UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT FRANKFORT

LIBERTARIAN NATIONAL COMMITTEE, INC., et al. PLAINTIFF v. DR. TERRY HOLIDAY, et al. DEFENDANTS	))))))))))	CIVIL ACTION 3:14-cv-00063-GFVT

DEFENDANTS' MOTION TO DISMISS ON THE PLEADINGS

Come the Defendants, by counsel, and pursuant to FED. R. CIV. P. 12(b)(6), hereby move to dismiss this lawsuit pursuant to the doctrine of laches. While Plaintiffs have failed to state a viable claim, this lawsuit should be dismissed before any consideration of the merits because Plaintiffs waited to file their claims until it was too late to fully and fairly litigate them.

Specifically, Plaintiffs demand that the Libertarian Party's candidate for U.S. Senate should be allowed to participate in an October 13, 2014 forum on Kentucky Education Television ("KET"). Plaintiffs waited until September 29, 2014 – just ten business days before the forum – to assert their constitutional claims, despite admittedly knowing of their claims since ***at least*** August 18, 2014. By waiting so long to file their claims, Plaintiffs have demanded that all aspects of a complex constitutional lawsuit, from discovery to trial to appeal, now be compressed into ten business days (four of which have already passed). The timing of Plaintiffs' filing severely prejudices Defendants, as it precludes them from taking any discovery, effectively preparing for trial, and having any opportunity for appeal. Plaintiffs have "slept on [their] rights," which in an election case is "fatal to [their] receiving any relief." *Kay v. Austin*, 62 F.2d

809, 813 (6th Cir. 1980) on their rights. It is too late to have a full and fair adjudication of them. Accordingly, Plaintiffs' claims should be dismissed. A supporting Memorandum and proposed Order are attached.

Defendants respectfully request that this Motion be heard in conjunction with any other motions that are heard by this Court at the hearing scheduled for Monday, October 6, 2014, at 10:00 a.m.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies on this 2nd day of October, 2014 the foregoing Answer was filed with the clerk using the Court's CM/ECF System, which automatically serves a copy of the foregoing via e-mail upon the following:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT FRANKFORT

LIBERTARIAN NATIONAL COMMITTEE, INC., et al.	)	
PLAINTIFF	)	
v.	)	CIVIL ACTION 3:14-cv-00063-GFVT
DR. TERRY HOLIDAY, et al.	)	
DEFENDANTS	)	

MEMORANDUM SUPPORTING DEFENDANTS'
MOTION TO DISMISS ON THE PLEADINGS

It's all set – only days away. At 8:00 p.m. on October 13, 2014, Kentucky Educational Television's "Kentucky Tonight" will feature as guests Senator Mitch McConnell and Kentucky Secretary of State Alison Grimes, contenders for the United States Senate seat to be decided in the upcoming November 4, 2014 election. The long-awaited, highly publicized appearance of the candidates will be the only state wide forum for the Republican and Democratic hopefuls. On Sunday, September 28, 2014 – a mere ten business days before the forum is to take place – Plaintiffs filed their 22-page Complaint and a related motion for immediate injunctive relief against Defendants, who are members of the Kentucky Authority for Educational Television (hereinafter referred to collectively as "KET"). And to date, they have not properly served ***any*** of the Defendants.[1] Plaintiffs' lawsuit seeks this Court's intervention to force KET to allow David Patterson, the Libertarian Party candidate for the United States Senate

[1] Plaintiffs' attempt at service consisted of leaving envelopes at the reception desk of the Kentucky Department of Education and a box of documents at the front desk at KET. This does not even ***approach*** proper service under the Federal Rules.

seat, to participate in the forum, even though he did not meet the objective criteria for participation set by KET months ago.

While Plaintiffs' claims lack merit, this Court should not even reach the merits of their claims due to the ***timing*** of Plaintiffs' lawsuit. In short, Plaintiffs now ask that their Complaint – which included 62 paragraphs and 24 exhibits – be litigated stem-to-stern in the ten business days between its filing and the October 13, 2014 forum. Not only is such a compressed schedule unrealistic, it is solely the result of Plaintiffs sitting on their claims. According to the affidavit of Ken Moellman, Chair of the Libertarian Party of Kentucky, which Plaintiffs filed alongside their Complaint, Plaintiffs have known about their claims since ***at least*** Monday August 18, 2014 at 5:15 p.m., when KET informed him that "Patterson would not be invited" to the October 13, 2014 forum because he did not meet KET's criteria for participation. In fact, Mr. Moellman issued a press release on August 18, 2014, in which he publicly stated the claims now at the heart of this lawsuit [Ex. A hereto].[2]

Plaintiffs, however, did not file their lawsuit during the week of August 18, 2014, even though their August 18, 2014 press release specifically noted that the forum was only eight weeks away. Nor did Plaintiffs file their claims the next week, nor during the following month. Instead, Plaintiffs waited an entire ***six weeks*** before filing this lawsuit. And as a result, they demanded that in the span of two weeks – ten business days – (a) that KET digest Plaintiffs'

[2] Courts considering a Fed. R. Civ. P. 12(b)(6) motion "may consider materials in addition to the complaint if such materials are public records or are otherwise appropriate for the taking of judicial notice." *New England Health Care Employees Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 501 (6th Cir. 2003), *cert. denied*, 540 U.S. 1183 (2004). Under Fed. R. Evid. 201, a court "may take judicial notice" of a "judicially noticed fact," which "must be one not subject to reasonable dispute." This requirement is satisfied if the fact is "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Plaintiffs, who include the candidate whose campaign issued the press release, cannot reasonably dispute the release's issuance, its timing, or its contents.

lengthy complaint and related documents, which assert numerous constitutional claims; (b) that KET find and retain counsel to do the same; (c) that Plaintiffs be allowed to take two depositions, including a 30(b)(6) deposition (even though no corporation is named as a Defendant); (d) that KET's counsel then take any and all necessary discovery, including the finding and presenting of expert witnesses; (e) that KET then prepare for trial; (f) that this Court then hold a full-blown trial; and (g) that any and all appeals be taken and completed.

Suffice it to say, Plaintiffs' claims cannot be fully and fairly litigated in ten business days – much less in the six business ***days*** remaining before the forum. Moreover, Plaintiffs' demand that their claims be litigated in such a whirlwind fashion is unacceptable in light of Plaintiffs' own admission, and press release, showing that they were aware of their claims over six weeks ago. Courts across the country routinely dismiss election lawsuits filed at the last minute on the doctrine of laches when the proof demonstrates that Plaintiffs sat on their claims for weeks. And here, Plaintiffs' own pleadings and supporting documents confirm that Plaintiffs waited for too long – nearly a month and a half. Their claims should now be dismissed.

A. Plaintiffs' Claims Should Be Dismissed Pursuant to the Doctrine of Laches.

Unlike most civil litigation, cases involving elections generally involve disputes over events that are slated to take place on a certain immovable date – events such as elections, the printing of ballots, or the holding of debates or public forums. Accordingly, it is essential that a plaintiff who has claims concerning an upcoming election-related event assert those claims as far in advance of the event as possible so that there is an opportunity to fairly, and completely, litigate the issue – even if on an expedited basis. As a result, courts consistently demand that plaintiffs bring such claims as expeditiously as possible, which means they cannot sit on their

claims for weeks before finally deciding to go to court. While it may be possible to fairly and fully litigate a complex constitutional elections case in six weeks, or even four weeks, it is not possible to do so in less than ten business days. Accordingly, courts routinely dismiss election-related claims on the doctrine of laches where Plaintiffs' delay precludes a full and fair adjudication of their claim.

For instance, just three months ago the Arizona District Court dismissed an election-based case with a timeline strikingly similar to this case on the doctrine of laches. In *Arizona Public Integrity Alliance v. Bennett*, 2014 WL 3715130 (D. Ariz. 2014), the plaintiffs were four Republican voters who challenged the constitutionality of an Arizona law requiring that candidates for statewide office present nomination petitions with signatures from voters in each county on or before May 28, 2014. The plaintiffs filed their suit on May 15, 2014 – approximately two weeks before the deadline at issue. The record, however, showed that "[p]laintiffs began looking seriously at the constitutionality of the county-distribution requirement in December, 2013," and that "they gave notice to the State on May 2, 2014 that they intended to seek an injunction, but they did not do so until May 15, 2014." *Id*. at *2. The Court dismissed the plaintiffs' claims as a result of this delay:

> Plaintiffs' delay until two weeks before the Secretary begins signature validation is unreasonable. . . . Defendant contends Plaintiffs' unwarranted delay prevented him from defending against the injunction. He does not respond on the merits for inability to marshal facts and authorities in the short time left. That is plainly true. Plaintiffs' response that Defendant did not need time to prepare a response because Plaintiffs' case is obviously meritorious is not a valid response to laches. A defendant and the court are entitled to a meaningful response precisely to determine the strength of the case. Plaintiffs' unreasonable delay in filing this Motion unduly prejudiced the State's ability to defend on the merits.

Id. at *3-4.

Similarly, in *Kay v. Austin*, 621 F.2d 809 (6th Cir. 1980), the plaintiff, a purported presidential candidate in a number of states, sought an order requiring that his name be placed on

the Michigan primary ballot. The plaintiff, however, (a) did not check to see if his name was on the ballot until two weeks after the state published a list of names that would be on the ballot, and then (b) waited another 11 days to file suit. In the meantime the State of Michigan prepared to print ballots without the plaintiff's name thereon. The Sixth Circuit held that the "failure of the appellant to press his case" in the 25 days after "he should have known that an injury had occurred" was "fatal to his receiving any relief." *Id.* at 813. Moreover, the Sixth Circuit correctly noted that "the candidate's claim to be a serious candidate who had received a serious injury became less credible by his having slept on his rights." *Id.*

Likewise, in *Gelineau v. Johnson*, 896 F. Supp. 2d 680 (W.D. Mich. 2012), the Libertarian Party, and its presidential candidate, sought a preliminary injunction to prevent the state from printing general-election ballots until their candidate was listed on the ballots. The Libertarian Party filed its Complaint on September 11, 2012 – just days before the State of Michigan planned on printing its ballots. The Plaintiffs, however, knew as early as May 2, 2012 about the basis of their claim. Accordingly, the District Court dismissed the claim on the doctrine of laches, which demands that a claim be dismissed where there is (1) a lack of diligence by a plaintiff, and (2) resulting prejudice to the defendant:

> The question that baffles this court is why the instant claims were not filed much earlier. Plaintiffs knew as early as May 2 that the Secretary would reject [their candidate's] candidacy. . . . Plaintiffs' delay in bringing this suit would thus effectively turn a temporary restraining order into permanent relief.

Id.

The case at hand is squarely in line with *Bennett*, *Kay*, *Gelineau*, and many other election cases like them. Plaintiffs' unilateral delay in waiting until Sunday, September 28, 2014 to file suit – despite being aware of Mr. Patterson's no later than August 18, 2014 – makes it impossible to fairly and fully litigate the case at the trial level, much less afford any opportunity

for appeal. While cases like this can be fairly litigated on an expedited basis, they cannot be fairly litigated in less than ten business days, as such a compressed timeline does not provide KET with any meaningful opportunity to take discovery, prepare for trial, or appeal.

B. Mr. Molleman's Affidavit Does Not Save Plaintiffs' Claims From Dismissal Pursuant to the Doctrine of Laches.

Plaintiffs are well aware that this Court will likely have a serious problem with their delay in filing suit, and the resulting (and obvious) prejudice to KET. Accordingly, Plaintiffs offer the affidavit of Ken Moellman, Chair of the Libertarian Party of Kentucky, to explain why Plaintiffs waited until September 28, 2014 to file suit.

The timeline set forth by Mr. Moellman is concerning. Mr. Moellman alleges that two days after becoming aware of Mr. Patterson's exclusion, he sent an Open Records Act request to KET seeking records relating to the October 13, 2014 forum [Affidavit, ¶ 9]. In accordance with the Open Records Act, KET provided the requested records within three business days, and offered to provide the records in both paper and electronic form [*id.* at ¶¶ 10-11]. KET produced 1,117 pages of documents in total [*id.* at ¶ 10]. After receiving the documents, Plaintiffs then took ***two weeks*** to put them in chronological order and "remove duplicated information" [*id.* at ¶ 11]. In other words, Plaintiffs reviewed and sorted KET's documents at the leisurely pace of less than 80 pages per day.

After taking ***two weeks*** to review a mere 1,117 pages – many of which were duplicates – Plaintiffs then apparently decided to hire a lawyer to pursue their claims. Plaintiffs, allege they encountered an unspecified delay because "LPKY general counsel is not certified to the Federal Bar, so outside counsel was sought" [*id.* at ¶¶ 12-13]. Plaintiffs then took two weeks to exchange cost estimates with outside counsel, raise funds, and do "further sorting" of the

documents produced well over a month earlier [*id.* at ¶ 13]. It then took Plaintiffs another week after that was done to file their lawsuit.

The actions described by Mr. Molleman cannot, under any lens, be described as a Plaintiff diligently pressing its claim. Instead, the actions are those of a litigant who alleges irreparable harm but moves at a snail's pace. Moreover, the alleged obstacles of finding a lawyer licensed in this Court, or working out a litigation budget, or raising of money to fund the litigation, provide absolutely no excuse for Plaintiffs' delay. *See Ottawa Tribe of Oklahoma v. Ohio Dept. of Natural Res.*, 541 F.Supp.2d 971, 976-77 (N.D. Ohio 2008) ("practical obstacles do not defeat a defense of laches"); *MGA, Inc. v. Centri-Spray Corporation*, 639 F.Supp. 1238, 1242 (E.D. Mich. 1986) ("the lack of legal funds is no excuse for delay in bringing suit").

If, despite the foregoing, Plaintiffs contend that they were "diligently" pursuing their claims during the six weeks between August 18, 2014 and September 29, 2014, the implications are far worse. That means that Plaintiffs knew that they were going to bring suit, but instead of pressing their cause at a time that would afford both sides an opportunity to take discovery and fully litigate the issues, they strategically chose to take discovery outside of litigation through the Kentucky Open Records Act, so as to get fully prepared to try this case, ***before*** strategically dropping their claims upon KET ten business days before the forum. The prejudice is manifest and as a matter of law, constitutes grounds for dismissal. The result leaves KET without any meaningful opportunity to take discovery or prepare for trial.

In short, Mr. Molleman's affidavit establishes that Plaintiffs' delay was, at best, the result of a lack of diligence, and at worst, procedural gamesmanship designed to gain an unfair advantage. Either way, KET is unduly prejudiced, as it is now (1) effectively precluded

from taking any discovery, (2) without time to meaningfully prepare for trial, and (3) stripped of all appellate rights and opportunities. This should not be allowed.

As the Sixth Circuit aptly concluded in *Kay v. Austin* a plaintiff's failure to press his cause in an election case is "fatal to his receiving any relief." 621 F.2d at 813. Mr. Patterson and the Libertarian entities slept on their rights. Defendants respectfully request their last-minute case be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies on this 2nd day of October, 2014 the foregoing Answer was filed with the clerk using the Court's CM/ECF System, which automatically serves a copy of the foregoing via e-mail upon the following:

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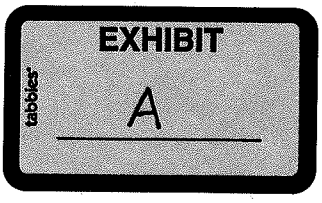

From: David Patterson, Libertarian candidate [mailto:campaign@david4senate.com]
Sent: Monday, August 18, 2014 6:53 PM
To: Deidre Clark
Subject: RELEASE: PATTERSON OBJECTS TO KET DEBATE CRITERIA

FOR IMMEDIATE RELEASE

PATTERSON OBJECTS TO KET DEBATE CRITERIA

KENTUCKY – Libertarian U.S. Senate candidate David Patterson and his supporters were disappointed on Monday when they were told Patterson would not be invited to participate in the upcoming KET debate.

Patterson spoke about KET's new criteria for inclusion. "We had less than 4 days between the filing deadline and the closure of KET's qualification period. We weren't even given a copy of the criteria until after the deadline. Even though there are two full months between now and the planned debate, KET has created rules which seem to be specifically aimed at preventing my participation."

"It's a real shame that our public tax resources are being spent on a debate that only includes 2/3rds of the ballot-listed options," said LPKY Chair Ken Moellman. "The old criteria, being ballot-qualified, were reasonable, despite the petitioning requirement itself being unreasonably restrictive. With this new policy, the taxpayers and voters of Kentucky are being downright cheated."

Kentucky law provides that Democrats and Republicans need only to collect 2 signatures to be on the ballot. All other candidates must collect a minimum of 5,000 signatures. Patterson collected over 9,100 signatures. The deadline for submission was Tuesday, August 12.

KET's new criteria required that, prior to August 16th, only 4 days after the filing deadline, that a candidate be a legal candidate for office, maintain an active website, have raised at least $100,000, and be polling 10% or higher in one independent poll.

Patterson became a candidate on August 11th, and has polled 7% in two polls that have included him in August.

The Libertarian Party is the third largest party in Kentucky. Founded in 1973, the Libertarian Party of Kentucky promotes individual liberty though free markets and social tolerance. More information can be found on their website, at www.LPKY.org

David Patterson is the Libertarian Party of Kentucky's 2014 US Senate Candidate. More information about David Patterson's campaign can be found at www.david4senate.com

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UNITED STATES DISTRICT COURT
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LIBERTARIAN NATIONAL COMMITTEE, INC., et al.	)	
PLAINTIFF	)	
v.	)	CIVIL ACTION 3:14-cv-00063-GFVT
DR. TERRY HOLIDAY, et al.	)	
DEFENDANTS	)	

ORDER

Defendants, by counsel, and pursuant to FED. R. CIV. P. 12(b)(6), having moved this Court to dismiss this lawsuit pursuant to the doctrine of laches, and all parties having had sufficient opportunity to be heard,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss is GRANTED. In this case Plaintiffs demand that the Libertarian Party's candidate for U.S. Senate should be allowed to participate in an October 13, 2014 forum on Kentucky Education Television ("KET"). Plaintiffs waited until September 29, 2014 – just ten business days before the forum – to assert their constitutional claims, despite admittedly knowing of their claims since at least August 18, 2014. By waiting so long to file their claims, Plaintiffs have demanded that all aspects of a complex constitutional lawsuit, from discovery to trial to appeal, now be compressed into ten business days (four of which have already passed). The timing of Plaintiffs' filing severely prejudices Defendants, as it precludes them from taking any discovery, effectively preparing for trial, and having any opportunity for appeal. Accordingly, Plaintiffs' claims are hereby dismissed.

This Order is final and appealable with no just reason for delay.

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