

RE: Depositions in LPO v. Husted, No. 13-953 [IWOV-DMS.FID42502]

Krista Meister [meister@lito.io] on behalf of Steven W. Tigges [tigges@lito.io]

Sent: Thursday, June 12, 2014 4:11 PM**To:** Brown, Mark**Cc:** bridget.coontz@ohioattorneygeneral.gov; flevenson@acluohio.org; John W. Zeiger [zeiger@lito.io]; Stuart G. Parsell [parsell@lito.io]; Mark Kafantaris; kristopher.armstrong@ohioattorneygeneral.gov; Steven W. Tigges [tigges@lito.io]

We are ordering the transcript of the conference.

From: Brown, Mark [mailto:MBrown@law.capital.edu]**Sent:** Thursday, June 12, 2014 11:52 AM**To:** Steven W. Tigges**Cc:** bridget.coontz@ohioattorneygeneral.gov; flevenson@acluohio.org; John W. Zeiger; Stuart G. Parsell; Mark Kafantaris; kristopher.armstrong@ohioattorneygeneral.gov**Subject:** RE: Depositions in LPO v. Husted, No. 13-953 [IWOV-DMS.FID42502]

Hi Steve,

You are correct that Count Five does not relate to Mr. Felsoci, and Plaintiffs have no questions of him in that regard. The rest of your description of Plaintiffs' Complaint is mistaken.

The Second Amended Complaint, of course, remains fully operative. Our deposition of Mr. Felsoci has nothing to do with the proposed Third Amended Complaint, although if the Motion to Amend is granted before the deposition of Mr. Felsoci the date of the deposition will remain as noticed. The proposed Third Amended Complaint changes nothing in terms of claims, Counts, or Defendants.

At the status conference I clearly stated that Counts Six and Eight were "effectively" taken off the table, for purposes of proceeding to an expedited conclusion, but that the District Court was always free to change its mind (and Plaintiffs hoped the District Court would!). (Because you were not present, you may have gotten some mistaken second-hand information on what I said). Discovery could present evidence convincing the District Court to change its mind on these two Counts. Thus, Plaintiffs will question Mr. Felsoci in regard to these two Counts.

Count Seven of the Second Amended Complaint, Plaintiffs' "as-applied" challenge, also remains against Mr. Felsoci. That Count includes a "selective application" component, as all "as-applied" First Amendment challenges do. Plaintiffs intend to question Mr. Felsoci about this Count, his answer and his defenses.

Your surmise and assumptions are incorrect.

Even though Plaintiffs have no obligation to deliver to do so, we have tried as best as can be expected in three e-mails to assuage Mr. Felsoci's concerns about the deposition. I don't know what else can be done.

As indicated in the first responsive e-mail, Plaintiffs are entitled as a matter of right to depose Mr. Felsoci. In the absence of a preferred date from Mr. Felsoci, Plaintiffs will notice his deposition for Monday, July 7, 2014.

Sincerely,

Mark

Mark R. Brown
Newton D. Baker/Baker & Hostetler Chair
Capital University Law School

From: Krista Meister [meister@lito.io] on behalf of Steven W. Tigges [tigges@lito.io]
Sent: Thursday, June 12, 2014 11:28 AM
To: Brown, Mark
Cc: bridget.coontz@ohioattorneygeneral.gov; flevenson@acluohio.org; John W. Zeiger; Stuart G. Parsell; Mark Kafantaris; kristopher.armstrong@ohioattorneygeneral.gov; Steven W. Tigges
Subject: RE: Depositions in LPO v. Husted, No. 13-953 [IWOV-DMS.FID42502]

At the status conference with Judge Watson on June 5, 2014, you represented to the Court that Counts Five and Seven of your second amended complaint are the only remaining operative claims, and that Counts Six and Eight have already been disposed of (or, as you put it, "taken off the table") by the Court's prior rulings. Count Five has nothing to do with Mr. Felsoci. And, you are proposing to replace Count Seven in the second amended complaint with your new "selective application" claim in Count Seven of the proposed third amended complaint. So, your assertion that you want to depose Mr. Felsoci on "questions relevant to Counts Six, Seven and Eight of the second amended complaint" obviously is not your real reason for seeking his deposition.

In view of your refusal to identify the specific, non-redundant issues on which you want to depose Mr. Felsoci, I can only assume you want to depose him on matters relating to your proposed third amended complaint. This would be inappropriate. The Court has not granted leave for you to file the third amended complaint and, we believe, leave will be denied on grounds of futility.

If you can identify any specific subjects for deposition of Mr. Felsoci that have not already been covered relating to the pending operative complaint (i.e. the second amended complaint), we will provide dates for his deposition. Otherwise, you will need to take this matter up with the Court.

From: Brown, Mark [<mailto:MBrown@law.capital.edu>]
Sent: Wednesday, June 11, 2014 3:59 PM
To: Steven W. Tigges
Cc: bridget.coontz@ohioattorneygeneral.gov; flevenson@acluohio.org; John W. Zeiger; Stuart G. Parsell; Mark Kafantaris; kristopher.armstrong@ohioattorneygeneral.gov
Subject: RE: Depositions in LPO v. Husted, No. 13-953 [IWOV-DMS.FID42502]

Hi Steve,

I believe my previous e-mail responds to your inquiry. Indeed, I don't know how else to respond. Plaintiffs intend to ask questions relevant to Counts Six, Seven and Eight.

A lot has happened, of course, since the preliminary injunction hearing, including Mr. Felsoci's (and the Secretary's) answering the Second Amended Complaint and Plaintiffs' Production requests of both Mr. Felsoci and the Secretary. I am sure you understand that in order to prepare for summary judgment Plaintiffs must conduct discovery. Requesting documents of parties followed by depositions of those parties is standard practice.

If you are concerned about the length of the deposition, I suspect it will not go longer than two or

three hours. Without Mr. Felsoci's documents it is difficult to say, exactly. Plaintiffs will have a better idea once those documents are delivered. I hope to give you a better idea about the length of the deposition once we go through those documents. Please be assured that we will not keep Mr. Felsoci any longer than necessary.

Again, just let us know what day works best.

Sincerely,

Mark

Mark R. Brown
Newton D. Baker/Baker & Hostetler Chair
Capital University Law School

From: Krista Meister [meister@ltohio.com] on behalf of Steven W. Tigges [tigges@ltohio.com]
Sent: Wednesday, June 11, 2014 3:22 PM
To: Brown, Mark
Cc: bridget.coontz@ohioattorneygeneral.gov; flevenson@acluohio.org; John W. Zeiger; Stuart G. Parsell; Mark Kafantaris; kristopher.armstrong@ohioattorneygeneral.gov; Steven W. Tigges
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I would appreciate an answer to my question. What specific subjects do you want to question Mr. Felsoci about that have not already been covered?

From: Brown, Mark [<mailto:MBrown@law.capital.edu>]
Sent: Wednesday, June 11, 2014 1:45 PM
To: Steven W. Tigges
Cc: bridget.coontz@ohioattorneygeneral.gov; flevenson@acluohio.org; John W. Zeiger; Stuart G. Parsell; Mark Kafantaris; kristopher.armstrong@ohioattorneygeneral.gov
Subject: RE: Depositions in LPO v. Husted, No. 13-953 [IWOV-DMS.FID42502]

Hi Steve,

Please be assured that Plaintiffs questions will comply with the requirements of Federal Rule of Civil Procedure 26(b)(1), which states: "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense--including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter."

Plaintiffs have made three claims (Counts Six, Seven and Eight in the Second Amended Complaint) that Defendant (Mr. Felsoci) is defending. Mr. Felsoci has also answered the Second Amended Complaint. The deposition will therefore involve questions regarding nonprivileged matter relevant to these claims in the Second Amended Complaint and the Defendants' (including Mr. Felsoci's) answers and defenses.

Under Rule 30(a)(1), of course, a "plaintiff has a right to depose defendants without court permission," *Jin v. Rodriguez*, 2006 WL 39091 (E.D. Cal. 2006), at least when the defendant/deponent has not yet been deposed. See Rule 30(a)(2)(A)(ii). See also *Shawmut Boston International Banking Corp. v. Duque-Pena*, 767 F.2d 1504, 1507 (11th Cir. 1985) (stating that a plaintiff has a "right to depose" a defendant); *Davis v. Lower Bucks Hospital*, 56 F.R.D. 21 (E.D. Pa. 1972) (same). Felsoci has not been deposed.

As before, Plaintiffs are happy to work with Mr. Felsoci in regard to the time of the deposition. I believe I sent John (Zeiger) a list of four or five days in July. We are more than willing to abide by any of these days Mr. Felsoci suggests. Indeed, should Mr. Felsoci complete his document production before July, we could conceivably schedule the deposition this month (June). Plaintiffs simply want to insure that Mr. Felsoci has adequate notice.

Please let me know what day Mr. Felsoci prefers.

Sincerely,

Mark

Mark R. Brown

Newton D. Baker/Baker & Hostetler Chair
Capital University Law School

From: Jan Strickland [strickland@litoio.com] on behalf of Steven W. Tigges [tigges@litoio.com]
Sent: Wednesday, June 11, 2014 11:23 AM
To: Brown, Mark
Cc: bridget.coontz@ohioattorneygeneral.gov; flevenson@acluohio.org; John W. Zeiger; Stuart G. Parsell
Subject: FW: Depositions in LPO v. Husted, No. 13-953 [IWOV-DMS.FID42502]

You already examined Mr. Felsoci extensively at the hearing in March, and he subsequently answered your supplemental interrogatories. We can't imagine anything else to ask him that is relevant to the claims in the operative complaint.

What are you proposing to ask Mr. Felsoci at a deposition that you have not already covered?

From: Brown, Mark [<mailto:MBrown@law.capital.edu>]
Sent: Tuesday, June 10, 2014 8:10 PM
To: John W. Zeiger
Cc: bridget.coontz@ohioattorneygeneral.gov; flevenson@acluohio.org
Subject: Depositions in LPO v. Husted, No. 13-953

Hi John,

You should have received a note I sent to Bridget about setting depositions for her clients. I would also like to set a deposition for Mr. Felsoci about this same time. We should be in receipt of the materials we requested from Mr. Felsoci before the week of July 7, 2014. Could you please let me know a preferred day for deposing Mr. Felsoci that week? My thought is to begin at 9 AM, though we are flexible. We can do it at your place, or at the

Law School, whichever is more convenient.

If I do not hear back from you by the end of the day, Friday, June 13, 2014, I will assume that Monday, July 7, 2014 is preferable to you. Again, we are quite flexible and look forward to arranging an appropriate time. Thanks.

Best,

Mark

Mark R. Brown
Newton D. Baker/Baker & Hostetler Chair
Capital University Law School