

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

FILED
JAMES BONINI
CLERK

2008 SEP 25 P 3: 31

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

KING LINCOLN, ET AL.

PLAINTIFFS,

AND

THE OHIO ELECTION JUSTICE CAMPAIGN,
PADDY SHAFFER, MARLYS BARBEE,
VIRGINIA BROOKS, MARK BROWN,
BRUCE DUNCANSON, MARIAN LUPO,
PETER JONES, AND TIMOTHY KETTLER

individually and as CLASS REPRESENTATIVES
under Fed.R.Civ.P. 23,

v.

JENNIFER BRUNNER, ET AL.

DEFENDANTS.

Civil Action No. C2 06 745

**JUDGE ALGENON
MARBLEY**

**MAGISTRATE
JUDGE KEMP**

INTERVENOR-PLAINTIFFS OHIO ELECTION JUSTICE CAMPAIGN, ET AL.
MOTION FOR AN EXPEDITED CONFERENCE FOR APPARENT FRAUD
UPON THE COURT

Proposed Intervenor-Plaintiffs ("OEJC Plaintiffs") respectfully move this Court for an expedited conference with this Court and all parties to address the following, which raises issues of apparent fraud upon the Court:

1. The agreement among the Plaintiffs' counsel and Defendant's counsel for the limited lifting of a stay that expired over a year ago.

2. Plaintiffs' counsel's filing of a late reply in contravention of two orders issued by the Magistrate Judge and submission of two declarations in this reply under signature of counsel.

The grounds for this Motion are set forth in the Memorandum below.

MEMORANDUM

For the sake of clarity and brevity, the facts will be presented in chronological order, and the OEJC Plaintiffs incorporate in this motion by reference the procedural history and legal argument set forth in their Response in Opposition to Plaintiffs' Second Motion for an Extension of Time, which was filed and served on Wednesday, September 10, 2008 (Docket Entry #60).

Since filing this opposition response, the OEJC Plaintiffs received, by regular mail, a copy of the Plaintiffs' counsel reply (Docket Entry #57, filed September 8, 2008) to their response in opposition to the motion entitled, "Plaintiffs' Motion to Strike." (Motion to Strike, Docket Entry #43, filed July 31, 2008; OEJC Plaintiffs' Response, Docket Entry #46, filed August 13, 2008). Because the OEJC Plaintiffs serve, file, and receive all papers by mail pursuant to S.D. Ohio Local Rule 5.1(c), they did not receive service of the late reply until after they had filed their response in opposition to the second request for an extension.

Thus, after the Magistrate Judge twice denied Plaintiffs' counsel request for an extension to reply (Docket Entries #54 and #56), Plaintiffs' counsel filed the reply *anyway*, on the very day of the second order that by its terms, *did not* grant an extension of time to reply to the OEJC Plaintiffs' response, and before the OEJC Plaintiffs even had an opportunity to respond to this second request for an extension of time. Magistrate

Kemp's order is limited to an extension of time to reply to the Attorney General's response in opposition to the "Motion for Relief from Stay" (Docket Entry #45, filed 8/11/08), based upon the Attorney General's consent to yet another extension of time. In this untimely reply filed in contravention of two court orders, the Plaintiffs' counsel file two declarations, one bearing his signature (Mr. Arnebeck) and the other the signature of co-counsel (Mr. Fittrakis), averring facts they have reason to know are materially incorrect and that they had a chance to correct following the OEJC Plaintiffs' response, dated August 13, 2006 (Docket Entry #46).

In reference to the above "Motion for Relief from Stay" (Docket Entry #39, filed 7/17/2008), the OEJC Plaintiffs never received service of this motion nor the Defendant's response in opposition. Further, the OEJC Plaintiffs did not receive a copy of Plaintiffs' counsel's motion for an extension of time to reply, and they were not on notice this matter was even before the Magistrate Judge until they received in the mail from Magistrate Kemp the order dated August 27, 2008 (Docket Entry #49), granting an extension of time to Plaintiffs' counsel to file a reply to the Defendant's opposition to the "Motion for Relief from Stay."

The OEJC Plaintiffs then contacted Magistrate Kemp's chambers to determine the status of this stay, which according to their research had expired. Chambers confirmed that the last stay in this case had expired almost a year ago, on August 31, 2007 (Docket Entry #34, August 15, 2008). Nonetheless, on September 19, 2008, Plaintiffs' counsel filed an agreed order between the Plaintiffs' counsel (Mr. Arnebeck) and the Defendant's counsel (Mr. Coglianese) to partially lift the stay for the purposes of taking depositions (Docket Entry #65). The OEJC Plaintiffs received a copy of this order by mail after it

was filed. The circumstances surrounding this order give rise to an inference of improper or less than candid conduct on the part of counsel for the Plaintiffs and the Defendant.

In summary, Plaintiffs' counsel (Mr. Arnebeck) filed a motion to lift a long-expired stay, the Defendant's counsel (Mr. Coglianese) opposed this motion, agreeing in his papers that there was a stay in place, Plaintiff's counsel then filed almost innumerable motions for extensions of time to reply to the opposition, which Defendant's counsel agreed upon, and then the Plaintiffs' counsel presented to the Magistrate Judge an agreed upon order to partially lift the stay that had expired over a year ago.¹ Further, in their filings before this Court and the Magistrate Judge, neither attorney acknowledged that the stay had expired, although this fact is clear from the docket. Even if the docket is somehow not clear, the OEJC Plaintiffs, in their filings since July 7, 2007, when they made their Motion to Intervene (Docket Entry #36), have brought this fact to the attention of counsel for both parties and have continued to research this issue because of Plaintiffs' counsels' continuing public representations that the case is stayed. Thus, both parties have had ample opportunity to correct their filings regarding the expired stay. Further, on September 25, 2008, the OEJC Plaintiffs contacted both Plaintiffs' counsel (Mr. Arnebeck) and Defendant's counsel to ask them to withdraw their filings. Plaintiffs' counsel could not give an answer. The Defendant's counsel did not return the phone calls.²

Fraud on the court consists of conduct that is directed to the judicial machinery itself and is intentionally false, willfully blind to the truth, or in reckless disregard for the truth. See, e.g., *Demjanjuk v. Petrovsky*, 10 F.3d 338, 348 (6th Cir. 1993). It has been

¹ For the sake of brevity, this memorandum will not address the additional extension nor the late reply Plaintiffs' counsel eventually did file on the "Motion for Relief from Stay." (Docket Entries #62, 63, & 64)

² The OEJC Plaintiffs attempted to reach both Mr. Coglianese and Ms. Chin.

described by the Supreme Court as "a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944) (overruled on other grounds, *Standard Oil Co. v. United States*, 429 U.S. 17, 18 (1976)), cited and discussed in *Ciba Specialty Chemicals, Corp. v. Zinkan Enterprises, Inc.*, 2003 U.S. Dist. Lexis 19929; 68 U.S.P.Q.2D (BNA) 1550 (S.D. Ohio 2003) (Sargus, J.); *see also Workman v. Bell*, 484 F.3d 837 (6th Cir. 2007) (discussing elements of fraud upon court). Because counsels' actions are directed at the judicial machinery, and because they demonstrate, at a minimum, a reckless disregard of the truth, the OEJC Plaintiffs request an expedited conference to address these serious issues, which have also severely prejudiced, harassed, and oppressed them.

Conclusion

For the foregoing reasons, Proposed Intervenor-Plaintiffs respectfully request an expedited conference to address the above issues for apparent fraud upon the Court.

Dated: September 25, 2008

Respectfully submitted,

Paddy Shaffer

Paddy Shaffer, Pro Se

2408 Sonnington Drive

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Dated: September 24, 2008

Respectfully submitted,

A handwritten signature in cursive script that reads "Marlys Barbee". The signature is written in black ink and is positioned above the typed contact information.

Marlys Barbee, *Pro Se*
8137 W. Sharps Ridge Road
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Dated: September 25, 2008

Respectfully submitted,

Virginia Brooks

Virginia Brooks, *Pro Se*

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Dated: September 25, 2008

Respectfully submitted,

Mark P Brown

Mark Brown, *Pro Se*

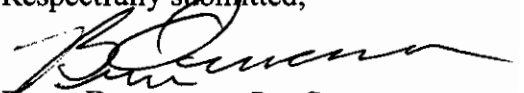
83 Hanford Street

Columbus, Ohio 43206

614-449-1989

Dated: September 25, 2008

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Bruce Duncanson", with a long, sweeping flourish extending to the right.

Bruce Duncanson, *Pro Se*
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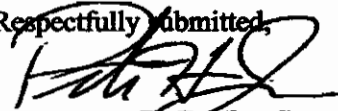
Dated: September 25, 2008

Respectfully submitted,

Marian Lupo
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Dated: September 25, 2008

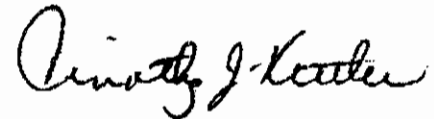
Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Peter Jones', written over the word 'Submitted'.

Peter Jones, Ph.D., *Pro Se*
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Dated: *Sept 25, 2008*

Respectfully submitted,



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Certificate of Service

I hereby certify that on September 25, 2008, the foregoing Motion for an Expedited Conference for Apparent Fraud Upon the Court was filed on paper in person with the clerk of court pursuant to U.S. District Court, S.D. Ohio local Civil Rule 5.1(c). A true copy of this motion was sent by regular mail to the following counsel of record:

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Richard W. Coglianese
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