UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-22643 COOKE/GOODMAN

FEDERAL ELECTION COMMISSION, Plaintiff, v. DAVID RIVERA, Defendant.	REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

PLAINTIFF FEDERAL ELECTION COMMISSION'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

In its Motion, the Federal Election Commission ("FEC" or "Commission") presented a substantial record showing that in 2012, former U.S. Congressman David Rivera secretly provided nearly $76,000 in in-kind contributions to the primary election campaign of Justin Lamar Sternad in Florida's 26th Congressional District, in violation of the Federal Election Campaign Act's ("FECA" or "Act") prohibition on contributions made in the name of another. The majority of Rivera's Response to Plaintiff's Motion for Summary Judgment (ECF No. 147) ("Opp.") focuses on Rivera's associate Ana Alliegro, arguing that the FEC's case rests solely on her testimony. It does not genuinely dispute the other volumes of evidence the FEC has presented, or offer any other evidence to dispute it, other than presenting yet another new affidavit by the defendant that purports to deny all responsibility. Instead, the Opposition focuses on an incorrect argument on the admissibility of Alliegro's testimony. Her grand jury testimony is admissible on summary judgment. Moreover, in addition to her testimony that directly identifies Rivera was the source of the cash contributions to the Sternad campaign, substantial other documentary evidence and testimony places Rivera as the source and the person that orchestrated this scheme to fund the Sternad mailers in order to take on Rivera's rival. Rivera's failure to substantively address the evidence supporting a number of facts further establishes that there is no genuine dispute.

II. ARGUMENT

A. Rivera's Admissions and Failures to Dispute Leave No Doubt Regarding His Liability and the Appropriateness of a Substantial Civil Penalty

Rivera's admissions at his deposition and in his responses to the Commission's Motion make concessions regarding so much of the illicit scheme that his concealed payments cannot be denied. Rivera does not dispute that he managed the design of the mailers, spent a day at the print shop with Alliegro reviewing and editing them, and was emailed the completed work by the graphic designer. (FEC SOF ¶¶ 13, 15; Def.'s Statement of Material Facts Submitted in Opp. to Pl.'s Mot. for Summ. J. ("Def.'s Resp. to FEC SOF") ¶¶ 13, 15 (Aug. 22, 2020) (ECF No. 147).) Rivera rests on evidentiary objections — which are unfounded, *see infra* pp. 4-6 — and submits no contradictory evidence for a wide range of facts demonstrating his shadow campaign support: Alliegro's explanation to Sternad that someone else would be taking care of funding, Rivera's bank payment and arranged submission of Sternad's ballot qualifying fees, Rivera's payments to

Expert Printing, Rivera's hiring of and payment for Rapid Mail, Alliegro's receipt of direction from Rivera, and the Commission's completion of the required administrative steps in advance of suit. (FEC SOF ¶¶ 7, 11, 17-20, 22-23, 38-39; Def.'s Resp. to FEC SOF ¶¶ 7, 11, 17-20, 22-23, 38-39 (ECF No. 147)). *See also* ECF No. 150 (Aug. 26, 2020) (FEC's Unopposed Motion to File Conventional Exhibit of recorded conversation between Rivera and Alliegro).[1] Because Rivera is mistaken regarding materials that may be considered at summary judgment (*infra* pp. 4-6), the unrebutted facts establish his violations.

The FEC also established in detail that Rivera's violations were knowing and willful, that his concealed payments harmed the public by depriving the electorate of information in advance of voting, that Rivera is able to pay a substantial civil penalty, and that Rivera's continued runs for public office and unwillingness to take responsibility for his actions demonstrate a likelihood of future violations.[2] (FEC's Mot. for Summ. J. ("FEC Mot.") at 17-20 (ECF No. 142).) Defendant makes no response to any of these showings. Rivera's liability is demonstrated for the reasons given above and below and, once established, the Commission's uncontradicted showing regarding remedy means that an injunction against future violations and a penalty of 700% of the amount of the violations, or $456,000 should be imposed.

B. The Record Leaves No Genuine Dispute of Material Fact

Rivera's Opposition primarily focuses on the testimony from Alliegro, arguing that she is the sole basis for the proof that the cash to fund the vendors providing services for the Sternad campaign came from Rivera, and the only evidence from Alliegro is her grand jury testimony and statements she made and accepted at her guilty plea. However, this argument discounts the substantial other evidence showing Rivera's involvement in this scheme.

---

[1] Should the Court grant the FEC's pending unopposed motion to file a thumb drive containing this audio recording, the FEC will submit this exhibit conventionally.

[2] In addition, Rivera was subsequently elected on August 18, 2020, to the Executive Committee of the Republican Party of Miami-Dade County, another position where he will be involved with helping to elect candidates and, absent deterrence, could seek to initiate new shadow campaigns in opposing-party primary elections. (*See* Miami-Dade County Supervisor of Elections, 2020 Primary Election, https://enr.electionsfl.org/DAD/2695/Summary/ (last updated Aug. 21, 2020 3:56 pm) (showing election to for District 23); Amidst Venezuela Scandal, David Rivera Wins Election in Miami-Dade, *Associated Press* (Aug. 24, 2020) *available at* https://floridapolitics.com/archives/361479-amidst-venezuela-scandal-david-rivera-wins-election-in-miami-dade.)

In addition to Alliegro's testimony, the vendors that Rivera worked with on the Sternad Campaign also confirm the source funds for the mailings. (FEC SOF ¶¶ 12-14 (ECF No. 142-1) (Rivera paying $2,600 for graphic design services)); *id.* ¶¶ 17-19 (Rivera paying at least $15,000 for printing mailers); *id.* ¶¶ 30-37 (Rivera paying more than $37,000 for postage and mailing services).) Testimony from the printing vendor shows how Rivera paid through an intermediary. (*See* FEC SOF, Exh 10, Barrios Decl. ¶¶ 9-10 (ECF No. 142-13; Barrios Decl. Exh. 2 IEPG 00058-59.) Testimony from the owner of Rapid Mail shows Rivera's payments to the mail vendor. (FEC SOF Exh.12, Borrero Decl. ¶¶ 5, 7 (ECF No. 142-15); (*See* FEC SOF ¶¶ 30-36).) Sternad also confirmed the payments to the vendors "were being taken care of by him [Rivera]." (FEC SOF Exh. 5, Sternad Dep. at 57:23-25; 58:6-14, 21-23 (ECF No. 142-8).) And even other campaign expenses that are not included in the Amended Complaint, like the fees for qualifying on the primary ballot, were also paid by Rivera. (*See* FEC's Opposing Statement of Facts, Additional Facts ¶¶ 18-19 (Aug. 24) (ECF No. 149).) Rivera had previously worked with all the vendors at issue and he has no explanation for why several of them have provided consistent testimony implicating him in the oversight and payment of mailers. (FEC Exh. 44 (Deposition Transcript of David Rivera (Aug. 7, 2020) ("Rivera Dep. Tr.") at 54-55, 125-126).)

Rivera's response to the evidence in the FEC's Motion is the submission of two affidavits that implausibly deny any of his involvement.[3] Both affidavits are contradicted by this record evidence and do not create a genuine dispute of fact. *See* FEC Mot. at 6-15; FEC SOF ¶¶ 4-40; *see also Scott v. Harris*, 550 U.S. 372, 380 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."); *Vicks v. Knight*, 380 Fed. App'x. 847, 852 (11th Cir. 2010) (per curiam) (affirming summary judgment where plaintiff's "version of events . . . was contradicted by all of the relevant evidence, with the exception of his own affidavit").[4]

---

[3] The affidavits are cited throughout Def.'s Resp. to FEC SOF without pinpoint citations in violation of Local Rule 56.1(b). The Commission's motion for summary judgment thus may also be granted on that ground. *See* Local Rule 56.1(d).

[4] Rivera's deposition, completed on the business day before summary judgment briefing, similarly asserts implausible denials. For example, despite repeatedly texting Alliegro throughout the summer of 2012 about the Sternad campaign, and in one text even quoting

C. Alliegro's Testimony is Admissible for Purposes of Summary Judgment

As explained above, substantial evidence from Sternad, the vendors, and even Rivera himself establish that he knowingly and willfully violated 52 U.S.C. § 30122. Additionally, Alliegro's testimony made before the grand jury, as well as statements she made and accepted during her guilty plea, are admissible at this stage to further establish Rivera's liability. Alliegro testified repeatedly that the cash to pay the vendors for the Sternad campaign came from Rivera, and that it was Rivera's scheme. (*See* FEC Mot. at 8-12; FEC SOF ¶¶ 18-23.) To discount this testimony, Rivera argues that Alliegro has not been deposed and subject to cross examination, and may not be available at trial to testify consistent her grand jury testimony. Opp. 4-5. However, in doing so he mistakenly jumbles the inquiry of admissible summary judgment evidence and the separate inquiry of admissibility of grand jury testimony at trial.

Federal Rule of Civil Procedure 56 states that the court should decide a summary judgment motion based on "materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c). The Supreme Court instructed in *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) that "the particular forms of evidence mentioned in [Rule 56] are not the exclusive means

---

Sternad's campaign slogan "Lamar will take us far," in a text message to Ana Alliegro *see* FEC Mot. at 14 n. 6, Rivera testified at his deposition to the following:

> Q: Were you familiar with the Sternad campaign's slogans or were you familiar with the Sternad campaign slogan?
> A: I was not familiar with his slogan or other Democrat's slogan because I was not involved in that election. I was not on the ballot.
> Q: "Lamar will take us far," do you remember that slogan?
> A: Only from your documents.

(FEC Ex. 44 (Rivera Dep. Tr.) at 100:23-101:6). In another instance, Rivera testified that he "[did] not recall" offering to find Sternad a job at a funeral home, *id.* at 102:2-4, despite evidence clearly showing that he had. FEC Mot. at 14. Rivera's recollection was equally not existent as to whether he had requested data from Hugh Cochran in 2012, FEC. Ex. 44 (Rivera Dep. Tr.) at 35-39, or seen any of the Sternad campaign mailers or invoices, *id.* at 64-67. Despite this, Rivera was able to testify in detail about a chart the defendant produced to the FEC during discovery that organized Rapid Mail invoices for the Sternad campaign, and how the chart purportedly shows "how much money John Borrero stole from the Sternad campaign," a concern that only Sternad or a funder of the campaign would seem to have. *Id.* at 94:1-3.

of presenting evidence on a [summary judgment] motion." 10A Charles Alan Wright, et al., Federal Practice & Procedure § 2721 (1998) (3d ed.). Further, Rule 56 requires only that evidence "would be admissible," not that it presently be admissible. *Celotex Corp.*, 477 U.S. at 324. Indeed, as indicated by the ending reference to "other materials," the particular forms of evidence mentioned in the Rule are not the exclusive means of presenting evidence on a Rule 56 motion. *See* 10A Wright, et al., § 2721 ("The court and the parties have great flexibility with regard to the evidence that may be used in a Rule 56 proceeding."). A district court may even "consider hearsay in deciding a summary judgment motion 'if the statement could be reduced to admissible evidence at trial.' " *See Fed. Trade Comm'n v. Lanier Law, LLC*, 715 Fed. App'x 970, 978 (11th Cir. 2017) (citing *Jones v. UPS Ground Freight*, 683 F. 3d 1283, 1293-94 (11th Cir. 2012)); *Reed v. CRST Van Expedited, Inc.*, No. 8:17-cv-00199, 2018 WL 3860220, at *1 (M.D. Fla. Aug. 9, 2018) (same).

Here, the proper inquiry on summary judgment is whether the contents of Alliegro's grand jury transcript represents admissible testimony. *See, e.g.*, *Kelley v. Price-Macemon, Inc.*, 992 F.2d 1408, 1415 n. 12 (5th Cir. 1993) ("It is well-settled that a certified transcript of a judicial proceeding may be considered on a motion for summary judgment"); *Lanier* 715 F. App'x at 978-79 (emphasis in original) (The salient question then "is not whether the [materials] *themselves* would ever be admissible–they may not be. Instead, the question is whether the evidence contained *within* those [materials] could be presented in an admissible form at trial."); *Arceo v. City of Junction City, Kansas*, 182 F. Supp. 2d 1062, 1081 (D. Kan. 2002) ("the fact that the grand jury transcripts are not admissible at trial is irrelevant since much of the transcripts' content presents admissible and reliable testimony").[5]

In *Arceo*, several defendants objected to the use of grand jury testimony at the summary judgement stage, arguing that the use of such testimony was improper because the parties did not have an opportunity to cross examine the witnesses. The court concluded that "grand jury

---

[5] *See also Fitzjerrell v. City of Gallup*, No. CV 00-1630 BB/DJS, 2003 WL 27385467, at *2 (D.N.M. Jan. 10, 2003) (holding that grand jury testimony can be properly considered for summary judgment purposes); *Fed. Deposit Ins. Corp. v. New Hampshire Ins. Co*., 953 F.2d 478, 485 (9th Cir. 1991) (grand jury indictment that "recites specific facts showing that [individuals] committed the dishonest acts, alleged in the amended complaint" properly considered on summary judgment); *Cf. Gordon v. United States*, 739 Fed. App'x 408, 411 (9th Cir. 2018) (finding that district court properly considered grand jury testimony in a Rule 12(b)(1) motion).

testimony, like the sworn and properly recorded statements," is "a reliable source of information which may be considered on summary judgment." *Id.* In other words, grand jury testimony is simply a statement made under oath which can be used in the same manner as the affidavits and declarations — which are also frequently not subject to cross-examination — permitted in summary judgment motion practice.

Similarly, in *Estate of Thurman v. City of Milwaukee*, 197 F. Supp. 2d 1141, 1146 (E.D. Wis. 2002), the District Court held a transcript of a criminal inquest containing testimony of eye witnesses was admissible on a summary judgment motion. The Court noted that "[t]he testimony that plaintiffs ask me to consider would clearly be admissible in evidence because it consists of the observations of eyewitnesses. Moreover, the testimony bears the earmarks of reliability because it was presented at a proceeding before a judge and jury, and the witnesses were duly sworn. . . " *Id.*

Here too, the Court need only focus on the admissibility of the contents of Alliegro's testimony, and question of admissibility of the transcript at trial is irrelevant at this stage. The contents of Alliegro's grand jury transcript here could become admissible evidence at trial in a number of ways: If she is available, Alliegro could also testify at trial based on her personal knowledge or, if she is unavailable, the transcript could be admitted on its own if the Court finds that it bears sufficient indicia of reliability. In any event, the question of her availability at trial is not one that determines here whether her previous testimony may be considered at summary judgment.[6] And at a minimum, Alliegro's previous testimony as well as contemporaneous communications with Rivera would be admissible to demonstrate Rivera's state of mind, *see, e.g.*, *Vira v. Crowley Liner Servs., Inc.*, 723 Fed. App'x 888, 894 (11th Cir. 2018) ("A statement

---

[6] Additionally, even if it had been relevant here, Rivera posits the wrong analysis for consideration of her testimony at trial. The Federal Rules of Evidence provide that, under certain circumstances, the former sworn testimony of an unavailable witness can be used in a civil trial. Rule 807 (formerly Rule 804(b)(5)) is a catchall provision that provides for the admission of statements not specifically covered by the exceptions enumerated in Rule 804(b)(1-4) for admission of hearsay statements of an unavailable trial witness. Following amendments to Rule 807 in 2019, "the existence or absence of corroboration" is relevant to whether a statement should be admissible under this exception. In other words, the Court will look at reliability without reference to the other hearsay exceptions, and moreover, a Court must consider corroborating evidence in the trustworthiness inquiry. *See* Fed. R. Evid. 807 (2012 Advisory Committee Notes).

that would otherwise be hearsay may nonetheless be admitted if it is '[a] statement of the declarant's then-existing state of mind. . . .'") (quoting Fed. R. Evid. 803(3)), particularly at issue here where the Commission seeks to establish that he acted knowing and willfully. There is no doubt that Rivera understood that his work with Alliegro involved providing support to Sternad's campaign.

D. Alliegro's Purported Affidavit Raises No Genuine Issue

Lastly, Rivera references, but does not cite in his Opposition, an affidavit that was purportedly signed by Ana Alliegro. As briefly explained in the FEC's Motion, this affidavit that Rivera seeks to use fails to create a genuine dispute of fact for numerous reasons. (*See* FEC Mot. (ECF No. 142) at 13 n.5).

First, even if accepted as true, the alleged affidavit does not meaningfully dispute most of the specific statements Alliegro made to the grand jury, nor could it. On its own terms, the affidavit (which references a bar complaint against the prosecutor in her criminal case, also filed by defendant) alleges that the central purported prosecutorial misconduct occurred *after* plea agreement and grand jury testimony. (*See* Def. Opp. Exh. E (ECF No. 147-5) at 4-5 (alleging incident after grand jury testimony.)) That allegation thus could not have had any bearing on the colloquy at her plea agreement or her grand jury testimony. Moreover, as to the validity of the generic denials of Alliegro's, they are plainly inconsistent with an overwhelming amount of testimony and documentary evidence. (*See* FEC SOF (Doc. No. 142-1) ¶¶ 5-39; *see also* FEC Reply SOF ¶¶ 46-47).

None of these submissions by the defendant are sufficient to defeat summary judgment. *See, e.g.*, *Blackledge v. Allison*, 431 U.S. 63, 74 (1977) ("Solemn declarations in open court carry a strong presumption of verity."); *Montoya v. Johnson*, 226 F.3d 399, 406 (5th Cir. 2000) (alterations in original) ("the representations of the defendant, his lawyer, and the prosecutor at [the original plea hearing], as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings"); *Maggard v. Singletary*, 23 F. Supp. 2d 1367, 1369 (M.D. Fla. 1998) ("With respect to recanting witnesses, the Court notes that 'recanting affidavits and witnesses are viewed with extreme suspicion by the courts.'") (quoting *United States v. Gresham*, 118 F.3d 258, 267 (5th Cir.), cert. denied, 522 U.S. 1052 (1998)); *United States v. Robinson*, No. 114CR176RWSJSA1, 2018 WL 8897807, at *2 (N.D. Ga. July 10, 2018) ("'[C]ourts look upon recantation with suspicion'") (quoting *United*

States v. Provost, 969 F.2d 617, 619 (8th Cir. 1992) (affirming the denial of a motion for new trial based on an affidavit regarding recanted testimony)).[7]

The purported affidavit also particularly fails to prevent summary judgment because the longstanding presumption of regularity "supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926); *see also Ochoa-Artega v. United States Attorney General*, 322 Fed. App'x. 768, 771 (11th Cir. 2009) (affirming presumption). The presumption is applicable to the conduct of an Assistant United States Attorney in the related criminal prosecutions, including in connection with the grand jury proceedings. *United States v. Sigman*, No. 11-80155-CR, 2013 WL 5890718, at *1 (S.D. Fla. Nov. 4, 2013). Rebutting the presumption of regularity for allegations of prosecutorial misconduct requires extremely compelling direct evidence, such as a statement from the prosecutor himself. *United States v. Simbaqueba Bonilla*, No. 07-20897 2010 WL 11627259, at *4-5 (S.D. Fla. May 20, 2010). The attack on the criminal-prosecution evidence consists entirely of the unsubstantiated allegations of misconduct in Alliegro's purported affidavit in which she recants prior incriminating statements given under oath in formal settings. This falls woefully short of the compelling evidence Rivera would need to provide to meet the demanding standard required to overcome the presumption of good faith to which AUSA Mulvihill is entitled and create a genuine issue requiring a trial.

Consistent with the failure to credibly call the Assistant United States Attorney's conduct into question, the complaint to the Florida bar was deemed unsupported and dismissed. S*ee* FEC Exh. 43 (Letter from Shanell M. Schuyler, Director of Intake, The Florida Bar, to Ana Sol Alliegro (June 1, 2018)). Rivera's filings in no place brought this to the Court's attention. Furthermore, Alliegro never filed a petition in criminal case to withdraw her guilty plea, seek new counsel or anything else on the premise that she was somehow coerced into submitting her guilty plea.

— — —

[7] Additionally, Rivera testified in his deposition that he "may have" been responsible for a whole host of things related to the alleged affidavit, including seeing it in draft form, emailing copies of the draft back and forth with Alliegro, providing suggestions, sending Alliegro the FEC's Amended Complaint, and even possibly being present when Alliegro allegedly signed it. (FEC Exh. 44 (Rivera Dep. Tr. 112-113).)

Contemporaneous documentary evidence, previous testimony of defendant's principal agent, and the testimony of all the vendors whose services were purchased establish that a sitting Congressman engaged in an illicit scheme to provide campaign assistance to an opponent's primary opponent to weaken him in advance of the general election. The resulting mailers included an attack on the likely general-election opponent as having abandoned a cancer-stricken wife while voters were left in the dark as to the source of financing. (FEC SOF ¶ 36). The business owners who received the disguised payments have been consistent regarding what transpired when speaking to the media in 2012, when the FBI and Department of Justice conducted their investigation six to eight years ago, when the FEC conducted its investigation three years ago, and in this case's civil discovery over the past year. Mistaken evidentiary objections, an apparent recanting by one witness to mount unsubstantiated allegations of prosecutorial misconduct, and conclusory denials by the defendant are insufficient to defeat the Commission's motion for summary judgment. No trial is necessary to litigate defendant's scintilla of evidence. Rivera should be found in violation and have the appropriate remedies imposed forthwith.

CONCLUSION

For the foregoing reasons, and for the additional reasons stated in the FEC's Motion for Summary Judgment (ECF No. 142), this Court should (1) grant summary judgment in favor of the Commission; (2) declare that Rivera violated 52 U.S.C. § 30122; (3) award a penalty of $456,000; and (4) issue a permanent injunction.

Respectfully submitted,

Lisa J. Stevenson (Special Bar No. A5502354)
Acting General Counsel
lstevenson@fec.gov

Kevin Deeley (Special Bar No. A5502355)
Associate General Counsel
kdeeley@fec.gov

/s/ Greg J. Mueller
Greg J. Mueller (Special Bar No. A5502376)
Attorney
gmueller@fec.gov

/s/ Shaina Ward
Shaina Ward (Special Bar No. A5502563)
Attorney
sward@fec.gov

August 31, 2020

FOR THE PLAINTIFF
FEDERAL ELECTION COMMISSION
1050 First Street, NE
Washington, D.C. 20463 (202) 694-1650

CERTIFICATE OF SERVICE

I, Greg J. Mueller, counsel of record in this case, certify that on August 31, 2020, I electronically filed plaintiff Federal Election Commission's Reply Memorandum in Support of its Motion for Summary Judgment, Reply Statement of Material Facts, and Exhibits with the Clerk of the United States District Court for the Southern District of Florida by using the Court's CM/ECF system, which sent notification of such filing to the following:

Roy J. Kahn, Esq.
rjk@roykahnlaw.com
Counsel for Defendant David Rivera

/s/ Greg J. Mueller
Greg J. Mueller (Special Bar No. A5502376)
Attorney
gmueller@fec.gov