IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRIC OF OHIO, EASTERN DIVISION

King Lincoln Bronzeville Neighborhood Association, *et al*.,

Plaintiffs,

v. **Case No. 2:06-cv-745**

Jennifer Brunner, *et al.*, **Judge Marbley**
Magistrate Judge Kemp

Defendants

Memorandum in Opposition to Motion for Reconsideration of the Magistrate Judge's November 19, 2010 Opinion and Order

I. FACTS

Since June of 2007, attorney Clifford O. Arnebeck, Jr. has been threatening, on behalf of unidentified clients and on the basis of unspecified acts, to bring RICO charges against the Ohio Chamber of Commerce ("Chamber") and the Partnership for Ohio's Future ("Partnership"). In this endeavor, he has demanded that the Chamber and the Partnership retain documents that would otherwise have long since been destroyed in the normal course of document management, and he has publicly accused the Chamber and the Partnership of violating the law in multiple press conferences and press releases, and in various articles published on websites under the bylines of his co-counsel in this suit, Robert Fitrakis and Harvey Wasserman. He has also publicly, through articles by his afore-named co-counsel, accused both Partnership officers and their counsel, the undersigned, of making false statements, the latter in the course of carrying out representation of the Chamber and the Partnership. *See e.g.* Bob Fitrakis and Havery Wasserman, *Ohio Chamber Lies and Hides Election Buys*, Huffington Post, Nov. 2, 2010.

On October 28, 2010, Arnebeck, acting in his personal capacity (or at least without identifying that his complaint was filed on behalf of any other person or entity), filed a complaint against the Partnership for Ohio's Future with the Ohio Elections Commission ("OEC"), seeking to use the subpoena

power of the OEC to obtain essentially the same information he now seeks in this action. Clifford O. Arnebeck, Jr. v. Partnership for Ohio's Future, OEC Case No. 2010E-122. In that complaint, Arnebeck stated his motive for the filing: to "alert the public to the nature of the source of this money before the election" (referring to independent expenditures made by the Partnership, as permitted under *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), in connection with races for the Ohio Supreme Court). He sought to gain public disclosure of information on donors to the Partnership, including the amounts and dates of contributions. His complaint hinted that former presidential advisor Karl Rove ordered the "assassination" of political consultant Michael Connell, and that the Partnership was also in some way complicit in that conspiracy.

However, perhaps understanding that Ohio law did and does not require the Partnership to reveal the information he sought, *see* Ohio Elections Commission Advisory Opinion 2010ELC-02, Arnebeck did not claim that the Partnership violated Ohio law by not filing donor information with the state.[1] Rather, he alleged that the Partnership's statement on its ads, as required of all independent expenditures, *see* O.R.C. § 3517, that the ads were not authorized by any candidate or committee, was a "false statement" because the ads were, he claims, coordinated with the candidates. Mr. Arnebeck's complaint, however, cited to no evidence of any coordination between the Partnership and any candidate. His complaint, it should be noted, implicitly alleges, again with no evidence, that two sitting Justices of the Ohio Supreme Court had violated the law by accepting and failing to report coordinated corporate contributions from the Partnership in violation of Ohio law. Arnebeck argued in the complaint that the OEC should find probable cause so that he could obtain information on the Partnership's donors and "alert the public to the source of this money before the election." OEC Complaint, p. 6, para. 32.

[1] At no point have Arnebeck or plaintiffs claimed that the disclosure originally he and now they seek is required by state or federal law. Plaintiffs do state in this Motion, see Motion to Reconsider at 8, that "it is urgent that the press and voters know the names and amounts of contributions because that is what Ohio election law is intended to assure them of receiving," but they cite to no authority for that proposition because, in fact, that is not what the law requires. OEC Advisory Opinion 2010ELC-02.

On the eve of the hearing before the OEC, Arnebeck appears to have grown nervous that the OEC would not find probable cause on his incredible complaint. At 10:15 p.m. on Sunday, October 31, Arnebeck sent an email to Assistant Attorney General Richard Coglianese, state's counsel in this case, asking permission to use this case to serve subpoenas on the Partnership and the Chamber because "the public will be irreparably harmed if it is not informed before Tuesday's election as to whom is funding these ads." Defendants' Response to the Plaintiffs Attempt to Subpoena Karl Rove, Ex. B.[2]

At a hearing before a probable cause panel of the OEC on November 1, 2010, Arnebeck accused the Partnership of "racketeering" and of participating in "a coup, an attempt to take over the government of the United States and the states of this country." He reiterated that he sought the Commission's authority so that he could issue subpoenas to "have disclosed the donors." Continuing, he asked the OEC, "Allow me to issue these subpoenas, and it must be today, because the public needs to know." Transcript, Ohio Elections Commission, Arnebeck v. Partnership for Ohio's Future, Nov. 1, 2010, p. 5-10. The OEC, however, dismissed Arnebeck's complaint with a finding of "no probable cause." *Id.* p. 31-33.

After the OEC had rejected his request to grant him subpoena power to force the Partnership to disclose information it is not legally required to disclose, Arnebeck seized on this lawsuit, lying dormant for nearly two years, as a vehicle to try to get the information from the Chamber and the Partnership. Neither the Chamber nor the Partnership, nor any of the Movants, are parties to this action. At approximately 11:30 a.m. on November 1, within two hours of the OEC hearing, under the guise of seeking discovery in this action, Arnebeck served subpoenas on the Partnership, the Chamber, the Ohio Chamber of Commerce Educational Foundation, and Andrew Doehrel (President of the Chamber) and

[2] Mr. Arnebeck needed the state's agreement because he was otherwise stayed from seeking further discovery in this case by this Court's order of April 6, 2007. In his eagerness to obtain such agreement, he apparently also attempted to contact Secretary of State, a represented party, without going through her counsel. *See* Defendants' Response to the Plaintiffs Attempt to Subpoena Karl Rove, Ex. B.

Linda Woggon (Vice-President of the Partnership for Ohio's Future), demanding substantially the same information he had sought to gain hours earlier through the OEC proceedings, and demanding production by 2:00 p.m. that same day. These organizations and individuals (collectively "Movants"), then moved to quash the subpoenas as burdensome, not relevant, in violation of a prior Stay Order issued in this case, and, for the individual movants, for failure of service.

The next day, November 2, which was also election day, during a telephone conference with Magistrate Judge Kemp, Plaintiffs' counsel reiterated his desire to release the requested information to the public in the hope of influencing voting before the polls closed. After it became clear that the Magistrate Judge would not grant the motion to compel that day, Plaintiffs' counsel argued, for the first time, that he sought the information from these non-party Movants in order to help him prepare for a deposition of Karl Rove that he hoped to take in this case.[3] After allowing for supplemental briefing, on November 19, 2010, Magistrate Judge Kemp quashed the subpoenas on the non-parties.

Since Magistrate Judge Kemp's order, the U.S. District Court for the District of Columbia has vacated Plaintiffs' deposition date for Karl Rove. King Lincoln Bronzeville Neighborhood Assoc. v. Brunner, (Slip Op., D.D.C. Nov. 24, 2010). Meanwhile, Movant Partnership for Ohio's Future, on request of Plaintiffs' counsel and even before Plaintiffs had filed the Motion to Compel at issue here, had sent to Plaintiffs' counsel, as it has to all who have asked, a list of its donors for the 2010 elections. Partnership and other Movants object, however, to providing the added information that Plaintiffs seek in this request. Plaintiffs now seek review of Magistrate Judge Kemp's November 19 Order granting movants' Motion to Quash and denying Plaintiffs Motion to Compel.

[3] Plaintiffs co-counsel, Messrs. Fitrakis and Wasserman, have been soliciting public donations to "help take Karl Rove's deposition: Put Bush's Brain Under Oath," on the website of their publication, The Free Press, http://freepress.org/index2.php (viewed December 15, 2010) and other blog sites, see "Priceless: Karl Rove Under Oath," http://fraudbusterbob.com/blog/2010/11/21/priceless-karl-rove-under-oath/ (viewed December 15, 2010).

II. STANDARD OF REVIEW

Pursuant to 28 U.S.C. §636 (b)(1)(A) and F.R.C.P. 72 (a), an order of the Magistrate Judge may be set aside only if the order is found to be "clearly erroneous or contrary to law." Thus, Plaintiffs face a substantial burden in seeking reconsideration of the Magistrate Judge's order. "A finding [of fact] is 'clearly erroneous' only when the reviewing court is left with the definite and firm conviction that a mistake has been made." *King v. Banks*, 2010 U.S. Dist. Lexis 114668 (S.D. Oh 2010). A conclusion of law is contrary to law only if it "contradict[s] or ignore[s] applicable precepts of law." *Id.*

III. ARGUMENT

A. The Magistrate Judge Correctly Held that Whether or Not a Deposition of Karl Rove is Warranted in This Case, Such a Deposition, if Permitted, Would Not Justify The Discovery Sought From These Non-Parties

In seeking to quash the subpoenas, the non-party Movants noted that a stay order has been in effect for discovery in this case since February 5, 2007. Partial relief from the Order was granted on September 19, 2008, for the purpose of deposing Michael Connell and "any other witnesses" as long as the testimony of those witnesses "in the judgment of [the] parties, may be warranted based on the deposition of Michael Connell." Quoted in Nov. 19 Order at 8. Movants argued that the stay order prohibited Plaintiffs from seeking this discovery both directly, by its explicit terms allowing only deposition testimony warranted by the deposition testimony of Mr. Connell, and indirectly, because the parties had not agreed that the deposition of Rove was warranted, and if the deposition of Rove was not warranted, then there could be no reason to gather this information in preparation for that deposition.

As a finding of fact, the Magistrate Judge found that Secretary Brunner did not agree that the Connell testimony warranted the deposition of Mr. Rove. Nov. 19. Order at 9.[4] Plaintiffs devote much

[4] Plaintiffs argue, on the basis of, well, nothing, that "Secretary of State Brunner understood [that] Rove's deposition was the next logical step in discovery based upon the conclusions drawn from the Connell deposition." Motion for Reconsideration at 2. *But see* Defendants Response to the Plaintiffs' Attempt to Subpoena Karl Rove, at 3 ("The deposition of Mr. Connell had did [sic] not touch upon any campaign finance issues. Rather, it concerned

of the Motion for Reconsideration to arguing that the Secretary of State did agree that the Connell deposition warranted the deposition of Rove, but they present no new evidence that that is the case. Rather, they devote the first five pages of their motion to arguing why *Plaintiffs* still think it makes sense to depose Rove, including their belief that Michael Connell may have been assassinated on Rove's orders. But Plaintiffs produce no evidence, old or new, to suggest that the Magistrate's finding of fact – that the *Secretary* did *not* find that the Connell testimony warranted the deposition of Rove or the discovery sought from these non-party Movants - is wrong, let alone "clearly erroneous."

In the end, this may not matter. While Movants continue to believe, as argued in both Movants Motion to Quash and Supplemental Memorandum in Support of Motion to Quash, that the Discovery Stay of 2007 is sufficient to quash the subpoenas and deny Plaintiffs Motion to Compel, the Magistrate Judge's order here under review does not decide or rely on that point. Clearly the Magistrate Judge was skeptical of Plaintiffs' argument, but the Magistrate Judge ruled that "the Court will construe plaintiffs' filings liberally and deem plaintiffs to be arguing that, even if, in Secretary Brunner's judgment, the Rove deposition is not proper follow-on discovery as defined in the Agreed Order, it is … something that the Court should allow… ." *Id*. at 10.

But even if that were true, the Magistrate Judge noted, "there is simply no logical relationship between the plaintiffs' desire to take Mr. Rove's deposition on subjects broached at Mr. Connell's deposition and the documents the plaintiffs have asked the movants to produce." *Id.* at 11. In short, whether or not the Secretary might agree that the Rove deposition is warranted by the Connell testimony, a Rove deposition provides no basis for this discovery from the non-party Movants. Thus,

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the computer system and webpage that Mr. Connell set up for then-Secretary Blackwell. Similarly, the *King Lincoln* case itself does not involve campaign finance issues. Although this rationale may be outside the bounds of the Court's order on whether discovery can be had in this case, the Secretary of State has no objection to whether the deposition of Mr. Rove should be allowed to go forward."). Or course, the Secretary of State has little reason to spend time and effort to object, since the Plaintiffs' deposition of Rove, like their demand for discovery from the non-party movants, imposes no costs on the State, does not require the State to make public information it has a right to keep private, and, given the Plaintiffs' increasingly bizarre theories, probably poses no serious threat of harming the State's legal position in the matter.

the Order under review correctly holds that the discovery sought, even if it might be relevant in some longshot way in this lawsuit, is not relevant for the limited discovery allowed (assuming, but not deciding, that a deposition of Rove would be allowed) under the Stay Order.

B. The Magistrate Judge Correctly Held That the Discovery Sought is Burdensome and Not Relevant

The Federal Rules of Civil Procedure provide a broad sweep for discovery, but that sweep is not limitless. "Although a plaintiff should not be denied access to information necessary to establish [his] claim, neither may a plaintiff be permitted 'to go fishing and a trial court retains discretion to determine that a discovery request is too broad and oppressive.'" *Surles v. Greyhound Lines, Inc*., 474 F.3d 288, 305 (6th Cir. 2007). "The proponent of a motion to compel discovery bears the initial burden of proving that the information sought is relevant." *Martin v. Select Portfolio Serving Holding Corp*., No. 1:05-CV-273, 2006 U.S. Dist. LEXIS 68779, at 2 (S.D. Ohio September 25, 2006).

Here is how the Defendants in this action have described the case:

> The amended complaint alleged that the[] individual defendants conspired with 100 unknown John Doe defendants to steal the 2004 presidential election in Ohio. Namely, the Plaintiffs alleged that these defendants conspired to allow fraudulent votes to be cast in 2004 for President Bush, that they allowed the double counting of absentee ballots, that they suppressed or spoiled votes in areas that tended to vote for John Kerry, they inflated vote tabulations from areas that voted for President Bush, they failed to properly follow Ohio's recount laws, and they violated other provisions of state and federal law.

Defendants Response to the Plaintiffs' Attempt to Subpoena Karl Rove at 1-2. Perhaps more to the point, here is the Plaintiffs' own description of the issues in this lawsuit:

> The immediate purpose of the suit was to preserve the ballots and related materials for the 2004 Ohio presidential election with respect to which the 22-month retention schedule was about to expire. Suit was filed on August 31, 2006. On September 7, 2006, on motion of the plaintiffs and with agreement of defendant Secretary of State Kenneth Blackwell, this court issued an order to all of the Ohio county boards of elections to preserve the 2004 ballots and related materials until further order of the court.
>
> The broader purpose of plaintiffs' complaint was protection against an ongoing conspiracy to interfere with the voting rights of African American and college student voters that was evident in the 2004 Ohio presidential election, and with respect to

> which this court ordered relief on election day 2004 in an action brought by the Ohio Democratic Party. The original complaint sought intervention of the court through appointment of a special master to oversee the integrity of the 2006 Ohio election and protect against interference with voting rights in that important election. On October 9, 2006, plaintiffs amended their complaint to add Rainbow PUSH and the Columbus Coalition for the Homeless as plaintiffs, various additional defendants and a request to declare unconstitutional the voter ID requirements, passed on a partisan basis into Ohio law in 2005.

Plaintiffs Memorandum in Support of Motion for Relief from Stay, Doc. #39. Spending on advertising in the 2010 election cannot possibly lead to the discovery of admissible evidence for this suit, as described by the Plaintiffs themselves. Or, as the Magistrate Judge's order states, "The way in which the 2010 Ohio election may have been influenced by money flowing into campaign ads from anonymous donors is not a 'claim or defense' raised in the pleadings" in this case. Order, p. 12.

Beyond being of an entirely different nature from anything in the complaint and untethered to the complaint in any way, the information sought by Plaintiffs pertains to events occurring four years after this lawsuit was filed. Campaign expenditures made four years after this lawsuit was filed, and six years after the events that triggered this lawsuit, cannot be relevant to the claims of vote suppression that are the subject of this complaint, or be reasonably calculated to lead to the discovery of admissible evidence. Even if such campaign speech were illegal (as opposed to protected First Amendment activity), it would not constitute "interfere[nce] with voting rights," nor shed any light on such efforts. In fact, none of these non-party Movants has ever been accused of engaging in or abetting any of the activities that are the subject of this suit.

Plaintiffs are reduced to arguing that "the Chamber has not denied" prior allegations of Plaintiffs' attorneys that the Chamber and Partnership have not revealed all the information sought by Plaintiffs because doing so would reveal that their funding "is coming from those corporations who profit most from the sale of foreign manufactured goods." But the Chamber has no obligation to specifically denounce every crackpot theory that makes its way onto a blog somewhere, and such

allegations, even if true, would not violate the law, or serve as a predicate act for Arnebeck's threatened RICO action, or be reasonably calculated to lead to admissible evidence in this vote suppression case. However, that theory now having made its way, with this Motion to Reconsider, into a judicial pleading, let the record show that the Movants do deny that theory.

Yet even in developing this "guilty until proven innocent" theory of discovery, Plaintiffs reveal their true interest, and it is not to gain information needed for this suit or any deposition of Mr. Rove. Rather, they, through their attorney, argue that "[d]isclosure of the funding sources would reveal the Chamber's activities against the general welfare of the people of the United States and against the economic welfare of the general membership of the Chamber of Commerce" – the same argument made when Plaintiffs' counsel first sought to appropriate the OEC's subpoena power to gain this private information. Motion for Reconsideration at 6-7. Thus even if Plaintiffs' claim about Movants motives were true, it simply highlights the irrelevance of the requested discovery to this case. Plaintiffs' belief that Movants would be embarrassed is not relevant to this case or any other and is not reasonably calculated – nor, in this case, even vaguely intended - to lead to the discovery of admissible evidence. Rather, the information is sought as part of Plaintiffs' counsel's vendetta against the Chamber and the Partnership, and, apparently, in the hope of influencing future elections in Ohio, or for contesting the election just past.

Plaintiffs then suggest that the sought-after discovery is relevant because four corporations which the Plaintiffs apparently have already identified funded elections ads (not necessarily in Ohio) in 2001 – nine years ago. Further, they argue, some other companies have contributed money to the U.S. Chamber of Commerce. (The U.S. Chamber of Commerce, in case it needs any clarification, is not affiliated with any of these Movants). Those contributions allegedly occurred in 2003, six years ago. Meanwhile, Boeing Corp. and EADS, we are told, are in a bidding war for a U.S. Air Force contract, though Plaintiffs don't even try to explain the relevance of this last bit of data. *Id.* at 7-8. Expenditures

made the better part of a decade ago by organizations unaffiliated with the Movants, and lobbying disputes between EADS and Boeing, do nothing to demonstrate that the information sought from these non-parties has anything to do with this case.

Courts should consider the status of a non-party when determining if discovery is warranted. *Katz v. Batavia Marine & Sporting Supplies, Inc.*, 984 F.2d 422, 424 (Fed. Cir. 1993); *American Standard Inc. v. Pfizer, Inc.*, 828 F.2d 734, 738 (Fed. Cir. 1987). Discovery exists "for the sole purpose of assisting in the preparation and trial, or settlement, of litigated disputes. " *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984). Discovery does not exist for Plaintiffs' attorney to carry on his personal vendetta against the Movants, or to protest the lawful political activities of those with whom he disagrees. "Discovery … may seriously implicate privacy interests of litigants and third parties." *Id.* at 34-35. It is clear from the events in this lawsuit, including the three and a half year imposition of "hold documents" notice on the Chamber and the Partnership by the Plaintiffs' counsel on behalf of unspecified clients,[5] the efforts by Plaintiffs' counsel to obtain this discovery first through the Ohio Elections Commission, the Plaintiffs' own statements in this latest proceeding, and the statements of Plaintiffs' counsel in OEC proceedings and in various postings on public blogs, that their purpose is to force the Chamber and the Partnership to disclose information that they are not legally required to disclose, on the theory that forcing such disclosure will affect election outcomes in a manner that the Plaintiffs' counsel deems favorable to his political designs and conspiracy theories.

Courts should protect litigants, and even more, non-parties, where the information "if publicly released, could be damaging to reputation and privacy." *Flagg v. City of Detroit*, 268 F.R.D. 279, 282 (E.D. Mich. 2010), quoting *Seattle Times* at 34-35. In this case, there can be no doubt that, in addition to the lack of relevance of the discovery requested to the matter at hand, plaintiffs particularly seek to publicize private information and use it to

[5] Plaintiffs' counsel has never identified on whose behalf he asserts these notices. In this most recent motion, he states that "plaintiffs' counsel issued document hold notices," but still does not reveal if he considers those notices made on behalf of these plaintiffs.

harass these non-party Movants. Plaintiffs' counsel have already been blogging directly on these proceedings, misrepresenting their conversations with Movants and Movants' counsel in the process. *See e.g.* Bob Fitrakis and Harvey Wasserman, *Ohio Chamber Lies and Hides Election Buys,* Huffington Post, Nov. 2, 2010, available at http://www.huffingtonpost.com/bob-fitrakis-and-harvey-wasserman/ohio-chamber-lies-hides-e_b_777688.html; Harvey Wasserman, *Cliff Arnebeck: Ohio Chamber Commits to Produce List of Contributors Today,* Op-ed News, Nov. 1, 2010, available at http://www.opednews.com/articles/Cliff-Arnebeck-Ohio-Chamb-by-Harvey-Wasserman-101101-70.html. We can at least agree that Plaintiffs are not engaged in a fishing expedition here. Rather, they are engaged in a calculated program of harassment.

CONCLUSION

Courts have broad discretion to determine the relevance of information sought in discovery. *DeMasi v. Weiss,* 669 F.2d 114, 121-22 (3d Cir. 1982). While the standard for relevancy is broad, "parties should not be permitted to roam in shadow zones of relevancy and to explore a matter which does not presently appear germane on the theory that it might conceivably become so." *Surety Assoc. of America v. Republic Ins. Co.,* 388 F.2d 412, 414 (2d Cir. 1967). Given this broad discretion to manage discovery and to make determinations on relevance, it surely cannot be said that any part of the Order of the Magistrate Judge is either "clearly erroneous" or "contrary to law."

Plaintiffs' Counsel is engaged in a long-term pattern of harassment of the Chamber and the Partnership, and his abuse of this lawsuit and the Federal Rules of Civil Procedure to try to gain information to which he is not lawfully entitled is merely the latest such episode. This Court should affrim the Order of the Magistrate Judge quashing the subpoenas and denying Plaintiffs' Motion to Compel Production from these non-party witnesses.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was served on counsel for the parties and respondents through the court's electronic filing system, this 17th day of December, 2010.

/s/ Bradley Alan Smith, #0046887