

1 Thomasenia P. Duncan
2 General Counsel

3 David Kolker
4 Acting Associate General Counsel

5 Colleen T. Sealander (csealander@fec.gov)
6 Assistant General Counsel

7 Greg J. Mueller (gmueLLer@fec.gov)
8 Benjamin Streeter (bstreeter@fec.gov)
9 Attorneys

10 FOR THE DEFENDANT
11 FEDERAL ELECTION COMMISSION
12 999 E Street, N.W.
13 Washington, D.C. 20463
14 (202) 694-1650
15 (202) 219-0260 (fax)

16 UNITED STATES DISTRICT COURT
17 FOR THE DISTRICT OF ARIZONA

18 Jon Marcus,

19 Plaintiff,

20 v.

21 United States Attorney General
22 Alberto R. Gonzales;
23 Federal Election Commission Chairman
24 Michael E. Toner;
25 In their official capacities,

26 Defendants.

27 CV07-00398-PCT EHC

28 REPLY IN SUPPORT OF
MOTION TO DISMISS

29 **REPLY IN SUPPORT OF DEFENDANT FEDERAL ELECTION**
30 **COMMISSION’S MOTION TO DISMISS**

31 On May 4, 2007, Defendant Federal Election Commission (“Commission”) moved to
32 dismiss plaintiff Jon Marcus’s Complaint for Declaratory Relief for failure to state a claim
33 pursuant to Fed. R. Civ. P 12(b)(6). Under LRCiv. 12.1(b), plaintiff’s opposition brief, if he
34 were to file one at all, was due thirty days later on June 4, 2007. That deadline has passed

1 and plaintiff has not filed any response to the Commission's Motion to Dismiss.¹ Because
2 the Commission's motion to dismiss is both unopposed and meritorious, the Court should
3 grant the motion summarily and dismiss this case with prejudice as to the Commission.

4 **Argument**

5 For the reasons explained in the Commission's motion to dismiss, and in the Attorney
6 General's motion to dismiss, this Court should dismiss the entire Complaint filed by plaintiff.
7 Furthermore, plaintiff's failure to oppose the Commission's motion to dismiss provides an
8 additional basis for dismissal of the plaintiff's claim against the Commission. Under this
9 Court's local rules, "if the opposing party does not serve and file the required answering
10 memoranda ... such non-compliance may be deemed a consent to the denial or granting of the
11 motion and the Court may dispose of the motion summarily." LRCiv. 7.2(i).

12 Under this rule "the court must weigh (1) the public's interest in expeditious resolution of
13 litigation, (2) the court's need to manage its docket, (3) the risk of prejudice to the
14 defendants, (4) the public policy favoring disposition of cases on their merits, and (5) the
15 availability of less drastic sanctions." *Hernandez v. Arpaio*, 2007 WL 1297536 at *2 (D.
16 Ariz. 2007) (citing *Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995); *Henderson v. Duncan*,
17 779 F.2d 1421, 1423 (9th Cir. 1986)).

18 In this case all of the factors weigh heavily toward dismissal. The public interest in
19 expeditious resolution of litigation and the Court's need to manage its docket are served by
20 dismissal of this case, especially since it is the plaintiff who once sought to expedite
21 resolution of this litigation. *See* Plaintiff's Motion to Expedite Proceedings, filed March 15,
22 2007. "There is no risk of prejudice to the [d]efendant to resolve the motion in his favor,"
23 *Hernandez*, 2007 WL 1297536 *2, and to the extent public policy favors a disposition on the

24 ¹ On May 24, 2007, plaintiff filed his Opposition to Defendant Gonzales' Motion to
25 Dismiss ("Opposition"), which explicitly confined itself to opposing the Attorney General's
26 motion to dismiss. *See* Opposition at 1 (captioned: "Opposition to Defendant Gonzales's
27 Motion to Dismiss"); at 9 (requesting that the Court "deny the Attorney General's motion to
28 dismiss," but making no mention of the Commission's pending motion). The arguments
raised in that Opposition are fully addressed in the Defendant Attorney General's Reply
Memorandum in Support of his Motion to Dismiss, filed June 1, 2007 ("Attorney General's
Reply"). The Commission hereby incorporates by reference the arguments contained in the
Attorney General's Reply.

1 merits, that interest will be served when the Court decides the sole legal issue presented by
2 this case within the context of the Attorney General's motion to dismiss. Accordingly, the
3 Court should grant the Commission's motion to dismiss summarily and dismiss plaintiff's
4 complaint as to the Commission in its entirety with prejudice.

5 Respectfully submitted,

6 /s/ Thomasenia P. Duncan
7 Thomasenia P. Duncan
General Counsel

8 /s/ David Kolker
9 David Kolker
Acting Associate General Counsel (dkolker@fec.gov)

10 /s/ Colleen T. Sealander
11 Colleen T. Sealander
Assistant General Counsel (csealander@fec.gov)

12 /s/ Greg J. Mueller
13 Greg J. Mueller
Attorney (gmueller@fec.gov)

14 /s/ Benjamin A. Streeter III
15 Benjamin A. Streeter III
Attorney (bstreeter@fec.gov)

16 FOR THE DEFENDANT
17 FEDERAL ELECTION COMMISSION AND
18 ITS CHAIRMAN
999 E Street, N.W.
Washington, D.C. 20463
19 (202) 694-1650

20
21
22
23
24
25
26
27
28
June 18, 2007