

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

IN RE: NOMINATION PAPERS OF MARGARET K. :
ROBERTSON FOR PRESIDENT OF THE UNITED :
STATES, ERIK VIKER FOR VICE PRESIDENT OF THE :
UNITED STATES, RAYBURN DOUGLAS SMITH FOR :
UNITED STATES SENATOR OF THE :
COMMONWEALTH OF PENNSYLVANIA, :
MARAKAY ROGERS FOR ATTORNEY GENERAL OF :
THE COMMONWEALTH OF PENNSYLVANIA, :
BETSY SUMMERS FOR AUDITOR GENERAL OF THE :
COMMONWEALTH OF PENNSYLVANIA, AND ROY :
MINET FOR TREASURER OF THE :
COMMONWEALTH OF PENNSYLVANIA, AS :
CANDIDATES OF THE LIBERTARIAN PARTY IN :
THE GENERAL ELECTION OF NOVEMBER 6, 2012 :
:
OBJECTIONS OF: DAMON KEGERISE, ANNE :
LAYNG, AND JUDITH GUISE :

DOCKET NO. 507 MD 2012

SENIOR JUDGE
JAMES GARDNER COLINS

ELECTION LAW CASE

RECEIVED & FILED
COMMONWEALTH COURT
OF PENNSYLVANIA
39 DEC 2012 14 39

**RESPONDENTS' MOTION FOR IMPOSITION OF COSTS AND RELATED FEES AND
EXPENSES AGAINST PETITIONERS**

On October 10, 2012, this Court dismissed Petitioners' "Petition to Set Aside Nomination Papers" filed by Petitioners with this Court on August 8, 2012 (hereinafter the "Petition") to remove the Libertarian Party candidates for: President of the United States; Vice President of the United States; United States Senator of the Commonwealth of Pennsylvania; Attorney General, Auditor General and Treasurer of the Commonwealth of Pennsylvania from the November, 2012, Pennsylvania General Election ballot (the "Nomination Papers"). Accordingly, pursuant to Section 977 of the Pennsylvania Election Code (the "Election Code"), Respondents have earned prevailing party status, eligible for an award of reasonable costs and expenses incurred by Respondents in their defense against Petitioners' failed Petition as equity and justice should require. Immediately after this Court denied Petitioners' Petition, and continuing until December 12, 2012, Respondents commenced an extensive audit of the various pleadings, court orders,

review worksheets and lists of contested signatures to determine whether or not Petitioners engaged in bad faith conduct during the review of signatures ordered by this Court. As more particularly set forth below, and in a forthcoming brief in support of this motion, and in addition to other relevant facts bearing on the award of costs and expenses, Respondents' have discovered clear and convincing evidence that Petitioners' conduct intentionally and systematically violated this Court's pre-hearing Order, dated August 10, 2012 (hereinafter the "Pre-Hearing Order")¹, and unnecessarily extended the court ordered signature review of the Nomination Papers sufficient that equity and justice require an award against Petitioners of Respondents' reasonable costs and expenses incurred as a result of Petitioners' failed Petition.

Further, after Respondents' extensive audit of the pleadings and the signature review work-papers, as well as testimony from Petitioners' subpoenaed witnesses (and others) in support of their global challenges to the Nomination Papers, Respondents have discovered evidence that Petitioners and/or Petitioners' agents intentionally engaged in bad-faith conduct during the pendency of this Court's review of the Petition that clearly rise to the level of dilatory, obdurate and/or vexatious conduct and/or a fraud upon this Court – conduct Petitioners intentionally concealed from this Court and Respondents' legal counsel. Petitioners' bad-faith conduct is sufficient for an award of Respondents' reasonable attorneys' fees incurred in defence of their Nomination Papers pursuant to 25 P.S. Section 2937.

¹ On August 10, 2012, this Court issued the Pre-Hearing Order requiring the parties, in addition to mandating that each side produce 20 reviewers to develop stipulations as to the validity or invalidity of the signatures contained in Respondents' Nomination Papers, to: (1) "tabulate the number of signatures stipulated to be valid and those stipulated to be invalid;" (2) "where the individuals are unable to stipulate, they shall consult their counsel;" (3) "in the event counsel cannot reach a stipulation, they shall stipulate to the information found in the SURE system, reserving only legal issues for further Court consideration;" and (4) "the parties shall provide the Court with a daily tabulation of the signatures reviewed that day, to include the number stipulated as valid, the number stipulated as invalid and the number as to which no stipulation was reached."

Specifically, in support of Respondents' instant motion, Petitioners' and/or their agents:

1) Filed a verified petition containing a minimum of 3,258 duplicate line objections forcing Respondents' legal counsel to spend 28.5 hours to review and compare Petitioners' pleadings with the Nomination Papers to determine the exact number of objections filed and the exact number of signatures unchallenged by Petitioners. Any cursory review of "Exhibit 1" by Petitioners would have discovered the multitude of errors, such that no individual could properly file an unsworn statement verifying that the statements made in Petitioners' Petition were true and correct to the best of the signers' "knowledge, information and belief." Whether Petitioners intentionally or just negligently filed objections obscuring the number of objections made to the Nomination Papers, and whether or not the verification of the Petition imposed upon Petitioners a heightened level of knowledge as to the reliability of the number of line objections purported to have been made in Petitioners' "Exhibit 1", Petitioners conduct imposed an unnecessary and unreasonable economic burden on Respondents' legal counsel that should have been properly borne by Petitioners' legal counsel and staff and rises to the level of "dilatory, obdurate or vexatious" conduct during the pendency of this matter;

2) Petitioners intentionally amended the pleadings in this action to artificially depress the number of valid signatures reported in the daily stipulations and evade the then pending Rule to Show Cause – all without any notice to this Court or opposing counsel of Petitioners' actions.

Between August 8, 2012 and August 18, 2012, Petitioners deleted over 2,800 duplicate line objections from the signature review work-sheets distributed to the review teams without informing this Court or opposing counsel in violation of this Court's Pre-Hearing Order. Petitioners' actions artificially depressed the number of stipulated valid signatures recorded in the daily stipulations (at a time when Petitioners' legal counsel were subject to this Court's Rule

to Show Cause) which Respondents' legal counsel had anticipated showing up in the daily review totals to supplement the number of actual objections stipulated as valid. Because Petitioners failed to notify this Court or opposing counsel that these duplicate line objections had been removed (and presumably secretly added to the number of valid signatures by virtue of the fact that the number of unchallenged signatures would have been increased on a 1 to 1 basis), and failed to add/indicate the number of duplicate objections deleted from the pleadings as part of the first joint daily stipulation filed by the parties with this Court on August 21, 2012, Respondents' legal counsel was led to believe that the lower than expected daily valid signature totals included the duplicate line objections previously discovered by Respondents' legal counsel and that the real rate of stipulated valid signatures was much lower than the "win" rate necessary to ultimately prevail.

In short, Petitioners' conduct of deleting the duplicate line objections without informing this Court or opposing counsel deceived Respondents into incorrectly assuming that the low valid signature rate was mostly comprised of the "easy" duplicate line objections previously discovered leading Respondent to believe that the more "difficult" and important task/metric of "winning" valid stipulations on contested signatures was much lower than the "win" rate necessary to ultimately prevail.

It is against this background of conduct that Petitioners' legal counsel also threatened Respondents' with costs and legal fees on August 22, 2012, unless Respondents withdrew their Nomination Papers by 3:00 p.m. on that date.

In an election contest, Petitioners owe this Court and opposing counsel the highest level of candor. Petitioners intentionally failed in that obligation. Petitioners' conduct is in clear violation of the Court's Pre-Hearing Order and rises to the level of "dilatory, obdurate or

vexatious” conduct during the pendency of this matter. Furthermore, in light of Petitioners’ own threats of imposing costs and attorney fees against Respondents if they refused to withdraw their Nomination Papers by 3:00 p.m. on August 22, 2012, basic principles of equity and justice require the imposition of Respondents’ costs against Petitioners;

3) In violation of the Court’s Pre-Hearing Order, Petitioners systematically failed to remove any Not Registered at Address (“NRA”) objections from the 12,686 signatures that remained contested following the initial review of the Nomination Papers. Of the 2,228 valid signatures stipulated as valid in the second round of signature review commenced on September 13th, 1,475 signatures determined to be valid remained burdened by objectively invalid “NRA” objections easily discerned as invalid by the *SURE* system (66.20% of the 2,228 signatures needed to prevail after the first round of signature review). Testimony will further establish the systematic refusal of Petitioners’ reviewers to remove any improper “NRA” objections during the first signature review process.

The refusal and failure to remove obviously invalid “NRA” objections placed all of those signatures into a category of signatures dependent upon the ultimate resolution of the legal issues surrounding the facial validity or invalidity of “NRA” signatures. This imposed on Respondents an unnecessary level of uncertainty as to the prospects of ultimate victory during the pendency of this matter. In short, during the months of August and September the improperly imposed fear that the “NRA” issue would be dispositive of the contest placed unnecessary stress on Respondents and pressure to withdraw the Nomination Papers. Petitioners’ conduct to create a smaller than necessary pool of contested signatures free from “NRA” objections in violation of this Court’s Pre-Hearing Order rise to the level of dilatory, obdurate and/or vexatious conduct during the pendency of this contest.

More importantly, of the 2,228 “pure” valid signatures required to prevail during the second round of signature review, 438 of the signatures determined to be valid were solely burdened by invalid “NRA” objections easily discerned as invalid by the *SURE* system. Based on stipulations filed by the parties with this Court, had these “sole” invalid “NRA” objections been removed during the first signature review process from August 20th to September 6th, Respondents would have secured stipulations on a sufficient number of “pure” valid signatures on October 5th – a full four (4) review days before the final conclusion of the second signature review process on October 10, 2012.

Petitioners, however, were more than willing to, and did in fact, add objections as allowed by the Court. Petitioners’ biased conduct demonstrates a singular focus on adding objections and obstacles to Respondents’ Nomination Papers and a blanket refusal to remove any objections from contested signatures. Petitioners’ conduct is in clear violation of the Court’s Pre-Hearing Order and rises to the level of “dilatory, obdurate or vexatious” conduct during the pendency of this matter;

4) In violation of this Court’s Pre-Hearing Order, Petitioners systematically failed to include any information recorded by Respondents’ reviewers (and signed off-on by Petitioners’ own reviewers) on invalid remaining objections tethered to the remaining contested signatures as determined by the *SURE* system. Accordingly, Petitioners’ conduct is in clear violation of the Court’s Pre-Hearing Order and rises to the level of “dilatory, obdurate or vexatious” conduct during the pendency of this matter;

5) Based on information and belief, witnesses, with first hand knowledge, will testify that Petitioners’ unlicensed “investigator” Reynold Selvaggio of Protocol Security Partners in Blackwood, New Jersey, offered them cash payments of up to \$2,000.00 to present perjured

testimony to this Court in support of Petitioners' "global challenges" to Respondents' Nomination Papers. One such witness, Mary Dunham, having previously testified to this Court, was found to be a "credible" witness by this Court. Witnesses will also testify that Mr. Selvaggio improperly represented himself as an "FBI agent" in order to intimidate and extract testimony from Respondents' circulators. Witness testimony concerning Petitioners' conduct in Pennsylvania, is consistent with information gathered by Respondents' national campaign that the Republican Party engaged in similar tactics as part the G.O.P's challenge of 3rd Party candidates in the State of Iowa, challenges similarly paid for by the Republican National Committee – and information unavailable to Respondents' Pennsylvania circulators at the time the allegations against Petitioners' agents were first voiced.

Based on these witness accounts, Petitioners, in order to bolster their global challenges to Respondents' Nomination Papers sought to obtain witness testimony by unlawful means. Attempted subornation of perjury, witness intimidation, corrupt bargaining and conspiracy are felonies in the Commonwealth of Pennsylvania and clearly establish, if true, an additional basis to award costs and attorneys' fees pursuant to Section 977 of the Election Code and 25 P.S. Section 2937.

Conclusion

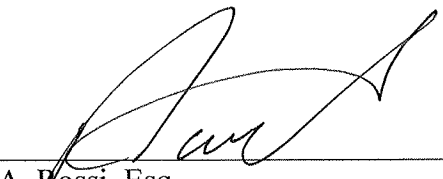
Accordingly, Respondents seek an award from this Court of reasonable costs and expenses from Petitioners and their agents in the amount of \$35,500.00 and an award of reasonable attorneys' fees from Petitioners and their agents in the amount of \$178,074.00.

Respondents, however, based on specific information and belief, have determined that Lawrence M. Otter, legal counsel for Petitioners, ("Attorney Otter") did not engage in any of the bad faith conduct alleged herein and, accordingly, Respondents expressly disclaim and do not

seek any award from this Court against Attorney Otter. Furthermore, Respondents have no evidence and do not believe that any member of Petitioners' legal team (as opposed to Petitioners' other agents) were aware of, condoned, or otherwise sanctioned, the alleged conduct of Petitioners' unlicensed "investigator" and, accordingly, Respondents expressly disclaim and do not seek any award from this Court against Petitioners' legal counsel with respect to the conduct of Mr. Selvaggio.

Respectfully submitted,

Dated: December 31, 2012



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CERTIFICATE OF SERVICE

I, Paul A. Rossi, hereby certify that on December 31, 2012, I caused to be served the foregoing on the following by First-Class United States Mail:

Via First Class Mail:

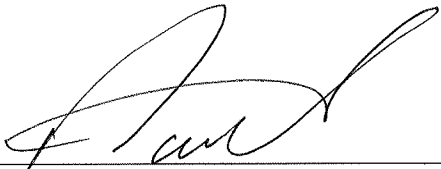
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