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 OPPOSITION

FEDERAL ELECTION COMMISSION'S OPPOSITION TO DEFENDANT EDWARD J. LYNCH'S AMENDED MOTION TO DISMISS

The Federal Election Commission ("Commission" or "FEC") opposes defendant Edward J. Lynch's July 6, 2016 Amended Motion to Dismiss ("Am. Mot.") (Docket No. 26) because it is untimely by a matter of months, it is more than twice the page limit set by this Court's Local Rules, and although it largely reproduces a prior motion already pending before this Court, it also adds a new argument that could have been raised before an answer was filed. Motions under Federal Rule of Civil Procedure 12(b) "must be made before pleading if a responsive pleading is allowed." Defendant Lynch filed his pleading responsive to the operative complaint by filing an amended answer (simultaneously with a motion to dismiss) on March 30, 2016. (Docket No. 20.) His Amended Motion to Dismiss ("Amended Motion") is thus more than three months late. The Amended Motion also violates the Court's April 11, 2016 Order Setting Trial Date & Disc. Deadlines, Referring Case to Mediation & Referring Disc. Mots. To U.S. Magistrate Judge ("Scheduling Order"), which creates a deadline of April 15, 2016 for either side to amend pleadings. (Docket No. 22 at 2.) In addition, Local Rule 7.1(c) generally limits motions and supporting memoranda to 20 pages, but Mr. Lynch's Amended Motion is 46 pages

long, on top of his already-pending motion to dismiss. (Docket No. 20.) Roughly two thirds of the Amended Motion reproduces baseless arguments that were fully briefed months ago. (Docket Nos. 12, 20, 23.) But the other third raises a frivolous new argument that all defendants' legal obligations under the Federal Election Campaign Act ("FECA"), 52 U.S.C. §§ 30101-46, ceased to exist the moment Mr. Lynch lost the April 2010 special election to represent Florida's 19th Congressional district, a ground for dismissal that could have been raised before filing an answer but was not. Mr. Lynch's filing seeks to improperly burden and prejudice the Commission by forcing it to respond to these arguments in the midst of discovery. To the extent they are appropriate, Mr. Lynch can make these arguments at summary judgment. But his Amended Motion to Dismiss should be denied.

I. BACKGROUND

This case seeks civil remedies for defendants' violation of 52 U.S.C. § 30114(b) by converting to Edward J. Lynch's personal use contributions made to Lynch for Congress, the political committee that served as Mr. Lynch's campaign committee in two campaigns to represent Florida in the U.S. House of Representatives. (Am. Compl. (Docket No. 14).) The Amended Complaint seeks declaratory and injunctive relief, civil penalties against Mr. Lynch and Lynch for Congress, and the disgorgement of certain personal use expenditures.

After the Commission filed its Amended Complaint on March 7, 2016, Lynch filed an Amended Answer on March 30, 2016. (Docket Nos. 14, 19.) The Amended Answer was filed simultaneously with a motion to dismiss. (Docket No. 20.) The Court's April 11 Scheduling Order set a deadline of April 15 for the amendment of pleadings. (Docket No. 22 at 2.) On July 6, 2016, Lynch filed the Amended Motion to Dismiss. (Docket No. 26.) Discovery is scheduled to close in this case on August 16. (Docket No. 22 at 2.)

Defendant Lynch's first motion to dismiss the Amended Complaint argued that the Commission did not properly attempt to conciliate this matter during the pre-litigation phase of the enforcement process and that certain alleged activity was beyond the statute of limitations. (Mot. to Dismiss (Docket No. 20).) The Commission refuted these arguments in its Opposition on April 15, 2016. (Docket No. 23 at 11-18.) The July 7 Amended Motion to Dismiss reproduces these two arguments. (Am. Mot. ¶¶ 71-158.) However, the Amended Motion also raises two new theories for dismissal, a claimed lack of subject matter jurisdiction and an alleged failure to state a claim on which relief can be granted, based on the specious argument that defendants' duty not to convert campaign funds to personal use ceased to exist at the moment that Lynch lost the April 2010 special election. (*Id*. ¶¶ 1-70.) Lynch now alleges for the first time that Lynch for Congress was no longer in existence merely because Lynch lost that special election ("there was no Committee and he [Lynch] was not acting in the capacity of Treasurer and the previous committee bank account had no money") (*id.* ¶ 15), that Lynch was merely "testing the waters" to determine whether he would become a candidate and thus was not a candidate under Commission rules (*id.* ¶¶ 21-28), and that any expenditures made while "testing the waters" could not count as contributions because Lynch made use only of personal funds while exploring the possibility of a new candidacy (*id.* ¶¶ 29-33).

II. THE AMENDED MOTION TO DISMISS IS UNTIMELY AND OTHERWISE IN VIOLATION OF APPLICABLE RULES

The Court should deny Lynch's Amended Motion to Dismiss because he has failed to follow the applicable procedural rules and essentially seeks to re-do a pending motion months after briefing was complete. Under Rule 12(b), a motion seeking the relief that Lynch does in his Amended Motion "must be made before pleading if a responsive pleading is allowed." Because Lynch's motion postdates his answer by more than three months, it should be denied.

See, e.g., *Mulhall v. District of Columbia*, 747 F. Supp. 15, 18 (D.D.C. 1990) ("Since defendants answered plaintiff's complaint prior to filing their motion to dismiss the complaint for failure state a claim upon which relief can be granted, under Fed. R. Civ. P. Rule 12(b)(6), this motion is untimely."); *Comprehensive Care Corp. v. Katzman*, No. 8:09-cv-1375 (M.D. Fla. Jan. 26, 2010) Order (Docket No. 87) (*sua sponte* striking an amended motion to dismiss filed "untimely without seeking leave of the Court and without showing good cause for the late filing") (attached as Exhibit 1).

In addition, when a party seeks to amend a pleading under Federal Rule 15(a)(2)[1] or to modify a scheduling order after the deadline for amending pleadings has passed, a party must seek permission from the court: "A schedule may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). Lynch did not seek any approval or leave to amend from the Court, but simply filed his Amended Motion to Dismiss months after the April 15 deadline for amendment of pleadings. Indeed, the Amended Motion was filed while the parties were in the thick of the short discovery period provided for by the Scheduling Order. The potential burdens caused by Lynch's late filing are compounded by the fact that the Amended Motion is more than twice the 20-page limit established by Local Rule 7.1(c) even for timely motions and supporting memoranda.

"Absent a showing of diligence on the part of a party seeking to extend deadlines contained in the scheduling order, the court-ordered schedule should not be disturbed. The Eleventh Circuit has consistently held that motions filed after a deadline imposed by a court should be denied as untimely. The scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril." *Idearc Media Corp. v.*

[1] "In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires."

Kimsey & Assocs., P.A., No. 8:07-cv-1024-T-17, 2009 WL 413531, at *4 (M.D. Fla. Feb. 18, 2009) (internal citations and quotations omitted). "The timetable established by the Case Management and Scheduling Order is binding upon the parties." *Payne v. Ryder Sys., Inc. Long Term Disability Plan*, 173 F.R.D. 537, 540 (M.D. Fla. 1997). Defendant Lynch's motion "is clearly untimely, and does not even attempt to demonstrate there is some 'good cause' why the court should modify the scheduling order. Therefore, the court need not address the merits of the motion." *Id.*. Here, of course, Lynch has failed to even seek leave to file his untimely motion.

Nor does the fact that Lynch is proceeding on a *pro se* basis entitle him to relief from the principles governing the manner in which scheduling orders can be modified. Although courts give "liberal construction to the pleadings of *pro se* litigants, [courts] nevertheless have required them to conform to procedural rules." *Albra v. Advan, Inc.* 490 F.3d 826, 829 (11th Cir. 2007) (citation omitted). Federal Rules 12 and 16 clearly convey the need to seek leave of the court to file amended court papers in situations like this one. Defendant Lynch failed to do so.

III. LYNCH HAS MADE NO SHOWING OF GOOD CAUSE TO AMEND

Even if Lynch had timely sought leave to file his Amended Motion to Dismiss, leave would be inappropriate because he cannot meet the good cause standard of Rule 16(b)(4), which requires diligence that Lynch cannot show. "Defendants first must demonstrate good cause under Rule 16(b) before the Court may consider whether the proposed pleading is proper." *Hurtado v. Raly Dev., Inc.*, 281 F.R.D. 696, 699 (S.D. Fla. 2012). "This good cause standard precludes modification unless the schedule cannot be met despite the diligence of the party seeking the extension." *ESYS Latin Am. Inc. v. Intel Corp.*, 290 F.R.D. 563, 564 (S.D. Fla. 2013) (internal quotations omitted).

In determining whether good cause exists to allow modification of a scheduling order, the element of diligence is critical:

> The primary measure of good cause is the movant's diligence in attempting to meet the order's requirements…. While the prejudice to the nonmovant resulting from modification of the scheduling order may also be a relevant factor, generally we will not consider prejudice if the movant has not been diligent in meeting the scheduling order's deadlines.

Sherman v. Winico Fireworks, Inc., 532 F.3d 709, 716 -17 (11th Cir. 2008) (citation omitted). "Our cases reviewing Rule 16(b) rulings focus in the first instance (and usually solely) on the diligence of the party who sought modification of the order." *Harris v. FedEx Nat'l LTL, Inc.*,760 F.3d 780, 786 (8th Cir. 2014) (citation omitted). Evaluating diligence requires weighing three factors: (1) "whether the [party] failed to ascertain facts prior to filing the [pleading] and to acquire information during the discovery period; (2) whether the information supporting the proposed amendment was available to the [party]; and (3) whether even after acquiring the information the [party] delayed in seeking the amendment." *Kernal Records Oy v. Mosley*, 794 F. Supp. 2d 1355, 1369 (S.D. Fla. 2011) (citation omitted); *Sanchez v. H & R Maint., L.C.*, 294 F.R.D. 677, 679 (S.D. Fla. 2013) (citation omitted). "Lack of diligence … precludes a finding of good cause when a [party] had all the factual information upon which a proposed amendment is based." *Alexander v. City of Muscle Shoals, Ala.*, 766 F. Supp. 2d 1214, 1227 (N.D. Ala. 2011) (internal quotations omitted).

Lynch has failed to exercise the requisite diligence to justify his untimely Amended Motion to Dismiss because, to the extent the Amended Motion differs from the prior one, Lynch has had the information on which the new filing is based since the beginning of the case. The Amended Motion claims that Mr. Lynch was not a candidate in the 2010 general election for Florida's 19th congressional district, that he spent no campaign funds because he was not a

candidate and because Lynch for Congress no longer existed once he had lost in April 2010, and that any funds he spent were only for the purpose of "testing the waters" and thus not subject to Commission regulations. (*See* Am. Mot. ¶¶ 6-29, 41-65.)

But these are simply new theories about facts known to Lynch from before the start of this case. Lynch claims that the Commission admitted that he was not a candidate (Am. Mot. ¶¶ 6-9, 42-45) merely because the Commission served written discovery requests seeking to ascertain whether Lynch considered himself a candidate in the 2010 fall general election. But such information would not be new to Lynch: He has known since 2010 whether he considered himself a candidate in the 2010 general election or had decided to "test the waters" for the 2012 election cycle. And the claim that the Commission has admitted these facts by filing discovery requests regarding Lynch's positions is absurd. He clearly had the relevant facts from the beginning of the case and did not acquire them through discovery, yet he still delayed for months before filing his untimely amended motion to dismiss.

In short, Lynch does not and cannot make the requisite showing that he has exercised sufficient diligence to satisfy Rule 16(b) because his new, untimely motion is based on information already known to him that lay dormant for almost three months. *See Alexander*, 766 F. Supp. 2d at 1227. Because Lynch clearly knew his candidate status in the fall of 2010, his failure to rely on those facts in his prior motion to dismiss shows a lack of diligence, so his Amended Motion to Dismiss should be denied on that ground alone.

IV. DEFENDANT LYNCH'S LACK OF DILIGENCE PREJUDICES THE FEC

Although the Court need not find prejudice to the FEC in order to strike Lynch's Amended Motion to Dismiss, the filing does cause such prejudice. In the context of pleadings, leave to amend can be denied on "numerous grounds," such as "undue delay, undue prejudice to

the [other party], and futility of the amendment." *Brewer-Giorgio v. Producers Video, Inc.*, 216 F.3d 1281, 1284 (11th Cir. 2000) (internal quotation marks omitted). Requiring the FEC to respond to the merits of this Amended Motion while attempting to conduct discovery under the agreed schedule will cause undue delay and prejudice, particularly since Lynch's recent resistance to discovery will apparently require the FEC to engage in motion practice before it can get the discovery to which it is entitled, with a current discovery deadline of August 16, 2016. Indeed, it appears that Lynch is using his new claim to prejudice the Commission by improperly attempting to limit the scope of the Commission's discovery. Rather than appear for deposition, Lynch filed a motion to quash that relies in part on his new theory. (Docket No. 30 at 2.)

Thus, the Amended Motion to Dismiss filed by defendant Lynch will prejudice the Commission by impeding its legitimate discovery, and Lynch has made no showing of diligence sufficient to warrant modifying the Scheduling Order. The Amended Motion should also be denied on that ground.

V. EVEN IF THE COURT WERE TO CONSIDER THE MERITS OF LYNCH'S MOTION, IT LACKS ANY LEGAL BASIS

The Court need not address the merits of Lynch's new arguments for dismissal at this time, but in any event they completely lack merit. The new contentions for dismissal mischaracterize the complaint, are inconsistent with allegations in the amended complaint that must be taken as true, improperly refer to matters outside the amended complaint, are unsupported by evidence, and misstate how FECA operates for committees that are winding down. The motion should be denied.

Lynch newly argues that the amended complaint "never asserts that the Defendant was a candidate . . . on or after August 20, 2010" and that "[t]here are no factual allegations made by the Plaintiff that the Defendant was, indeed, a candidate on or after August 20, 2010." (Am.

Mot. ¶¶ 11, 14, 47-48.) But the amended complaint includes that exact allegation: "In addition to being a candidate, Mr. Lynch has served as the treasurer and custodian of records for the Lynch Committee since February 28, 2008." (Am. Compl. ¶ 8.) As explained further below, *see infra* pp. 10-11, FECA imposed continuing obligations on Lynch related to his candidacy in earlier elections. The Amended Motion also argues that Lynch for Congress "was no longer an entity, active or otherwise" and that the complaint does not assert that "there was a committee on or after August 20, 2010." (Am. Mot. ¶¶ 14, 18.) Again, the amended complaint alleges precisely that: "Defendant Lynch for Congress . . . was *and is* a political committee of Edward J. Lynch, Sr. within the meaning of 52 U.S.C. § 30101(4)." (Am. Compl. ¶ 7 (emphasis added).) Lynch's characterization of the complaint is inaccurate and the premise of his new ground for dismissal is entirely unfounded.

Moreover, the factual allegations in the complaint must be taken as true and all inferences must be drawn in the FEC's favor. *St. George v. Pinellas Cty.*, 285 F.3d 1334, 1337 (11th Cir. 2002). To the extent there are any ambiguities in the complaint, then, the Court should infer that the FEC alleged that Lynch has remained a candidate for purposes of the prohibition on personal use of leftover campaign funds and Lynch for Congress has remained a political committee registered with the Commission. The Court must take these allegations as true and disregard all of Lynch's contrary allegations, including that he was not a candidate, that he was merely exploring a run for office in 2012 (Am. Mot. ¶ 22), and that Lynch for Congress did not exist.

Furthermore, the Court should not convert Lynch's new argument for dismissal under Rule 12(b)(6) (Am. Mot. ¶¶ 38-70) to a motion for summary judgment or consider matters outside the pleadings for his argument for dismissal under Rule 12(b)(1) (Am. Mot. ¶¶ 1-37), because he has not submitted any evidence. Instead, he merely makes unsworn statements in his

brief and refers to discovery requests by the Commission. Those discovery requests were not even filed with the Court and would not constitute evidence if they had been. There is nothing for the Court to review outside the pleadings.

Moreover, Lynch's new contentions that he ceased to be a candidate or the treasurer of Lynch for Congress, and that Lynch for Congress ceased to exist the moment that he lost the April 2010 special election, are inaccurate as a matter of law and fact. (Am. Mot. ¶¶ 6-19, 42-45). Principal campaign committees like Lynch for Congress remain subject to FECA requirements until meeting the criteria for termination, which includes filing a termination report and having no outstanding obligations. 11 C.F.R. § 102.3. If the Court chose to consider matters beyond the complaint, however, Lynch for Congress clearly had not terminated before the 2010 expenditures at issue (and still has not). (*See* FEC Campaign Finance Disclosure Portal, www.fec.gov/fecviewer/CandidateCommitteeDetail.do, Exh. 2 (listing filings for Lynch for Congress).)

Finally, the allegations in the Commission's complaint are consistent with FECA's personal use prohibition. It is not limited to the time of a candidate's active campaigning. *See* 52 U.S.C. § 30114(b)(2); 11 C.F.R. 113.1(g). Indeed, the guide the Commission provides to congressional candidates specifically advises in the "Winding Down the Campaign" section that campaign funds left over after an election may not be converted to personal use. FEC, *Campaign Guide for Congressional Candidates and Committees*, 123-27 (2014), *available at* http://www.fec.gov/pdf/candgui.pdf. Commission regulations at 11 C.F.R. §§ 100.72 and 100.131 do permit an individual to "test the waters" to determine whether to run for office without becoming subject to Commission regulations so long as no more than $5,000 is raised or spent and other conditions met, but the Amended Complaint alleges that the expenditures at issue

were made with campaign funds of Lynch for Congress — an entity already registered with and reporting to the Commission — not from any other source. (Am. Compl. ¶ 22.) Lynch was spending funds raised as contributions to his authorized committee for his earlier candidacy, not personal funds or money contributed to an exploratory committee pursuant to the "test the waters" regulatory exemption. Lynch's arguments for dismissal also fail on the merits.

VI. CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the Amended Motion be denied.

Respectfully submitted,

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July 25, 2016

CERTIFICATE OF SERVICE

I, Harry J. Summers, an attorney of record in this case, certify that I served on July 25, 2016 a copy of the foregoing Federal Election Commission's Opposition to Defendant Edward J. Lynch's Amended Motion to Dismiss via email to his preferred email address of "edward@evergladesgroup.co".

s/ Harry J. Summers