IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-11437-GG

FEDERAL ELECTION COMMISSION,

Plaintiff - Appellee,

v.

DAVID RIVERA,

Defendant - Appellant.

Appeal from the United States District Court
for the Southern District of Florida
No. 17-cv-22643

APPELLANT'S REPLY BRIEF

Jeffrey David Feldman
TRAILBLAZER
1200 Brickell Avenue
Penthouse 1900
Miami, FL 33131
Phone: 305.222.7851
Fax: 305.760.4193
jfeldman@trailblazerlaw.com

Thomas L. Hunker
Virginia Ashley Paxton
HUNKER PAXTON APPEALS & TRIALS
1 East Broward Boulevard, Suite 700
Fort Lauderdale, FL 33301
Phone: 877.841.8808
Fax: 954.477.7313
thomas.hunker@hunkerappeals.com
ashley.paxton@hunkerappeals.com

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-2, I certify that the certificate of interested persons (CIP) contained in the parties' principal briefs includes a complete list of trial judge(s), attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this particular case or appeal, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party.

Respectfully submitted,

/s/ Thomas L. Hunker
Thomas L. Hunker
Counsel for Appellant

TABLE OF CONTENTS

TABLE OF CITATIONS

FEC Cases

DOJ Cases

Statutes

Regulations

Rules

ARGUMENT

I. The district court lacked subject matter jurisdiction.

A. FEC's brief improperly references non-record matters that were not before the trial court in violation of FRAP 28.

Rule 28 of the Federal Rule of Appellate Procedure requires that every brief with a statement of facts contain "appropriate references to the record" and that any argument factually based contain "citations to the … parts of the record on which the appellant relies." *See* FRAP 28(a)(4) (statements of fact must refer to record). This Court has stricken or disregarded portions of briefs that reference non-record material. *See e.g., Diversified Numismatics v. City of Orlando, Fl.*, 949 F.2d 382, 384 (11th Cir.1991) ("Appellants should not have referenced material not in the record, and we will not consider any non-record evidence or arguments based upon non-record evidence."); *Riley v. City of Montgomery*, 104 F.3d 1247, 1251 (11th Cir. 1997) ("We grant Defendants' motion for those portions of Plaintiff's brief which refer to 'evidence' that is not in the record."); *see also Holmberg v. Baxter Healthcare Corp.*, 901 F.2d 1387, FN 4 (7th Cir. 1990) ("To the extent Baxter's brief makes a reference to these facts outside the record, those portions of the brief are properly stricken.").

In Part I.C.2. (pages 11-12) of its brief, FEC blatantly injects irrelevant and inflammatory non-record matters into this appeal that were not before the trial court. It also flagged them for the Court's attention by including a subheading ("*2. David*

Rivera's Subsequent Activities and Current Criminal Charges") so that the non-record matters are listed in the Table of Contents and to ensure that this Court doesn't overlook them. FEC only references these matters in the purported "Factual Background" section of its brief and not in the Argument section of its brief. Thus, FEC's gratuitous statements about inflammatory, non-record matters are irrelevant to the issues on appeal and have no place in FEC's brief. This is an obvious attempt by FEC to unfairly prejudice this Court against Rivera in flagrant violation of the Rules of Appellate Procedure. Accordingly, Rivera respectfully requests that this Court strike and/or disregard Part I.C.2. (pages 11-12) of FEC's brief. *See Diversified Numismatics*, 949 F.2d at 384.

B. The jurisdictional issue is preserved.

FEC claims that Rivera did not preserve the jurisdictional issues for appeal because Rivera did not argue them below. FEC is wrong for two reasons: (1) Rivera did expressly argue this below [DE 171, DE 174 at 6-8].; and (2) even if he didn't, FEC's violations are jurisdictional defects which may be raised for the first time on appeal. First, the record shows that Rivera filed a comprehensive motion to dismiss for lack of subject matter jurisdiction as well as a reply to FEC's response. *See* [DE 171, 172, 174]. Rivera argued in his motion that he never received important documents and correspondence that FEC claimed it sent to him. [DE 171]. FEC's response was accompanied by a declaration from its attorney Ana Pena-Wallace,

Esq. with exhibits showing that FEC received correspondence from attorney Yesenia Collazo, Esq. in 2013 with a signed form designating Collazo as Rivera's counsel in the FEC proceeding. Collazo submitted documents and communications to FEC on Rivera's behalf and reaffirmed in 2016 that she still represented Rivera in reference to FEC's claims. Yet, FEC never sent key communications to Collazo and illegally initiated and continued direct and exclusive communication with Rivera (and without Collazo) during key points of the presuit administrative process including its subpoena for a statement from Rivera, its probable cause recommendation and determination, and its attempt at conciliation. *See* [DE 172-1]. Rivera thoroughly and expressly argued that FEC's presuit procedures were defective due to FEC's knowing failure to communicate with and direct critical notices and documents to his counsel of record. *See* [DE 174 at 6-8].

Moreover, FEC's compliance with presuit procedures is a jurisdictional issue. "[W]here the FEC fails . . . to comply with the mandatory **prerequisites** to suit, an enforcement suit is premature, and the court, at a minimum, must stay the action pending cure by the FEC, or in certain cases dismiss the suit for want of **subject matter jurisdiction**." *See FEC v. NRA*, 553 F. Supp. 1331, 1333, 1336-1338, 1346 (D.D.C. 1983) (emphasis added) (dismissing allegations in a FEC complaint that were not submitted to the defendants by the General Counsel and approved by the Commission). Indeed, in both its original and amended complaints, FEC alleged that

it "satisfied all of the **jurisdictional** requirements in the FECA that are **prerequisites** to filing this action." *See* [DE 1 at 8-9; DE 42 at 8-9] (emphasis added). As such, the Court is independently required to determine whether the trial court had subject matter jurisdiction based on FEC compliance – or lack of compliance – with its mandatory presuit procedures. This is true whether Rivera raised the issue below, argued it for the first time on appeal, or even failed to raise it on appeal.[1]

C. FEC initiated contact and communicated solely with Rivera rather than his designated counsel in violation of its own regulations.

In its brief, FEC claims that it communicated directly and exclusively with Rivera "only after counsel ceased representation[.]" *See* FEC's Brief at 32. The record contradicts this statement. Rivera submitted FEC's form designating Yesenia Collazo, Esq. as his attorney in September 2013 and that Collazo submitted a detailed response to FEC's 2013 "reason to believe" letter and factual and legal analysis. *See* [DE 172-1 at 2, 12, 15-17]. The exhibits to FEC's response further

1. *See Nicklaw v. CitiMortgage, Inc.*, 839 F.3d 998, 1001 (11th Cir. 2016) ("Questions of subject matter jurisdiction may be raised at any time. Although we ordinarily will not address issues raised for the first time on appeal, any time doubt arises as to the existence of federal jurisdiction, we are obliged to address the issue before proceeding further.") (citations omitted); *Fairlane Car Wash, Inc. v. Knight Enters.*, 396 Fed. Appx. 281, 284-285 (6th Cir. Sept. 15, 2010) ("Although Knight challenges subject-matter jurisdiction for the first time on appeal, objections to subject-matter jurisdiction cannot be waived and must be addressed by a federal court at every stage of proceeding."); *Andrus v. Charlestone Stone Prods. Co.*, 436 U.S. 604, 607 n.6 (1978) ("Although the question of the District Court's subject-matter jurisdiction was not raised in this Court or apparently in either court below, we have an obligation to consider the question sua sponte.").

revealed that Pena-Wallace communicated with Collazo in November 2016 and received a voicemail from Collazo on November 10, 2016 advising that Collazo still represented Rivera in the FEC proceeding. *See* [DE 172-1 at 2-3, 18-19]. Perez-Wallace understood the significance of Collazo's response because, according to her declaration, she "did not make additional calls to [Rivera] in November 2016 after receiving a voicemail message from his counsel on or about November 10, 2016." *See* [DE 172-1 at ¶6]. Two weeks later, on November 22, 2016, Pena-Wallace wrote Collazo again to inquire whether Collazo still represented Rivera. [DE 172-1 at 19]. Thereafter, Pena-Wallace admittedly initiated and maintained direct contact solely with Rivera, including sending him (and not Collazo) a subpoena, General Counsel's brief, probable cause recommendation, finding of probable cause, and proposed conciliation agreement asking him to settle FEC's claim by admitting to things that would have subjected him to criminal prosecution by the Department of Justice (DOJ). *See* [DE 172 at 3, 11-12, 16; DE 172-1 at 2-3, 20-56]. In her communications with Rivera, Pena-Wallace continued to refer to Collazo as Rivera's "counsel" and asked Rivera whether Collazo was still representing him. *See* [DE 172-1 at 7, 23]. Nothing in FEC's filings indicates that Collazo or Rivera ever authorized FEC to contact Rivera directly. And Pena-Wallace's communications with Collazo and Rivera reflect that she – at best – didn't know whether Collazo still represented Rivera – despite the fact that Collazo left her a voicemail in November 2016

confirming that she still represented Rivera. FEC's unfounded and subjective doubt does not justify its violation of its own no-contact rule.

FEC admits that Rivera never responded to its 2016 requests to indicate whether he was still represented by counsel but claims that it was authorized to exclude Collazo from important communications when Rivera "began to communicate in a manner consistent with self-representation." *See* FEC's brief at 32. However, Pena-Wallace's declaration and exhibits show that FEC induced Rivera to communicate directly with them when Pena-Wallace initiated direct and exclusive contact with Rivera in violation FEC's "no-contact" regulation and many other applicable regulations. *See* 11 C.F.R. § 111.23 (FEC's 'no-contact' regulation); 28 U.S.C. § 530B; 28 C.F.R. § 77.3; Fla. Bar R. 4-4.2; S.D. Fla. Local R. 11.l(c). FEC claims that Rivera's response to FEC's initial violation of the no-contact regulations constituted a waiver of FEC's initial and subsequent violations. This argument is meritless because FEC was never authorized to contact Rivera directly in the first place. As the product of FEC's illegal contact, Rivera's response is akin to the fruit of the poisonous tree and cannot logically, reasonably, or fairly constitute a waiver of rights. FEC paused its investigation for three years before it suddenly decided to revive the administrative process in late-2016 shortly before the expiration of the statute of limitations in mid-2017. This self-induced time crunch

likely motivated FEC to skirt its own rules and bypass Collazo so that FEC could finish the process before its claims were time-barred.

D. FEC's amended complaint raised an entirely new "primary liability" theory that was not authorized by a vote of the Commissioners or asserted during its mandatory presuit procedures.

"The FEC has 'sole discretionary power' to determine in the first instance whether or not a civil violation of the Act has occurred." *Hagelin v. FEC*, 411 F.3d 237, 267 (D.C. Cir. 2005) (citing *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981)). As the FEC argued in *Lieu v. FEC*, 370 F. Supp. 3d 175 (D.C. Dist. 2019), "[I]n the context of a decision to not enforce FECA, an agency engages in a complicated balance of factors **particularly in the agency's expertise** including whether the agency is likely to succeed if it acts and whether the enforcement action best fits the agency's overall policy goals." *Lieu v. FEC*, 370 F. Supp. 3d 175, 183 (D.C. Dist. 2019) (citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)).

According to the FEC's Enforcement Manual, "[T]he enforcement process contains several stages, and a matter cannot proceed to the next stage unless at least four Commissioners vote to proceed." *Office of the General Counsel for the Federal Election Commission*, OGC Enforcement Manual 16 (June 2013). Among the five organizational units of the FEC's Office of General Counsel:

> The **Enforcement Division** recommends to the Commission appropriate action to take with respect to administrative complaints and apparent violations. Where authorized, the Enforcement Division investigates alleged violations of the Act **and negotiates conciliation agreements**, which may include civil penalties and other remedies.

Office of the General Counsel for the Federal Election Commission, OGC Enforcement Manual 16 (June 2013).[2] If conciliation is unsuccessful, General Counsel should "draft and circulate a [General Counsel's Report] recommending that the Commission authorize [the Office of General Counsel] to file a civil suit." *Id.* at 104.

> As the legal and factual issues have already been fully briefed, the suit authority report should be short but fully explain why OGC believes that filing suit is an appropriate use of the Commission's resources. . . . If the Commission approves the recommendations, the attorney should inform the respondent that the Commission has authorized the Office of General Counsel to file a civil suit. . . . From this point forward, **Litigation attorneys, not enforcement attorneys**, communicate with the respondent or counsel.

Id. Given the specialized roles and tasks assigned the various divisions at various stages of the enforcement process, it could not be "the intention of Congress that 'the Commission could attempt conciliation on one set of issues and having failed, litigate a different set.'" *See EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14, 19 (2d

2. *See* https://www.fec.gov/resources/updates/agendas/2013/mtgdoc_13-21.pdf.

Cir. 1981) (where "[n]o settlement proposals were made based upon the firing practices at the White Plains and Brooklyn stores, and Sears was given **no notice** prior to the filing of th[e] suit that the Commission **intended to single out practices at th[o]se two facilities**") (quoting *EEOC v. E.I. DuPont De Nemours and Co.*, 373 F. Supp. 1321, 1336 (D.Del. 1974), aff'd, 516 F.2d 1297 (3d Cir. 1975).).

To date, FEC's Commissioners have never voted in favor of a finding of "probable cause" that Rivera was the "source" or "contributor" of a false-name contribution (i.e., "primary liability") and never attempted conciliation or voted to authorize a lawsuit on that basis. *See* [DE 172-5]. To the contrary, the Commissioners found probable cause, proposed conciliation, and authorized suit **solely** "in connection with **assisting** in the making of contributions" from "**unknown** contributors" in the name of another (i.e., "secondary liability"). *See* [DE 171-6 at 5-6, 8, 13; DE 171-7 at 1, 7-8] (emphasis added). FEC based its probable cause determination on the analysis and recommendation contained in its General Counsel's Brief which recommended a finding of probable cause solely on the basis that Rivera "assisted" in making contributions in the name of another:

> . . . The evidence clearly establishes that Rivera knowingly and willfully **assisted** in the making of contributions in the name another. . . . The facts indicate that during the 2012 Democratic primary, Rivera **conspired** to secretly fund Sternad's primary campaign with $81,486.20 in funds from **unknown contributors** that were not disclosed on the Sternad Committee's disclosure reports. . . . The Act prohibits a person from making a contribution in the name of another. Under Commission regulations, that prohibition extends to knowingly

> **helping or assisting** "any person io making a contribution in the name of another," The Commission has explained that the provisions addressing such a contribution apply to "those who **initiate** or **instigate** or have some **significant participation** in a **plan** or **scheme** to make a contribution in the name of another." The scheme in this case involved the making of direct and in-kind contributions to the Sternad Committee totaling $81,486.20. Although the Committee's amended disclosure reports state that the **sources** of contributions are unknown, there is **no dispute** that Rivera **assisted** in the making of contributions in the name of another given that he **orchestrated** the **scheme** to secretly funnel contributions to Sternad's campaign that were initially falsely disclosed as personal loans from the candidate. The evidence shows that Rivera **conceived** of the scheme, **enlisted** Alliegro to help carry out the scheme, and **directed** Alliegro to perform certain tasks in furtherance of the scheme. . . . Based on the foregoing, the Commission's investigation shows that Rivera knowingly **assisted** in making contributions in the name of another in violation of 52 U.S.C. § 30122 **and 11 C.F.R. § 110.4(b)(l)(iii).**

See [DE 171-6 at 4-5, 12] (citations omitted, emphasis added). In both FEC's probable cause brief and its original complaint, FEC accused Rivera **solely** of violating 52 U.S.C. § 30122 *in conjunction with* 11 CFR § 110.4(b)(1)**(iii)** which purported to prohibit "helping or assisting" any person making a contribution in the name of another. The General Counsel's Brief **only** cited **subparagraph (iii)** of 11 C.F.R. § 110.4(b)(1) and **not subparagraphs (i) or (ii).** Subparagraphs (i) and (ii), respectively prohibit: (i) directly "making a contribution in the name of another" (i.e., being the "source" or "contributor" of the illegal contributions); and (ii) "knowingly permit[ting]" one's "name to be used to effect that contribution." Subparagraph (iii) purported to create secondary liability.

Shortly after FEC filed the original complaint against Rivera, the District of Utah *Swallow*ed FEC's secondary liability theory by enjoining FEC from enforcing 11 CFR § 110.4(b)(1)(iii) and ordering the provision stricken from the Code of Federal Regulations. The *Swallow* court determined that FEC improperly expanded the scope of 52 U.S.C. § 30122 by creating in 11 CFR § 110.4(b)(1)(iii) a substantive violation for "helping an assisting" (i.e., aiding and abetting) someone in making a contribution in the name of another that Congress did not provide for in the language of § 30122. *See FEC v. Swallow*, 304 F. Supp. 3d 1113, 1115 (D. Utah 2018).

FEC's attorneys argue that they were free to amend its complaint to fundamentally shift FEC's factual and legal positions from "secondary" to "primary" liability without a vote of the Commissioners authorizing suit based on a finding of probable cause that Rivera directly violated § 30122 by making a contribution in the name of another. FEC's attorneys claim FEC didn't need to give Rivera presuit notice or attempt conciliation based on its primary liability position. In its brief, FEC attempts to downplay the amendment to its complaint as merely "narrowing the case," but the amendment did not merely drop an issue – it attempted to materially alter the allegations to replace its invalid secondary liability factual and legal position with a materially distinct primary liability position. In dismissing FEC's original complaint, the district court rejected FEC's argument that it asserted both primary and secondary liability in its original complaint. *See* [DE 31 at 4-5]

("*Swallow* is fatal to the FEC's claim against Rivera."). If primary liability were part of the original complaint, the district court would not have dismissed FEC's entire original complaint – it would have dismissed only to the extent the original complaint asserted a secondary liability claim and would have allowed FEC to proceed on FEC's original complaint to the extent it asserted primary liability.

For Rivera to have violated 11 CFR 110.4(b)(1)(i) as alleged in the amended complaint, he would have had to have been a contributor. This was not alleged in the original complaint. Rather, the original complaint, para 1, accused Rivera of "engag[ing] in a scheme to secretly provide. . ." direct and in-kind contributions" and in para 37, "by making contributions in the name of another when he caused, directed, and assisted in the making of contributions . . ." In short, the original complaint skirted around the "contributor" issue, by alleging that Rivera aided and abetted (i.e., "helped and assisted") in making a contribution in the name of another. The amended complaint departed from this theory by expressly alleging for the first time, in paragraphs 1, 13, 18, 24, 25, that Rivera was the actual contributor or source of the contributions -- a theory the Commissioners never considered, and without which Rivera could not be accused of violating 11 CFR § 110.4(b)(1)(i).

In short, the factual and legal position approved by the Commissioners ("secondary liability") has since been invalidated and repealed. The Commission never evaluated and voted on the central issue underlying the amended complaint

("primary liability"). To date, the Commission has never considered or made any kind of determination as to whether Rivera was a contributor, and FEC has never attempted to conciliate with Rivera on that basis.

II. FEC's allegations against Rivera do not describe the kind of conduct prohibited by § 30122.

Even if FEC had complied with the presuit requirements and demonstrated that Rivera was the "contributor" or "source" of the contributions in question, it nevertheless failed to state a cause of action for violation of § 30122 because Rivera was not Sternad's campaign treasurer or an intermediary/conduit. As an alleged "source," Rivera did not have a reporting requirement because FECA only creates reporting and disclosure requirements for campaign treasurers and intermediaries/conduits.[3] FEC did not allege that Rivera personally affixed Sternad's name to the alleged contributions. Rather, the allegations, at best, establish that Sternad violated the second and third prongs of § 30122 and the second and fourth prongs of 11 C.F.R. § 110.4(b) by "permitting his … name to be used to effect such

3. FECA "requires the **treasurer** of a political committee to report to [FEC] the name, address, occupation, and employer of donors giving more than $200 in a single year." *Repub. Nat'l Comm. v. FEC*, 76 F.3d 400, 403 (D.C. Cir. 1996) (emphasis added) (citing § 434(b)(3)(A) [now § 30104(b)(3)(A)]); 11 C.F.R. § 104.14(d); 11 C.F.R. § 114.12. "The **intermediary** or **conduit** shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient." 52 U.S.C. § 30116(a)(8) (emphasis added); *Repub. Nat'l Comm.*, 76 F.3d at 403 ("**Neither** the Act **nor** any other law, however, requires **donors** to disclose this information.") (emphasis added).

a contribution" and by "accept[ing] contribution[s] made by one person in the name of another." FEC alleged that Sternad was "[f]ollowing instructions"[4] from Rivera that were "conveyed by Alliegro" when Sternad falsely reported to FEC that the contributions were loans from Sternad's personal funds. *See* [DE 41 at 6]. Sternad was the campaign treasurer and allegedly knew that either Alliegro or Rivera were the source of the contributions and that the contributions were not made from his personal funds. Alliegro was the alleged conduit/intermediary and allegedly knew that Rivera was the source of the contributions. Yet, neither Sternad nor Alliegro complied with their respective disclosure and reporting requirements.

FEC may have been able to state a claim against Rivera for making excessive contributions or excessive cash contributions, but it did not assert such claims against Rivera – probably because it wanted to reach the 300-1000% super-penalty multiplier provision in § 30109(6) which only applies to knowing violations of § 30122. But, the allegations against Rivera do not establish a violation of § 30122 because: (1) Rivera (as an alleged "source") had no reporting or disclosure requirement under FECA; and (2) FEC did not allege that Rivera personally affixed someone else's name to his alleged contributions or otherwise misled the campaign

4. *See Swallow*, 304 F. Supp. 1113 (quoting 54 Fed. Reg. at 34, 104-05 (1989) (describing "helping and assisting" ad including "initiat[ing]" or "instigat[ing]" or having "some significant participation in a plan or scheme" or "soliciting" a "go-between").

into falsely reporting the source of the contributions.[5] FEC's reliance on criminal cases is misplaced because those cases involved criminal conspiracy and aiding and abetting statutes (i.e., secondary liability statutes) which are not at issue in FEC's civil claims against Rivera. They also predated *Swallow* which held that section 30122 – by itself – does not provide civil liability for secondary liability.

III. The district court entered summary judgment for FEC based on hearsay, non-record material, and conflicting evidence.

FEC's only evidence that Rivera instructed Sternard to report the contributions as loans comes from Alliegro's grand jury testimony:

> Q. Now, when Mr. Sternard received the funds in Washington -- in the TD Bank of Justin Sternard for Congress in the Washington branches, how did he initially report that money?
>
> A. After speaking with David the only thing that I advised Mr. Sternard to do was to report it as a personal loan and then go ahead and amend it later, because David supposedly had another plan of how he was going to take care of all this. Apparently he didn't and I'm sitting here now.

[DE 142-5 at 33-34].

> Q. What happened in August that started causing you a great deal of concern about those Federal Election Campaign forms?

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5. *See e.g.*, *United States v. Curran*, 20 F.3d 560, 567 (3d Cir. 1994); *United States v. Whittemore*, 776 F.3d 1074, 1080 (9th Cir. 2015); *United States v. Hsia*, 24 F. Supp. 2d 33, 59 (D.D.C. 1998); *United States v. O'Donnell*, 608 F.3d 546, 554 (9th Cir. 2010). "There is nothing in the language of [§ 30116(a)(8)] to indicate that the provision was directed at the disclosure concerns of [§ 30122]." *O'Donnell*, 608 F.3d at 554 ("[Section 30116(a)(8)] does **not** place reporting obligations on the original **source**") (emphasis added).

> A. The Miami Herald picked up the information on the flyers, they actually went to the mail house, they spoke to Mr. Borrero, I believe, they started an investigation. It became a topic of great concern at that point and then it became a rush to do this first false report that we did saying it was a loan. Rivera thought if we did this and called it a loan the media would get off of it and it would all go away, that did not happen.
>
> Q. Did you file -- did you participate with Justin Sternard in filing a disclosure form, Federal Election Commission Disclosure form that was false concerning where the source of the those funds came?
>
> A. Yes, I did.

[DE 142-5 at 34-35]. Nowhere in this testimony does Alliegro say that Rivera instructed her to have Sternard falsely report the contributions as loans. Alliegro testified that she gave Sternard that instruction.

Perhaps a factfinder (not on summary judgment) could infer that Alliegro gave Sternad that instruction because of her conversation with Rivera, but there is no evidence that Rivera gave Alliegro an edict to deliver to Sternard. This equally plausible inference is partially corroborated by Sternard's deposition testimony. *See* [DE 142-8 at 8-9, 11-16, 19-20] ("She directed me" and "I did what she directed."):

> Q. Okay. Why did you put on there that said loan to my campaign?
>
> A. That's what I was directed to do.
>
> Q. Directed by Ms. Alliegro?
>
> A. Yes.

[DE 142-8 at 51].

> Q. Okay. At no time did Ms. Alliegro tell you that David Rivera wanted you to put on there that it was a loan contribution; is that correct?

> MS. WARD: Objection; vague.
>
> THE WITNESS: I do not recall.
>
> BY MR. KAHN: Q. Okay. So as you sit here today, all you know is that Ms. Alliegro told you to make your amendment to your FEC report, represent that it was a campaign loan from you?
>
> A. I did what **she** directed.

[DE 142-8 at 69-70]. Thus, from Alliegro's testimony, the idea of instructing Sternard to report the contributions as loans could have been her decision as much as Rivera's. There is no evidence that she did this because David gave her that instruction – particularly in light of the statements in her subsequent declaration and Bar complaint against AUSA Mulvihill. Because this was FEC's best evidence on this point, summary judgment was improper.

IV. Section 30109(a)(6)(C)'s 300–1000% enhanced civil penalty is unconstitutionally vague and excessive.

On this point, FEC's arguments do not merit a detailed response other than to refer the Court back to the arguments contained in Rivera's principal brief, particularly the observation that no other statute facially imposes a civil penalty with a mandatory **minimum** of 300% (cf. statutes and precedent on per-se excessive punitive damages awards) up to a **maximum** of 1000% of the amount of the alleged illegal contributions. Thus, the cases cited by FEC referring to a presumption of constitutionality for civil penalties falling within a statutory range created by Congress are inapplicable here because they do not involve statutes providing for a

standardless and obviously **excessive range** like the one provided in section 30109(a)(6)(C). Consistent with prior decisions striking down several other provisions of the 2002 FECA amendments as unconstitutional, this Court should strike section 30109(a)(6)(C).

V. The district court's $465,000 civil penalty is an unconstitutional excessive fine under the Eighth Amendment.

On this point, FEC's arguments merely regurgitate the district court's rationale which Rivera thoroughly address in his principal brief. Accordingly, it is unnecessary to provide a reply other than to refer the Court back to the arguments contained in Rivera's principal brief.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand for entry of dismissal or final summary judgment in Rivera's favor because FEC failed to comply with the jurisdictional presuit requirements under FECA § 30109(a)(4) and has neither alleged nor presented any evidence that Rivera violated FECA § 30122. Alternatively, the Court should reverse and remand for trial because the summary judgment evidence was inconclusive and precluded summary judgment for FEC. Lastly, the Court should reverse the $465,000 civil penalty as an unconstitutional excessive fine under the Eighth Amendment and because section 30109(a)(6)(C)'s 300–1000% civil penalty provision is unconstitutionally vague and excessive.

CERTIFICATE OF COMPLIANCE

This document complies with the **type-volume limit** of FRAP 32(a)(7)(B) because, excluding the parts of the document exempted by FRAP 32(f), this document contains 4658 words. This document complies with the **typeface requirements** of FRAP 32(a)(5) and the **type-style requirements** of FRAP 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft® Word for Microsoft 365 MSO (Version 2304 Build 16.0.16327.20200) 64-bit in 14-point font and Times New Roman type style.

/s/ Thomas L. Hunker
Thomas L. Hunker
Dated: **October 6, 2023**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **October 6, 2023**, a copy of this document was furnished by electronic filing with the Clerk of the Court via CM/ECF, to:

Kevin Deeley, Greg J. Mueller, Lisa J. Stevenson,
Harry J. Summers, and Shaina Ward
FEDERAL ELECTION COMMISSION
1050 First Street, NE, Washington, DC 20463
202-694-1650; 202-694-1553; 202-694-1566
gmueller@fec.gov; kdeeley@fec.gov; lstevenson@fec.gov;
hsummers@fec.gov; sward@fec.gov

Respectfully submitted,

/s/ *Jeffrey David Feldman*
Jeffrey David Feldman

/s/ Thomas L. Hunker
Thomas L. Hunker

Fla. Bar No. 330302
TRAILBLAZER
1200 Brickell Avenue
Penthouse 1900
Miami, FL 33131
305-222-7851
jfeldman@trailblazerlaw.com

Fla. Bar No. 38325
V. Ashley Paxton
Fla. Bar No. 1003907
HUNKER PAXTON APPEALS & TRIALS
1 EAST BROWARD BLVD, SUITE 700
Fort Lauderdale, FL 33301
877-841-8808
thomas.hunker@hunkerappeals.com
ashley.paxton@hunkerappeals.com
jodi.kain@hunkerappeals.com
tamara.mihajlovic@hunkerappeals.com