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

Supplemental Memorandum of Non-Parties Partnership for Ohio's Future, the Ohio Chamber of Commerce Educational Foundation, Inc., Ohio Chamber of Commerce, Linda Woggon, and Andrew Doehrel in Support of Motion to Quash Subpoenas.

BACKGROUND

Since June of 2007, plaintiffs' attorney in this matter, Cliff Arnebeck, Jr., has placed a "document hold" order on the Partnership for Ohio's Future ("Partnership") and the Ohio Chamber of Commerce ("Chamber"), allegedly to preserve evidence for a lawsuit to be brought on behalf of unspecified plaintiffs alleging violations of Ohio's RICO statute. The alleged bases for this as yet unconsummated suit are actions allegedly taken by the Partnership and the Chamber to influence Ohio elections. In March of 2010, counsel for the Partnership and the Chamber contacted Mr. Arnebeck about ending the hold, in light of the fact that the statute of limitations on any predicate acts noted in the original document hold request had passed. On April 30, 2008 Mr. Arnebeck first stated his theory that the alleged "assassination" of Michael Connell in December 2008 constituted a new predicate act on which he might base his suit, thus extending, in his mind, the statute of limitations. The Partnership and Chamber have continued, at not inconsiderable cost and inconvenience, to hold documents now dating back over ten years as Mr. Arnebeck continues, apparently, to research conspiracy blog sites to build his case. See Plaintiffs' Supplemental Memorandum in Opposition to Motion to Quash, hereinafter "Plaintiffs' Supp. Memo.," Ex. 3.

On October 28, 2010, Mr. Arnebeck, in his individual capacity, filed a complaint with the Ohio Elections Commission alleging that the Partnership and two sitting Ohio Supreme Court Justices, Judith Lanzinger and Maureen O'Connor, had engaged in illegal coordinated spending during the course of the 2010 campaign, and further alleging that the legal notice required of all independent expenditures in campaign advertising, that the ads were "not authorized by any candidate or committee" therefore constituted a "false statement" by the Partnership in violation of the Ohio Revised Code. See Plaintiffs' Supp. Memo., Appendix 1. The Partnership responded on October 29 and a hearing was held before a probable cause panel of the Ohio Elections Commission on November 1, 2010.

In his complaint, Mr. Arnebeck made clear that he sought to use the subpoena power that would accrue to him through a finding of Probable Cause in order to "expose[]" the "corrupt nature" of the Partnership's lawful spending in connection with Ohio elections, which he alleged would "determine the outcome of those elections unless the public is informed before the election of the probable fact that these are illegal in-kind contributions to these campaigns." Plaintiffs' Supp. Memo., App. 1, p. 5, Para. 27. Further, he urged the Commission to find "probable cause" in order to "alert the public to the nature of the source of this money before the election." Id., p. 6, Para. 32. He reiterated these concerns at the public hearing on November 1, stating that, "unless you act today and find probable cause in our complaint [sic] and the media provides the information to the public," Maureen O'Connor and Judith Lanzinger would win elections to the Ohio Supreme Court. Id., App. 2, p 7. Describing the Partnership's activity as part of a "coup" to "take over the government of the United States and the states of this country," he urged the Commission to "blow the whistle." That, he said, they could do by authorizing the issuance of subpoenas "to get the donors [to the Partnership] disclosed." He concluded that compelling disclosure of the Partnership's donors before the election was necessary to "save democracy." "Allow me to issue these subpoenas, and it must be today, because the public needs to know." Id., p. 8-10, p. 20. At no point in his complaint to the Commission or in his oral presentation did

Mr. Arnebeck claim to need this information for any purpose other than to disclose it to the public and then to pursue additional charges against the Partnership.

It appears, however, that Mr. Arnebeck was concerned even before the hearing that the OEC would dismiss his complaint, and therefore began looking for alternative means to compel production. In an email to Defendant's counsel, Assistant Attorney General Richard Coglianese, sent at 10:15 p.m. on Sunday, October 31, 2010, Mr. Arnebeck sought permission to serve subpoenas on the Partnership and Chamber "under the auspices of the King Lincoln case," because, "the public will be irreparably harmed if it is not informed before Tuesday's election as to whom is funding these ads." In no way did he suggest that these subpoenas were necessary for him to prepare for his sought after deposition of Mr. Rove. See Defendants' Response to the Plaintiffs' Attempt to Subpoena Karl Rove, Ex. B.[1] Only after the Ohio Elections Commission dismissed Mr. Arnebeck's complaint with a finding of "no probable cause" did Mr. Arnebeck turn to this lawsuit, laying dormant in this court for the better part of two years, as a vehicle to try to force the Movants to disclose private information.

On November 1, approximately two hours after the OEC hearing dismissing his complaint, Mr. Arnebeck, now purporting to act on behalf of the King Lincoln Neighborhood Association, served or attempted to serve subpoenas on the Partnership for Ohio's Future, the Ohio Chamber of Commerce Educational Foundation, the Ohio Chamber of Commerce, Linda Woggon, and Andrew Doehrel ("Movants") seeking information about contributors to the organizations, demanding compliance in less than two and a half hours time.[2] Movants filed to quash the subpoenas that afternoon. On November

[1]In seeking to depose Mr. Rove, Mr. Arnebeck needed permission from the Defendants. To obtain this permission, Mr. Arnebeck appears to have directly contacted the defendant, Secretary of State Jennifer Brunner, even though Secretary Brunner is represented by counsel. See Defendants' Response to the Plaintiffs' Attempt to Subpoena Karl Rove, Ex. B.

[2] It is not entirely clear exactly whom Mr. Arnebeck seeks to serve. One subpoena is addressed to the Partnership for Ohio's Future, but a second is addressed to Linda Woggon at the Partnership for Ohio's Future – it is not clear if this is merely duplicative or if he is attempting to serve Ms. Woggon personally. The other two subpoenas are addressed to Andrew E. Doehrel, one at the Ohio Chamber of Commerce, and one at the Ohio Chamber of Commerce Educational Foundation. Again, it is not clear if he seeks to subpoena Mr. Doehrel personally or the

2, Mr. Arnebeck served a Motion to Compel Discovery. At a telephone conference with Movants' counsel, State's Attorney Richard Coglianese, and Magistrate Judge Kemp on November 2, Mr. Arnebeck asserted that an immediate order to compel was necessary in order to inform as many Ohio voters as possible of the names of contributors and the dates and amounts of contributions to the Partnership before the polls closed. Only after it became clear that the Magistrate would not order immediate compliance with the subpoenas did Mr. Arnebeck then suggest that he needed the information in question in order to properly depose Karl Rove, a former presidential advisor that Mr. Arnebeck seeks to depose in this case.[3]

Acting on Mr. Arnebeck's insistence that time was of the essence, the Magistrate ordered the parties to the case to file supplemental memoranda by November 9, and granted these non-party Movants until November 12 to respond. On November 10 Mr. Arnebeck requested permission from the Assistant Attorney General and from Counsel for Movants to file a late reply "one day out of period, that is today." Consent was granted by Movants and Defendant Brunner, but though he sought no further extensions, Mr. Arnebeck still did not file until the morning of Saturday, November 13.

ARGUMENT

Mr. Arnebeck, speaking at times for himself (the OEC complaint) and at times purportedly on behalf of his clients in this suit, claims to be fighting a great evil. Just in the documents connected to this discovery request and motion to quash, plaintiffs, through their counsel, have suggested that numerous well known and established civic and trade organizations (including Movant the Ohio Chamber of Commerce), two sitting Justices of the Ohio Supreme Court, and numerous other high ranking and current officials and former officials, including U.S. Senator Bob Corker, former U.S. Senate Majority

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organizations, which is made more confusing by the fact that one of the subpoenas – to the Partnership for Ohio's Future – does not attempt to name an individual.

[3] In seeking to depose Mr. Rove, Mr. Arnebeck needed permission from the Defendants. To obtain this permission, Mr. Arnebeck directly contacted the defendant, Secretary of State Jennifer Brunner, even though Secretary Brunner is represented by counsel. See Defendants' Response to the Plaintiffs' Attempt to Subpoena Karl Rove, Ex. A.

Leader Bob Dole, former Speaker of the U.S. House of Representatives Newt Gingrich, former Ohio Governor Robert Taft, and others, have engaged in criminal and civil violations of the law. Plaintiffs, through counsel, have accused a former top advisor to the President of the United States of arranging the assassination of an innocent informant, and unspecified elements of the U.S. Military, the Federal Bureau of Investigation, and the National Transportation Safety Board of engaging in a cover-up of this assassination. All of this is part of an illegal "coup," Plaintiffs' counsel asserts, to take over the government of the United States and the State of Ohio.

It is good that Plaintiffs make such allegations, for no lesser threat could justify the repeated assertions of inflammatory, illogical, and likely defamatory remarks, the regular divulging of confidential communications with opposing counsel, the bending of ethical rules, and the abuse of this case to attempt to gain information from the Movants that Movants are not legally required to disclose.

Movants see no reason why they should be forced to expend time and money and suffer a loss of confidentiality and privacy to themselves and the non-parties who have donated to the Partnership so that Plaintiffs (or their attorneys) may indulge these bizarre theories. Plaintiffs' discovery request are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this case, and suffer from other defects as discussed below.

A. The information sought is not relevant to this case.

"The deposition of Mr. Connell did not touch upon any campaign finance issues. Rather, it concerned 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." Defendants Response at 3. Plaintiffs now seek to discover from Movant non-party witnesses private information on their funding and their donors. According to plaintiffs' attorney in an email to Defendant Brunner's counsel, "creating an avalanche of billionaire/global corporate funding in favor of candidates in favor or freedom of special

interests from taxation and regulation is just another form of fraudulent manipulation of the election process." *See* Defendants Response, Ex. A.

Except that, of course, it is not illegal to make independent campaign expenditures in any amount – in fact, it is constitutionally protected activity. *See Citizens United v. Federal Election Commission,* 130 S. Ct. 876 (2010), *Buckley v. Valeo,* 424 U.S. 1, 44-51 (1976). Plaintiffs (or at least plaintiffs' counsel) have responded by alleging that otherwise legal expenditures are illegal because they are "coordinated." But Plaintiffs present no evidence of this whatsoever. They produce, to be sure, various news columns and interview transcripts in which various individuals freely admit to coordinating their election related activity with other individuals or entities (though interestingly, these do not include any of the Movants). And they are free to state this so publicly because coordination of election spending between these individuals and organizations is not illegal, under either Ohio or Federal law. Rather, coordinated spending becomes treated as a "contribution" (and hence subject to legal limits and prohibitions) only when it is conducted between entities or individuals and political candidates or committees. *See* O.R.C. 3517.01(B)(17)(d); 2 U.S.C. 441a(7)(B); 11 C.F.R. 109.1 et seq.

In his complaint at the OEC, Plaintiffs' attorney admits that his allegations of "coordination" were not based on a legal definition but on the theory that the expenditures were "de facto" coordinated, admitting that they were not "officially" coordinated. Plaintiffs' Supp. Memo. App. 1, p. 1, para. 2, and at 6, para. 31. This is not enough. Coordination, in the sense that it is subject to legal restrictions, is a legal concept. Plaintiffs cannot claim that they need this discovery of what their counsel implicitly admits is legal activity because they claim it will prove that these non-parties are engaged in illegal activity with Karl Rove. And if, as Plaintiffs' counsel implicitly admits, this is legal activity, it is highly unlikely to lead to the discovery of admissible evidence regarding Karl Rove's alleged illegal assassinations and conspiracies. If Plaintiffs' theory were to stand, any individual making any type of political expenditure could be hauled before a court and subjected to onerous discovery requests on the

theory that what appear to be constitutionally protected independent expenditures may in fact have been coordinated. One hesitates to raise the time-worn claim of "fishing expedition," but it is hard to know what else one calls this theory but perpetually legalized fishing expeditions with no statute of limitations because, in plaintiffs mind, each election in which a party exercises its First Amendment rights constitutes a new predicate act for a RICO charge.

Because this type of discovery from non-parties involves core First Amendment rights, the Court should be particularly hesitant to allow this type of behavior in the discovery process. Investigations chill constitutionally protected political speech through the burdens they places on speakers. *See Wisconsin Right to Life v. Federal Election Commission,* 551 U.S. 449, 482 (2007)(Alito, J., concurring); *Id* at 497 (Scalia, J., concurring). In *AFL-CIO v. Federal Election Commission,* 333 F. 3d 168 (D.C. Cir. 2003), the Court held that an FEC practice of disclosing donor information was unconstitutional because it "creates an incentive for political groups to file complaints against their opponents in order to gain access to their strategic plans, as well as to chill the opponents' activities," and would "directly frustrate the organizations' ability to pursue their political goals effectively by revealing to their opponents activities, strategies and tactics… ." 333 F. 3d at 183 (quoting brief of James Madison Center), 176-77. Those same concerns are applicable here. If Plaintiffs can invoke discovery on these non-party witnesses on such speculative grounds, it will encourage others to file suits based on nothing more than the mere allegation of coordination, simply to use the discovery process to learn the tactics and strategies of the opposing side. After all, any group or individual can be charged with coordinating any expenditure. Solicitude for avoiding unnecessary chilling of speech is even more important in this case, where not only the privacy rights of the Movants is involved, but also the rights of those who contributed to the Chamber and the Partnership with the understanding that the data would remain confidential, as permitted by law. *See* Ohio Elections Commission, Advisory Opinion 2010ELC-02 (Noting that Ohio law does not require corporations making expenditures in Ohio elections to make any

disclosures.[4]) Those donors are unrepresented in this motion to compel, and it is therefore up to the Court to protect those missing non-parties.

The need to avoid chilling speech is especially apparent in a case such as this, in which Plaintiffs' counsel has a history of revealing private and/or confidential information. See Plaintiffs' Supp. Memo. Appendix 1 at p. 4, para. 20; 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. Plaintiffs' lead counsel, Mr. Arnebeck, has made no secret, in his October 28 OEC complaint, at the November 1 hearing before the OEC, in his October 31 email to Richard Coglianese, and in the conference with the Magistrate Judge on November 2, that his primary reason for seeking the information is to release it publicly in the hope that it will sway the electorate and discourage future lawful political activity by their political opponents. Plaintiffs' co-counsel Wasserman and Fitrakis have similarly displayed no hesitancy in writing publicly about the content of conversations between attorneys and parties on blogs - and misrepresenting the contents of those discussions to boot. *See* Fitrakis & Wasserman, *supra; see* 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.

Moreover, even under Plaintiffs' theory of relevance, this discovery is not needed to help Plaintiffs' counsel prepare to depose Karl Rove. Plaintiffs' have in their possession a list of donors to the Partnership for Ohio's Future in 2010, which list was made available on request to any member of the public. Plaintiffs can certainly ask Mr. Rove about these donors to the Partnership. But conspicuously absent from Plaintiffs Motion to Compel, or its supplemental memorandum, is any explanation of how

[4] Despite the absence of any legal requirement to do so, Movant Partnership for Ohio's Future has filed reports on its spending with the Ohio Secretary of State, *see* Plaintiffs Supp. Memo. App. 1, Ex. 2, and has made available on request, as noted above, the names of contributors to its efforts, but not the other information sought by Plaintiffs, *see* Plaintiffs Supp. Memo. Ex. 2.

the added information it seeks is necessary for its deposition of Mr. Rove. It seeks to know exact amounts and dates of contributions, and disbursements that were not made for political expenditures but were made by the Partnership to other organizations. None of that information is necessary to ask Mr. Rove about plaintiffs' theory of illegal coordinated expenditures being somehow part of the conspiracy to deprive minority voters of their rights – the original issue in this case.

In short, plaintiffs and their attorneys have made abundantly clear that their goal is to force the disclosure of information which is not legally required to be disclosed, in the hope that this violation of privacy will discourage further political activity by the Movants and others. The information sought is not relevant to the King Lincoln suit or to any efforts by the plaintiffs to prepare to depose Karl Rove.

B. The subpoenas violate this Court's Stay Order

This Court's Stay Order of April 6, 2007 prohibits further discovery in this case. On September 19, 2008, this Court lifted the Stay "for the sole purpose of permitting the plaintiffs to take the deposition of Michael Connell and any other witnesses whose testimony, in the judgment of these parties, may be warranted based upon the deposition of Michael Connell."

Plaintiffs (including Plaintiffs' counsel Arnebeck, acting on behalf of himself in the OEC Complaint 2010E-122, *Arnebeck v. Partnership for Ohio's Future*) have at no point alleged that anything in Mr. Connell's testimony mentioned or touched on the operations of the Partnership for Ohio's Future, the Chamber, or any of the other Movants. Rather, their clear purpose in pursuing this discovery request is simply too obtain information on the private operations of the Partnership and the Chamber, and on donors who gave to those organizations in the assumption that the details would, as permitted by law, remain confidential.

While Defendant Brunner has stated that she has "no objection to whether the deposition of Mr. Rove should be allowed to go forward," the Secretary does not suggest that this discovery is in any way related to Mr. Connell's testimony. See Defendants' Response at p. 3 ("The deposition of Mr.

Connell had did [sic] not touch on any campaign finance issues.") Thus, the matter remains outside the scope of the Court's order. Of course there is little reason for the Secretary to object at this point – the burden of complying with the deposition falls on Mr. Rove, and the burden of complying with the subpoenas in this matter falls on the Movants and on donors to the Partnership for Ohio's Future, who are not here represented. But in any case, even if the Secretary of State has "no objection" to the deposition of Mr. Rove, she has not consented to *this* discovery, that is, to the subpoenas for information from these non-parties.

Furthermore, there is another defendant in this case who remains unconsulted. Plaintiffs chose, for what appear to be political reasons, to name former Ohio Secretary of State Kenneth Blackwell as a defendant in this case not only in his official capacity, but in his personal capacity. Having made that determination, they cannot simply ignore Mr. Blackwell when it is inconvenient to their efforts to use the King Lincoln case to gain information from non-parties. Without Mr. Blackwell's agreement, this discovery falls outside the stay order.

C. Any discovery order should not be granted until it is clear that Mr. Rove will be deposed.

Karl Rove has filed a motion to quash the deposition scheduled for November 29. Plaintiffs, after initially seeking the information from Movants in order to publicize prior to the election, now argue that the reason they need the demanded information from the Movants is to prepare to depose Mr. Rove. Even if any of this information were necessary to that effort (and it is not, see above), there is no reason to order production until it is certain that the deposition of Mr. Rove will go forward.

D. **Movants Woggon and Doehrel were not properly served**.

Movants Woggon and Doehrel were not properly served. *See* Memorandum in support of Motion to Quash, p. 3.

CONCLUSION

Plaintiffs' subpoenas should be quashed and the motion to compel discovery against these non-parties denied, and Movants should be awarded attorney's fees for the cost of responding to these subpoenas.

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 15th day of November, 2010.

/s/ Bradley Alan Smith, #0046887