E.D.N.Y. 2010) ("[C]ommunications between a private and state actor, without facts supporting a concerted effort or plan between the parties, are insufficient to make a private party a state actor.… [A]lleging merely that a private party regularly interacts with a state actor does not create an inference of agreement to violate a plaintiff's rights"); *Fisk v. Letterman*, 401 F. Supp. 2d 362, 377 (S.D.N.Y. 2005) ("All the plaintiff has alleged is that there were 'dialogues,' 'communications,' or 'interactions' between [private actors] and the state actors…. Communications between a private and a state actor, without facts supporting a concerted effort or plan between the parties, are insufficient to make the private party a state actor"). Plaintiffs' proof thus falls woefully short of implicating the Governor's Office in this matter.

- Matt Damschroder: Lastly, Plaintiffs offer a few additional emails between Casey and Matt Damschroder. Last October, the Court rejected Plaintiffs' reliance on similar email and text exchanges between Casey and Damschroder, observing that communications between them "have little, if any significance . . . in the absence of evidence that they actually influenced or controlled the *decision making process* in the subject protests." [Doc. No. 260 at pg. 7091 (emphasis in original)] There continues to be no evidence that Damschroder (or, for that matter, anyone else) influenced the outcome of Felsoci's protest in any respect.

With respect to state action, here's the bottom line: Casey undoubtedly was supporting Felsoci's protest, but there is no evidence that Casey did so in any capacity other than his private

interests as a "political junkie." Casey also communicated with and, in a few instances, received assistance from representatives of the Kasich campaign and the Ohio Republican Party, but the case law is clear that they too are private parties, not state actors. And, to the limited extent that Casey communicated with persons employed by state government (such as Damschroder or employees in the Governor's Office), there is no evidence that any state employee did anything to influence or otherwise taint Secretary Husted's decision. There simply is no evidence in this record of a conspiracy by state actors.

D. Plaintiffs' Self-Inflicted Wound Is Not A Federal Injury

Count Seven suffers from another defect: Plaintiffs did not suffer an injury recognized under § 1983.

In order to prove a cause of action under § 1983, Plaintiffs must establish two elements: (1) state action that caused (2) deprivation of a right protected by federal law. *Northern Kentucky Right to Life Committee, supra* at *5 (6th Cir. 1998).

When a candidate is removed from the ballot because of his own failure to comply with a valid state election law, there is no deprivation of any federal right of ballot access. *Romanelli v. DeWeese*, 2011 WL 2149857 at * 7 (M.D. Pa. 2011). In *Romanelli*, the plaintiff was a Green Party candidate whose ballot access was challenged by persons connected with the Democratic Party. The candidate contended that his ballot access was being challenged because the Democrats "feared he would divert votes from the Democratic nominee…." *Id.* at *1. Several political operatives and state employees worked around the clock – using state resources – on the election challenge. Yet, not only did the Court find that these allegations were insufficient for a § 1983 claim to survive a 12(b)(6) motion, the Court concluded that "the complaint's legal

grounds are tenuous at best." *Id*. at *9. Even assuming state action, the court concluded there was no allegation of an injury protected by § 1983:

> … Romanelli has failed to allege the deprivation of any federal right. While ballot access is recognized as an important aspect of voting rights, … states have legitimate interest[s] in regulating the number of candidates on the ballot … to reduce ballot clutter…. Thus, there is no constitutional right to ballot access unfettered from all state regulation.
>
> … Romanelli asserts a constitutional right under the First Amendment to "run for federal office in an unimpaired fashion." As noted above, to the extent he claims a right to be free from Pennsylvania's signature requirements, no such right exists. The Pennsylvania statutes provide for challenges to nomination papers when signatures do not comport with the statutory requirements. ***When the validity of the signatures is challenged in accordance with state procedure, and the signatures are found to be in some way insufficient, it does not violate any constitutional right to deny the potential candidate access to the ballot.***…
>
> The state courts found that Romanelli's nomination paper failed to secure the required number of valid signatures.… That determination is conclusive in this suit.… Thus, ***because the rejection of his nomination paper was based on failure to meet a valid state signature requirement, Romanelli was not denied any federal right of ballot access.***
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> [*Id*. at *7 (emphasis added)]

The *Romanelli* Court also rejected the exact same type of selective enforcement theory advanced by Plaintiffs here (*i.e.*, that Romanelli's candidacy was protested so he would not "divert votes from the Democratic nominee," *id*. at *1):

> [T]o the extent that Romanelli's complaint might be construed to allege a violation of the Fourteenth Amendment, it also fails…. Although Romanelli does not allege any class-based discrimination, a plaintiff can proceed on a "class of one" theory by alleging that he has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment…. In light of the state court decisions [upholding the election protest], which are accorded preclusive effect, … Romanelli could not plausibly maintain that the

> defendants (assuming, without deciding, that they were state actors for § 1983 purposes) challenged his petition without a rational basis. ***The state courts found that Romanelli failed to secure the required number of valid signatures, and this failure provides a rational basis upon which the defendants successfully challenged the petition***….
>
> Because Romanelli fails to show that he was deprived of any federal right, his complaint must be dismissed….
>
> [*Id*. at *7-8 (emphasis added)]

Here, as in *Romanelli*, Charlie Earl was not on the ballot because his petitions did not comply with state law. Even if this Court assumes state action (as the court in *Romanelli* did) and further assumes that the protest was brought so Earl would not divert votes from another candidate (as the court in *Romanelli* also assumed), Plaintiffs' claim still fails because Plaintiffs, *on their own*, failed to comply with Ohio election law. Every judicial officer who has reviewed the protest – Hearing Officer Smith, Secretary Husted, this Court, the Sixth Circuit and the Ohio Supreme Court – has concluded that the employer disclosure requirement in R.C. 3501.38(E)(1) is a valid state election law with which Plaintiffs could have complied, but, for whatever reason, they did not comply. Plaintiffs' failure to appear on the ballot was the result of their own self-inflicted wound – their failure to comply with a valid state election law – not any deprivation of a federal right of ballot access.

E. <u>Felsoci Is Immune From Liability</u>

Plaintiffs are seeking two remedies: (i) injunctive relief that would restore LPO as ballot-qualified and (ii) attorney fees under § 1988. Obviously, Felsoci cannot restore LPO as a ballot-qualified party. So the only relief Plaintiffs really seek against Felsoci is monetary relief. As explained below, even if Plaintiffs could overcome all of the defects in their § 1983 claim, Felsoci is immune from liability under the *Noerr-Pennington* doctrine.

"The *Noerr-Pennington* doctrine holds that defendants who petition the government for redress of grievances, whether by efforts to influence legislative or executive action or by seeking redress in court, are immune from liability for such activity under the First Amendment." *Nader v. Democratic Nat. Comm.*, 555 F. Supp. 2d 137, 156 (D.D.C. 2008) *aff'd on other grounds* 567 F.3d 692 (D.C. Cir. 2009). "Under the *Noerr-Pennington* doctrine, liability may not be assessed under § 1983 … except in very limited circumstances, for actions taken when petitioning authorities to take official action, regardless of the motives of the petitioners, even where the petitioning activity has the intent or effect of depriving another of property interests." *Eaton v. Newport Bd. of Educ.*, 975 F.2d 292, 298 (6th Cir. 1992).

Even if Plaintiffs could prove their supposed conspiracy, it would not make a difference because "there is no 'conspiracy' exception to the *Noerr-Pennington* doctrine that applies when government officials conspire with a private party to employ government action as a means of depriving other parties of their federal constitutional or statutory rights. *Empress LLC v. San Francisco*, 419 F.3d 1052, 1057 (9th Cir. 2005). Rather, "[i]n such circumstances, *a remedy lies only against the conspiring government officials, not against the private citizens*." *Id*. (emphasis added).

There is, however, an exception to *Noerr-Pennington* immunity for "sham litigation." In order for the sham exception to apply, the plaintiff must show that the petition for government action was "*objectively baseless* in the sense that no reasonable litigant could realistically expect success on the merits." *Nader v. Democratic Nat'l Comm.*, *supra* at 157 (emphasis added). The sham exception cannot apply where, as here, the petition was successful. *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 61 (1993) ("A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham.").

For example, in *Northern Kentucky Right to Life*, *supra at* * 6, the Sixth Circuit held that the local political party chair who had filed the election law complaint was entitled to *Noerr-Pennington* immunity on the plaintiff's § 1983 claim, because his protest "was substantiated by legitimate evidence." And, in *Nader v. Democratic Nat'l Comm.*, the court held that *Noerr-Pennington* applied to immunize those behind the election protests challenging Ralph Nader's petitions in Ohio and other states. The court explained that Nader and his co-plaintiffs "cannot bring claims predicated on the challenges brought in the five states [including Ohio] where the plaintiffs lost, because they could not plausibly establish the first prong of the sham exception." 555 F. Supp. 2d at 157. The court specifically rejected the argument that "partisan motives alone can satisfy the sham exception" and explained:

> [E]very litigant has a personal stake in an action and, thus, a selfish motive of some sort; otherwise, they would lack standing. Were the court to adopt the plaintiffs' principle that any motive other than the altruistic impulse to see that the law is observed renders a litigant liable, then … ***election laws … relying on private challenges would be compromised***.
>
> [*Id*. at 158 (emphasis added)]

So too here, Felsoci is entitled to *Noerr-Pennington* immunity because he filed an objectively reasonable protest. Felsoci's protest is unquestionably objectively reasonable because Hearing Officer Smith, Secretary Husted, the Ohio Supreme Court, this Court and the Sixth Circuit all agreed that his protest properly asserted a violation of R.C. 3501.38(E)(1) that required Earl's removal from the ballot. As such, he is immune from liability under §§ 1983 and 1988.

III. Response To Plaintiffs' Omnibus Filing

Felsoci objects to the following materials attached to Plaintiffs' omnibus filing:

- Exhibits 5 and 6: Felsoci objects to the pleadings from the administrative action filed by Charles Earl in the Ohio Elections Commission because they are irrelevant. Plaintiff purports to offer these documents as evidence of the Ohio Republican Party's payment of a portion of Felsoci's legal fees to Zeiger, Tigges & Little on the theory that such evidence supports the notion that the Ohio Republican Party was a state actor. As noted above, this Court has already held that "[e]ven if [Felsoci's protest] was on behalf of the Ohio Republican Party," it "did not constitute a state action under § 1983." [Doc. No. 260 at pg. 7095] For the same reasons, Felsoci objects to the relevance of Exhibits 5 and 6.
- Exhibit 8: Felsoci objects to this chapter from a book about validity rates of paid circulators because it only relates to Plaintiffs' Count Six upon which the Court has now granted summary judgment in favor of Defendants. It also constitutes inadmissible hearsay and lacks a proper foundation.
- Exhibit 9: Intervenor Defendant Felsoci objects to Exhibit 9 on the grounds that it is only relevant to Plaintiffs' motion to maintain the status quo, which the Court has now denied. It also constitutes inadmissible hearsay and lacks a proper foundation.
- Exhibits 10 and 12: Plaintiffs state that there has been a stipulation "to the authenticity and admissibility of these documents" other than as to relevance. [Doc. No. 335, at pg. 8314 notes 1-2] To be clear, the stipulation was not that broad. The exact wording of the stipulation was that Felsoci agreed to "stipulate to authenticity and all foundations for admissibility, but leave open for the Court's decision whether the documents are relevant or probative to any issues in the case." [10/7/2015 emails among counsel, attached as Exhibit A]

IV. Conclusion

A final point bears emphasis: Throughout this litigation, Plaintiffs have never identified a single case in which a candidate who *lost* an election protest succeeded on a § 1983 theory against the individuals, state employees or political parties involved in filing the protest. Two courts have squarely addressed Plaintiffs' theory – *Nader v. McAuliffe*, *supra* and *Romanelli v. DeWeese*, *supra* – and each held that the § 1983 claims failed as a matter of law. This Court should reach the same conclusion.

For all the foregoing reasons, Plaintiffs' motion for summary judgment on Count Seven should be denied and Felsoci's cross-motion should be granted.

Respectfully submitted,

/s/ Steven W. Tigges
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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of October, 2015, 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/ Steven W. Tigges
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