UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

FEDERAL ELECTION COMMISSION, Plaintiff, v. CHRISTINE O'DONNELL, *et al.*, Defendants.	No. 15-cv-00017-LPS MOTION FOR SUMMARY JUDGMENT

PLAINTIFF FEDERAL ELECTION COMMISSION'S
MOTION FOR SUMMARY JUDGMENT

For the reasons stated in the brief that accompanies this motion, the Federal Election Commission hereby moves for summary judgment on both its affirmative claims and the defendants' counterclaims. The Commission respectfully requests that the Court order payment of civil penalties, disgorgement, and injunctive relief.

Respectfully submitted,

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March 8, 2016

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

FEDERAL ELECTION COMMISSION, Plaintiff, v. CHRISTINE O'DONNELL, *et al.*, Defendants.	No. 15-cv-00017-LPS BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

OPENING BRIEF IN SUPPORT OF PLAINTIFF FEDERAL ELECTION COMMISSION'S MOTION FOR SUMMARY JUDGMENT

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STATEMENT OF NATURE AND STAGE OF THE PROCEEDINGS

Pursuant to Federal Rule of Civil Procedure 56, the Federal Election Commission ("Commission" or "FEC") moves for summary judgment. The defendants, including Christine O'Donnell and her campaign committee, violated 52 U.S.C. § 30114(b) by using more than $25,000 in campaign funds to pay for rent and utilities at O'Donnell's residence during her campaign for U.S. Senate in 2010. Discovery in this case, including defendants' admissions, has confirmed that O'Donnell resided at her campaign's headquarters at 1242 Presidential Drive, Greenville ("the Townhouse") for well over a year and that campaign funds were used for the rent and utility payments on the Townhouse. This was an unlawful conversion of campaign funds to personal use, even though O'Donnell belatedly reimbursed a small portion of these costs. The personal use rule reasonably bars such attempted allocation of household expenses, avoiding the very kind of evidentiary difficulties that plagued discovery in this case. The Court should therefore grant summary judgment to the FEC and order payment of civil penalties, disgorgement, and injunctive relief.

SUMMARY OF ARGUMENT

1. The Federal Election Campaign Act ("FECA") makes it illegal for a candidate to use campaign contributions for personal use. It is a *per se* violation of the personal use ban if campaign funds are used to pay rent or utilities for any part of a personal residence of a candidate, even if part of the personal residence is used for campaign purposes.

2. Defendant Christine O'Donnell resided at the Townhouse from January 2010 till after March 2011. The Townhouse was also headquarters for her 2010 U.S. Senate campaign.

3. Defendant Friends of Christine O'Donnell ("the Committee"), the authorized campaign committee for O'Donnell's 2010 Senate campaign, used campaign funds to pay more than $25,000 in rent and utilities (electric and cable) for the Townhouse from January 2010 through March 2011. Christine O'Donnell later reimbursed the committee only a small fraction of that amount, making five payments to the Committee for rent and utilities totaling $3,850.

4. By using campaign funds to pay rent and utilities at O'Donnell's residence, the defendants violated the personal use provision of FECA and the accompanying regulation.

5. Contrary to defendants' counterclaims, the statute and the regulation that prohibits personal use of campaign funds are constitutional. The ban is a rational restriction on the use of funds which is designed to deter corruption and promote public confidence in the political system.

6. Defendants' supposed reliance on advice given in two alleged phone calls between O'Donnell and an FEC reports analyst is not legally relevant. Even if such oral statements were made, they would not absolve defendants of liability. In any event, O'Donnell's claim — first made years after the fact — that these calls occurred is not credible.

7. This Court should therefore order a civil penalty from defendants O'Donnell and Friends of Christine O'Donnell, disgorgement from O'Donnell, and injunctive relief.

STATEMENT OF FACTS

1. The Commission is the independent agency of the United States government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of FECA, codified at 52 U.S.C. §§ 30101-146. *See* 52 U.S.C. §§ 30106(b)(1), 30107(a), 30109. The Commission is authorized to institute investigations of possible violations of FECA, 52 U.S.C. § 30109(a)(1)-(2), and to initiate civil actions in the United States district courts to obtain judicial enforcement of FECA, 52 U.S.C. §§ 30107(e), 30109(a)(6).

2. Christine O'Donnell was a candidate for the U.S. Senate from Delaware in 2010. (Plaintiff FEC's Compl. for Civil Penalty, Declaratory, Injunctive, and Other Appropriate Relief ("Compl.") ¶ 6 (D.I. 1); Defs.' Answer and Countercls. ("Ans. & Countercls.") ¶ 6 (D.I. 9.))

3. O'Donnell designated defendant Friends of Christine O'Donnell as her authorized principal campaign committee under 52 U.S.C. § 30101(5)-(6) for the 2010 election. (Compl. ¶ 7; Ans. & Countercls. ¶ 7.) As such, the Committee was authorized to receive contributions and make expenditures on behalf of the candidate. 52 U.S.C. § 30102(e)(1)-(2). Chris Marston is

the current treasurer of the Committee and a defendant in this case in that official capacity only. (Compl. ¶ 8; Ans. & Countercls. ¶ 8.)

4. In late 2009, in preparation for her 2010 Senate campaign, O'Donnell and her campaign staff considered various properties for the Committee to lease as its campaign headquarters. (Deposition of Christine O'Donnell ("O'Donnell Dep.") at 10-13, FEC Exh. 14.)

5. O'Donnell evaluated at least four different potential properties to lease. (O'Donnell Dep. at 15-23; Defs.' Suppl. Resps. to FEC's First Set of Interrogs. and Admis. Reqs. ("Resp. to Disc.") RFA 5, FEC Exh. 12.) Only one of these properties was in a residential area or had living space. (*Id.*) That property was the Townhouse. (*Id.*)

6. The Townhouse had three bedrooms. (Resp. to Disc., RFA 2.) It was in a residential neighborhood. (O'Donnell Dep. at 93-94.) The fact the Townhouse had living space was among the reasons O'Donnell decided to lease it for campaign headquarters. (*Id.* at 26-27.)

7. On January 8, 2010, the Committee entered into a lease for the Townhouse. (Answer & Countercls. ¶ 13; Rental Agreement ¶ 1, FEC Exh. 1.) Christine O'Donnell signed both the Rental Agreement and the Progressive Rent Addendum on behalf of the Committee. (Rental Agreement; Progressive Rent Addendum, FEC Exh. 2; Resp. to Disc., RFA 4.)

8. The Committee used the Townhouse as its headquarters during O'Donnell's 2010 campaign for Senate and continued to use the Townhouse after the November 2010 general election. (Ans. & Countercls. ¶ 14.) The Committee paid rent and utilities for the Townhouse, including payments to Comcast of Delaware for communications services and to Delmarva Power for electricity. (*Id.*¶ 16.)

9. The lease required a security deposit of $99. (Resp. to Disc., RFA 6.) The pro-rated rent for January 2010 was $1,316. (Resp. to Disc., RFA 6.) The monthly rent from February 2010 to March 2011 was $1,645/month, but $235 of that monthly rent was "[d]eferred," meaning that it did not need to be paid unless the Committee defaulted on the lease, in which case all such deferred rent, both prior and subsequent to the default, became due. (Progressive Rent Addendum ¶ 2; Resp. to Disc., RFA 7.) Thus, the minimum amount payable

each month beginning in February 2010 was $1,410/month. Under the terms of the lease, however, if rent was paid after the fifth day of the month, a late charge of 5% would be assessed. (Rental Agreement ¶ 6(c).) During the period January 2010 through March 2011, the Committee paid at least $21,375 in rental costs for the Townhouse. These included: the security deposit and service fee ($101.20); the prorated partial month rent for January 2010 and service fee ($1,318.20); monthly rent for February 2010 to March 2011 (totaling at least $19,740); and utility reimbursements to the landlord for electricity from January 8-14, 2010 ($216.47). (*See* Excerpts from Friends of Christine O'Donnell Amended FEC Form 3 Reports of Receipts and Disbursements (filed Apr. 15, 2011), FEC Exh. 6; Resp. to Disc., RFA 8; Greenville Place Ledger for 1242 Presidential Dr. (Jan. 12, 2016) at OD-419, FEC Exh. 13.)

10. Utility payments by the Committee to Comcast and Delmarva Power in February, March, April and May 2010 totaled $1,218.41, a monthly average of $304.60. (Resps. to Disc., RFAs 10-13; Order dated Feb. 29, 2016 (D.I. 52) (RFAs 9-22 deemed to be admitted)). Using that monthly baseline average of $304.60, utilities paid by the Committee for the Townhouse from February 2010 through March 2011 were at least $4,264.40.[1] O'Donnell began to reside at

[1] Defendants were deemed to have admitted paying $15,526.20 to Comcast and Delmarva Power for the Townhouse during the fifteen-month lease. (Resps. to Disc., RFAs 6, 9-22; Order dated Feb. 29, 2016 (D.I. 52) (RFAs 9-22 deemed to be admitted).) The FEC nevertheless relies on those admissions only up to the amount of $4,264.40. As explained in the briefing that led to the Court's discovery order, the precise amount of the utilities for the full period that Christine O'Donnell resided at the Townhouse is difficult to ascertain based on the current record because the campaign began making payments for utilities on other properties in June 2010. When the Committee reported those rent and utility payments on its FEC reports, it did not identify the specific property for which the payments were made. In light of evidence that a portion of the Committee's utility payments were for other properties, and given that any increase in utility payments over time was likely not attributable to O'Donnell residing at the townhouse, the FEC seeks a determination of the amount in violation based on the conservative estimate of $4,264.40 of utility payments for the Townhouse for the full duration of the lease. This estimate is an extrapolation based on payments for utilities from February to May 2010, when the Townhouse was the only property leased by the Committee. (O'Donnell Dep. at 134, 137-38.) In addition, although defendants have been deemed to have admitted paying for thousands of dollars in phone utility payments for the Townhouse, the FEC does not rely on those admissions at this time given evidence indicating that a number of such payments were either unrelated to the Townhouse or not for Ms. O'Donnell's use.

the Townhouse in January 2010 and used the Townhouse as her legal residence until after March 2011. (O'Donnell Dep. at 37-38, 166; Resps. to Disc., Interrog. 6.) The Townhouse was the address on her driver's license and where she was registered to vote. (O'Donnell Dep. at 37-38.)

11. O'Donnell used the Townhouse as an actual residence, although not continuously. She slept there on some occasions, and she kept clothes and toiletries there. (O'Donnell Dep. at 37, 124.) Early in the period of the lease, O'Donnell had exclusive use of a master bedroom and connecting bathroom in the Townhouse. (*Id*. at 121.) She also had use of the kitchen and the other common areas. (*Id.* at 128.) At some point prior to July 2010, campaign interns began using the master bedroom and bathroom as their residence and O'Donnell no longer had exclusive use of that portion of the Townhouse, but she continued to sleep at the Townhouse periodically and to keep personal items there. (*Id.* at 122.)

12. O'Donnell made the Townhouse her residence before she and the campaign had reached any agreement about the amount that she would reimburse the campaign for her use of the Townhouse as a residence. (O'Donnell Dep. at 101, 103, 105-06.) O'Donnell paid the Committee a total of $3,850 to reimburse it for her use of the Townhouse, in five payments of $770 each, on April 14, 2010, June 28, 2010, August 4, 2010, September 27, 2010, and March 28, 2011. (Resp. to Disc., RFAs 23-24.)

13. O'Donnell did not sign a written lease or sublease with the Committee. (Resp. to Disc., RFAs 25-26.) She did not pay a security deposit. (Resp. to Disc., RFA 27; O'Donnell Dep. at 111.) There was no agreement about when O'Donnell would stop using the Townhouse as a residence. (O'Donnell Dep. at 109.) There was no agreement regarding whether O'Donnell would reimburse the Committee for deferred rent if the Committee defaulted on its lease. (*Id*.)

14. Campaign finance analysts in the FEC's Reports Analysis Division ("RAD") are required by RAD policy to log all phone calls that they have with representatives of authorized campaign committees. (Dep. of Vicki Davis ("Davis Dep.") at 24, FEC Exh. 15.) The policy requiring analysts to log all such phone calls, no matter how trivial, has been in place since 2008 or earlier. (Dep. of Nataliya Ioffe ("Ioffe Dep.") at 43-44, FEC Exh. 16.)

15. The logs of phone calls to RAD indicate that there were 15 calls between representatives of the Committee and RAD analysts between April 6, 2009 and September 10, 2010. (Attachment to Decl. of Nataliya Ioffe ("Ioffe Decl."), FEC Exh. 18.) None of the calls on that log reflects a RAD analyst indicating to the Committee that it would be legal for Ms. O'Donnell to reside in the Townhouse for which the Committee was paying; indeed, the call log includes no mention of the Townhouse at all. (*Id.*)

16. In September 2010, the FEC received an administrative complaint alleging that O'Donnell and the Committee had violated FECA's personal use ban by using campaign funds to pay for O'Donnell's rent and utilities at the Townhouse. (Administrative Compl. in MUR 6380, FEC Exh. 3).

17. The Commission notified defendants of the administrative complaint. (Letters from Jeff S. Jordan, FEC, to Christine O'Donnell and Sandra A. Taylor (Sept. 24, 2010), FEC Exh. 4) In response, O'Donnell submitted an affidavit that does not mention reliance on any advice from the FEC in determining that she could legally reside at the Townhouse. (Affidavit of Christine O'Donnell dated Dec. 2, 2010 ("2010 O'Donnell Aff."), FEC Exh. 5.)

18. The Commission voted 6-0 in May 2012 to open an investigation into violations of 52 U.S.C. § 30114(b) by defendants. (Cert. of FEC (May 23, 2012), FEC Exh. 7; Letter from Caroline C. Hunter, FEC Chair, to Cleta Mitchell, Esq. (June 1, 2012), attaching Factual and Legal Analysis, FEC Exh. 8.)

19. The Commission voted 6-0 in November 2014 to find probable cause to believe that defendants had violated that personal use provision. (Cert. of FEC (Nov. 20, 2014), FEC Exh. 9; Letter from Kathleen M. Guith, FEC, to Christine O'Donnell (Nov. 20, 2014), FEC Exh. 10.) The Commission attempted to engage in conciliation with defendants, but those efforts were unsuccessful, and the Commission thereafter voted 6-0 to authorize this suit. (Cert. of FEC (Jan. 5, 2015), FEC Exh. 11.) The Commission has therefore satisfied all jurisdictional prerequisites to bringing suit.

ARGUMENT

I. STANDARD OF REVIEW

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the burden of demonstrating the absence of a genuine issue of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 n. 10 (1986). A party asserting that a fact cannot be genuinely disputed must cite "particular parts of materials in the record" or "show[ ] that the materials cited do not establish the . . . presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(A), (B). If the moving party has carried its burden, the nonmovant must then "come forward with specific facts showing that there is a genuine issue for trial." *Matsushita*, 475 U.S. at 587 (internal quotation marks omitted).

The Court's role is not to "make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). Rather, the Court should determine whether there is a genuine issue for trial and whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 252 (1986). To defeat a motion for summary judgment, the non-moving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586–87; *see also Podobnik v. U.S. Postal Service*, 409 F.3d 584, 594 (3d Cir. 2005) (non-moving party "must present more than just bare assertions, conclusory allegations or suspicions to show the existence of a genuine issue") (internal quotation marks omitted). The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson*, 477 U.S. at 247–48. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249–50 (internal citations omitted).

II. DEFENDANTS VIOLATED FECA'S PERSONAL USE PROHIBITION

A. FECA Prohibits the Use of Campaign Funds to Pay Rent or Utilities on Any Part of a Property Used As a Candidate's Residence

FECA provides that candidate campaign funds "shall not be converted by any person to personal use," which the statute defines as using such funds to pay any expense "that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office"; the statute lists examples including "a home mortgage, rent, or utility payment." 52 U.S.C. § 30114(b). The Commission's regulation defining "personal use" divides the prohibited uses of campaign funds into two categories. *See* 11 C.F.R. § 113.1(g). Some types of spending, such as rent and utility payments, are *per se* "personal use." *Id.* § 113.1(g)(1)(i). Other spending is examined on a case-by-case basis under the "irrespective" test. *Id.* § 113.1(g); *see also id.* § 113.1(g)(1)(ii). In 2002, Congress rewrote FECA's personal-use statute to codify the Commission's regulation, including both the irrespective test and the list of *per se* violations. *See* 148 Cong. Rec. S1991-02 (daily ed. Mar. 18, 2002); Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 301, 116 Stat. 81 (codified as amended at 52 U.S.C. § 30114(b) (formerly 2 U.S.C. § 439a(b))). The FEC has explained why certain spending is a *per se* violation:

> Paragraph (g)(1)(i) of the final rules contains a list of expenses that are considered personal use. The list includes household food items, funeral expenses, clothing, tuition payments, mortgage, rent and utility payments, entertainment expenses, club dues, and salary payments to family members. The rule assumes that, in the indicated circumstances, these expenses would exist irrespective of the candidate's campaign or duties as a Federal [officeholder]. Therefore, the rule treats the use of campaign funds for these expenses as per se personal use.

Expenditures; Reports by Political Committees; Personal Use of Campaign Funds, 60 Fed. Reg. 7862, 7864 (Feb. 9, 1995) ("E&J").

In explaining the application of the ban to household expenses, the FEC made clear 20 years ago that allocation is not permitted: "Under paragraph (g)(1)(i)(E)(1), the use of campaign funds for mortgage, rent or utility payments *on any part of a personal residence of the candidate*

or a member of the candidate's family is personal use, even if part of the personal residence is being used in the campaign." E&J at 7865 (emphasis added). The *per se* banning of the use of campaign funds for rent and utility payments "reduces the need [f]or case by case review" and "*avoids the need to allocate expenses associated with the residence between campaign and personal use*." *Id.* at 7864-65 (emphasis added).

B. The Committee's Payment of the Rent and Utilities for the Townhouse Where Christine O'Donnell Resided Violated FECA

There is no dispute that O'Donnell used the Townhouse as both her legal residence and as an actual residence. (FEC's Statement of Facts ("Facts") ¶¶ 10-11.) Defendants describe O'Donnell's living arrangement as a "sublease." (Ans. & Countercls., Countercl. ¶ 9.) As an initial matter, however, the lawfulness of the arrangement does not turn on whether the candidate's residence is considered a sublease from the campaign or the campaign simply pays the candidate's rent and utilities. (*See infra* at 11-12.) As long as campaign funds are used for any part of a candidate's residence, it is prohibited by FECA. (E&J at 7865.)

Moreover, the arrangement between O'Donnell and the campaign had none of the indicators of a traditional sublease. The master bedroom and bathroom were not segregated — O'Donnell and the campaign shared the Townhouse's common areas and shared the use of utilities. (Facts ¶ 11.) There was no written agreement between O'Donnell and the Committee, and no contemporaneous evidence of any effort to assure a fair, arms-length transaction; there were only the five small payments O'Donnell made later. (Facts ¶¶ 12-13.) There was no security deposit or deferred rent arrangement. (Facts ¶ 12.) There was no end date. (Facts ¶ 12.) In sum, defendants took few if any steps to assure that O'Donnell would not receive a personal benefit from the Committee's payment of rent and utilities.

Even if the $3,850 O'Donnell later paid the Committee is subtracted, the Committee paid for about 85% of the total Townhouse rent and power and cable utility costs (as estimated above) from January 2010 through March 2011, or $25,639.40 (although the lack of any contemporaneous documentation makes it difficult to segregate the types of expenses or

determine the specific rationale for the proportion of the total costs that O'Donnell paid). (Facts ¶¶ 9-10, 12.) And these numbers actually understate the percentage of financial responsibility the Committee assumed for O'Donnell. The Committee was expected to pay rent by the first day of the month and had to pay a 5% late fee if payments were made late. (Facts ¶ 9.) But O'Donnell only paid rent roughly every three months, for the period of time she had already been living there, which is the equivalent of interest-free loans from the Committee. (Facts at ¶ 12.) The Committee also assumed all of the financial risk associated with the security deposit and deferred rent, none of which was shared by O'Donnell. (Facts ¶ 13.)

Whatever the validity of O'Donnell's purported "sublease," there is no genuine issue regarding the fact that O'Donnell resided at the Townhouse where the Committee paid rent and utilities for 15 months. The Court should grant the FEC summary judgment and determine that defendants violated the personal use prohibition.

III. SUMMARY JUDGMENT SHOULD BE GRANTED TO THE COMMISSION ON DEFENDANTS' OTHER AFFIRMATIVE DEFENSES AND COUNTERCLAIMS

Defendants have made three other meritless affirmative defenses and counterclaims, asking the Court for declaratory judgments that: A) they did not violate the personal use statute or regulations; B) the FEC's personal use regulation governing the use of campaign funds for a candidate's rent and utilities is facially unconstitutional; and C) the personal use statute is unconstitutional as applied to defendants. The FEC previously moved to dismiss these counterclaims. (*See* Opening Br. in Supp. of Pl. FEC's Mot. to Dismiss Countercls. ("MTD Br.") (D.I. 14); Reply Br. in Supp. of Pl. FEC's Mot. to Dismiss Countercls. ("MTD Reply") (D.I. 19).) As explained in those previous briefs and for the reasons discussed below, summary judgment should be granted to the FEC on all three counterclaims.

A. Defendants' Actions Violated FECA's Personal Use Ban

Defendants' first counterclaim is that they did not violate 52 U.S.C. § 30114 because the law allegedly does not apply where a candidate pays for use of space in campaign headquarters, and because the Committee would have incurred the same costs, or even more, were it not for

"Christine O'Donnell's subsequent decision to sublease a portion of the space." (Ans. & Countercls. at Countercl. ¶ 9 (D.I. 9).) In addition, the defendants claim they should not be held liable because of the "Safe Harbor" provision at 52 U.S.C. § 30111(e). None of these arguments has any merit.

1. The *per se* rule regarding rent and utility payments reflects the plain meaning of the statute and it clearly applies to defendants' conduct

As discussed above, *supra* pp. 8-9, the statute, regulation, and Explanation and Justification for the regulation specifically bar the use of campaign funds for home, rent, or utility payments. 52 U.S.C. § 30114 (b)(2); s*ee also* 11 C.F.R. § 113.1(g); E&J at 7865. But that is exactly what defendants did, in violation of the plain language of the statute and contrary to the guidance in the Explanation & Justification that allocation of such expenses is not permitted.

Defendants' position is completely inconsistent with the rationale behind the *per se* prohibition against campaigns paying for rent and utilities at a candidate's residence. Rent and utilities are violations *per se* because they are expenses that a candidate would have even in the absence of a campaign. E&J at 7865. The Commission does not permit the allocation of those expenses because doing so would require the potentially invasive and difficult process of calculating the fair market value of what was received by the candidate. (*See* MTD Br. at 16; MTD Reply at 5-6.) This case is a perfect illustration of the challenges associated with trying to unmake such an omelet. It is best if courts need not attempt to determine who should be responsible for what share of a townhouse that was used by a candidate and campaign staffers over a 15-month period. Both the Commission and Congress have adopted the *per se* rule to provide guidance to campaigns, to improve administrability, and to avoid invasive investigations.

Finally, the claim that O'Donnell's residence at the Townhouse did not cost the campaign any money, or even saved money, amounts to an unsupported claim that O'Donnell intentionally chose to rent space for her campaign that was larger than required for campaign activity, and so

the space she occupied would otherwise have been wasted. Of course, such a claim would presumably not apply to the utilities at all, since those are billed according to usage.[2]

2. Defendants had no basis to rely on FECA's "Safe Harbor" provision

Defendants also invoke the "Safe Harbor" provision of 52 U.S.C. § 30111(e), under which a person is not liable for violating FECA if she was acting in good faith reliance on "any rule or regulation prescribed by the Commission." 52 U.S.C. § 30111(e). But defendants have not identified any FEC rule or regulation that they relied upon, nor could they. As described above, the Commission's regulations and the Explanation & Justification for those regulations both clearly state that it is a *per se* violation of the law to use campaign funds to pay for any portion of the rent or utilities at a candidate's residence.

Defendants instead argue that they relied on FEC regulations that "do not prohibit a campaign committee from subleasing a portion of such space in a campaign headquarters to a candidate as a residence." (Ans. & Countercl., Countercl. ¶ 11 (D.I. 9.) As an initial matter, any reasonable reading of the applicable regulation and other authorities leads to the conclusion that such an arrangement is precluded, as discussed earlier. But more fundamentally, the Safe Harbor provision only protects a person acting in reliance on a rule or regulation, not in reliance on the *absence* of some rule or regulation. 52 U.S.C. § 30111(e). If FECA prohibits an activity, a person is not insulated from that law just because there is no FEC regulation that describes it with maximum specificity, perhaps using the term "sublease." If defendants believed there was some ambiguity in the regulation, FECA provides a mechanism that offers possible protection from liability, and that is to seek an advisory opinion directly from the Commission. *See* 52 U.S.C. § 30108; 11 C.F.R. § 112.1. Defendants did not seek an advisory opinion, even though

[2] Furthermore, the notion that O'Donnell made a "subsequent decision" to sublease in the Townhouse is undermined by her active role in choosing the Townhouse for campaign headquarters; the fact that the Townhouse's living space was a factor in her choice; and the fact that she changed her residence immediately after the campaign's lease began. (Facts ¶¶ 4-7.)

they were on notice no later than early 2010, by O'Donnell's own account, that some people believed her campaign's payment of expenses at her residence was unlawful. (Facts ¶ 17.)

B. The Personal Use Statute and the Regulation Are Constitutional

Defendants' two remaining counterclaims are that the FEC regulation governing the use of campaign funds for a candidate's rent and utilities is facially unconstitutional and that the personal use statute is unconstitutional as applied to defendants, but the FEC already explained in its motion to dismiss why these claims fail. (*See* MTD Br. at 15-20; MTD Reply at 4-10.) The FEC incorporates the arguments made in support of its motion to dismiss.

IV. O'DONNELL'S ALLEGED RELIANCE ON ADVICE FROM AN FEC ANALYST IS LEGALLY IRRELEVANT AND NOT CREDIBLE IN ANY EVENT

In what appears to be a last-minute bid to avoid responsibility for her personal use of campaign funds, O'Donnell claims in this litigation that she relied on oral advice from FEC campaign finance analyst Vicki Davis given in two alleged phone calls occurring around the time the Townhouse lease began in early 2010. (O'Donnell Dep. at 49, 56-57, 64, 69.) O'Donnell's claim is not consistent with other sworn testimony she has provided, nor with an overwhelming amount of other evidence in the record. (*See infra* pp. 14-16.) But even if true, the claim would be insufficient to create a genuine issue because it could not excuse defendants' unlawful conduct. No FEC employee can authorize a violation of federal law or make statements that estop the government from enforcing a law. So even if there is a dispute as to whether Davis told O'Donnell her living arrangement was legal, that issue of fact is immaterial and does not preclude summary judgment.

A. Only an FEC Advisory Opinion, Not Oral Advice from an FEC Employee, Could Create a Legal Defense for Defendants' Conduct

Defendants claim that Vicki Davis told O'Donnell it was legal for O'Donnell to reside at the campaign-funded Townhouse as long as she paid rent to the Committee (O'Donnell Dep. at 49, 56-57, 64, 69), but FECA does not absolve a person of liability for violating the law based on reliance on an oral communication with an FEC employee. Rather, a person can only obtain

such protection by asking for an advisory opinion from the FEC. An advisory opinion provides certain legal protections to a person who (1) engages in activity that is "indistinguishable in all its material aspects" from the activity on which the advisory opinion is issued, and (2) acts in good faith in accord with the opinion. 52 U.S.C. § 30108(c); 11 C.F.R. § 112.5. O'Donnell sought no opinion.

B. The Federal Government Cannot Be Estopped from Enforcing Laws As a Result of the Actions of One of Its Employees

O'Donnell's claim of reliance on advice from an FEC employee also fails because the federal government may not be equitably estopped from enforcing public laws, even if private parties may suffer hardship as a result. *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 418-19 (1990); *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 66 (1984). Indeed, that rule applies even if the wrongdoer acted in reliance on oral advice from a federal employee. *Heckler*, 467 U.S. at 65. In this case, defendants argue that even if they did break the law, they did so in reliance on oral advice supposedly given by Vicki Davis. But "an estoppel cannot be erected on the basis of . . . oral advice" due to "[t]he necessity for ensuring that governmental agents stay within the lawful scope of their authority." *Id.* It is therefore legally irrelevant whether O'Donnell received such advice, and this factual dispute does not prevent the Court from granting summary judgment to the Commission.

C. O'Donnell's Claim of Having Received Advice from the FEC is Not Credible

O'Donnell's testimony is that in December 2009 or early January 2010, she spoke on the phone with Vicki Davis. (O'Donnell Dep. at 49.) Davis purportedly told O'Donnell it was legal for her to reside at the Townhouse, "as long as I was paying the campaign rent . . . ." (*Id.* at 57.) O'Donnell also testified that a reporter claimed that her living arrangement was illegal in either January or February 2010, and that O'Donnell then had a second phone call with Davis in which Davis reconfirmed that the arrangement was legal. (*Id.* at 64, 68-70.)

O'Donnell did not, however, mention the calls or any reliance on FEC advice in her December 2010 affidavit addressing this matter during its administrative phase. (2010

O'Donnell Aff.) Indeed, she appears to have never before made the specific claim about Davis — even though the legality of the arrangement has been a public issue since early 2010.

RAD analysts like Davis provide guidance to political committees about FEC reporting, but they are trained to refer questions that require legal interpretation elsewhere. (Ioffe Dep. at 24-27.) RAD analysts also log all phone conversations with Committee representatives in a computer database, but no calls listed in the log for the relevant time period even mention the Townhouse, much less indicate that a RAD analyst told O'Donnell it would be legal for her to reside there while the Committee was paying the rent and utilities. (Attachment to Ioffe Decl.)

Vicki Davis has no recollection of any phone calls like the two described by Christine O'Donnell. (Declaration of Vicki Davis ("Davis Decl.") ¶ 11, FEC Exh. 17.) Davis does not believe that any such phone calls took place because she is trained not to engage in the legal interpretation described by O'Donnell; instead, she should transfer such inquiries to the FEC's Information Division or suggest that the caller obtain an Advisory Opinion from the FEC. (Davis Decl. ¶ 11; Ioffe Dep. at 24-27.) Consistent with RAD policy, Davis's practice since prior to 2009 has been to log all calls received from authorized committees, and there is no evidence that she failed to do so. (Davis Decl. ¶¶ 7-8; Ioffe Dep. at 44; Davis Dep. at 24, 34-35.)

Even with the facts evaluated in the light most favorable to O'Donnell as the non-movant, then, her new story fails to create a genuine issue of fact. The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson*, 477 U.S. at 247–48; *see also Bank of Illinois v. Allied Signal Safety Restraint Sys.*, 75 F.3d 1162, 1172 (7th Cir. 1996) (affirming grant of summary judgment despite deposition testimony that contradicted earlier sworn testimony); *Drumgo v. Burris*, No. cv 12-1204-GMS, 2015 WL 4591957, at *5 (D. Del. July 29, 2015) (granting summary judgment where earlier statements contained no support for plaintiff's alleged injuries and "the only evidentiary support for these injuries comes from [plaintiff's] brief, submitted over three years after the incident," even treating the brief as an affidavit). In addition to being omitted from her earlier testimony, the purported conversations are contradicted by the

testimony of FEC analyst Davis, the RAD phone logs for the period, and RAD policy and training for its analysts. (Davis Decl. ¶¶ 8, 11; Attachment to Ioffe Decl.; Ioffe Dep. at 24-27) Those government records receive a presumption of regularity and good faith. *See Latif v. Obama,* 677 F.3d 1175, 1191 (D.C. Cir. 2015) (reversing district court grant of habeas in part because "[plaintiff] offers no evidence to rebut the Government's presumptively reliable record aside from his own statements and the Report itself."); *Riggs Nat'l Corp. & Subsidiaries v. Comm'r of IRS,* 295 F.3d 16, 20 (D.C. Cir. 2002) ("Common law has long recognized a presumption of regularity for actions and records of public officials.").

V. THE COURT SHOULD ORDER CIVIL PENALTIES, DISGORGEMENT, AND INJUNCTIVE RELIEF

FECA authorizes this Court to grant a "permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of [$7,500] or an amount equal to any contribution or expenditure involved" in the violation. 52 U.S.C. § 30109(a)(6)(B); *see* 11 C.F.R. § 111.24(a)(1). If this Court concludes that defendants violated FECA's personal use ban, the Commission respectfully requests that the Court (1) order O'Donnell and the Committee to jointly pay a $25,000 civil penalty; (2) order O'Donnell to disgorge $5,000 to the U.S. Treasury; and (3) provide declaratory and injunctive relief.

A. The Committee and O'Donnell Should Be Ordered to Pay A Civil Penalty for the Full Amount of the Violation

FECA authorizes this Court to impose a civil penalty on each defendant (O'Donnell and the Committee) in an amount up to the more than $40,000 in expenditures involved in each defendant's violation (counting admitted rent for the Townhouse and all Committee electric and cable payments during the relevant period, which defendants have not differentiated), for a total potential penalty of more than $80,000. *See* 52 U.S.C. § 30109(a)(6)(B); Facts ¶ 10 & n.1. At a minimum, the statute authorizes a penalty against each defendant in the amount of spending that the FEC has estimated to be fairly attributable to the Townhouse, which is more than $25,000, leading to potential total penalties of more than $50,000. The Court has wide discretion in

determining civil penalties when, as in this case, Congress has not mandated a particular amount. *See United States v. Mun. Auth. of Union Twp.*, 150 F.3d 259, 264 (3d Cir. 1998) ("[T]he court will accord the district court's award of a penalty wide discretion, even though it represents an approximation."); *see also Tull v. United States*, 481 U.S. 412, 426-27 (1987).

In this case, the FEC respectfully requests a single $25,000 civil penalty to be imposed jointly against O'Donnell and the Committee. In exercising its discretion about the appropriate amount to assess as a civil penalty, the Court should consider several factors. As a general matter, robust civil penalties deter defendants and others from engaging in similar illegal activities. *See United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 231-32 (1975). For the type of violation at issue here, a substantial civil penalty "would deter not only future misconduct by these defendants, but also the misappropriation of campaign funds by others." *FEC v. Craig for U.S. Senate*, 70 F. Supp. 3d 82, 100 (D.D.C. 2014), *aff'd*, __ F.3d __, No. 14-5297, 2016 WL 850823 (D.C. Cir. Mar. 4, 2016).

The personal use of campaign funds both injures those who contributed to the Committee and undermines the public's confidence in the government and campaign finance system. *Craig for U.S. Senate*, 70 F. Supp. 3d at 99-100 (noting the "harm to the contributors" of a personal use violator, "who presumably intended that their donations be used for lawful, campaign-related purposes"); *FEC v. Comm. of 100 Democrats*, 844 F. Supp. 1, 7 (D.D.C 1993); *FEC v. Furgatch*, 869 F.2d 1256, 1258 (9th Cir. 1989); *FEC v. Am. Fed'n of State, Cty. and Mun. Emps.—P.E.O.P.L.E. Qualified*, No. 88-3208, 1991 WL 241892, at *2 (D.D.C. Oct. 31, 1991) ("there is always harm to the public when FECA is violated").

The Court should also consider "the necessity of vindicating the authority of the responsible agency." *Comm. of 100 Democrats*, 844 F. Supp. at 7; *see also Furgatch*, 869 F.2d at 1258. "[A] penalty here would certainly vindicate the authority of the FEC and strengthen its ability to enforce the FECA's personal use ban in the future." *Craig for U.S. Senate*, 70 F. Supp. 3d at 99. If FECA penalties imposed after litigation are not generally higher than those arrived at through the statutory procedure of voluntary conciliation, it undermines the Commission's ability

to enforce the statute through the conciliation process, which is the "preferred method of dispute resolution under FECA," *FEC v. NRA*, 553 F. Supp. 1331, 1338 (D.D.C. 1983).

The Court should also take into account defendants' ability to pay a civil penalty. *Furgatch*, 869 F.2d at 1258. O'Donnell has to date declined to demonstrate an inability to pay. The Court has ordered production of information about O'Donnell's current income and assets, or a waiver of an argument that she is unable to pay, by March 15, 2016, after the filing of this brief. (Order (D.I. 52).) The Committee has now spent virtually all its funds, but joint liability would permit O'Donnell to pay the entire civil penalty. *Cf. Craig for U.S. Senate*, 70 F. Supp. 3d at 101 (ordering the candidate rather than a defunct committee to pay entire civil penalty).

Lastly, an important factor in determining a civil penalty is whether the defendants acted in good or bad faith. *See United States v. Reader's Digest Ass'n, Inc.*, 662 F.2d 955, 968 (3d Cir. 1981). In this case, O'Donnell testified that within the first month that she resided at the Townhouse, a reporter told her that she was violating a specific part of FECA. (O'Donnell Dep. at 67-69.) Despite this information, O'Donnell did not change her legal residence, even after the administrative complaint that led to this lawsuit was filed with the FEC. O'Donnell Dep. at 166; *Craig for U.S. Senate*, 70 F. Supp. 3d at 99 (finding that persisting in expending campaign funds on conduct that a defendant was on notice "might not comport with the law" was an indication of bad faith). Nor did the campaign ever seek an advisory opinion from the Commission. *Reader's Digest Ass'n, Inc.*, 662 F.2d at 968 (finding that in a particular administrative proceeding, the failure to seek an agency advisory opinion was evidence of bad faith); *Craig for U.S. Senate*, 70 F. Supp. 3d at 99. There is no showing of good faith here.

B. Christine O'Donnell Should Be Ordered to Disgorge the Full Amount of Her Personal Benefit

This Court should order O'Donnell to disgorge the amount she benefited from her personal use, which the Commission estimates to be about $5,000. *See* 52 U.S.C. § 30109(a)(6)(B) (authorizing "other order[s]" to remedy FECA violations). The primary purpose of disgorgement is to deprive a wrongdoer of ill-gotten gain. *See SEC v. Teo*, 746 F.3d 90, 104

(3d Cir. 2014), *cert denied*, 135 S. Ct. 675 (2014); *see also Commodity Futures Trading Comm'n v. Am. Metals Exch. Corp.*, 991 F.2d 71, 76 (3d Cir. 1993); *Furgatch*, 869 F.2d at 1258 n.1.

The Commission believes that $5,000 is a reasonable estimate of the benefit that O'Donnell received from the Committee, over and above the $3,850 that she reimbursed. There are three bedrooms in the Townhouse, so in a more typical shared-rent situation, the occupant of each bedroom would be expected to pay roughly one-third of the costs of rent and utilities.[3] In this case, the estimated total of rent and utilities for the Townhouse over the relevant time period is $25,639.40. One third of that total is $8,546.46, which is about $4,696 more than O'Donnell has already reimbursed for her rent and utilities. (Facts ¶ 12.) Rounding up to $5,000 is warranted because O'Donnell had the largest bedroom and many other benefits, such as only paying rent every three months. (Facts ¶¶ 11-12.) She also has had what amounts to an interest-free loan, and adding just 2% simple annual interest on $4,696 from March 31, 2011 until March 31, 2016 would total about $5,165. Ordering $5,000 in disgorgement would provide assurance that O'Donnell would not profit, without being punitive. *See SEC v. Lazare Indus., Inc.*, 294 F. App'x 711, 715 (3d Cir. 2008) (affirming district court finding that "reasonably approximate[d] the amount of disgorgement."). Because the Committee "is little more than an alter-ego" for O'Donnell and repayment to contributors is impractical, O'Donnell should disgorge funds to the U.S. Treasury rather than to the Committee. *Craig for U.S. Senate*, 70 F. Supp. 3d at 101.

C. Defendants Should Be Enjoined from Converting Committee Funds to Personal Use

If the Court concludes that defendants violated 52 U.S.C. § 30114(b), the Court should issue a declaration to that effect and permanently enjoin defendants from committing such

[3] It is true that O'Donnell testified that she did not use the Townhouse as a full-time residence. (Facts ¶ 11.) But the fair market benefit to her is not judged by the value she placed on her use of the Townhouse, but rather by the use of the Townhouse to which she had the right and what a willing party would have paid for that right in an arms-length transaction. O'Donnell's control of the Committee and participation in every step of its decision-making process here makes evident that this was not an arms-length transaction. (Facts ¶¶ 4-7.)

violations. *See* 52 U.S.C. § 30109(a)(6)(B). O'Donnell has not stated that she will not run for federal office again, *compare Craig for U.S. Senate*, 70 F. Supp. 3d at 101 (noting defendant had no plans to run for office again), and she continues to operate ChristinePAC, a political action committee (http://docquery.fec.gov/pdf/727/201601319004980727/201601319004980727.pdf .) O'Donnell continued to use the Townhouse as a residence until 2015, with the Townhouse paid for by ChristinePAC. (O'Donnell Dep. at 166, 173.) The personal use ban does not apply ChristinePAC, which was never the authorized committee of O'Donnell in her capacity as a candidate. But her willingness to continue to live in a residence paid with funds from political contributors suggests some danger of recurrence. An injunction would preclude defendants from repeating the unlawful conduct involved here, *see Reader's Digest Ass'n*, 662 F.2d at 969-70.

CONCLUSION

For the foregoing reasons, summary judgment should be granted to the Commission and the Court should award appropriate remedies.

Respectfully submitted,

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