

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

LIBERTARIAN PARTY OF OHIO, et al.,

Plaintiffs,

Case No. 2:13-cv-00953

v.

JUDGE WATSON
MAGISTRATE JUDGE KEMP

JON HUSTED, et al.,

Defendants.

ELECTION LAW MATTER
EMERGENCY RELIEF REQUESTED

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF
OMNIBUS MOTION TO SUPPLEMENT RECORD

I. **Plaintiffs' Supplemental Evidence is Relevant to Count Seven of Plaintiffs' Third Amended Complaint.**

Plaintiffs' Supplemental Exhibits are relevant to Count Seven of their Third Amended Complaint because they: (1) establish "**joint activity**" between Casey, the Ohio Republican Party (ORP), the Kasich Campaign, the Governor's Office, and Defendant-Secretary (through, inter alia, Matt Damschroder) in an effort to remove Plaintiff-Earl from the Plaintiff- Libertarian Party of Ohio's ("LPO") 2014 primary ballot; and (2) further establish that the ORP "**ratified**" Casey's actions causing Plaintiff-Earl's removal from the LPO's primary ballot during Ohio's 2014 electoral primary. Either conclusion supports liability under 42 U.S.C. § 1983.

"To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in **joint activity** with the State or its agents." *Wilkerson v. Warner*, 545 Fed. Appx. 413, 420 (6th Cir. 2013) (quoting *Adickes v. S.H. Kress Co.*, 398 U.S. 144, 150 (1970)). "[P]rivate persons **jointly engaged** with state officials in a deprivation of civil

rights are acting under color of law for purposes of § 1983." *Warner*, 545 Fed. Appx. at 421 (emphasis added) (quoting *Hooks v. Hooks*, 771 F.2d 935, 943 (6th Cir. 1985)).

The Sixth Circuit in *Hooks*, 771 F.2d at 943, stated:

A civil conspiracy is an agreement between two or more persons to injure another by unlawful action. Express agreement among all the conspirators is not necessary to find the existence of a civil conspiracy. Each conspirator need not have known all of the details of the illegal plan or all of the participants involved. All that must be shown is that there was a single plan, that the alleged coconspirator shared in the general conspiratorial objective, and that an overt act was committed in furtherance of the conspiracy that caused injury to the complainant.

Further, even if ORP, the Kasich Campaign, the Governor's Office, Casey and Felsoci acted independently of the Secretary's agents, including Damschroder, they acted jointly with each other. Casey, the Kasich Campaign, the Governor's Office and ORP are all state actors.

A. Casey is a State Actor.

Casey not only chaired Ohio's Personnel Board of Review but also exercised authority over "classified state service" employees in the Secretary's Office at all relevant times in this case. Casey's position provided him an "aura of official authority and power," *United States v. Lanier*, 33 F.3d 639, 653 (6th Cir. 1994), *vacated on other grounds*, 73 F.3d 1380 (1996), *rev'd*, 520 U.S. 259 (1997), especially over those in the Secretary's Office subject to his jurisdiction. *See also Memphis, Tennessee Area Local American Postal Workers Union v. Memphis*, 361 F.3d 898, 903 (6th Cir. 2004). He engaged in state action.

B. The Kasich Campaign and ORP are State Actors.

To the extent they acted to remove a competitor from Ohio's primary ballot,¹ ORP, the Kasich Campaign and their agents in the Governor's Office, are themselves state actors acting

¹ Whether it was to hurt Democrats, help Republicans, or destroy the LPO is immaterial. All are political objectives that are impermissible under the First Amendment if perpetrated by state actors.

under color of law. *See Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953) (plurality); *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996) (plurality); *LaRouche v. Fowler*, 152 F.3d 974, 992 (D.C. Cir. 1998); *Texas Democratic Party v. Benkiser*, 459 F.3d 582 (5th Cir. 2006); *LULAC of Texas v. Texas Democratic Party*, 651 F. Supp.2d 700, 711-12 (W.D. Tex. 2009); *Trinsey v. Commonwealth of Pennsylvania State Board of Elections*, 766 F. Supp.2d 1338, 1345 (E.D. Pa. 1991).

C. ORP Ratified Earl's Removal.

Even if ORP did not join the Kasich Campaign's, Casey's and the Governor's Office's actions in February and March of 2014, its **ratification** of their actions is a well-established method of proving liability under § 1983. *See, e.g., Monistere v. City of Memphis*, 115 Fed. Appx. 845, 853 n.6 (6th Cir. 2004) ("Plaintiff may establish municipal liability by 'showing that an official with final policymaking authority ... **ratified** the decision of, a subordinate'") (quoting *Ulrich v. City & County of San Francisco*, 308 F.3d 968, 985 (9th Cir. 2002)) (emphasis added); *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1248 (6th Cir. 1990); *Marchese v. Lucas*, 758 F.2d 181, 188 (6th Cir. 1985). ORP ratified Casey's actions by agreeing to pay his legal fees.

D. The Supplemental Evidence Supports Count Seven.

Plaintiffs' supplemental evidence proves that Casey, the Kasich Campaign, ORP, the Governor's Office and Damschroder acted pursuant to "a single plan" and "shared in the general conspiratorial objective." *Hooks*, 771 F.2d at 943. The evidence has not been refuted.² Below are illustrations drawn from the supplemental evidence.

² Borges, on behalf of ORP, initially claimed that any and all relevant documents had been destroyed. *See* Doc. No. 314. He finally produced documents surrounding ORP's payments to Zeiger for the DeWine Campaign and canceled checks documenting the ORP's payments to Zeiger for Casey and the Kasich Campaign, but only after Plaintiffs' renewed their Motion to Compel, Doc. No. 326. Borges continued to claim, however, that all other records had been

1. Payments to the Zeiger Firm By ORP.

1. ORP began making payments to the Zeiger firm on Casey's behalf on November 19, 2014. *See* Exhibit 3, Casey Dep.Ex.1, at TC000234; Exhibit 4, Felsoci Dep., at 5 & 10; Exhibit 12, Borges Dep., at 13. Felsoci never agreed to payments being made by ORP. *See* Exhibit 4, Felsoci Dep., at 8.

2. The first payment was \$100,000 on November 19, 2014. *See* Exhibit 3, Casey Dep. Ex.1, at TC000234. The second payment was \$100,000 made on December 22, 2014. *Id.* TC000233. The third payment was \$50,000 made on December 29, 2014. *Id.* TC000232. The fourth payment was \$50,000 made on February 24, 2015. *Id.* TC000231. The four known payments total \$300,000, though more payments may have been made. Exhibit 11, Borges Dep., at 13, 21.

3. All four of these payments were made by ORP to the Zeiger firm to pay for the protest of Earl. *See* Exhibit 5 at 5-6, 7; Exhibit 6 at 11; Exhibit 11, Borges Dep., at 12-13.

4. Borges testified that "the Ohio Republican Party provides legal services to all of our candidates and campaigns," Exhibit 11, Borges Dep., at 14-15, and that its "standard practice" is to "pick up the bills of statewide candidates." *Id.* at 15, 16, 17.

5. Borges testified that statewide candidates "are ... familiar with our practices" of picking up their legal bills. *Id.* at 17.

6. Felsoci admitted that ORP's payments were made on his behalf to cover the Zeiger firm's fee for handling his protest of Earl. Exhibit 4, Felsoci Dep., at 10. Casey admitted the same. Exhibit 2, Casey Dep., at 75-80.

7. ORP's payments to the Zeiger firm and its subsequent campaign-finance reports of these payments are only be relevant to Casey's potential liability for unreported and improper in-kind

destroyed. Borges' claim is incredible in light of his admissions at his deposition that documents exist. *See, e.g.*, Exhibit 11, Borges Dep., at 11, 12, 14.

contributions to the Kasich Campaign if ORP had hired the Zeiger firm to protest Earl in the first instance. *See* O.A.C. 111-5-16; Exhibit 5; Exhibit 6.

8. Casey denied that he "hired" the Zeiger firm to protest Plaintiff-Earl, *see* Exhibit 2, Casey Dep., at 17, and refused to admit that he "owed" the Zeiger firm. *See id.* at 71.

9. Mr. Zeiger filed an affidavit with the Court on August 6, 2014 claiming that Felsoci's co-client's identity needed to remain confidential. *See* Doc. No. 159-1. Casey testified that it was not important to keep his identity a secret. *See* Exhibit 2, Casey Dep., at 89.

10. Borges admitted a long-running personal and business relationship existed with Mr. Zeiger. Exhibit 11, Borges Dep., at 10, 11, 12.

11. Borges first testified that he had never had an attorney-client relationship with Zeiger or the Zeiger firm, *id.* at 10, but then expressed uncertainty over whether he had an attorney-client relationship with Zeiger when he began making payments. *Id.* at 19.

12. Casey on November 11, 2014 hand-delivered the November 10, 2014 invoice from the Zeiger firm reflecting a \$552,305.26 bill for "Professional Services" to Borges. Exhibit 2, Casey Dep., at 75; Exhibit 3, Casey Dep. Ex.1, at TC000229.

13. On March 3, 2015 the Zeiger firm generated an invoice for "Professional Services" which explained additional "Fees and Expenses from October 1, 2014 thru February 28, 2015" related to Felsoci's protest of Earl and totaling \$39,769.65. *Id.* TC000230.

14. The March 3, 2015 invoice reported a "balance due from statement dated November 10, 2014" as \$252,305.26 and reflected payments totaling \$300,000 already made by ORP. *Id.* The remaining balance due on March 3, 2015 was reported to be \$292,074.91. *Id.*

15. Casey did not recall receiving the March 3, 2015 invoice. Exhibit 2, Casey Dep., at 72.

16. At the meeting with Casey, Borges "grabbed this copy and another copy out of [Casey's] hands, and he basically volunteered and said that he wanted to take care of it." *Id.* at 75.

17. Borges "said he was going to chat with Mr. Zeiger," *id.* at 76, that ORP was "rolling ahead or doing something on it," *id.* at 78, and Casey "got the sense that Borges had been in touch with Zeiger and that they had communicated and that they were moving ahead." *Id.* at 80.

18. Casey did not know that ORP had paid the Zeiger law firm \$300,000 until April of 2015, *id.* at 78-79, more than one month after the last invoice dated March 3, 2015 was mailed.

19. On or about November 25, 2013, the DeWine Campaign hired the Zeiger firm to represent it and ORP agreed to pay the Campaign's full legal bill. *See* Borges Response, Doc. No. 327, and Exhibits, Docs. No. 327-1 & Doc. No. 327-4.

20. On February 24, 2015, Borges phoned Zeiger to inform him that a fourth payment was being sent and there was "more to come." Exhibit 7.

21. Felsoci was not informed about how the Zeiger firm would be paid and Casey's involvement until sometime after August 12, 2014. *See* Exhibit 4, Felsoci Dep. at 5-6.

22. Felsoci learned of ORP's payments to his lawyers only "recently." *Id.* at 10.

2. ORP's Conspiracy with Casey.

23. Casey admitted that he "[b]eginning in approximately mid-February 2014, ... sought help from various individuals associated with the Franklin, Summit, Cuyahoga and Lucas County Republican Parties [and] also sought assistance in identifying an LPO member who would agree to initiate a protest of Mr. Earl's candidacy." Exhibit 5 at 3 (emphasis added).

24. E-mails establish joint activity between Casey and ORP, including Chris Schrimpf (ORP Communications Director) and Matt Borges (Chair of ORP), between February 19, 2014 (before

the protest was filed) and May 1, 2014 (when the Sixth Circuit affirmed this Court's denial of preliminary relief):

A. On February 19, 2014, Casey complained to Schrimpf that the "Dems will be spinning big on the failure for this poll to account for the number of voters an Libertarian candidate will drain off." Exhibit 3, Casey Dep. Ex.1, at TC000180.

B. On February 21, 2014, Casey reported to Schrimpf, Borges, Carle, Polesovsky, Luketic and others that Oscar Hatchett, Jr. had also collected signatures for the DeWine Campaign. Exhibit 12, Borges Dep. Ex.1, at TC000524.

C. Borges was copied on a March 7, 2014 e-mail by Casey to Schrimpf just after the Secretary announced the removal of Earl from the LPO's primary ballot. Exhibit 3, Casey Dep. Ex.1, at TC000221. Schrimpf responded to the Casey e-mail, copying Borges, and stating that he "aim[ed] to speak as little about this as possible and when I do it will be to say that it is important to follow the law." *Id.* Borges responded, "Agree." *Id.* TC000224.

D. Schrimpf on March 7, 2014 wrote to Borges, with a copy to Casey, "I did talk to Chrissie Thompson who was using Borges quote. Told her this is about whether or not people followed the law, not wild accusations that folks want to make." *Id.* TC000225.³

D. Casey on March 7, 2014 wrote to Carle, with copies to Borges, Schrimpf, Luketic and Polesovsky, that Earl would "be filing tonight in Federal Court." *Id.* TC000227.

E. On March 10, 2014, Casey wrote to Carle, Polesovsky, Luketic, and Schrimpf, with blind copies to Borges and Damschroder, that a hearing was scheduled in this case for 2 PM on March 11, 2014. Exhibit 12, Borges Dep. Ex.1, at TC000252.

³ Chrissie Thompson wrote the story that quoted Borges' statement that ORP was behind the protest of Earl. *See* Doc. No. 68. Borges later attempted to disavow this statement in testimony delivered to this Court on March 17, 2014. *See* Doc. No. 301.

F. On March 11, 2014, in texts between Casey, Polesovsky, Luketic and Borges, Borges wrote that "SPP guys" could help Zeiger as expert witnesses. *Id.* TC000254.

G. On March 16, 2014, Casey e-mailed Carle, with copies to Polesovsky and Luketic, and blind copies to Borges, Schrimpf, and Damschroder, that Plaintiffs had sought to amend their complaint to add ORP. *Id.* TC000258.

H. On March 16, 2014, Borges e-mailed Casey, with copies to Polesovsky, Carle and Luketic, that he would testify at the preliminary injunction hearing pursuant to the Court's direction but thought he might avoid it. *Id.* TC000293.

I. On March 16, 2014, Borges forwarded to Casey an e-mail from his (Borges') lawyer (Armstrong) regarding Borges' potential testimony in federal court. *Id.* TC000527.

J. Earlier that day on March 16, 2014, Casey's lawyers sent to Armstrong a copy of Felsoci's opposition to Plaintiffs' motion to amend their complaint. *Id.*

K. On March 17, 2014, Casey e-mailed to Zeiger a news report on Borges' testimony in federal court with blind copies to Carle, Luketic, Polesovsky, Schrimpf and Borges. *Id.* TC000295.

L. On March 19, 2014, Casey e-mailed Carle, with copies to Polesovsky and Luketic and a blind copy to Borges, that the Court had ruled for the Defendants. *Id.* TC000297.

M. On March 19, 2014, Casey e-mailed Carle, Polesovsky, and Luketic, with blind copies to Borges, Schrimpf, and Damschroder, about potential proceedings following this Court's denial of preliminary relief. *Id.* TC000298.

N. On March 19, 2014, Borges forwarded to Casey, Carle, Polesovsky and Luketic an e-mail from his (Borges') lawyer (Armstrong) discussing the Court's Order and the Court's not mentioning Borges' testimony. *Id.* TC000327.

O. On March 19, 2014, Casey responded to Borges, with copies to Carle, Polesovsky, Luketic and Carle, that "it is very good that Matt Borges merited absolutely no mention" *Id.* TC000329.

P. On March 19 and 20, 2014, Casey e-mailed to Zeiger with blind copies to Carle, Polesovsky, Luketic, Schrimpf and Borges, several news stories about the Court's decision. *Id.* TC000331 & TC000335.

Q. On March 20, 2014, Casey e-mailed directly to Carle, Polesovsky, and Luketic, with blind copies to Borges, Schrimpf and Damschroder, a story about the case. *Id.* TC000337.

R. On March 21, 2014, Casey e-mailed to Damschroder, with blind copies to Carle, Polesovsky, Luketic, Borges and Schrimpf, Felsoci's brief in the Sixth Circuit. *Id.* TC000339.

S. On March 22, 2014, Casey e-mailed a news story about the case to Carle, Damschroder, Borges and Schrimpf. *Id.* TC000361.

T. On April 3, 2014, Casey e-mailed to Damschroder, with blind copies to Zeiger, Borges, Carle, Polesovsky, and Schrimpf, comments on the Ohio Supreme Court's ruling and stating "Let me know when handy to discuss some other issues this morning." *Id.* TC000372.

U. On April 3, 2104, Casey e-mailed Zeiger, with blind copies to Carle, Polesovsky and Borges, about the Ohio Supreme Court's decision. *Id.* TC000373.

V. On April 3, 2014, Casey e-mailed his lawyers, with blind copies to Damschroder, Carle, Borges and Polesovsky, about the Ohio Supreme Court's decision. *Id.* TC000387.

W. On April 10, 2014 Casey e-mailed his lawyer, with blind copies to Damschroder, Carle, Borges, Polesovsky, and Luketic, about Felsoci's brief in the Sixth Circuit and stated "I will share this information/background with other interested parties on our side." *Id.* TC 000338.

X. Casey continued to e-mail Borges, Carle, Polesovsky, Luketic and Schrimpf about

the Sixth Circuit proceedings from April 15, 2014 to May 1, 2014. *See id.* TC000465, TC000467, TC000469, TC000501, TC000502, TC000503, TC000505, TC000507.

Y. On May 1, 2014 Casey exchanged texts with Carle and Borges; Casey wrote to them "Big Sixth Circuit win this morning for GOP," *id.* TC000508 (emphasis added), while Borges and Carle responded, "That's great news," and "Looks like Charlie Earl will have a lot of time to spend in the Garden this summer." *Id.*

Z. Casey continued to e-mail Borges, Carle, Schrimpf, Polesovsky, Luketic and Damschroder about the Supreme Court's consideration of the case from May 2, 2014 to May 6, 2014. *See id.* TC000512-13, TC000515-16, TC000517.

25. Schrimpf discussed the protest with Casey between February 19, 2014 (two days before the protest was filed) and March 7, 2014 (the day the Secretary removed Earl from the LPO's ballot) regularly:

A. On February 19, 2014, Casey complained to Schrimpf that the "Dems will be spinning big on the failure for this poll to account for the number of voters an Libertarian candidate will drain off." Exhibit 3, Casey Dep. Ex.1, at TC000180.

B. On February 28, 2014, Casey wrote to Jim Heath, with a blind copy to Schrimpf, asking whether "the laws of Ohio were fully and faithfully followed by the Libertarian Party?" *Id.* TC000208. "Let's have Charlie Earl answer for ALL of the questions under oath." *Id.*

C. On March 4, 2014, Casey texted Schrimpf and said he would "call back later," indicating that a phone call had been attempted. Schrimpf responded, "Thx." Exhibit 10, Casey Docs., at TC000526.

D. On March 4, 2014, Casey e-mailed Schrimpf, "Get My Text? Borges Telling Media??" Exhibit 12, Borges Dep. Ex.1, at TC000525. Casey inquired whether Borges had

really told the press that GOP was funding the protest: "BUT, I was told yesterday that Chairman Borges told some in the media yesterday during a press gaggle that the ORP was funding things in this legal battle against the petitions? Correct or not??" *Id.*

E. On March 7, 2014 Schrimpf e-mailed Casey and Borges, that he would "speak as little as possible" about Earl's removal. Exhibit 3, Casey Dep. Ex.1, at TC000221.

F. Casey responded to Schrimpf's comment, copying Borges, by stating, "Absolute smart, right and 100% on message." *Id.* TC000223.

G. Schrimpf on March 7, 2014 wrote to Borges, with a copy to Casey, "I did talk to Chrissie Thompson who was using Borges quote. Told her this is about whether or not people followed the law, not wild accusations that folks want to make." *Id.* TC000225.

H. Casey on March 7, 2014 wrote to Carle, with copies to Borges and Schrimpf, that Earl would "be filing tonight in Federal Court." *Id.* TC000227.

26. Borges testified that he "did not recall" communicating with Casey in February and March of 2014. *See* Exhibit 11, Borges Dep., at 26.

27. Borges testified that he had "no idea" whether Schrimpf communicated with Casey during February or March of 2014. *Id.* at 27-28.

28. Borges testified that it "would be news" to him if Schrimpf had communicated with Casey about Earl's protest, *id.* at 30, but that Schrimpf's communications with Casey would still have been authorized by ORP. *Id.* at 28.

29. Borges testified that he had no recollection of how he learned of Earl's protest. *Id.* at 37.

30. Borges testified that it was "very common" for the Ohio Republican Party to "challenge candidates from other parties." *Id.* at 39-40.

31. Borges testified that he was friends with both Polesovsky and Luketic, exchanged hundreds of e-mails with them, but never discussed Earl's protest. *Id.* at 35-36.

32. Schrimpf on February 18, 2014 provided to Luketic the records of "all Form 14's filed for all Libertarian candidates for statewide office," Exhibit 3, Casey Dep.Ex.1, at TC000122, which Schrimpf had previously obtained from Chris Shea at the Secretary Office and which Luketic later forwarded to Casey. *See id.* at TC000121.

33. County chairs and agents of the Ohio Republican Party were involved in discussions with Casey and the Kasich Campaign beginning on February 19, 2014:

A. Stainbrook (Chair, Lucas County Republican Party) and Arshinkoff (Chair, Summit County Republican Party) were e-mailed by Casey on February 19, 2014. *Id.* TC000180.

B. Casey wrote to Polesovsky and Luketic on February 19, 2014, with a copy to Preisse (Chair, Franklin County Republican Party), that he "push[ed] Stainbrook earlier this morning for getting us a Libertarian potential client." *Id.* TC000182.⁴

3. The Kasich Campaign's Joint Participation.

34. In addition to the e-mails described above, Casey admitted that "[b]eginning in approximately mid-February 2014," he "sought help from various individuals associated with ... the Kasich campaign in collecting Libertarian candidate petitions and facts regarding their circulation ... [and] also sought assistance in identifying an LPO member who would agree to initiate a protest of Mr. Earl's candidacy." Exhibit 5 at 3 (emphasis added).

35. Numerous e-mails between the Kasich Campaign and Casey beginning on February 14, 2014, one week before the protest was filed, prove their coordinated activity:

⁴ JoAnn Davidson, a one-time national committee member for ORP who had also served the ORP in several different roles, was also blind-copied on February 19, 2014, *id.* TC000180, March 7, 2014, *id.* TC000220, and then again later that same day. *Id.* TC000227.

A. Carle, Luketic and Polesovsky were e-mailed by Casey on February 14, 2014, "Just had a call back from John Zeiger. Will get together with him later this afternoon Will update later today ... Plus, what is next!!" Exhibit 3, Casey Dep.Ex.1, at TC000115.

B. They were e-mailed again on February 15, 2014 by Casey with detailed descriptions of "Legal Needs" flowing from "Attorney-Client Protected Notes." Casey stated "Keep working on gaining potential Libertarian filers in each of these major counties. ... That will be the key as we get closer to our protest deadline." *Id.* TC000116 (emphasis added).

C. On February 15, 2014, Polesovsky wrote to Luketic, with copies to Carle, Scott Blake (also a member of Kasich Campaign), and Casey, "Dave, can we get copies of the petitions and the Form 14s over to Terry today? Scott - can you send around your findings on circulator statements/party ID of circulators? Then we can continue to work down the action item list." *Id.* TC000118 (emphasis added).

D. On February 17, 2014, Casey wrote to Polesovsky, Luketic and Carle about his "two-hour plus meeting with these two attorneys this afternoon." *Id.* TC000119. Casey stated "we need to keep digging on Oscar [Hatchett]. He could be a key 'star' in this future production/show." *Id.* Casey added, "Jeff and I have discussed some 'creative' options for research with Oscar. Need to review more on Tuesday." *Id.*

E. On February 18, 2014, Casey wrote to Polesovsky, Luketic and Carle about checking on another of Earl's circulators, Sara Hart. *Id.* TC000120.

F. On February 18, 2014, Luketic forwarded to Casey records that had been obtained by Schrimpf from Chris Shea at the Secretary Office. *Id.* TC000121. These records were "all Form 14's filed for all Libertarian candidates for statewide office." *Id.* TC000122.

G. When questioned about the records Luketic provided, Casey testified, "I don't know whether that is about Charlie Earl or somebody with the first name Earl. I have no idea." Exhibit 2, Casey Dep., at 20.

H. Casey wrote to Gonidakis on February 19, 2014, with blind copies to Polesovsky, Luketic and Carle, as well as Jai Chaibra (Senior Advisor to Governor Kasich), Rob Nichols (Governor Kasich's Press Secretary), and Connie Wehrkamp, about "the number of voters a Libertarian candidate will drain off." Exhibit 3, Casey Dep. Ex.1, at TC000180.

I. On February 19, 2014, Casey wrote to Polesovsky, Luketic and Carle that "Clock is Ticking!!!" and that he had pushed "Stainbrook earlier this morning for getting us a Libertarian potential client." *Id.* TC000182 (emphasis added). When asked "Who was 'us'", Casey testified "Our attorneys." Exhibit 2, Casey Dep., at 30 (emphasis added).

J. Luketic responded later that day, February 19, 2014, with information on the "Earl Validity Report - SOS." Exhibit 3, Casey Dep. Ex.1, at TC000183.

K. On February 19, 2014, Casey wrote to Polesovsky that "we now have a client from Cuyahoga County who is a Libertarian Party member and who is concerned about these types of issues. They are still working on a 'back-up' from Lima/Allen County. ... Matt Carle has been up in Akron today for the funeral of Lt. Gov. Mary Taylor's mother. ... Matt has been on the phone lining up those other needs for this process." *Id.*, Casey Dep. Ex.2, at TC 000235 (emphasis added).

L. Polesovsky replied to Casey on February 20, 2014 about "Having Client, Working on Back-Up, Too!," and stated "just lost our client in Allen County. Looking for others by we might just have to roll with Cuyahoga." *Id.* (emphasis added).

M. Luketic on February 20, 2014 e-mailed to Casey "Hackett & Hart reports" from "Our Friends." *Id.*, Casey Dep. Ex.1, at TC000184 (emphasis added). This report contained criminal background information on Earl's circulator. *Id.* TC000186-000191.

N. On February 20, 2014, Luketic e-mailed to Casey "Gregory Felsoci Voting History," which identified how Felsoci voted in the most recent elections. *Id.* TC000192.

O. On February 20, 2014, Luketic e-mailed Casey a "Lib. Petition Report," which was "Paid For By Kasich Taylor For Ohio," *id.* TC 000193, and outlined in detail the signature collection efforts of Earl's circulators, including Hackett and Hart. *Id.* TC000194-000203.

P. On February 21, 2014, just hours before the protest was filed against Earl, Polesovsky sent to Casey the name of Chris Klym at 11:21AM as a "Contact." *Id.* TC 000204.

Q. On February 21, 2014, Casey e-mailed to Klym at 12:39 PM Felsoci's name and telephone number, *see* Exhibit 10, Casey Docs., at TC000545, establishing that contact with Felsoci originated with Polesovsky. Casey testified that Klym may have known Felsoci. Exhibit 2, Casey Dep., at 36.

R. On February 26, 2014, Luketic texted Casey asking "Would it help our case if one of the circulators signed a Democrat petitions this year?" Exhibit 3, Casey Dep. Ex.1, at TC000206 (emphasis added).

S. On February 26, 2014, Polesovsky e-mailed to Casey Musca's⁵ phone number. *Id.* TC000207. Casey admitted he did not have Musca's number until February 26, 2014 and that Polesovsky had the number before he did. Exhibit 2, Casey Dep., at 40.

T. On February 28, 2014, Casey's lawyer e-mailed a request to Casey for "whatever documentation you have of Andrew Goldsmith and Emily Baker are Democrats?", which Casey

⁵ Musca has already been identified by Felsoci as placing him in contact with his (Felsoci's) lawyers to protest Earl. *See* Felsoci Testimony, March 17, 2014, Doc. No. 79.

forwarded that same day to Polesovsky asking for assistance: "Not sure of your Sat. schedule and/or who might be able to do some searching." Exhibit 3, Casey Dep. Ex.1, at TC000209. Polesovsky responded "Will do" later that day. *Id.* TC 000210. The following day he responded "Some checking is being done." *Id.* TC000211.

U. On March 4, 2014 Casey wrote Schrimpf, with blind copies to Polesovsky and Luketic, thanking Schrimpf for clarifying what "Borges Telling Media??" *Id.* TC000212.

V. On the day of the administrative hearing, March 4, 2014, Schrimpf, Polesovsky, Luketic and Casey text-messaged each other about the proceedings. *Id.* TC000213 - 000214.

W. On March 4, 2014, Casey forwarded to Schrimpf, with blind copies to Polesovsky, Luketic and Damschroder, an "earlier, less detailed Plain Dealer story, including the item in the 8th paragraph involving Chairman Borges" and the "Borges Tie-in." *Id.* TC000215. That story had reported that "Party Chairman Matt Borges acknowledged the party had a role in a media interview, although he quickly backtracked and said it was the Libertarians who made the challenge." *Id.* TC000216.

X. On March 7, 2014 Casey e-mailed Polesovsky, Luketic, Schrimpf and Carle that LPO would be filing in federal court. *Id.* TC000227. Casey stated that "Per discussion with the State GOP folks, I strongly encourage staying 'low-key'" *Id.* (emphasis added).

Y. On March 8, 2014, Polesovsky texted Casey "ill reach out to our contacts. Can you email me details of what he needs to do?" Exhibit 10, Casey Docs., at TC000511.⁶

⁶ This text was a response to Casey's request that Felsoci be located to testify at the federal hearing. Casey texted Polesovsky approximately 90 minutes later that "Greg called Zeiger back mid day and we are taken care of." *Id.* Polesovsky immediately texted back, "Ok good, i put in word to rob to have him ready for a call," *id.*, providing even more evidence that Polesovsky was the contact with Felsoci.

Z. On May 16, 2014, Casey e-mailed his lawyer, Zeiger, and blind-copied Damschroder, with comments about "LPO v. Husted." Exhibit 10, Casey Docs., at TC000519.

AA. On March 10, 2014, Casey blind-copied Carle an e-mail he sent to his lawyer, Zeiger, stating that Felsoci's intervention motion "Looks good! ... It is good to keep 'visible' and in front of Judge Watson." *Id.* TC000250.

BB. On March 10, 2014, after Schrimpf had reported that "Chrissie Thompson ... was just skeptical that ORP wasn't involved," Casey forwarded this report to Connie Wehrkamp,⁷ a Kasich Campaign staffer, *see* Exhibit 2, Casey Dep., at 24, and blind-copied Carle, Polesovsky, Luketic and Rob Nichols (Press Secretary for the Governor), stating "lets the lawyers (sic) work on making sure that the final nails are driven into the Charlie Earl coffin." Exhibit 10, Casey Docs., at TC000251.

CC. On March 10, 2014, Casey e-mailed Carle that "[a]s of late monday today, Stuart and the Taft firm have been engaged! Any word from Mary?" *Id.* TC000253.

DD. On March 14, 2014, after Plaintiffs had requested leave to question Zeiger, Casey reported to Carle, with a copy to JoAnn Davidson, that Davidson thought Zeiger "did not seem happy" and that "[i]f John testifies this am, it would be that I contacted him and that he hopes some Republican sources will help fund a portion of his time and costs. That is what he knows and would share, if and if. Me not being there makes it harder to allow more 'over-reach' by their attorney." *Id.* TC000255 (emphasis added).

EE. On April 3, 2014, Casey wrote to Michael Lenzo, with blind copies to Damschroder and Polesovsky, about LPO being removed from the ballot and having to collect

⁷ Wehrkamp received numerous e-mails regarding the protest of Earl. *See* Exhibit 3, Casey Dep. Ex.1, at TC000180, 000208, 000217, 000221, 000223, 000224, 000225, 000227.

signatures: "If they can't get 500 good one, hard to believe that they can 28,000+++ of them." *Id.* TC000386.

36. Schrimpf was working for ORP when he assisted Casey's and Felsoci's protest of Earl; he presently works for the Kasich for President Campaign. Exhibit 2, Casey Dep., at 66.

4. Knowledge of Agents in the Governor's Office.

37. Agents in the Governor's Office, in addition to agents involved with his re-election Campaign, were aware of Casey's, the Kasich Campaign's and ORP's effort to remove Earl:

A. Jai Chaibra, a senior Advisor to Governor Kasich, was made aware of Casey's, the Kasich Campaign's, and ORP's efforts to remove Earl as early as February 19, 2014, two days before the protest was filed. Exhibit 3, Casey Dep. Ex.1, at TC000180. He was informed again on March 7, 2014, just after the Secretary removed Earl from the ballot. *Id.* TC000220.

B. Scott Milburn, the Communications Director for Governor Kasich, was likewise first informed on February 19, 2014 and informed again on March 7, 2014 when Earl was removed. *Id.* TC000180 & TC000220.

C. Rob Nichols, Governor Kasich's Press Secretary, was first notified on February 19, 2014. *Id.* TC000180. He was repeatedly notified of events surrounding Earl's protest thereafter. *See id.* TC000208, TC000217, TC000220, TC000223, and TC000227.

5. Involvement of the Secretary's Office.

38. The Secretary's Office was also intimately involved with Casey, the Kasich Campaign, the Governor's Office and the ORP's protest of Earl. Numerous e-mails described above include communications with Damschroder. In addition to those described above, on March 4, 2014, in the same e-mail that Casey worried over Borges' statement about ORP's funding the protest, Casey blind-copied Damschroder using his personal e-mail account. *Id.* TC000212.

Damschroder was blind-copied again later that day when Casey discussed with Schrimpf, Polesovsky, and Luketic the leaked "Borges Tie-in." *Id.* TC000215.

E. Synthesis of Supplemental Evidence.

Casey did not return from an extended trip abroad until February 10, 2014. Exhibit 2, Casey Dep., at 90. There was little time to arrange the intricate plans reflected in the e-mails. The plan was arranged before Casey returned from his trip abroad, and Casey stepped into the arrangements. Casey did not hire the Zeiger firm and did not "owe" the Zeiger firm. Either the Kasich Campaign or ORP arranged Earl's protest and agreed to pay the Zeiger firm. As opposed to Casey, Borges had a longstanding relationship with Zeiger and everyone understood that it was "common" for ORP to challenge other party's candidates and "standard practice" for ORP to pay the challengers' legal bills. ORP began paying Casey's legal bills just after the election.

The Kasich Campaign, Borges, Schrimpf, Damschroder and members of the Governor's Office were all intricately involved in the planning of the protest of Earl from the beginning. The "team" began searching for a reason to disqualify Earl soon after Schrimpf was given Earl's petitions. The Kasich Campaign located Felsoci, coordinated his recruitment, contacted him through Klym, and delivered him to Casey.

Damschroder was kept apprised from the very beginning for an important reason. He was the insider who could not only provide advice, but who could actively assist if time ran short. Damschroder followed through, instructing his staff to accept protests that came in after the statutory deadline of 4 PM on February 21, 2014. Casey and the Kasich Campaign, after all, had only located Felsoci four hours before the deadline. They needed Damschroder's assistance just in case Felsoci's protest did not arrive from Cuyahogo County in time. Damschroder responded by instructing his staff to accept protests filed after 4 PM.

The Kasich Campaign, Borges, Schrimpf, Damschroder, the Governor's staff and Casey from the very beginning were in constant contact about the protest. They shared a common objective -- to keep Earl off the ballot. Their minds had met; they acted together.

II. The Evidence Supports Plaintiffs' Request for Emergency Relief.

Following the 2014 general election, the Secretary directed local election boards to deny LPO candidates access to Ohio's 2015 election ballots. Some refused, and LPO candidates successfully ran in local primaries. Exhibit 9 illustrates that LPO candidates who successfully ran in Ohio's 2015 primary are now, in the middle of the game, 'having the goal posts moved.' *See* Order, Doc. No. 47 at PAGEID #827. Even though they won their primaries, they are being removed from the 2015 general election ballot. Emergency relief is needed.

CONCLUSION

Plaintiffs' Motion to Supplement the Record should be **GRANTED**.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this Motion, Memorandum of Law, and Attached Exhibits were filed using the Court's electronic filing system, and will thereby be electronically delivered to all parties through their counsel of record.

s/ Mark R. Brown

Mark R. Brown