

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

THE CONSTITUTION PARTY OF
PENNSYLVANIA, THE GREEN PARTY OF
PENNSYLVANIA, THE LIBERTARIAN
PARTY OF PENNSYLVANIA, JOE MURPHY,
JAMES N. CLYMER, CARL J. ROMANELLI,
THOMAS ROBERT STEVENS and KEN
KRAWCHUK,

Plaintiffs,

V.

CAROL AICHELE, JONATHAN M. MARKS
and LINDA L. KELLY,

Defendants.

Civil Action No. 5:12-cv-02726

The Honorable Lawrence F. Stengel

MOTION TO INTERVENE AS DEFENDANTS

Pursuant to Federal Rule of Civil Procedure 24, Pennsylvania electors Carol Sides, Richard J. Tems, Louis Nudi, Damon Kegerise, Anne Layng and Judith Guise (collectively, as the “Intervenors”) hereby move to intervene as defendants in this action. The Intervenors wish to safeguard the integrity of the signature-gathering process underlying the nomination of candidates from minor political parties and, specifically, to defend the statute that authorizes Pennsylvania courts to award legal fees and costs to the prevailing party in nomination paper challenges. The Intervenors have an interest which is distinct and different from Defendants Carol Aichele, Jonathan M. Marks and Linda L. Kelly (“Defendants”) in that the Intervenors have filed objections in the Commonwealth Court of Pennsylvania to the nomination papers submitted by some of the Plaintiffs. Under Section 977 of the Pennsylvania Election Code, 25 P.S. §2937, 1937 Pa. Laws 1333, § 977 (“Section 977”), if Intervenors’ objections are

successful, they may be entitled to reimbursement of all or a portion of their litigation fees and costs if the Commonwealth Court deems reimbursement to be just. Accordingly, Intervenor seeks permission to intervene in this matter.

In support of this Motion, Intervenor aver as follows:

FACTS

From February to July 2012, the Constitution Party of Pennsylvania and the Libertarian Party of Pennsylvania (together, the “Party Plaintiffs”) collected signatures on nomination papers in an attempt to qualify their candidates for placement on the ballot for the November 6, 2012 General Election. To qualify for placement on the November 6, 2012 ballot, the Party Plaintiffs are required under the Pennsylvania Election Code to submit nomination papers which contain at least 20,601 signatures, which number represents two percent (2%) of the largest entire vote cast for any elected candidate in Pennsylvania at the last preceding election at which State-wide candidates were voted for. *See* 25 P.S. § 2911(b), 1937 Pa. Laws 1333, § 951 (“Section 951”).

On May 17, 2012, the Party Plaintiffs and others filed the Complaint in this action. The Complaint seeks, among other things, a declaration that, in nomination papers submitted under Section 951, Pennsylvania courts cannot assess legal fees and costs against the losing party pursuant to Section 977.

On August 1, 2012, the Party Plaintiffs submitted the signatures that they had gathered between February and July 2012, seeking to nominate, among others, Plaintiffs Joe Murphy and James N. Clymer as the Constitution Party’s candidates for the offices of Vice President of the United States and United States Senator for the Commonwealth of Pennsylvania, respectfully, and Ken Krawchuk as one of the Libertarian Party’s Presidential Electors. Neither Plaintiff Carl

J. Romanelli nor Thomas Robert Stevens were named on the nomination papers that the Party Plaintiffs submitted on August 1, 2012.

In reviewing the signatures submitted by the Party Plaintiffs, the Intervenor discovered extensive irregularities and probable fraud. In light of their findings, on August 8, 2012 the Intervenor filed in the Commonwealth Court of Pennsylvania two separate legal challenges to the Party Plaintiffs' nomination paper signatures. The first challenge is captioned "*In re Nomination Papers of Margaret K. Robertson, et al.*," and docketed at 507 M.D. 2012, and the second challenge is captioned "*In re Nomination Papers of Virgil H. Goode, et al.*," and docketed at 508 M.D. 2012. True and correct copies of the two nomination paper challenges (sans Exhibit 1¹) are attached hereto, marked as Exhibits "A" and "B." In their challenges, Intervenor has raised line-item and global challenges to the Party Plaintiffs' nomination papers, including a global objection requesting the Commonwealth Court to set aside the nomination papers on the basis of pervasive fraud in the signature collection process. *See* Exh. A (Petition to Set Aside Nomination Papers, 507 M.D. 2012, ¶¶ 31-38); Exh. B (Petition to Set Aside Nomination Papers, 508 M.D. 2012, ¶¶ 31-49).

On August 10, 2012, the Commonwealth Court issued Scheduling and Case Management Orders with respect to the Intervenor's nomination paper challenges, ordering an initial signature review to begin on August 20, 2012, at the Philadelphia Board of Elections. True and correct copies of the Commonwealth Court's August 10, 2012 Scheduling and Case Management Orders are attached hereto, marked as Exhibits "C" and "D," and made a part hereof.

¹ Exhibit 1 to each of the nomination paper challenges represent the Excel spreadsheets that the Commonwealth Court requires to be used and filed both in paper format and electronically with the nomination paper challenges. Because of their size, paper copies of Exhibit 1 to both nomination paper challenges are quite large. With the Court's permission, Intervenor will provide the Court with electronic versions of Exhibit 1 to the two nomination paper challenges.

On the same day that Intervenor filed their petitions with the Commonwealth Court, the Plaintiffs filed their Motion for Temporary Restraining Order or Preliminary Injunction [ECF No. 12] (the “Motion”) in this action. The Motion seeks to enjoin, among other things, enforcement of Section 951’s signature-gathering requirement and Section 977’s cost-shifting provisions.

Because the Motion, if granted, would limit and/or eliminate Intervenor’s remedies in their pending nomination papers challenges, Intervenor wishes to intervene as defendant in this action and present evidence and arguments in opposition to Plaintiffs’ claims and the Motion, including without limitation those set forth in the opposition memorandum and joinder motion to dismiss attached hereto as Exhibits “E” and “F.”

APPLICABLE LEGAL STANDARDS

The Federal Rules of Civil Procedure recognize two forms of intervention: intervention of right and permissive intervention.

In the Third Circuit, intervention of right has four elements: “(1) the application for intervention [must be] timely; (2) the applicant [must have] a sufficient interest in the litigation; (3) [there must be a possibility that] the interest [will] be affected or impaired, as a practical matter[,] by the disposition of the action; and (4) the interest [must not be] adequately represented by an existing party in the litigation.” *Brody v. Spang*, 957 F.2d 1108, 1115 (3d Cir. 1992) (quoting *Harris v. Pernsley*, 820 F.2d 592, 596 (3d Cir. 1987)); *see also* Fed. R. Civ. P. 24(a)(2). When the four elements of intervention of right are met, the court has ancillary jurisdiction to hear the intervenor’s claims and arguments. 28 U.S.C. § 1367; *see also Ambromovage v. United Mine Workers*, 726 F.2d 972, 989 (3d Cir. 1984).

Where the movant merely “has a claim or defense that shares with the main action a common question of law or fact,” the court has discretion to allow permissive intervention. Fed. R. Civ. P. 24(b)(1)(B); *see also Hoots v. Pennsylvania*, 672 F.2d 1133, 1136 (3d Cir. 1982). For permissive intervention, unlike intervention of right, the court may not review an intervenor’s claims or arguments unless there are “independent jurisdictional grounds.” *Beach v. KDI Corp.*, 490 F.2d 1312, 1319 (3d Cir. 1974) (quoting *Babcock & Wilcox Co. v. Parsons Corp.*, 430 F.2d 531, 540 (8th Cir. 1970)).

ARGUMENT

The Intervenors may intervene of right. Alternatively, this Court should allow permissive intervention.

I. THE INTERVENORS MAY INTERVENE OF RIGHT.

Each of the four elements for intervention of right is met in this case. The Intervenors therefore may intervene of right.

A. This Motion Is Timely.

A motion to intervene of right must be timely. *Brody*, 957 F.2d at 1115. Courts must review timeliness based on all the factors in a case, but “should be reluctant to dismiss a request for intervention as untimely.” *Mountain Top Condo. Ass’n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 369-70 (3d Cir. 1995) (quoting *Halderman v. Pennhurst State Sch. & Hosp.*, 612 F.2d 131 (3d Cir. 1979)).

In this case, the Party Plaintiffs submitted their signatures on August 1, 2012. One week later, on August 8, 2012, the Intervenors filed their challenges to the Party Plaintiffs’ signatures and the Plaintiffs filed the Motion. This motion to intervene, along with a joinder in Defendants’ Motion to Dismiss and Intervenors’ Opposition to Plaintiffs’ Motion for Preliminary Injunction,

is being filed a mere four (4) business days after the Motion was filed. Intervenor has filed *before* the deadline for existing Defendants in the action to respond to the Motion; their motion to intervene is not only timely, but expeditious.

B. Intervenor Has a Sufficient Interest in This Litigation.

For intervention of right, the movant must have “a sufficient interest in the litigation.” *Brody*, 957 F.2d at 1115.

The Intervenor’s interest in this litigation is significant. As this Court has previously noted:

Neither the judicial nor executive defendants can initiate a suit challenging a candidate’s nomination paper. *See* 25 P.S. § 2937. Only private individuals may challenge a non-major party candidate’s nomination paper. If the paper is dismissed, a state court could require the candidate to pay costs “as [the court] shall deem just.” 25 P.S. § 2937; [*In re Nomination Paper of*] *Nader*, 905 A.2d [450, 458] (Pa. 2006)].

Constitution Party v. Cortes, 712 F. Supp. 2d 387, 397 (E.D. Pa. 2010). Hence, only the Intervenor, not the Defendants, possess the very interest which the Plaintiffs seek to enjoin or otherwise divest: the ability to challenge a non-major party candidate’s nomination paper because it fails to contain the requisite number of valid signatures of qualified, registered electors.

Moreover, the Intervenor’s legal challenges to the Party Plaintiffs’ nomination papers have already resulted in legal fees and costs incurred by the Intervenor, and will most likely give rise to further fees and costs for all parties to the nomination paper challenges. Because those legal fees and costs are likely to be significant for all parties involved in the nomination paper challenges, the Intervenor’s potential liability for such expenses represents a very significant interest.

As a result, the Intervenor has a sufficient interest in this litigation.

C. The Disposition of This Action May as a Practical Matter Impair or Impede the Intervenor's Interests.

Intervention of right is appropriate only where there is a possibility that, as a practical matter, Intervenor's interests may be affected or impaired by the disposition of the action. *Brody*, 957 F.2d at 1115. "In order to prove an interest is impeded, the third part of the intervention test, the applicant must demonstrate 'a tangible threat to [its] legal interest.'" *United States v. Alcan Aluminum, Inc.*, 25 F.3d 1174, 1185 n.15 (3d Cir. 1994) (quoting *Brody*, 957 F.2d at 1123).

The disposition of the Motion, and the resolution of this action more generally, will have a tremendous impact on the Intervenor's interests. If the court grants the Motion and enjoins enforcement of Section 951's signature requirement, then the Intervenor's rights as registered members of the Pennsylvania electorate to challenge otherwise invalid nomination papers will be divested or lost, in contravention of the private enforcement scheme enacted by the General Assembly under Section 977. Similarly, if the Court enjoins enforcement of Section 977's cost-shifting provisions, the Intervenor will be forced to internalize all the fees and costs they accrue in the prosecution of their nomination paper challenges. If the Motion is denied, however, the Intervenor expects that, in light of the significant number of invalid signatures and the Party Plaintiffs' demonstrable bad faith and fraudulent conduct in collecting signatures on the nomination papers, the Pennsylvania courts will grant the Intervenor's petitions to set aside the Party Plaintiffs' nomination papers. Intervenor further expects that the Commonwealth Court will find an award of fees and costs against the Party Plaintiffs to be just. If this occurs, Intervenor will not be liable for at least a portion of their fees and costs incurred in bringing their nomination paper challenges. The disposition of the Motion, and judgment in this action more generally, will therefore directly impact the Intervenor's interests.

D. The Existing Parties Do Not Adequately Represent the Intervenor's Interests.

Although an intervenor must explain why its interest may not be adequately represented by an existing party in the litigation, *see Brody*, 957 F.2d at 1115, the Supreme Court has held that such a showing is a “minimal” requirement. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972).

In this case, the existing Defendants will not adequately represent the Intervenor's interests. Although the existing Defendants are responsible for the administration of elections in Pennsylvania, and can be trusted to defend the fair administration of elections generally, they have no interest in the Intervenor's pending nomination paper challenges or the allocation of fees and costs arising in connection with those challenges. *See Constitution Party*, 712 F. Supp. 2d at 397. If the reallocation of fees and costs in a nomination contest are subject to certain constitutional limitations, as the Party Plaintiffs argue in the Motion,² there are a number of reasons why the Party Plaintiffs should nonetheless absorb fees and costs in the currently pending nomination paper challenges filed by the Intervenor (*e.g.*, the doctrines of abstention, laches, and unclean hands). Because the existing Defendants in this action have no stake in the Intervenor's nomination paper challenges, however, the existing Defendants in this action are unlikely to raise such arguments. The Intervenor must, therefore, be permitted to raise such arguments in this action in order to demonstrate the outer limits of the arguments being advanced by the Plaintiffs, and to ensure that the Intervenor's interests are adequately represented.

² For the avoidance of doubt, the Intervenor disagrees with the Plaintiffs' arguments and maintain that, pursuant to Section 977, the losing party in a nomination petition or paper challenge should bear all parties' fees and costs if a court determines it to be just.

II. **ALTERNATIVELY, THE COURT SHOULD GRANT PERMISSIVE INTERVENTION.**

A. **The Intervenors' Claims and Defenses Have a Question of Law in Common with the Plaintiffs' Claims and Arguments in This Action.**

Federal Rule of Civil Procedure 24(b)(1)(B) provides permissive intervention whenever a movant "has a claim or defense that shares with the main action a common question of law or fact."

In this case, the Intervenors have such claims and defenses. Specifically, the Intervenors have a claim for legal fees and costs in the currently pending nomination paper challenges and, as discussed in their Intervenors' substantive response to the Motion and the Defendants' Motion To Dismiss, defenses to the Plaintiffs' argument that the U.S. Constitution prohibits the award of legal fees and costs in all nomination petition or paper challenges. Such claims and defenses share with this action a common question of law, namely, whether Pennsylvania courts may award legal fees and costs to the prevailing party in the pending nomination paper challenges pursuant to Section 977 without violating the First and Fourteenth Amendments to the U.S. Constitution. Because there is a common question of law, this Court has discretion to grant permissive intervention.

The Court should exercise its discretion to allow intervention in this case. By deciding the common questions of law in one action, in which all the interested parties are joined, the Court will be able to evaluate all competing claims and arguments without piecemeal and prolonged adjudication. That is particularly important in this matter because the November 6, 2012 General Election is fast approaching, and the parties must begin preparing ballots and voting machines, and campaigning to the voters, immediately. Consequently, the proximity of

the November 6, 2012 General Election makes intervention and consolidation unusually important in this matter.

B. The Court Has Independent Jurisdiction over the Intervenor's Arguments.

Before examining claims and arguments raised through permissive intervention, this Court must have an independent jurisdictional basis. *KDI Corp.*, 490 F.2d at 1319.

This Court has federal question jurisdiction over the Intervenor's arguments because the Intervenor is merely raising defenses to the Plaintiffs' claims—and each of the Plaintiffs' claims, in turn, arises under the First and Fourteenth Amendments to the U.S. Constitution and 42 U.S.C. § 1983. *See* 28 U.S.C. § 1331 (providing federal question jurisdiction for all claims arising under the "Constitution [and] laws . . . of the United States").

CONCLUSION

For the reasons discussed above, this Court should grant the Intervenor's motion to intervene as defendants in this action.

Dated: August 14, 2012

Respectfully submitted,

Ronald L. Hicks, Jr., Esquire
PA ID #49520
rlh@muslaw.com
MEYER, UNKOVIC & SCOTT LLP
Firm #199
535 Smithfield Street
1300 Oliver Building
Pittsburgh, PA 15222
Tele: (412) 456-2800
Fax: (412) 456-2864

and

Lawrence M. Otter, Esquire
PA ID #31383
PO BOX 2131
Doylestown, PA 18901
Tele: (267) 261-2948
email: larryotter@hotmail.com

and

Jonathan S. Goldstein, Esquire
PA ID #201627
Jonathan@POBOX.com
Law Offices of Jonathan S. Goldstein, LLC
P.O. Box 945
Narberth, PA 19072
Tele: (610) 949-0444

Attorneys for Intervenors

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

THE CONSTITUTION PARTY OF
PENNSYLVANIA, et. al.,

Plaintiffs,

v.

CAROL AICHELE, et al.,

Defendants.

:
:
: Civil Action No. 5:12-cv-02726
:
:
: The Honorable Lawrence F. Stengel
:
:
:
:

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August, 2012, I caused the foregoing Motion to Intervene As Defendants to be served by means of the Court's CM/ECF system, upon the following:

Oliver B. Hall
CENTER FOR COMPETITIVE
DEMOCRACY
P.O. Box 21090
Washington, D.C. 20009
Counsel for Plaintiffs

Sean A. Kirkpatrick
Deputy Attorney General
Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
Counsel for Defendants

Ronald L. Hicks, Jr.