

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

HILDA L. SOLIS,)
Secretary of Labor,)
United States Department of Labor,)
)
Plaintiff,)

v.)

Civil Action No. JKB-09-3375

LOCAL 9477,)
UNITED STEELWORKERS,)
)
)
Defendant.)

**MEMORANDUM OF LAW IN SUPPORT
OF PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

Plaintiff Hilda L. Solis, Secretary of Labor, United States Department of Labor (“Department” or “Secretary”), by the undersigned counsel, respectfully submits this Memorandum of Law in Support of her Motion for Summary Judgment.

I. INTRODUCTION

This action is brought by Plaintiff pursuant to Title IV of the Labor-Management Reporting and Disclosure Act of 1959, as amended, 29 U.S.C. §§ 401, *et seq.*, (“LMRDA” or “Act”), which governs the conduct of union officer elections. Section 401 (g) of the LMRDA, 29 U.S.C. § 481(g), prohibits the use of employer moneys to promote the candidacy of any person in an election of officers.

Defendant Local 9477, United Steelworkers (“Local 9477”), violated section 401(g) of the LMRDA, 29 U.S.C. § 481(g), in its April 20, 2009 officer election because the incumbent slate used employer resources to promote its candidates for election. As is discussed in this

Memorandum, the incumbent slate used the employer's telefax machine, copiers, and computer/email system to reproduce and distribute campaign literature and to coordinate the dissemination of literature for campaign purposes. These resources were used to the advantage of the incumbent slate to facilitate the wide dissemination of campaign materials, which may have affected the outcome for all offices won by the incumbent slate.

Plaintiff is entitled to judgment as a matter of law, pursuant to Federal Rule of Civil Procedure 56, because there is no genuine issue as to any material fact and the facts establish a violation. Accordingly, the Secretary seeks the sole remedy mandated by section 401 of the LMRDA for a violation of the Act: that the April 20, 2009 election be declared void and that a new election be conducted under her supervision. 29 U.S.C. § 482(c).

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

The following material facts are undisputed in this case:

1. Local 9477 is a labor organization engaged in an industry affecting commerce within the meaning of sections 3(i) and 3(j), of the LMRDA, 29 USC §§ 402(i) and 402 (j), and has filed labor organization annual reports, as required by section 201 of the LMRDA, 29 U.S.C. § 431. Exh. A (First Amended Complaint ("Complaint")) at ¶ 6.
2. Local 9477 is a labor organization subject to the union officer election provisions contained in Title IV of the LMRDA, including section 401(g), 29 U.S.C. § 481(g), which prohibits the contribution of employer funds to promote the candidacy of any person. *Id.* at ¶¶ 7 and 20.
3. Local 9477 is comprised of several units, the largest of which represents the Severstal Sparrows Point Plant ("Sparrows Point"), which was the plant primarily involved in this case. Exh. B (Declaration of Investigator Erica Weber ("Weber Decl.)) at ¶ 3.

4. Local 9477 had approximately 2,400 members at Sparrows Point at the time of the election. *Id.* At the time of the election, local members worked in seven departments, called "zones." *Id.* Seven grievance committee members represented each of the separate zones and were elected by the members in that zone. *Id.* There were nine local officers who were elected by the membership at large. *Id.*
5. Local 9477 conducted its last regular election on April 20, 2009. Exh. C (Defendant's Answer to Plaintiff's First Amended Complaint ("Answer")) at ¶ 1. The two slates in that election were the Incumbent Slate, known as the Red, White and Blue ("incumbent slate"); and the Insurgent Slate, known as the United Steelworkers for Action ("insurgent slate"). Exh. B (Weber Decl.) at ¶ 5.
6. Local 9477's April 20, 2009 election was subject to the provisions of Title IV of the LMRDA. Exh. A (Complaint) at ¶ 7; Exh. C (Answer) at ¶ 7.
7. John Cirri was a candidate for re-election as Local 9477 President on the incumbent slate. Jeff Mikula was the candidate for Vice President on the incumbent slate. Exh. F (Election Results Chart).
8. James Blankenship was the candidate for President of Local 9477 on the insurgent slate. Exh. D (Defendant's Answers to Plaintiff's First Set of Interr.) and attachments Bates Numbers 00000002-000000010; Exh. F (Election Results Chart).
9. The incumbent slate won the general offices of President, Vice President, Financial Secretary, Treasurer, Outside and Inside Guards, First and Second Trustees in the April 20, 2009 general election. Exh. F (Election Results Chart); Exh. B (Weber Decl.) at ¶ 14. The sole offices won by the insurgent slate were Recording Secretary and Grievance Committee Chair.

10. The largest margin of victory with respect to the election for general offices was for First Trustee, with a 332-vote lead; the smallest margin of victory was for Second Trustee with a 26-vote lead. Exh. F (Election Results Chart); Exh. B (Weber Decl.) at ¶¶ 6 and 14.
11. The incumbent slate also won four zone elections. Three of the four zone election offices are covered by this motion: Zone 1, Zone 3 and Zone 7. Exh. A (Complaint) at ¶ 21; Exh. Q (Declaration of Stephen J. Willertz (“Willertz Decl.”)) at ¶ 4.
12. On July 22, 2010, Local 9477 agreed to have the Department supervise the Zone 6 Grievance Committee Member election. Exh. G (Partial Settlement Agreement).
13. On February 11, 2011, this Court signed an Order Declaring the Election Results for Zone 6 Grievance Committee Member. Exh. W (Order Declaring Election Results).
14. For the three disputed zone elections for Zone 1, Zone 3, and Zone 7, the largest margin of victory among these three zones was for the Zone 1 Committee Member, which position was won by a margin of 66 voters. Exh. F (Election Results Chart).
15. James Blankenship filed a written protest concerning the conduct of the April 20, 2009 election with Local 9477 and subsequently filed a timely administrative Complaint with the Secretary, in compliance with section 402(a)(2) of the Act. Exh. C (Answer) at ¶¶ 12-15.
16. All fax machine and copiers located on the premises of Sparrows Point, including the Union Annex, belong to Sparrows Point. Sparrows Point also maintains its own computer and email system. Exh. H (Sparrows Point Directive); Exh. J (Defendant’s Response to Plaintiff’s First Set of Requests for Admissions to Defendant) (“Admissions, First Set”) at ¶ 14.

17. Sparrows Point provided office space for the use of Local 9477 to conduct union business. *Id.* at ¶ 18. Local 9477's offices are located within the Human Resources building ("HR"), informally referred to as the Union Annex. *Id.*
18. Prior to the April 2009 election, Sparrows Point issued a directive concerning the Company's campaigning policy. Exh. H (Sparrows Point Directive); Exh. J (Admissions, First Set) at ¶ 22. The directive states: "The use of the Company computers (including Company e-mail), Fax machines, Copy machines, and/or Company telephones to distribute or to solicit votes is prohibited." Exh. H (Sparrows Point Directive) at ¶ 5.
19. The incumbent slate paid Apple Printer to print campaign documents, including 1,000 flyers for Vice Presidential candidate Jeff Mikula. Exh. D (Defendant's Answers to Plaintiff's First Set of Interr.) and attachment thereto Bates Nos. 000000037-000000038.
20. The heading on the flyer read: "Re-elect John T. Cirri President[:] Vote the Entire Red White & Blue Team." The flyer concluded: "Accordingly, Jeff asks for your support for Vice President and support for the entire Red, White & Blue Team. MAKE A DIFFERENCE IN YOUR UNION – ON APRIL 20TH – VOTE RED, WHITE & BLUE[.] VOTE THE 'A' LINE[.]" Exh. J (Admissions, First Set) at ¶ 13; Exh. X (Mikula Campaign Flyer).
21. The flyer was printed on white paper, with a large, colored watermark placed in the center of the flyer. The heading and union symbol were in colored ink; the remainder of the text was in black ink. Exh. K (Defendant's Response to Plaintiff's Second Set of Requests for Admissions to Defendant ("Requests, Second Set")) at ¶ 2,

22. The Annex, which Sparrows Point provided to Local 9477 for union business, contains a telefax machine, owned by the employer, with the fax number 410-388-4007. Exh. J (Admissions, First Set) at ¶¶ 14 and 18; Exh. H (Sparrows Point Directive).
23. On April 6, 2009, a two-page transmission was made from a Sparrows Point-owned telefax machine located in the Union Annex. The first page consisted of a list of all candidates, with a handwritten note on the lower right-hand corner of the page stating “Please post thanks Jeff ext. 4068.” The second page of the transmission was a black and white copy of the Mikula flyer. Exh. X (Mikula Campaign Flyer); Exh. J (Admissions, First Set) at ¶¶ 13, 14, and 15.
24. Mikula admitted that the notation was in his handwriting and that he faxed the first page containing the list of candidates. *Id.* at ¶ 15. Local 9477 denied that Mikula transmitted the second page. *Id.* at ¶ 16.
25. Except for the page number, the first and second pages of this fax have the identical telefax header, with identical date and time, at the top of the page: APR/06/2009/MON 07:22 AM TD340 HR BLDG FAX NO. 410-388-4007. Exh. K (Requests, Second Set) at ¶¶ 3 and 4. Preceding the telefax number, the first page was identified as “P.001” and the second page as “P.002”. *Id.* at ¶4.
26. Sandy Wright, a member of the insurgent slate and successful candidate for Recording Secretary, saw the two pages of Mikula’s April 6 fax displayed side-by-side in the Rolling Mill Alignment area, which is part of Central Maintenance, Zone 6. Exh. L (Signed Statement of Sandy Wright).

27. In Central Maintenance (Zone 6), 201 members voted. Exh. D (Defendant's Answers to Plaintiff's First Set of Interr.) at ¶ 5, and attached thereto Bates 00000003-00000010; Exh. B (Weber Decl.) at ¶ 15.
28. Tyrone Lewis, a member of the incumbent slate, saw the April 6 fax posted at Hot Mill (Zone 4) and Mobile Equipment (Zone 7) areas. Exh. M (Signed Statement of Tyrone Lewis); Exh. B (Weber Decl.) at ¶ 10.
29. At the Hot Mill area, 177 members voted; 139 members voted in Mobile Equipment area. Exh. D (Defendant's Answers to Plaintiff's First Set of Interr.) at ¶ 5, and attached thereto, Bates Nos. 00000002-00000010, citing to elect results; Exh. B (Weber Decl.) at ¶ 10; Exh. N (Zone to Employer Areas chart). In the Ironmaking area (Zone 1), 178 members voted. Exh. B (Weber Decl.) at ¶ 11; Exh. N (Zone to Employer Areas chart).
30. Michael Carr saw the April 6 fax displayed in Central Welfare Building and B Street Maintenance, which is part of Ironmaking area (Zone 1). Exh. O (Signed Statement of Michael Carr); Exh. B (Weber Decl.) at ¶ 11; Exh. K (Requests, Second Set) at ¶ 6.
31. Sparrows Point is the owner of the two copiers located at the Coating Plant and the Cold Mill. Exh. D (Defendant's Answers to Plaintiff's First Set of Interr.) at ¶ 3; Exh. K (Requests, Second Set) at ¶ 8.
32. During the campaign leading up to the April 20, 2009 election, Tony Juarascio was union safety coordinator at the Cold Mill and Coated Products Department, representing approximately 450 local members. Exh. P (Signed Statement of Tony Juarascio (Feb. 28, 2011) ("2/28/11 Juarascio Signed Statement")); Exh. D (Defendant's Answers to Plaintiff's First Set of Interr.) at ¶ 7; Exh. Q (Willertz Decl.) at ¶ 4.

33. John Cirri authored a two-page open letter to members of Local 9477 during the election campaign. Exh. J (Admissions, First Set) at ¶ 23.
34. Tom Blackburn provided Juarascio with approximately 50 copies each of the two-page Cirri open letter and the Mikula flyer for distribution. Exh. P (2/28/11 Juarascio Signed Statement); Exh. Q (Willertz Decl.) at ¶ 4. However, 50 copies were insufficient to distribute to the number of employees in Juarascio's area of representation. Exh. P (2/28/11 Juarascio Signed Statement). While being paid by Severstal, Juarascio reproduced 150 copies of Cirri's two-page open letter and 150 copies of the Mikula flyer, using the copier at the Coating Plant, which contained paper paid for by the Company. Exh. P (2/28/11 Juarascio Signed Statement).
35. While being paid by Severstal, Juarascio reproduced 250 copies of the Cirri two-page open letter and 250 copies of the Mikula flyer using the copier at the Cold Mill, which contained paper paid for by the Company. *Id.*
36. Juarascio distributed the 800 campaign flyers to employees, providing each employee in the Cold Mill and Coated Products area with a copy of the two-page Cirri open letter and the Mikula flyer, either handing the copies directly to employees or leaving them on employees' desks or pulpits. *Id.*
37. Michael Carr and Chris Paul saw the Cirri open letter distributed in various areas of the plant. Exh. B (Weber Decl.) at ¶ 12.
38. At the Cold Mill and Coated Products Plant (Zone 5), 193 members voted. Exh. B (Weber Decl.) at ¶ 15; Exh. N (Zone to Employer Areas chart).
39. Thomas Blackburn is the Training Coordinator jointly appointed by the employer Severstal and Defendant. Exh. D (Defendant's Answers to Plaintiff's First Set of Interr.)

at ¶ 6. Blackburn is paid by the employer. Exh. I (Defendant's Answers to Plaintiff's Second Set of Interr.) at ¶ 5. He coordinated gate assignments for the distribution of the incumbent slate's campaign materials referenced in the Complaint. Exh. J (Admissions, First Set) at ¶¶ 24-27; Exh. K (Requests, Second Set) at ¶ 9.

40. Using Severstal's email system, Blackburn transmitted an email dated February 24, 2009, to 14 union representatives: Linda Merryman, Tony Juarascio, Jeff Mikula, Craig Haviland, Glen Davis, Jerry Ernest, Michael Harthnett, David Irby, Gary Pascarell, Kathy Garrison, Michael Lewis, Kevin Cooper, John Schriefer and Dave Schascheck; Joe Bartal's name was in the "cc" header. Exh. J (Admissions, First Set) at ¶¶ 24-27; Exh. V (Email from Tom Blackburn (Feb. 24, 2009) ("Blackburn Email")); Exh. T (8-page open letter from John T. Cirri ("Cirri 8-page open letter")).
41. The February 24, 2009 email solicited the assistance of the 14 recipients to distribute an eight-page open letter by President Cirri at designated gates. Exh. J (Admissions, First Set) at ¶ 26; Exh. V (Blackburn Email); Exh. T (Cirri 8-page open letter).
42. The email referenced an attachment that assigned each recipient to a particular gate where campaign distribution was to be made. Exh. J (Admissions, First Set) at ¶ 27; Exh. S (Gate Assignment Sheet).
43. Recipients were instructed to collect copies of the eight-page Cirri open letter on Thursday, February 26, 2009, at 4:30 a.m. from Joe Bartal. Exh. V (Blackburn Email); Exh. S (Gate Assignment Sheet).
44. Joe Bartal provided 800 copies of the Cirri eight-page open letter for distribution by union representatives on the morning of February 26, 2009. Exh. I (Defendant's Answers

to Plaintiff’s Second Set of Interr.) at ¶ 8(b). None of the 800 copies was returned to Bartal. *Id.* at ¶ 8(d).

45. Juarascio distributed 250-300 pieces of Cirri’s eight-page open letter at the Tin Mill South Gate to which he had been assigned. Exh. P (2/28/11 Juarascio Signed Statement). Tin Mill South is covered by Zone 3. Exh. N (Zone to Employer Areas chart); Exh. P (2/28/11 Juarascio Signed Statement). According to the gate assignment sheet attached to the February 24, 2009 email from Tom Blackburn, Merryman was assigned to the Welfare gate. Exh. V (Blackburn Email); Exh. T (Cirri 8-page open letter); Exh. S (Gate Assignment Sheet). Merryman estimated she distributed 50 pieces of the same open letter at the Welfare gate. Exh. B (Weber Decl.) at ¶ 13. The Welfare Building is located within the Ironmaking area, in Zone 1. Exh. K (Requests, Second Set) at ¶ 6.

46. The table below (Violations to Zones Table) displays the number of members that voted during the election for both general offices and for Zones 1, 3 and 7 elections and identifies, by zone, the number of voters exposed to each illegal use of employer resources. Exh. B (Weber Decl.) at ¶ 15.

VIOLATIONS TO ZONES TABLE

ZONES	FAX	COPIER	EMAIL	MEMBERS WHO VOTED
Zone 1	178		50	178
Zone 3			240	240
Zone 4	177			177
Zone 5		193		193
Zone 6	201			201

Zone 7	139			139
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47. With respect to the Zones 1, 3 and 7 elections, the margin of victory in each of the zone races won by the incumbent slate was significantly lower than the number of members who voted in that particular zone. Exh. F (Election Results Chart).
48. The margin of victory for the election of Zone 1 Grievance Committee member was 66, fewer than the 178 members who voted in this area; the margin in Zone 3 was 16, fewer than the 240 members who voted in this area and were exposed to the campaign literature that was distributed using Severstal Sparrows Point’s email system. The margin in Zone 7 was 8 votes, fewer than the 139 members who voted in this zone and were affected by the fax violation. *Id.*
49. The positions of President, Vice President, Financial Secretary, Treasurer, Financial Secretary, Outside and Inside Guards, and First and Second Trustees were all won by incumbent slate members by 332 votes or less. Exh. D (Defendant’s Answers to Plaintiff’s First Set of Interr.) at ¶5 and Bates Nos. 00000002-00000010; Exh. B (Weber Decl.) at ¶ 14; Exh. Q (Willertz Decl.) at ¶ 4; Exh. F (Election Results Chart); Exh. N (Zone to Employer Areas chart).
50. The total number of members of Local 9477 improperly exposed to campaign material as a result of the use of Sparrows Point resources – *i.e.*, fax, copiers and email system – was 1,128 (695 members of Local 9477 who voted and were exposed to campaign material related to the fax violation, plus 193 members who voted and were exposed to campaign material produced by the employer’s copiers, plus 240 members of the Local who voted

and were exposed to campaign material transmitted by the employer's email system. Exh. B (Weber Decl.) at ¶ 15.

51. The number of members improperly exposed to campaign material as a result of the use of Sparrows Point resources (1,128) exceeds the highest margin of victory of 332 votes for First Trustee and the 237 vote margin of victory for Treasurer. *Id.* at ¶ 16; Exh. Q (Willertz Decl.) at ¶ 4; Election Chart Results, Exh. F.

III. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56(c), a court must enter summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). The Supreme Court has made clear that, “[b]y its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). Entry of summary judgment is appropriate “against any party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). “One of the principle purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses,” and the Supreme Court has instructed that Rule 56 “should be interpreted in a way that allows it to accomplish this purpose.” *Id.* at 323-24.

As the Statement of Undisputed Material Facts and the attached documentary evidence show, there is no genuine dispute as to any material fact. Accordingly, Plaintiff is entitled to judgment as a matter of law.

IV. STATUTORY BACKGROUND

The principal goal of Title IV of the LMRDA “is to insure fair and democratic [union] elections.” *Wirtz v. Local 153, Glass Bottle Blowers, Ass’n*, 389 U.S. 463, 470 (1968); *Wirtz v. Hotel, Motel and Club Employees Union, Local 6*, 391 U.S. 492, 496 (1968). The Act was a response to Congressional investigations that revealed corruption in union leadership and disregard for rank-and-file members. *See* LMRDA § 2(b), 29 U.S.C. § 401(b); S. Rep. No. 187, 86th Cong., 1st Sess., reprinted in 1959 U.S. Code Cong. & Admin. News 2318-2321. Through the LMRDA, Congress sought to “protect the rights of rank-and-file members to participate fully in the operation of their union through processes of democratic self-government, and through the election process. . . .” *Hotel Employees, Local 6*, 391 U.S. at 497; *see, e.g.*, LMRDA § 2(c); *Local 153, Glass Bottle Blowers*, 389 U.S. at 469-471. Recognizing that free and fair elections were essential to union self-government, Congress enacted the safeguards of Title I and Title IV of the LMRDA “to provide a fair election and guarantee membership participation.” *American Federation of Musicians v. Wittstein*, 379 U.S. 171, 182 (1964); *see also Wirtz v. American Guild of Variety Artists*, 267 F. Supp. 527, 544 (S.D. N.Y. 1967) (Congress intended unions to conduct democratic and scrupulously fair elections).

Congressional investigation into the nation’s unions revealed cooperation between some employers and some labor officials which operated to the detriment of employees. *See* H.R.Rep. No. 741, 86th Cong., 1st Sess. 6-7 reprinted in (1959) U.S. code Cong. & Ad News 2424, 2428-29; S.Rep. No. 187, 86th Cong., 1st Sess. 5-7 (1959) reprinted in (1959) U.S. Code Cong. & Ad.

News 2318, 2322-24. To protect the union membership against such practices, Congress enacted §401(g) of the Act, which provides that:

No moneys received by any labor organization by way of dues, assessment, or similar levy, and no moneys of an employer shall be contributed or applied to promote the candidacy of any person in any election subject to the provisions of this subchapter.

29 U.S.C. § 481(g).

Congress intended to protect the rights and interests of employees and to further the public interest by insuring that employers, labor organizations and their respective representatives "adhere to the highest standards of responsibility and ethical conduct" 29 U.S.C. § 401(a). *See also Donovan v. Local 70, Int'l Brh'd of Teamsters*, 661 F.2d 1199, 1201 (9th Cir. 1981).

Section 401(g)'s statutory proscription against use of employer resources to promote an individual's candidacy is unambiguous. *Shultz v. Local 6799, United Steelworkers*, 426 F.2d 969 (9th Cir. 1970), *aff'd on other grounds sub nom., Hodgson v. Local 6779, United Steelworkers*, 403 U.S. 333 (1971). To clarify the duty of the union with respect to the requirements of Section 401(g), the Department of Labor promulgated the following interpretative regulation:

Expenditures by employers -- (a) As an additional safeguard, section 401(g) provides that no money of an employer is to be contributed or applied to promote the candidacy of any person in an election subject to the provisions of Title IV. This includes indirect as well as direct expenditures. . . .This prohibition against the use of employer money includes *any costs incurred by an employer, or anything of value contributed by an employer*, in order to support the candidacy of any individual in an election...

29 C.F.R. § 452.78 (emphasis added). This regulation makes clear that the Act prohibits any use of employer resources to promote a candidate's campaign. *See Donovan v. Local 70, Int'l Brh'd of Teamsters*, 661 F.2d at 1202; *Donovan v. Local 738, United Automobile Workers*, 575 F.

Supp. 52, 55 (D. Md. 1983); *Martin v. Local 996, Int'l Brh'd. of Teamsters*, 1991 WL 346365, *3 (D. Haw. 1991).

V. ARGUMENT

For the Secretary to prevail, the Court must find that a violation of section 401(g) occurred during Local 9477's April 20, 2009 election, that the violation may have affected the outcome of the election, and that there is no genuine dispute as to any material fact regarding the evidence presented. 29 U.S.C. § 402(b) and 402(c); *Donovan v. Local 738, Int'l Union United Automobile*, 575 F. Supp. at 55.

A. Local 9477 Violated Section 401(g) of the Act, 29 U.S.C. § 481(g), When a Sparrows Point-Owned Telefax Machine Was Used to Transmit an Incumbent Slate Campaign Flyer.

Section 401(g) of the Act provides that "[n]o moneys received by any labor organization by way of dues, assessment, or similar levy, and no moneys of an employer shall be contributed or applied to promote the candidacy of any person in any election subject to the provisions of this subchapter." 29 U.S.C. § 481(g). The evidence establishes that Jeff Mikula's April 6, 2009 campaign flyer (Exh. X at 2) was transmitted from a Sparrows Point-owned fax machine in the Union Annex and posted at various locations throughout the facility.

There is no doubt that Mikula's flyer constituted campaign material that promoted the candidacy of the incumbent slate. In determining whether a written communication constitutes campaign material, courts consider whether the tone, content and timing of the written communication effectively encourages or endorses any person's candidacy. *See, e.g., Donovan v. Council of Carpenters*, 797 F.2d 140, 145 (3d Cir. 1986) ("Section 401(g) is only violated when "the tone, content and timing of the ... publications ... effectively encourage[] and endorse[] the re-election of [the incumbent]."), *abrogated on other grounds by Donovan v. Council of*

Carpenters, 498 U.S. 466 (1991); *Reich v. Local 843, Int'l Brh'd of Teamsters*, 869 F. Supp. 1142, 1149 (D. N.J. 1994); *Dole v. Federation of Postal Police Officers, Inc.*, 744 F. Supp. 413, 418 (E.D. N.Y. 1990); *Brock v. Connecticut Union of Tele. Workers, Inc.*, 703 F. Supp. 202, 206 (D. Conn. 1988); *Donovan v. National Alliance of Postal & Federal Employees*, 566 F. Supp. 529, 532 (D. D.C. 1983); *Donovan v. Local 719, United Auto Workers*, 561 F. Supp. 54, 58 (N.D. Ill. 1982). The tone of the Mikula flyer was promotional, encouraging the reader to vote for Mikula and his slate. The content unequivocally solicited votes for Cirri and the incumbent slate. See Sec. II, *supra*, at ¶ 10. This campaign flyer was transmitted only two weeks before the election. The tone and content of the flyer and the timing of its transmission leave no doubt that it constituted campaign material.

The fax heading clearly shows the Mikula flyer was transmitted from a Sparrows Point fax machine located in the Human Resources building, informally known as the Union Annex. The two pages transmitted from the Sparrows Point fax have identical transmission dates, time and place of origination; the designation "HR BLDG" signifies the Human Resources building.

The use of a Sparrows Point fax machine to transmit the incumbent's campaign flyer, in and of itself, establishes a violation section 401(g) of the Act. Courts have consistently found section 401(g) violations when the employer's office equipment and supplies were used to promote an individual's candidacy. See, e.g., *Brock v. Int'l Union, United Automobile, Aerospace, and Agricultural Implement Workers*, 682 F. Supp. 1415 (E.D. Mich.1988) (use of union stationery, typewriter, and facilities violated section 401(g)); *Martin v. Local 996 International Brotherhood of Teamsters*, 1991 WL 346365 (candidate's use of employer photocopier machine to duplicate campaign literature violated section 401(g)); *Donovan v. Local 738, United Automobile Workers*, 575 F. Supp. 52 (D. Md. 1983) (successful candidate used

employer's typewriter and duplication equipment to type and reproduce campaign literature); *Donovan v. Local 29, Blasters, Drillrunners & Miners Union*, 521 F. Supp. 595 (S.D. N.Y. 1981) (employer's contribution of copying services to union candidate violated section 401(g)); *Marshall v. Office and Professional Employees Union, Local 2*, 505 F. Supp. 121 (D. D.C. 1981) (union member's use of employer's duplicating equipment to reproduce a one-page campaign flyer constituted a violation of section 401(g)).

It is well established that the use of employer resources for campaign purposes violates the LMRDA, regardless of how minimal the monetary value of those resources. *See, e.g., Office and Professional Employees Union, Local 2*, 505 F. Supp. at 123 (fact that prohibited duplicating expenses may have amounted to only \$6.40 is legally inconsequential); *Shultz v. Local 6799, United Steelworkers*, 426 F.2d at 972. (use of employer's materials, secretarial help and facilities valued at \$13.04 to print 10 leaflets violated section 401(g) of the Act).

While the evidence suggests that Mikula himself transmitted the flyer on the Sparrows Point fax machine, it is the transmission itself which violates the Act, regardless of who actually faxed the document. The uncontradicted evidence in this case establishes that a Sparrows Point's telefax, located at the Union Annex, was used to transmit the incumbent slate's campaign material and that the faxed flyer was widely distributed throughout Sparrows Point, thereby promoting the candidacy of the incumbent slate through the use of employer resources. Given the uncontested facts regarding the fax transmission, summary judgment in favor of the Secretary is warranted on this issue.

B. Local 9477 Violated Section 401(g) of the Act, 29 U.S.C. § 481(g), When Sparrows Point Copiers Were Used to Reproduce Incumbent Slate Campaign Materials.

Less than one month before the 2009 election, Safety Coordinator Tony Juarascio used Sparrows Point's copiers to make 800 copies of the Mikula flyer (Exh. X at 2) and a two-page open letter authored by President Cirri (Exh. U), which he then distributed to local members in his area of representation. Approximately two or three weeks before the election, Tom Blackburn provided Juarascio with roughly 50 copies each of Mikula's flyer and Cirri's two-page open letter. Exh. P (2/28/11 Juarascio Signed Statement). The quantity that Blackburn initially had provided Juarascio was insufficient to cover all 450 members in his area. *Id.* Consequently, Juarascio used the Sparrows Point copier and Sparrows Point paper located in Coating Products, where 132 members were employed, to reproduce 150 copies each of the Mikula flyer and the Cirri's two-page open letter. *Id.* He then used the Sparrows Point copier and paper located in the Cold Mill, where 238 members were employed, to make an additional 250 copies each of the Mikula flyer and the Cirri two-page open letter. *Id.*

As discussed above, the Mikula flyer constituted campaign material. For the same reasons, the two-page Cirri open letter (Exh. U) also constituted campaign material. The tone of this open letter was critical of the insurgent slate, accusing the insurgents of using "dirty politics and misleading statements" to garner support. Exh. U (Cirri 2-page open letter). Section 401(g) prohibits praise or criticism or attack on a candidate when using employer or union funds. *See* 29 C.F.R. § 452.75 (union may neither attack nor praise a candidate in a union-financed publication). The content of Cirri's open letter attempts to refute, with itemized responses, the insurgent slate's statements concerning the state of the local, thereby discrediting the insurgent's statements. It accuses the insurgent slate members of violating International and Local Union

By-Laws and wanting “nothing but division” rather than “equality and fairness for all.” Exh. U (Cirri 2-page open letter). In closing, Cirri urged members to vote for their choice of candidate but reminded members to vote for those that will represent them honestly and professionally. *Id.* Given the letter’s explicit attack on the insurgent slate’s integrity and honesty, the clear implication is that voters should vote for Cirri and his slate. Importantly, this two-page Cirri letter was distributed within a month of the April 20, 2009 election.

To establish a violation of section 401(g), the publication need not explicitly or implicitly endorse specific candidates or even attack the opposition. Rather, its overall tone, timing, and content must be evaluated to determine whether there is blatant encouragement of the incumbent (or challengers). *Reich v. Local 843, Bottle Beer Drivers*, 869 F. Supp. 1142 (D. N.J. 1994). As discussed above, the tone and content of Cirri's open letter constitute an attack on the incumbent slate and – together with the timing of the letter’s distribution, its explicit reference to the upcoming election and its repeated reference to his “political opponents” – render it campaign material clearly encouraging election of the incumbent slate. *See Donovan v. Council of Carpenters*, 797 F.2d 140, 145 (3d Cir. 1986) (“Section 401(g) is only violated when “the tone, content and timing of the ... publications ... effectively encourage[] and endorse[] the re-election of [the incumbent].”); *Brock v. Connecticut Union of Telephone Workers*, 703 F. Supp. 202 (D. Conn. 1988) (finding to be campaign material letter which does not simply correct facts, but, in the midst of an election, identifies the opponent as one who “misrepresents” facts and acts in ways which do not serve union membership); *Donovan v. National Alliance of Postal & Federal Employees*, 566 F. Supp. 529, 532 (D. D.C. 1983) (leaflet attacking credibility of opponents went beyond a purely factual statement involving union business and constituted campaign literature.)

The same legal standard that applies to the use of the employer's fax machine applies to the use of the employer's copiers. The use of Sparrows Point's copiers and its copy paper to reproduce incumbent slate campaign material establishes a violation of section 401(g) of the Act. *Donovan v. Local 738, United Automobile Workers*, 575 F. Supp. 52, 55 (D. Md. 1983) (successful candidate's "admission that he used the employer's equipment to type and reproduce partisan campaign literature definitely establishes a violation")

The uncontradicted evidence in this case establishes that Sparrows Point-owned copiers and paper were used to reproduce campaign materials promoting the candidacy of the incumbent's slate. Accordingly, the Secretary is entitled to summary judgment on this issue.

C. Local 9477 Violated Section 401(g) of the Act, 29, U.S.C. § 481(g), When the Incumbent Slate Used a Sparrows Point-Owned Email System to Coordinate the Distribution of Its Campaign Literature.

Approximately two months before the 2009 election, Union Training Coordinator Thomas Blackburn used the Sparrows Point computer and email system to coordinate the distribution of some 800 copies of an eight-page open letter authored by incumbent presidential candidate John Cirri. Exh. I (Defendant's Answers to Plaintiff's Second Set of Interr.) at ¶¶ 8(a), 8(b), and 8(d). In his February 24, 2009 e-mail to 14 union representatives (Exh. V), Blackburn transmitted instructions for picking up copies of the literature and assigned each representative to specific gates for distribution of the literature. Those union representatives identified in the February 24 email collected copies of the open letter and distributed those copies at their assigned gates. Exh. I (Defendant's Answers to Plaintiff's Second Set of Interr.) at ¶¶ 8(b) and 8(d); Exh. P (2/28/11 Juarascio Signed Statement); Exh. B (Weber Decl.) at ¶ 13. Clearly, Sparrows Point's email system was used for the purpose of coordinating the incumbent slate's campaign.

Cirri's eight-page open letter (Exh. T) unmistakably promoted the candidacy of Cirri and his slate, and likewise constituted campaign material. Exh. T (Cirri 8-page open letter). In closing the letter, Cirri writes, "I am announcing that I WILL ACCEPT NOMINATION FOR PRESIDENT!" and **"For our continued improvement, I am asking each of you to give your full support to the Candidates of the Red, White & Blue."** *Id.* at 8 (emphasis in original). The letter outlines his own accomplishments and attacks the credibility of the insurgent slate, effectively endorsing his own candidacy and that of his slate. Section 401(g) prohibits the use of employer resources to praise, criticize or attack a candidate. *See* 29 C.F.R § 452.75 (union may neither attack nor praise a candidate in a union-financed publication). *See also Reich v. Local 843, Bottle Beer Drivers*, 869 F. Supp. 1142 (D. N.J. 1994) (By criticizing an opponent, a letter effectively endorsed the opposing candidate.); *Donovan v. National Alliance of Postal & Federal Employees*, 566 F. Supp. 529, 532 (D. D.C. 1983) (Strong praise for an incumbent in a union newsletter distributed preceding an election constitutes prohibited campaign literature). Cirri's eight-page open letter was distributed approximately two months prior to the election. The tone, content, and timing of the open letter encouraged and endorsed the re-election of the incumbent President and his slate – and, therefore, violated section 401(g).

The use of the Sparrows Point's computer and email system for campaign purposes violates section 401(g) of the LMRDA. As discussed above, the interpretative regulations make clear that section 401(g) prohibits the use of any employer resources for campaigning purposes and, as discussed above, courts have found that prohibition to apply to a variety of types of office technology and equipment including fax machines, copiers and typewriters. While there is currently no case law specifically applying this prohibition to an employer's computer email system, such technology is indisputably a resource of value within the meaning of the

interpretative regulation. In this case, the Sparrows Point's email system provided a means by which the union was able to coordinate a mass distribution of campaign literature throughout the facility. *See* 29 C.F.R. § 452.78 (This prohibition against the use of employer money “includes . . . anything of value contributed by an employer, in order to support the candidacy of any individual in an election.”).

Defendant cannot withstand summary judgment on the basis that the monetary cost associated with the use of the employer's computer system was *de minimis*. *See Professional Employees Union, Local 2*, 505 F. Supp. at 123; *Shultz v. Local 6799, United Steelworkers*, 426 F.2d at 972. It is the fact of the donation itself, not the size of its monetary value, that is the relevant consideration under section 401(g). For example, in *Donovan v. Local 70, Int'l Brh'd. of Teamsters*, 661 F.2d 1199 (9th Cir. 1981), the Ninth Circuit found that the use of the walls of the employer's trailers as billboards for campaign posters violated section 401(g). As the court stated in that case: “The fact that walls of trailers are a benefit in kind does not render the statute inoperative. ‘Moneys,’ as used within section 401(g), has been interpreted as anything of value, whether the expenditure be direct or indirect.” *Id.* at 1202. Here, the use of the Sparrows Point's email system enhanced the incumbent slate's campaign, allowing it to reach a large number of members as they exited from the workplace through Sparrows Point's gates where union representatives handed them campaign materials. Defendant's use of the Sparrows Point's email system to coordinate and ultimately promote the incumbent slate's campaign was a benefit in kind that violated section 401(g).

The uncontroverted evidence demonstrates that Defendant used Sparrows Point's email system to assign union representatives to a particular gate, on a specific date and time, and to instruct them when and where to collect the eight-page Cirri campaign document for distribution.

Despite Sparrows Point's directive prohibiting the use of its email system, the incumbent slate used the email system to coordinate its campaigning endeavor and promote its candidates, in plain violation of the Act. *Brock v. Local 369, Int'l Union of Operating Engineers*, 790 F.2d 508, 513 (6th Cir. 1986) (union president's use of a typewriter for personal electioneering purposes found to be a plain violation of section 401(g)). Given these uncontested facts, summary judgment on this issue must be granted in favor of the Secretary.

D. Local 9477's Violations of Section 401(g), 29 U.S.C. §§ 4819(g), May Have Affected the Outcome of Its 2007 Election for All Offices Won by the Incumbent Slate.

Section 402(c) of the Act requires that the court declare a contested election void and order a new election under the government's supervision where a violation of section 401 "may have affected the outcome of the election." 29 U.S.C. § 482(c). The Supreme Court has held that once the Secretary establishes a violation of section 401, she has established a *prima facie* case that the violation may have affected the outcome of the election and the burden of proof shifts to the union to prove that the violation did not affect the election results. *See Wirtz v. Hotel, Motel & Club Employees Union, Local 6*, 391 U.S. at 506-507. Defendant's burden is substantial. *See Hotel Local 6*, 391 U.S. 506-07; *Marshall v. Local 1010, United Steelworkers*, 664 F.2d 144, 148 (7th Cir. 1981); *Donovan v. Local Union 70, Int'l Brh'd. of Teamsters*, 661 F.2d at 1202; *Local 12447, United Steelworkers*, 591 F.2d 199, 205-06 (3d Cir. 1978).

It is not necessary that the court find that a violation actually affected the outcome of an election but, rather, only that it may have had this effect. 29 U.S.C. § 482(c). The legislative history shows that Congress rejected a showing of actual effect because "the difficulty of proving such an actuality would be so great as to render the statutory remedy practically worthless." *Hotel Employees, Local 6*, 391 U.S. at 506 (quoting 105 Cong. Rec. 19765).

In determining whether a violation may have affected the outcome of the election, courts have used numerical calculations, ascribing effect on the election where the number of pieces of campaign material distributed exceed the margin of victory for any given office. In one case, the court determined that an illegal publication disseminated to 19,000 members may have affected the election outcome despite a wide margin of over 1,200 votes. *See Donovan v. Nat'l Alliance of Postal and Federal Employees*, 566 F. Supp. 529 (D. D.C. 1983). In another case, the court compared the number of members who were not mailed an election notice with the margins for the relevant offices in determining that the violation may have affected the election outcome. *See Office & Professional Employees Union, Local 2*, 505 F. Supp. at 123. Additionally, the court found that since 14 of the 15 candidates on the ballot who were endorsed by a campaign flyer that violated section 401(g) won office, and the union had produced no evidence that refuted the violation or refuted that the violation affected the outcome of the election, then an unrefuted inference existed that the flyer affected the outcome of the election. *Id.*

In this case, the Secretary has established that Local 9477 violated section 401(g) by using the Sparrows Point's fax, copiers, and email system. The presumption that the violations may have affected the outcome of the election is especially difficult to rebut when, as here, the alleged violations include the use of Sparrows Point resources to promote the candidacy of incumbent officers who won the election. *See, e.g., Office & Professional Employees, Local 2*, 505 F. Supp. at 123. Indeed, Defendant cannot offer any tangible evidence to rebut the presumption that the violation may have affected the outcome of the election because courts, in considering this type of rebuttal evidence, will not engage in speculation as to the members' decision-making processes in voting in the election. *See, e.g., Usery v. International Organization of Masters, Mates and Pilots*, 422 F. Supp. 1221 (S.D. N.Y. 1976) (Union engaged

in improper campaigning in a union newsletter mailed to each union member. Granting summary judgment for the Secretary, the court found there to be no conceivable way in which the union could confront and overcome the “imponderables inherent in analyzing the decisions made by each elector” in the election.), *aff’d and modified on other grounds*, 538 F.2d 946 (2d Cir. 1976); *McLaughlin v. Am. Fed. of Musicians*, 700 F. Supp. 726, 738 (S.D. N.Y. 1988) (Court found a reasonable possibility that an illegal campaign flyer may have contributed to the effectiveness of the incumbent slate's campaign, despite the incumbent's many legitimate campaign activities, and the court refused to speculate regarding the interplay among the violations and the lawful campaign activity); *Dole v. Drywall Tapers and Finishers Local*, 733 F. Supp. 864 (D. N.J. 1990.) (Court found as a matter of law that the violative letter may have affected the outcome of the election because any proof relating to the outcome would, necessarily, be speculative.)

The evidence establishes that Defendant will not be able to meet its substantial burden of establishing that the outcome of the election was not affected by these violations.

1. Use of fax machine

The uncontradicted evidence establishes that Mikula's campaign flyer was faxed using a Sparrows Point fax machine and copies of the faxed flyer were posted in the Central Welfare building and B Street Maintenance (Zone 1),¹ the Hot Mill (Zone 4),² Central Maintenance (Zone 6)³ and Mobile Equipment (Zone 7).⁴ There were 178 union members from Zone 1 who voted in

¹ Exh. O (Signed Statement Michael Carr).

² Exh. M (Signed Statement of Tyrone Lewis).

³ Exh. L (Signed Statement Sandy Wright).

⁴ Exh. M (Signed Statement of Tyrone Lewis).

the election, 177 members from Zone 4, 201 members from Zone 6, and 139 members from Zone 7. Therefore, a total of 695 voting members were exposed to the illegally transmitted campaign flyer.

The margins of victory for the General Offices won by the incumbent slate candidates were as follows: President – 160, Vice President – 99, Treasurer – 237, Financial Secretary – 77, Inside Guard – 212, Outside Guard – 69, First Trustee – 332 and Second Trustee – 26. Because the total number of voting members (695) exposed to the illegally transmitted flyer far exceeded any of these margins of victory, the violation may have affected the outcome for these general officer elections.

With respect to zone elections, Zone 1 and Zone 7 may have been affected by the fax violation.⁵ The margin of victory for the Zone 1 election was 66 votes, but the number of members who voted in that zone was 178 members. Therefore, the number of members exposed to the illegally transmitted fax exceeds the margin of victory. Similarly, for Zone 7, the margin of victory was 8 votes, but 139 members voted in that zone, again exceeding the 8-vote margin. Consequently, the number of members who voted in the elections for Zone 1 and Zone 7 Grievance Committee members, and who were exposed to the illegally transmitted fax, far exceeds the vote margins in each of these zones. Accordingly, this violation – the use of Sparrows Point fax machine – may have affected the outcome of the election for both Zones 1 and 7.

⁵ The Zone 6 election was rerun under the Department's supervision, and consequently is not included in determining effect on outcome with respect to zone elections. However, the 201 members who voted in Zone 6 is used to calculate the potential number of members affected by various violations for general offices won by the incumbent slate. Similarly, the Zone 4 election is not included in this suit, as the winner of that election was a member of the insurgent slate, but the total of 177 members who voted in that election was used to calculate the potential effect on outcome for the election for all general offices won by the incumbent slate.

2. Use of copier

As discussed above, the uncontradicted evidence establishes that 800 copies of campaign literature were made using the employer's copy machines and distributed to members working in Zone 5. There were 193 union members from Zone 5 who voted in the election⁶ and, thus, who were exposed to the illegally copied literature. This violation may have affected the outcome of the election for President, Vice President, Financial Secretary, Outside Guard, and Second Trustee because these positions had margins of victory of 160, 99, 77, 69, and 26, respectively. Exh. F (Election Results Chart).⁷

3. Use of email system

As discussed above, the uncontradicted evidence establishes that the employer's email system was used to coordinate the distribution of campaign literature to up to 800 members.⁸ Unrebutted evidence establishes that, pursuant to the email transmission, campaign literature was distributed to members at the facility gates serving Zones 1 and 3. There were 50 members who voted in gates covered by Zone 1 and 240 members who voted in gates covered by Zone 3. Therefore, 290 members were exposed to campaign literature as a result of this violation. Because this number exceeds all of the margins of victory for the general officer elections won

⁶ Exh. N (Zone to Employer Area Chart).

⁷ There is no effect on the election for Zone 5 Grievance Committee member because that position was unopposed.

⁸ As admitted by Defendant, none of the 800 copies of the Cirri eight-page open letter provided to union representatives for distribution to the membership was returned to Joe Bartal. Exh. I (Defendant's Answers to Plaintiff's Second Set of Interr.) at ¶ 8(d).

by the incumbent slate, except for First Trustee, the violation may have affected the outcome of each of those elections.⁹

The number of voting members that may have been affected also far exceeded the margin of victory for the Zone 1 election, which was won by 66 votes, and the Zone 3 election, which was won by a margin of only 16 votes. Therefore the illegal use of Sparrows Point email system may have affected the outcome of the election for Zones 1 and 3.

The aggregate total of all the members who voted and were exposed to campaign material related to all three violations – *i.e.*, fax, copiers and email – is 1,128, which includes the 695 voting members who were exposed to the fax violation, the 193 voting members who were exposed to the copier violation, and the 240 voting members exposed to the email violation.¹⁰ This evidence shows that the aggregate sum of those voting members may have affected the outcome of the election for all general offices won by the incumbent slate.

That Local 9477 also may have legitimately distributed campaign material paid for with incumbent slate funds is insufficient to rebut the presumption that the violations may have affected the outcome of the election. *See McLaughlin v. Am. Fed. of Musicians*, 700 F. Supp. 726, 738 (S.D. N.Y. 1988) (“[I]n the absence of tangible evidence, the court is in a position only to speculate regarding the interplay among the violations and the lawful campaign activity. . . . [C]onjecture as a means of satisfying the defendant’s burden has been expressly repudiated by the Supreme Court.”).

⁹ The First Trustee election was won by a margin of 332 votes and is therefore not affected by this violation.

¹⁰ The aggregate total does not include the 50 voting members from Zone 1 who were exposed to the e-mail violation because those members were already included in the 178 members exposed to the fax violation.

In this case, the evidence establishes that Defendant cannot meet its substantial burden of establishing that the outcome was not affected by these violations. Accordingly, Plaintiff is entitled to summary judgment.

VI. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant her motion for summary judgment and enter judgment in her favor.

Respectfully submitted,

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