

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

LIBERTARIAN PARTY OF OHIO, et al.  
Plaintiffs,

v.

CASE NO. 13-953  
JUDGE WATSON  
MAGISTRATE JUDGE KEMP

JON HUSTED, et al.,  
Defendants.

---

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF RENEWED MOTION FOR  
SUMMARY JUDGMENT UNDER COUNT SEVEN**

Count Seven's selective enforcement/application theory is well-established under the First Amendment. *See, e.g., Wayte v. United States*, 470 U.S. 594, 614 (1985); *Reno v. American-Arab Anti-Discrimination Commn.*, 525 U.S. 471, 497 (1999) (Ginsburg, J., concurring) (“Under our selective prosecution doctrine, ‘the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights.’”).

"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)). (quoting *Hooks v. Hooks*, 771 F.2d 935, 943 (6th Cir. 1985)).

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

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.

**I. Argument.**

**A. Casey's Combination with Agents in the Secretary's Office.**

Casey sent additional e-mails to Damschroder about the protest that were recently uncovered; these are cataloged in Plaintiffs' Omnibus Motion with Exhibits and speak for themselves. Doc. No. 335.

**B. Casey's Combination with "the Governor's Folks".**

Casey first testified that he "retained" the Zeiger firm on February 14, 2014. Casey Testimony, Doc. No. 247, at PAGEID # 6491. At his deposition, however, Casey stated he had not "hired" the Zeiger firm. Casey Dep., Doc. No. 335-2, at 17. Zeiger's representation obviously had already been arranged through the Kasich Campaign when Casey returned from abroad on February 10, 2014. The Kasich Campaign, after all, knew ORP would pay.

As early as February 5, 2014, Luketic had already reported to Damschroder that "ORP is sending a records request to you via email for all of" Earl's part-petitions. PI Hearing, Ex. 56 (SOS Redacted 0147); Damschroder Testimony, Doc. No. 247, at PAGEID # 6616. Casey came on board on February 14, 2014. Carle, Luketic and Polesovsky were e-mailed that day by Casey about his meeting with Zeiger, "Plus, what is next!!" Casey Dep.Ex.1, Doc. No. 335-3, at TC000115. They were e-mailed again on February 15, 2014 by Casey with detailed descriptions of "Legal Needs" flowing from his "Attorney-Client Protected Notes." *Id.* TC000116.

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? ... Then we can continue to work down the action item list." *Id.* TC000118 (emphasis added). On February 17, 2014, Casey wrote to Polesovsky, Luketic and Carle and stated "we need to keep digging on Oscar [Hatchett]." *Id.* 000119.

On February 17, 2014, Casey e-mailed Richard Lumpe that he was "doing an high priority research project for the Governor's folks." PI Hearing, Doc. No.247, Ex. D (TC000005). On February 18, 2014, Casey wrote to Polesovsky, Luketic and Carle about checking on another of Earl's circulators, Sara Hart. Casey Dep.Ex.1, Doc. No. 335-3 at TC000120. That same day, Luketic forwarded to Casey records that had been obtained by Schrimpf from Chris Shea at the Secretary Office. *Id.* TC000121.

On February 18, 2014, Casey e-mailed his lawyers, with blind copies to Carle, Polesovsky and Luketic, that he had checked with "a solid source," Damschroder, about how best to proceed against Earl. Casey Testimony, Doc. No. 247, at PAGEID # 6516. On February 19, 2014, Casey e-mailed Luketic about the "Earl Validity Report," with copies to his lawyer, Mead, and Polesovsky. Casey testified that he received Earl's part-petitions from the Kasich Campaign. Casey Testimony, Doc. No. 247, at PAGEID # 6541. He received subsequent validity reports from Schrimpf (ORP).

On February 19, 2014, Luketic e-mailed Casey, Meade, Zeiger, Polesoovsky, and Carle, stating: "Team. Our numbers may have been a little of (sic) (in a good way." PI Hearing, Ex.D. (TC000042). 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." Casey Dep.Ex.1, Doc. No. 335-3 at TC000180. On that same day, 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). Luketic responded later that day, February 19, 2014, with information on the "Earl Validity Report - SOS." *Id.* TC000183.

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. ... Matt has been on the phone lining up those other needs for this process." *Id.* TC 000235 (emphasis added). 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).

Luketic on February 20, 2014 e-mailed to Casey "Hackett & Hart reports" from "Our Friends." *Id.* TC000184 (emphasis added). This report contained criminal background information on Earl's circulator. *Id.* TC000186-000191. 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. On that same day, Luketic e-mailed Casey a "Lib. Petition Report," *id.* TC 000193, and outlined in detail the signature collection efforts of Earl's circulators, including Hatchett and Hart. *Id.* TC000194-000203.

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. That same day, Casey e-mailed to Klym at 12:39 PM Felsoci's name and telephone number, *see* Casey Docs., Doc. No. 335-10, at TC000545, establishing that contact with Felsoci originated with Polesovsky. On February 26, 2014, Luketic texted Casey asking "Would it help our case if one

of the circulators signed a Democrat petitions this year?" Casey Dep. Ex.1, Doc. No.35-3, at TC000206 (emphasis added).

On February 26, 2014, Polesovsky e-mailed to Casey Musca's 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. Casey Dep., Doc. No. 335-2, at 40. 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 forwarded that same day to Polesovsky asking for assistance. Casey Dep. Ex.1, Doc. No. 335-3, at TC000209. Polesovsky responded "Will do" later that day. *Id.* TC 000210. The following day he responded "Some checking is being done." *Id.* TC000211.

On March 4, 2014 Casey wrote Schrimpf, with blind copies to Polesovsky and Luketic, thanking Schrimpf for clarifying what "Borges Telling Media??" *Id.* TC000212. On March 10, 2014, after Schrimpf had reported that "Chrissie Thompson ... was just skeptical that ORP wasn't involved," Casey forwarded this report to Wehrkamp, a Kasich Campaign staffer, and blind-copied Carle, Polesovsky, Luketic and Rob Nichols, stating "lets the lawyers (sic) work on making sure that the final nails are driven into the Charlie Earl coffin." Casey Docs., Doc. No. 335-10, at TC000251. Communications between Casey and the Kasich Campaign continued well-beyond the conclusion of the administrative proceeding. These additional communications are detailed in Plaintiffs' Omnibus Motion to Supplement the Record, Doc. No. 335.

**C. ORP's Combination with Casey and Kasich Campaign.**

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." Doc. No. 335-3 at 3. Between February 19, 2014 and the end of March 2014, numerous e-mails were exchanged with Schrimpf (ORP Communications Director) and Borges (Chair of ORP).

On February 19, 2014, for example, 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." Casey Dep. Ex.1, Doc. No. 335-3, at TC000180. 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. Plaintiffs' Deposition Exhibit for Borges Deposition, dated Oct. 7, 2015 (hereinafter "Borges Dep. Ex.1"), Doc. No. 335-12, at TC000524. Casey on February 28, 2014 wrote to Jim Heath, with a blind copy to Schrimpf, "Let's have Charlie Earl answer for ALL of the questions under oath." Casey Dep. Ex.1, Doc. No. 335-3, at TC000208.

On March 4, 2014, Casey e-mailed Schrimpf, "Get My Text? Borges Telling Media??" Borges Dep. Ex.1, Doc. No. 335-12, 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.* On March 7, 2014 Schrimpf e-mailed Casey and Borges, that he would "speak as little as possible" about Earl's removal. Casey Dep. Ex.1, Doc. No. 335-3, at TC000221. Casey responded to Schrimpf's comment, copying Borges, by stating, "Absolute smart, right and 100% on message." *Id.* TC000223.

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. Borges was copied on an

e-mail that same day by Casey to Schrimpf just after the Secretary announced the removal of Earl from the LPO's primary ballot. *Id.* 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. 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.<sup>1</sup>

Throughout March of 2014, Casey continued to communicate with Borges about the protest, and vice versa. 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. Borges Dep. Ex.1, Doc. No. 335-12, at TC000252. 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. 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.

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. On that same day, Borges forwarded to Casey an e-mail from his (Borges') lawyer (Armstrong) regarding Borges' potential testimony in federal court. *Id.* TC000527. 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.*

---

<sup>1</sup> 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.

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. 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. 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.

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. 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. 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.

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. On March 21, 2014, Casey e-mailed Damschroder, with blind copies to Carle, Polesovsky, Luketic, Borges and Schrimpf, Felsoci's brief. *Id.* TC000339. On March 22, 2014, Casey e-mailed a news story about the case to Carle, Damschroder, Borges and Schrimpf. *Id.* TC000361.

Notwithstanding these documented communications with Casey in February and March of 2014, as well as his prior review of these documents, Borges testified at his deposition that he "did not recall" communicating with Casey in February and March of 2014. *See* Deposition of Matt Borges, Oct. 7, 2015 (hereinafter "Borges Dep."), Doc. No. 335-11, at 26. Borges further

testified that he had "no idea" whether Schrimpf communicated with Casey during February or March of 2014. *Id.* at 27-28. Borges testified that it "would be news" to him if Schrimpf had communicated with Casey about Earl's protest. *Id.* at 30. Borges was obviously attempting to hide ORP's involvement. Borges is not credible. ORP was involved from the beginning.

**D. Payments to the Zeiger Firm By ORP.**

ORP began making payments to the Zeiger firm on Casey's behalf on November 19, 2014. *See* Casey Dep.Ex.1, Doc. No. 335-3, at TC000234. The first payment was \$100,000 on November 19, 2014. *See id.* The second payment for \$100,000 was made on December 22, 2014. *Id.* TC000233. The third payment, \$50,000, was made on December 29, 2014. *Id.* TC000232. The fourth payment, \$50,000, was made on February 24, 2015. *Id.* TC000231. The four total \$300,000, though more may have been made. Borges Dep., Doc. No. 335-11, at 13, 21.

All four were made by ORP to the Zeiger firm to pay for the protest of Earl. *See id.* at 12-13. Borges explained that ORP "provides legal services to all of our candidates and campaigns," *id.* at 14-15, and that "standard practice" is to "pick up the bills of statewide candidates." *Id.* at 15, 16, 17. Statewide candidates, Borges said, "are ... familiar with our practices." *Id.* at 17.

Casey on November 11, 2014 hand-delivered his November 10, 2014 invoice reflecting a \$552,305.26 bill. Casey Dep., Doc. No. 335-2, at 75; Casey Dep. Ex.1, Doc. No. 335-3, at TC000229. A subsequent March 3, 2015 invoice reported a "balance due from statement dated November 10, 2014" as \$252,305.26. *Id.* The remaining balance due on March 3, 2015 was \$292,074.91. *Id.* Borges phoned Zeiger on February 24, 2015 to inform him that a payment was sent and there was "more to come." *See* Doc. No. 335-7.

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." Casey Dep., Doc.

No. 335-2, at 75. Borges, Casey testified, "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.

These payments not only prove ORP's part in the conspiracy, they ratify the conspiracy's action. *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)).

## II. Conclusion.

Plaintiffs Motion for Summary Judgment should be **GRANTED**.

Respectfully submitted,

s/ Mark R. Brown

Mark R. Brown, Trial Counsel  
Ohio Registration No. 81941  
303 East Broad Street  
Columbus, OH 43215  
(614) 236-6590  
(614) 236-6956 (fax)  
mbrown@law.capital.edu

Mark G. Kafantaris  
Ohio Registration No. 80392  
625 City Park Avenue  
Columbus, OH 43206  
(614) 223-1444  
(614) 300-5123  
mark@kafantaris.com

### CERTIFICATE OF SERVICE

I certify that copies of this Motion and accompanying Memorandum 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