UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

FEDERAL ELECTION COMMISSION, Plaintiff, v. EDWARD J. LYNCH, Sr., *et al.*, Defendants.	)	No. 15-cv-81732-KAM MEMORANDUM OF LAW

PLAINTIFF FEDERAL ELECTION COMMISSION'S MEMORANDUM OF LAW IN OPPOSTION TO DEFENDANTS' MOTION TO DISMISS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

The Federal Election Commission ("Commission" or "FEC") submits its Memorandum of Law in opposition to defendant Edward J. Lynch, Sr.'s motion to dismiss the FEC's amended complaint. The Commission alleges that Lynch, a former candidate for United States Congress, and Lynch for Congress, Lynch's principal campaign committee, violated the Federal Election Campaign Act ("FECA" or "the Act") by using campaign funds to pay for various personal expenses of Mr. Lynch. The motion to dismiss does not dispute that defendants violated FECA, 52 U.S.C. § 30114(b).

Instead, the motion appears to assert two broad arguments in support of dismissal, neither of which has any merit. Lynch first urges dismissal based on his apparent misunderstanding of how the applicable statute of limitations period is calculated, and his disregard of the two tolling agreements that he signed, which extended the FEC's deadline for filing suit in this case. Lynch also asserts that the Commission's claims should be dismissed based on the nature and duration of the parties' pre-litigation conciliation process, with which Lynch was unsatisfied. But regardless of Lynch's *subjective* satisfaction with the conciliation process, his own motion confirms that the FEC more than fulfilled its duty "to *attempt* conciliation before filing suit," and thus that this case easily survives the "barebones" judicial review that the Supreme Court recently held applies in cases, like this one, where a party argues that an agency failed to adequately conciliate before filing suit. *Mach Mining, LLC v. EEOC*, --- U.S. ---, 135 S. Ct. 1645, 1649, 1655-56 (2015) (emphasis added).

For these reasons and those discussed below, the motion to dismiss should be denied.

BACKGROUND

I. THE PARTIES

A. The Commission

The FEC is a six-member, independent agency of the United States government with "exclusive jurisdiction" to administer, interpret, and civilly enforce the Act. *See generally* 52 U.S.C. §§ 30106, 30107. Congress authorized the Commission to "formulate policy" with respect to the Act, *id.* § 30106(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [the Act]," *id.* §§ 30107(a)(8), 30111(a)(8) and to investigate possible violations of the Act, *id.* § 30109(a)(1)-(2). The Commission has exclusive jurisdiction to initiate civil enforcement actions for violations of the Act in the United States district courts. *Id.* §§ 30106(b)(1), 30109(a)(6).

B. Defendants

Defendant Edward J. Lynch, Sr. was a candidate, within the meaning of 52 U.S.C. § 30101(2), to represent Florida's 19th Congressional District in the United States House of Representatives in 2008 and in a special election for the same congressional seat in 2010. (Amend. Compl. ¶ 6.)

Defendant Lynch for Congress ("Lynch Committee") was and is a political committee of Edward J. Lynch, Sr. within the meaning of 52 U.S.C. § 30101(4). (Amend. Compl. ¶ 7.) Mr. Lynch designated the Lynch Committee as his authorized principal campaign committee, within the meaning of 52 U.S.C. § 30101(5)-(6), for the 2008 election to represent Florida's 19th Congressional District in the United States House of Representatives and the 2010 special election for the same congressional seat. (*Id.*) As such, the Lynch Committee was authorized to receive contributions and make expenditures on behalf of the candidate, Edward J. Lynch, Sr.

Id.; *see* 52 U.S.C. § 30102(e)(1)-(2). No expenditure by or on behalf of the Lynch Committee could or can be made without the authorization of the Committee's treasurer or his or her agent. Amend. Compl. ¶ 7; *see* 52 U.S.C. §§ 30102(a), 30103(b)(4).

In addition to being a congressional candidate in 2008 and 2010, Mr. Lynch has served as the treasurer and custodian of records for the Lynch Committee since February 28, 2008. (Amend. Compl. ¶¶ 8, 16.)

II. RELEVANT STATUTORY AND REGULATORY PROVISIONS

A. FECA's Prohibition on Personal Use of Campaign Funds

FECA provides that contributions accepted by a candidate may be used by the candidate for, *inter alia*, "otherwise authorized expenditures in connection with the campaign for Federal office of the candidate." 52 U.S.C. § 30114(a)(1). The Act provides that contributions or donations described in 52 U.S.C. § 30114(a) "shall not be converted by any person to personal use." 52 U.S.C. § 30114(b)(1). FECA defines "personal use" as the use of a contribution or donation "to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office." 52 U.S.C. § 30114(b)(2). Personal use includes, *inter alia*, payments of home mortgages, rent, or utilities; clothing purchases; non-campaign related automobile expenses; and health club dues, among other payments. *Id.*; *see* 11 C.F.R. § 113.1(g)(1)(i).

B. FECA's Administrative Enforcement Process

The Act permits any person to file an administrative complaint with the Commission alleging a violation of the Act. 52 U.S.C. § 30109(a)(1); *see also* 11 C.F.R. § 111.4. Alternatively, the Commission may initiate its administrative enforcement process "on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities."

52 U.S.C. § 30109(a)(2). After reviewing either an administrative complaint or information ascertained in the normal course of carrying out the FEC's supervisory responsibilities and any response filed, the Commission determines whether there is "reason to believe" that the Act has been violated. 52 U.S.C. § 30109(a)(2). If at least four of the FEC's six Commissioners vote to find reason to believe, the FEC may investigate the alleged violation. *Id.* §§ 30106(c), 30109(a)(2). Any investigation under this provision is confidential until the administrative process is complete. *Id.* § 30109(a)(12). If the Commission votes to proceed with an investigation, it then must determine upon completion of the investigation whether there is "probable cause" to believe that the Act has been violated. *Id.* § 30109(a)(4)(A)(i). Like a reason-to-believe determination, a determination to find probable cause to believe that a violation of the Act has occurred requires an affirmative vote of at least four Commissioners. *Id.* §§ 30106(c), 30109(a)(4)(A)(i).

If the Commission so votes, it is statutorily required to attempt, for a period of not less than 30 days, to remedy the violation informally and attempt to reach a conciliation agreement with the respondent. *Id.* § 30109(a)(4)(A)(i). Ratifying a conciliation agreement requires an affirmative vote of at least four Commissioners and such an agreement, unless violated, operates as a bar to any further action by the Commission related to the violation underlying that agreement. *Id.* If the Commission is unable to reach a conciliation agreement, the Act authorizes the FEC to institute a *de novo* civil enforcement action in federal district court. *Id.* § 30109(a)(6)(A). The institution of a civil action under section 30109(a)(6)(A) also requires an affirmative vote of at least four Commissioners. *Id.* § 30106(c).

In enforcement actions instituted by the Commission, courts are authorized to grant injunctions or other orders, including assessing civil penalties that do not exceed the greater of

$7500 or an amount equal to any contribution or expenditure involved, for each violation of the Act. 52 U.S.C. § 30109(a)(6)(B); 11 C.F.R. § 111.24(a)(1) (providing the inflation-adjusted statutory penalty amount). Actions "for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise," including for violations of the personal use prohibition, are subject to a five-year statute of limitations. 28 U.S.C. § 2462.

III. THE UNDERLYING ADMINISTRATIVE ENFORCEMENT MATTER

The underlying administrative enforcement matter, Matter Under Review ("MUR") 6498, was internally generated as a result of the Commission's review of information indicating that the Lynch Committee and Mr. Lynch, personally and in his official capacity as treasurer of the Lynch Committee, may have violated, *inter alia*, the Act's personal use provisions by using campaign funds for personal expenses. (Amend. Compl. ¶ 23.) On or about June 14, 2010, the Commission sent defendants Mr. Lynch and the Lynch Committee a letter notifying them that the Commission had identified the apparent violations and that the matter had been referred to the Commission's Office of General Counsel for possible enforcement action. (Amend. Compl. ¶ 24). The letter further informed defendants that the Commission's Office of General Counsel was reviewing the information in connection with making a recommendation to the Commission as to whether there is reason to believe that defendants violated the Act, and that before the General Counsel makes such a recommendation, defendants may provide in writing any factual or legal materials that they believe are relevant to the matter, including any related documents. (*Id.* ¶ 24.)

On July 6, 2010, the Commission received a letter from Mr. Lynch responding to the Commission's June 14 notification letter. (Amend. Compl. ¶ 25).

After reviewing the available information, on November 1, 2011, the FEC voted 6-0 to find reason to believe that Mr. Lynch violated, *inter alia*, 52 U.S.C. § 30114(b), by using campaign funds for personal expenses, that the Lynch Committee and Mr. Lynch, in his official capacity as treasurer of the Lynch Committee, violated, *inter alia*, 52 U.S.C. 30114(b) by disbursing campaign funds for Mr. Lynch's personal expenses, and to open an investigation. (Amend. Compl. ¶ 26.) The Commission notified defendants of its reason-to-believe determination by letter sent on or about November 7, 2011. (*Id.*)

During the course of the Commission's investigation of MUR 6498, the parties executed two tolling agreements, first on April 1, 2013, and second on May 28, 2013, each time allowing defendants additional time to respond to a letter and subpoena from the Commission and extending the Commission's time to institute a civil law enforcement suit by a period of 60 calendar days from the expiration date of the five-year statute of limitations found at 28 U.S.C. § 2462. (Amend. Compl. ¶ 27.) As a result, defendants agreed to toll the FEC's deadline for initiating a civil enforcement action in this matter for a total of 120 days beyond the expiration of the applicable 5-year statute of limitations period. *See* 28 U.S.C. § 2462.

On or about July 1, 2015, the Commission's Office of General Counsel notified defendants that the Office of General Counsel was prepared to recommend that the Commission find "probable cause" to believe that the defendants had violated, *inter alia*, 52 U.S.C. § 30114(b). Amend. Compl. ¶ 28; *see* 52 U.S.C. § 30109(a)(3). The Office of General Counsel also enclosed with its July 1 notification a brief stating the position of the Office on the legal and factual issues of the matter, and informed defendants that they may file a brief stating their position on the issues and replying to the brief of the Office of General Counsel. (Amend. Compl. ¶ 28.) Defendants did not file a response to the General Counsel's brief. (*Id.*)

On or about September 10, 2015, the Commission sent Mr. Lynch a letter referencing its July 1, 2015 notification and enclosed brief and the lack of any timely reply to that brief by defendants. (Amend. Compl. ¶ 29.) The letter further advised Mr. Lynch of the Office General Counsel's intent to proceed with recommending that the Commission find probable cause to believe that defendants had violated, *inter alia*, 52 U.S.C. § 30114(b) based on the factual and legal analysis set forth in the Office of General Counsel's brief. (*Id.*)

After reviewing the information available, on October 1, 2015, the Commission voted 6-0 to find probable cause to believe that Lynch for Congress and Mr. Lynch, personally and in his official capacity as treasurer, violated, *inter alia*, 52 U.S.C. § 30114(b). (Amend. Compl. ¶ 30.) The Commission further authorized the Office of General Counsel to attempt to correct the defendants' violations through informal methods of conference, conciliation, and persuasion. (*Id.*)

On or about October 14, 2015, the Commission notified the defendants of its October 1, 2015 findings, and, for a period of not less than 30 days, endeavored to correct the violations through informal methods of conference, conciliation, and persuasion. Amend. Compl. ¶ 31; *see* Lynch Mot. ¶ 16 ("On October 14, 2015, a letter was sent by the [FEC's Office of General Counsel] which attempted to allow for conciliation."); 52 U.S.C. § 30109(a)(4)(A). Unable to secure acceptable conciliation agreements with defendants, on December 10, 2015, the Commission voted 6-0 to authorize filing this civil lawsuit against defendants. Amend. Compl. ¶ 32; *see* 52 U.S.C. § 30109(a)(6).

IV. THIS CIVIL ENFORCEMENT ACTION

Although it was not statutorily required to do so, the Commission made a further attempt to resolve this matter before filing suit, including by sending defendants a draft of the original

complaint days before it was filed, as defendant Lynch acknowledges. (Lynch Mot. ¶¶ 26-29.) In the absence of acceptable conciliation agreements, or further agreements to toll the statute of limitations (*id.* ¶ 32), the FEC filed its original complaint on December 18, 2015. In accordance with Federal Rule of Civil Procedure 15(a)(1)(B), the Commission timely filed an amended complaint "as a matter of course" on March 7, 2016.

The FEC's amended complaint alleges that between 2008 and 2010, Mr. Lynch converted as much as $53,500 of campaign contributions given to the Lynch Committee to his personal use. (Amend. Compl. ¶ 1.) The amended complaint alleges that Lynch used campaign funds to pay for various personal expenses, including monthly gym membership dues, payments on a personal loan, various automobile expenses, and retail purchases, and that Lynch exercised nearly exclusive oversight of the Lynch Committee's funds and bank records and restricted his staff's access to records reflecting the Lynch Committee's financial activities and status. (*Id.* ¶¶ 1, 17.) Although many of defendants' personal use violations occurred outside the governing statute-of-limitations period, the FEC's amended complaint details certain personal expenditures that Mr. Lynch paid with the Lynch Committee's campaign funds between August 20 and November 17, 2010, *i.e.*, within 5 years and 120 days of when the Commission filed this lawsuit, and it accordingly seeks civil penalties and disgorgement based solely on those personal-use violations. (*See id.* ¶ 22.)

ARGUMENT

I. STANDARD OF REVIEW

On a motion to dismiss, the Court must "accept[] the facts alleged in the complaint as true and draw[] all reasonable inferences in the plaintiff's favor. The scope of the review must be limited to the four corners of the complaint." *St. George v. Pinnellas Cnty.*, 285 F.3d 1334, 1337 (11th Cir. 2002). "A complaint may not be dismissed pursuant to Rule 12(b)(6) 'unless it

appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Grossman v. Nationsbank, N.A.*, 225 F.3d 1228, 1231-32 (11th Cir. 2000) (per curiam) (quoting *Lopez v. First Union Nat'l Bank of Fla.*, 129 F.3d 1186, 1189 (11th Cir. 1997)).

Where, as here, a plaintiff seeks dismissal based on the alleged expiration of the statute of limitations, dismissal must be denied unless "'it it is apparent from the face of the complaint that the claim is time-barred' because '[a] statute of limitations bar is an affirmative defense, and . . . plaintiff[s] [are] not required to negate an affirmative defense in [their] complaint.'" *Lindley v. City of Birmingham*, 515 F. App'x 813, 815 (11th Cir. 2013) (per curiam) (quoting *La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845 (11th Cir. 2004) (quotation marks omitted)). The Court of Appeals for the Eleventh Circuit has thus explained that "'[a]t the motion-to-dismiss stage, a complaint may be dismissed on the basis of a statute-of-limitations defense only if it appears beyond a doubt that Plaintiffs can prove no set of facts that toll the statute.'" *Id.* (quoting *Tello v. Dean Witter Reynolds, Inc.*, 410 F.3d 1275, 1288 n. 13 (11th Cir.2005) (quotation marks omitted)).

"The moving party bears the burden to show that the complaint should be dismissed." *Sprint Solutions, Inc. v. Fils-Amie*, 44 F.Supp.3d 1224, 1228 (S.D. Fl. 2014) (internal quotation marks omitted).

II. THE AMENDED COMPLAINT ADEQUATELY PLEADS THAT DEFENDANTS VIOLATED 52 U.S.C. § 30114(b) BY CONVERTING FUNDS DONATED TO LYNCH FOR CONGRESS FOR MR. LYNCH'S PERSONAL USE

As explained above, FECA provides that a candidate or federal officeholder may use contributions or donations "for any . . . lawful purpose unless prohibited by" 52 U.S.C. § 30114(b). *See* 52 U.S.C. § 30114(a)(6). Section 30114(b)(1) states that a "contribution or

donation . . . shall not be converted by any person to personal use." Conversion to personal use occurs when funds from a campaign account are "used to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office." 2 U.S.C. § 30114(b)(2); *see* 11 C.F.R. § 113.1(g).

Defendant Lynch's motion does not appear to challenge the sufficiency of the Commission's allegations. Indeed, the well-pleaded factual allegations in the FEC's amended complaint are more than sufficient, at this stage of the proceedings, to sustain the FEC's claims that defendants violated FECA's personal-use provision. *See St. George*, 285 F.3d at 1337. Those allegations, which must be accepted as true in deciding Lynch's motion to dismiss, *id.*, include the following facts:

- During each of his two congressional campaigns campaign, Mr. Lynch exercised nearly exclusive oversight of the Lynch Committee's funds and bank records and restricted his staff's access to records reflecting the Lynch Committee's financial activities and status. (Amend. Compl. ¶ 17.)
- Between August 20, and November 17, 2010, the following personal expenditures of Mr. Lynch were paid with the Lynch Committee's campaign funds:

Date	Amount of disbursement	Description of Payment in Bank Statement
8/20/2010	$59.22	Chevron
8/30/2010	$69.00	Shell Oil
8/30/2010	$35.00	The Ladders
9/2/2010	$82.72	ER Bradley's Saloon
9/3/2010	$42.00	Lake Point BP
9/7/2010	$17.36	Publix
9/16/2010	$500.00	Over the Counter W/D
9/16/2010	$52.77	On the Border Royal
9/16/2010	$64.18	Shell Oil

9/16/2010	$286.42	Kohl's
9/17/2010	$10.65	PF Royal Palm
9/20/2010	$52.61	Shell Oil
9/27/2010	$62.54	Exxon Mobil
10/10/2010	$29.00	PF Royal Palm
11/17/2010	$10.65	PLA FIT RPB member pay
TOTAL	$1,374.12	

(Amend. Compl. ¶ 22.)

- As defendant Lynch has emphasized, these expenditures occurred *after* he failed to win the 2010 special election for Florida's 19th Congressional District in the United States House of Representatives. (*E.g.* Lynch Mot. ¶ 1 ("no violations occurred . . . since I was even a candidate for office"); *id.* ¶¶ 2, 15 (same); *see* Amend. Compl. ¶ 22 (explaining that the FEC's amended complaint seeks relief for the above-listed personal expenditures of Lynch Committee funds, which were made "*months after Mr. Lynch lost the April 2010 special election for Florida's 19th Congressional District in the United States House of Representatives*") (emphasis added).)
- During the course of the Commission's investigation of MUR 6498, the parties executed two tolling agreements, first on April 1, 2013, and second on May 28, 2013, each time allowing defendants additional time to respond to a letter and subpoena from the Commission and, in return, collectively extending the Commission's time to institute a civil law enforcement suit by a total of 120 days after the expiration date of the five-year statute of limitations found at 28 U.S.C. § 2462. (Amend. Compl. ¶ 27.)

III. THE FEC'S CLAIMS ARE NOT TIME-BARRED

Defendant Lynch seeks dismissal of the Commission's complaint based on the expiration of the statute of limitations (Lynch Mot. ¶¶ 1-15), but he has not met, and cannot meet, his heavy burden of proving "beyond a doubt" that the claims for which the Commission seeks relief are time barred. *See Lindley*, 515 F. App'x at 815; *Tello*, 410 F.3d at 1288 n. 13. Federal law

provides that actions "for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise," including for violations of the personal use prohibition, must be brought within five years of the violation. 28 U.S.C. § 2462. As detailed in the FEC's amended complaint, the Commission and defendants executed two tolling agreements in connection with this matter that collectively extended the Commission's time to institute a civil law enforcement suit against defendants by a total of 120 days after the expiration date of the five-year statute of limitations found at 28 U.S.C. § 2462. (Amend. Compl. ¶ 27.) The Commission filed its original complaint on December 18, 2015, within 5 years and 120 days of the violations listed above. (*See* Amend. Compl. ¶ 22.) Defendants thus cannot demonstrate "beyond a doubt" that the Commission's claims were brought within the governing statute-of-limitations period as tolled by the parties' agreements. *Tello,* 410 F.3d at 1288 n.13.

Nor does Lynch attempt to make such a demonstration. Instead, his motion emphasizes that his violations occurred after he failed to win the 2010 special election for Florida's 19th Congressional District in the United States House of Representatives. (*E.g.* Lynch Mot. ¶1 ("no violations occurred . . . since I was even a candidate for office"); *id.* ¶¶ 2, 15 (same).) But the status of Mr. Lynch's candidacy at the time he impermissibly used campaign contributions for his personal expenses has no bearing on whether the Commission's claim are time-barred. Indeed, his non-candidacy at the time of such expenditures is irrelevant here, except to the extent that it underscores the personal nature of such payments, which were entirely unrelated to his campaign.

In addition, Lynch's statute-of-limitations arguments are inadequate to dismiss the Commission's claims for declaratory and injunctive relief (Amend. Compl. Prayer for Relief ¶¶ A, D) for the separate reasons that those equitable claims are not subject to the 5-year statute

of limitations in 28 U.S.C. § 2462 that applies to the Commission's civil penalty claims. As the Court of Appeals for the Eleventh Circuit has recognized, "[t]he plain language of section 2462 does not apply to equitable remedies." *United States v. Banks*, 115 F.3d 916, 919 (11th Cir. 1997) ("Traditionally, 'statutes of limitation are not controlling measures of equitable relief.'" (quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946)). Moreover, in situations like this one, where a government plaintiff, acting "in its official enforcement capacity," asserts claims for both civil penalties and equitable relief, the Court of Appeals has refused to extend the statute of limitations applicable to the government's civil penalty claims to its concurrent claims for equitable relief. *Id.*

IV. THE COMMISSION SATISFIED ITS STATUTORY DUTY TO CONCILIATE

The bulk of Mr. Lynch's motion (Lynch Mot. ¶¶ 16-86) appears to be devoted to his contention that the FEC failed to adequately attempt to correct his violations through conciliation. This argument fails as a matter of law, however, because Lynch's motion itself admits facts that show the FEC met the Supreme Court's requirements for attempting to conciliate in the enforcement context under statutes like FECA. Indeed, far from sustaining his burden of proving that the FEC violated its duty to conciliate in this case, Lynch's motion demonstrates that the Commission did more to attempt to conciliate with defendants than was required by the controlling Supreme Court standard.

FECA requires the Commission, after finding that there is probable cause to believe that a respondent violated the Act, to "attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved." 52 U.S.C. § 30109(a)(4)(A)(i); *see FEC v. Johnson*, 15-cv-00439, slip op. at 2 (D. Utah Feb. 23, 2016), available at

http://www.fec.gov/law/litigation/johnson_dc_order_mot_part_judg.pdf. If that attempt fails to produce a conciliation agreement acceptable to the Commission, the FEC may then sue the respondent in federal district court to enforce the Act. 52 U.S.C. § 30109(a)(6)(A). These provisions require the FEC only to "attempt" to conciliate — meaning that the FEC need only "come to the conciliation table." *FEC v. Club For Growth, Inc.*, 432 F. Supp. 2d 87, 92 (D.D.C. 2006). The FEC "is not bound to accept a conciliation agreement which it finds unacceptable." *FEC v. Nat'l Rifle Ass'n*, 553 F. Supp. 1331, 1339 (D.D.C. 1983); *see also FEC v. Adams*, 558 F. 2d Supp. 982, 989 (C.D. Cal. 2008) ("[T]he Act . . . does not require the FEC to continue negotiations until a conciliation agreement is reached.")

Moreover, the Supreme Court recently held that for a federal agency to meet its duty "to attempt conciliation before filing suit," the agency need only (1) "inform the [respondent] about the specific allegation," and (2) "try to engage the [respondent] in some form of discussion (whether written or oral), so as to give the [respondent] an opportunity to remedy" the alleged offense. *Mach Mining*, 135 S. Ct. at 1649, 1655-56.[1] A court may exercise only "relatively barebones review" to determine whether an agency has satisfied these two requirements — "and nothing else." *Id.* at 1656. A court may *not* review any of the agency's "strategic decisions" in conciliation, including "whether to make a bare-minimum offer, to lay all its cards on the table, or to respond to each of [a respondent's] counter-offers." *Id.* at 1654. Nor may a court review the agency's choices regarding "the pace and duration of conciliation efforts, the plasticity or

[1] In *Mach Mining*, the Supreme Court reviewed the Equal Employment Opportunity Commission's statutory duty to attempt to conciliate, which is nearly identical to the FEC's. *See* 42 U.S.C. § 2000e-5(b) (requiring the EEOC to "endeavor to eliminate" alleged violations of Title VII using "informal methods of conference, conciliation, and persuasion" before filing suit). Courts evaluating the FEC's duty to attempt to conciliate have routinely followed the "instructive" guidance of decisions evaluating the EEOC's similar duty. *Nat'l Rifle Ass'n*, 553 F. Supp. at 1344; *see also Club For Growth, Inc.*, 432 F. Supp. 2d at 91 (same); *Adams*, 558 F. Supp. 2d at 990 (same).

firmness of its negotiating positions, and the content of its demands for relief." *Id.* This barebones review respects the "expansive discretion" that statutes like FECA give to an agency "to decide how to conduct conciliation efforts and when to end them." *Id.* at 1656; *see, e.g.*, *Club For Growth, Inc.*, 432 F. Supp. 2d at 91 (affording "high deference" to the FEC's conciliation attempts). Moreover, barebones review is necessary to preserve the confidentiality required to promote candor in settlement negotiations in general, *Mach Mining*, 135 S. Ct. at 1655, and the confidentiality required by FECA in particular, *see* 52 U.S.C. § 30109(a)(4)(B)(i) (barring "action[s]" and "information derived" from conciliation from being "made public" without the respondent's written consent).

In general, an agency may satisfy this low bar merely by providing "a sworn affidavit from the [agency] stating that it has performed the obligations" required "but that its efforts have failed." *Mach Mining*, 135 S. Ct. at 1656. Here, however, an affidavit is unnecessary, because admissions in defendant Lynch's motion confirm the allegations in the Commission's amended complaint that the FEC satisfied its statutory duty to attempt to conciliate with the defendants and demonstrate that the Commission has more than satisfied the *Mach Mining* standard.

A. The FEC Satisfied Its Obligation to Inform Defendants About the Violations at Issue Here

As detailed above, the FEC's amended complaint explains that the Commission notified the defendants on or about November 7, 2011 of its determination that there was reason to believe that defendants violated 52 U.S.C. § 30114(b) by disbursing and using campaign funds for personal expenses, and to open an investigation. (Amend. Compl. ¶ 26.) The amended complaint also explains that on or about July 1, 2015, the Commission's Office of General Counsel notified defendants that the Office of General Counsel was prepared to recommend that the Commission find "probable cause" to believe that the defendants had violated section

30114(b), enclosed with its July 1 notification a brief stating the position of the FEC's legal staff on the legal and factual issues of the matter, and informed defendants that they may file a brief stating their position on the issues and replying to the brief of the Office of General Counsel. (*Id.* ¶ 28.) The amended complaint explains that the defendants did not submit any response to the General Counsel's brief. (*Id.*)

The Commission's actions described above and in the amended complaint fully satisfied the agency's obligation under *Mach Mining* to inform defendants about the violations at issue. *See Mach Mining*, 135 S. Ct. at 1655-56 (explaining that EEOC "typically" satisfies its duty to "inform the [respondent] about the specific allegation . . . in a letter announcing its determination of [probable] cause").

In any event, Lynch does not dispute that he was repeatedly informed of the specific violations at issue, nor could he. He simply complains about not receiving copies of the FEC's "work papers substantiating their claim" as part of the parties' conciliation efforts, and about differences in the "amount that the[Commission] claim[ed] in alleged violations" during the administrative and litigation phases of this case. (Lynch Mot. ¶¶ 35, 37; *see id.* ¶ 21 (reciting defendant's request, during the course of the parties conciliation discussions "for the [FEC's Office of General Counsel] to send me their work papers . . . so that I may refute their claims as necessary and work towards a resolution eliminating or mitigating any civil penalty fine"); *id.* ¶¶ 17, 19, 25, 36 (reiterating defendant's complaint about not receiving the Commission's "work papers"); *id.* ¶¶ 59, 85 (asserting that the Commission "failed to provide an accurate amount [in violation] due [to] changing the amount they claim in alleged violations").) But neither FECA nor the Supreme Court's *Mach Mining* decision require agencies to provide respondents with attorney work product or any other agency "work papers substantiating" the agency's bases for

the alleged violations. And the Commission's decision not to assert claims in this litigation for violations that may have been at issue during the administrative phase of this matter does not in any way undermine the agency's satisfaction of its duty to conciliate as part of the underlying administrative process.[2] The FEC plainly satisfied the first prong of its conciliation duties under *Mach Mining*, and defendant's attempt to challenge the agency's "strategic decisions" in conciliation must be rejected. 135 S. Ct. at 1654.

B. The FEC Satisfied Its Obligation to "Attempt" Conciliation with Defendants

Defendant Lynch's motion to dismiss also confirms that the FEC fulfilled its statutory duty to "try to engage [defendants] in some form of discussion (whether written or oral), so as to give the[m] an opportunity to remedy" the alleged offense. *Mach Mining*, 135 S. Ct. at 1655-56. Indeed, defendant Lynch's own descriptions of various e-mails and conversations that he exchanged with Commission staff during the conciliation process (*e.g.* Lynch Mot. ¶¶ 16-22, 40-

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[2] To the extent defendant Lynch's references to the changes in the amount of his alleged violations are intended to address the Commission's amendment of its complaint, the Commission notes that the amended complaint corrects certain details regarding the amount of defendants' violations underlying its claims in this litigation and the amount of disgorgement the Commission seeks from defendant Lynch (*see* Amend. Compl. ¶ 22, Prayer for Relief ¶ C). Specifically, the FEC's amended complaint clarifies that the FEC's claims in this action are based on the personal expenditures that Mr. Lynch paid with the Lynch Committee's campaign funds on or after August 20, 2010, and not any expenditures that may have been made before that date. (Amend. Compl. ¶ 22.) The amendment relatedly clarifies that the FEC is seeking disgorgement of the $1,374 of Lynch Committee funds that defendant Lynch unlawfully converted to his personal use on or after August 20, 2010. (Amend. Compl. ¶ 1, Prayer for Relief ¶ C.) The FEC's remaining allegations and claims — including the amount of civil penalties sought against the defendants — are materially identical to the allegations and claims asserted in the original complaint. *See supra* pp. 4-5 (explaining that FECA and Commission regulations provide for civil penalties of $7500 or an amount equal to any contribution or expenditure involved for each violation of the Act (citing 52 U.S.C. § 30109(a)(6)(B); 11 C.F.R. § 111.24(a)(1)); *compare* Compl. Prayer for Relief ¶ B (requesting statutory civil penalties of $7500 respectively against Edward Lynch, Sr. in his personal capacity and against the Lynch Committee and Mr. Lynch in his official capacity as treasurer), *with* Amend. Compl. Prayer for Relief ¶ B (same).

45, 62-67) belie his unsupported assertion that he was denied the chance to participate in the conciliation process. In particular, the motion itself asserts that the FEC's Office of General Counsel "attempted to allow for conciliation," beginning on October 14, 2015 (Lynch Mot. ¶ 16), and that Mr. Lynch had multiple communications with FEC staff related to such conciliation efforts between mid-October and mid-November 2015 (*id.* ¶¶ 17-22). The motion further asserts that Mr. Lynch engaged in additional conciliation discussions with FEC staff in December 2015, before the FEC filed this lawsuit, and that such discussions included, *inter alia*, the FEC's providing Mr. Lynch with "a draft of the civil complaint which mirrors this civil suit." (*Id.* ¶¶ 25-26, 28-30.) Mr. Lynch's own assertions thus confirm that the FEC conducted "some form of discussion . . . so as to give [defendants] an opportunity to remedy" their violations, *Mach Mining*, 135 S. Ct. at 1649, 1655-56, and his motion certainly does not "present any evidence to the contrary," *Johnson*, No. 15-cv-00439, Slip Op. at 2. Neither Mr. Lynch's preference for more information from the FEC, nor his desire for additional time to pursue conciliation, nor his wish to "work towards a resolution eliminating or mitigating any civil penalty fine" (Lynch Mot. ¶ 21; *see id.* ¶¶ 17, 19, 24, 25, 36) even suggest, let alone demonstrate, that the FEC abused its "expansive discretion" in deciding "how to conduct conciliation efforts and when to end them." *Mach Mining*, 135 S. Ct. at 1656.

Lynch's own motion confirms that the Commission's actions fully satisfied its conciliation obligations under FECA and *Mach Mining*.

CONCLUSION

For the foregoing reasons the motion to dismiss should be denied.

Respectfully submitted,

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April 15, 2016

CERTIFICATE OF SERVICE

I, Benjamin A. Streeter III, an attorney of record in this case, certify that I served on April 15, 2016 a copy of the foregoing Federal Election Commission's Memorandum of Law in Opposition to Defendant Edward J. Lynch Sr.'s Motion to Dismiss to Edward J. Lynch, Sr., individually and in his official capacity as treasurer and as custodian of records for Lynch for Congress, via first class mail addressed to Mr. Lynch at his address of record, 10269 Trianon Place, Wellington, FL 33449, and via this Court's Electronic Case Filing System.

s/ Benjamin A. Streeter III