UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-CV-22643-COOKE/GOODMAN

FEDERAL ELECTION COMMISSION,

Plaintiff,

v.

DAVID RIVERA,

Defendant.
_____/

DEFENDANT RIVERA'S MOTION TO DISMISS AMENDED COMPLAINT

Comes Now, DAVID RIVERA, by and through his undersigned counsel, and files this motion to dismiss plaintiff's amended complaint, pursuant to Federal Rule of Civil Procedure 12(b)(6). In support of his motion, Mr. Rivera states the following:

Case History

1. On July 14, 2017 the Federal Election Commission filed its initial complaint against David Rivera (D.E. 1) in which it alleged that David Rivera, at the time a United States Congressman, participated in a scheme to provide in-kind contributions to Justin Lamar Sternad's primary campaign for Florida's 26th Congressional District against democrat Joseph Garcia. The complaint alleged that this scheme was carried out by the defendant helping or assisting another person, *to wit* Ana Sol Alliegro, to make payments in cash and checks drawn on corporate accounts to vendors involved in providing campaign services to Mr. Sternad's campaign committee. The original complaint further alleged that Mr. Rivera, through a third party, *to wit* Ana Sol Alliegro,

instructed Mr. Sternad not to report the donations on his campaign disclosure report, even though the candidate was fully aware of Mr. Rivera's in-kind contributions.

2. On September 24, 2018 this Honorable Court entered its order granting Mr. Rivera's motion to dismiss the original complaint. (D.E. 31). In its order, the Court found that the original complaint's sole claim for relief – titled First Cause of Action – unambiguously stated that it arises under 11 C.F.R. §110.4(b)(1)(iii). In dismissing the original complaint this Court followed the legal analysis and reasoning of *Federal Election Commission v. Swallow*, 304 F. Supp. 3d 113, 115 (D. Utah 2018), concluding that Congress did not intend to create a secondary liability for "helping and assisting" in making a contribution in the name of another when it enacted the Federal Election Campaign Act.

3. In its order, this Honorable Court further explained that the facts alleged in the original complaint did not support a primary liability with respect to Mr. Rivera because it "does not allege that Rivera secretly made donations without Sternad's knowledge, or that he himself used a false name, or that he himself instructed Sternad to falsify his disclosure forms." (D.E. 31, p. 5). The Court concluded that the original complaint, therefore, did not violate 52 U.S.C. §30122.

4. On October 22, 2018 the Federal Election Commission filed its motion to reopen this case and requested leave from the Court to file an amended complaint (D.E. 32). On November 14, 2018 Mr. Rivera filed his response in opposition to the FEC's request for permission to file an amended complaint.

5. On January 5, 2019 this Honorable Court granted the Federal Election Commission's motion seeking leave to file its amended complaint. On January 15, 2019 plaintiff filed its amended complaint (D.E. 41) to which Mr. Rivera now moves to dismiss the allegations contained therein.

Argument

A complaint should be dismissed under Rule 12(b)(6) when the facts, as alleged in the complaint, fail to state a "plausible" claim for relief. *Ashcroft v. Iqbal*, 556 US 662, 663, 129 S.Ct. 1937, 173 L.Ed. 2d 868 (2009). In ruling on a motion to dismiss, the facts alleged in the complaint must be accepted as true and must be construed in the light most favorable to the plaintiff. *Quality Foods v. Centro America, S.A. v. Latin AM. Agribusines v. VEV. Corp., S.A.*, 711 F.2d 989, 994-95 (11th Cir. 1983); *Jackson v. Bellsouth Telecomms*, 372 F.3d 1250, 1262 (11th Cir. 2004). However, the Supreme Court explained that:

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level.
>
> *Bell Atlantic ATL, Corp. v. Twombly*, 550 US 544, 555, 127 S.Ct. 1955, 167 L.Ed. 2d 929 (2007).

Furthermore, courts "are not bound to accept as true a legal conclusion couched as a factual allegation". *Papasan v. Allain*, 478 US 265, 286, 106 S.Ct. 2932, 92 L.Ed. 2d 909 (1986).

I. Failure To State A Cause Of Action

The Federal Election Commission, in both its original complaint and in its amended complaint, accuses Mr. Rivera of making in-kind donations to the Sternad campaign by personally paying vendors to provide campaign literature on behalf of Mr. Sternad's campaign and "took measures to conceal his involvement and the source of the contributions". Although Mr. Rivera denies these allegations, there is nothing improper about someone making in-kind contributions on behalf of a candidate. What the donor is prohibited from doing is concealing his identity from the vendors and/or the candidate. In the amended complaint the allegation relied upon by the Federal

Election Commission to support its contention that Mr. Rivera attempted to conceal his involvement as the source of the contributions is that Mr. Rivera "delivered cash to vendors providing services to the committee". The FEC seems to promote the idea in its amended complaint that paying cash to vendors to perform a service for a particular candidate is enough to sufficiently allege a violation of 52 U.S.C. §30122. As this Court is well aware, §30122 is titled Contributions in Name of Another Prohibited and states:

> No person shall make a contribution in the name of another person or knowingly permit his name to be used to affect such contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.

However, the statute does not prohibit a donor from making direct payments to vendors on behalf of a candidate as alleged in its amended complaint. A donor who directly pays a vendor for the benefit of a candidate, whether by cash, check, or credit card, is not in violation of the statute. Such in-kind contributions are permitted provided that these services are reported by the candidate.

Once again, in its amended complaint, there is no allegation, nor even a reference, that Rivera secretly made donations without Sternad's knowledge, or that he, Rivera himself, used a false name, or that he, Rivera himself, participated in the falsification of Sternad's disclosure forms. This Court, in its order granting the motion to dismiss the original complaint, stated that without such allegations, there can be no violation of §30122.

The amended complaint attempts to establish the "concealment element" by alleging Mr. Rivera delivered cash himself, or through intermediaries, to vendors for the services they rendered to Sternad's campaign. At all times relevant to the amended complaint during which Mr. Rivera is accused of working with the vendors, the vendors were never misled as to who was paying for the services. It is beyond comprehension to understand how Mr. Rivera can be accused of "concealing

his identity" from the vendors by simply paying them cash, without ever alleging that the vendors were in fact misled, or that they were never advised as to the identity of the true payor. In fact, the amended complaint clearly contends that when there appeared to be an outstanding invoice for services by one of the vendors, the owner of the business knew to contact Mr. Rivera directly in order to receive payment (Amended Complaint, paragraph 19). As previously argued by Mr. Rivera in his initial motion to dismiss, 52 U.S.C. §30122 prohibits a person from making a contribution in the name of another person or knowingly permitting one's name to be used as a "straw donor". What the statute does not prohibit is a donor making direct payments to vendors on behalf of a candidate or for the benefit of a candidate. Mr. Rivera is not accused of paying the vendors through third parties in order to mislead or conceal his identity from the vendors. In fact, the amended complaint makes it very clear that Mr. Rivera allegedly hired the same vendors that he had used for his own previous campaign (Amended Complaint, paragraph 16).

Therefore, if the vendors were not misled as to the identity of the payor for the services rendered to the Sternad's campaign, then one must look to the conduct of Mr. Rivera in affecting the false information placed on Sternad's financial disclosure forms. The amended complaint clearly contends that the Sternad campaign was fully aware of the identity of the donor of the in-kind contributions. Again, as argued in the initial motion to dismiss, had Mr. Sternad disclosed who he knew to be the true and known source of the in-kind contributions made to the vendors, there would not be any violation of FECA. The candidate, who allegedly knew at the time he filed his campaign disclosure forms that the true donor of the in-kind contribution was Rivera, intentionally lied on those forms. Only the candidate himself can choose to lie on his disclosure form as to the identity of the true donor. Neither the candidate nor his campaign was ever misled with false information provided by Mr. Rivera.

The intent of §30122 is to ensure the candidate on whose behalf the donation was being made is advised as to the true identity of the donor and then the candidate has the responsibility to place the true identity of the donor on his campaign disclosure forms. The amended complaint alleges that Sternad signed and mailed multiple disclosure forms to the FEC, falsely reporting that the contributions he received from the vendors were loans from his personal funds. Again, the FEC alleges that these instructions were conveyed directly to Sternad from Ms. Alliegro. However, the FEC now contends that the instructions conveyed by Ms. Alliegro to Sternad originally came from Rivera. Again, there was no "concealment" from the Sternad campaign of the identity of the donor. The FEC attempts to bootstrap into a §30122 violation Mr. Rivera's alleged participation in a scheme to violate 18 U.S.C. (false statements on a document). §30122 does not encompass the conduct alleged in the amended complaint attributed to Mr. Rivera.

In essence, the FEC is contending that Mr. Rivera participated in a conspiracy to file false documents with the FEC. Although such conduct, if proven, may establish some other federal violation, allegedly telling a candidate to knowingly not disclose the name of the donor does not fall within the conduct intended to be prohibited by §30122.

II. Statute of Limitations

On July 14, 2017 the Federal Election Commission filed its original complaint against David Rivera, alleging that he knowingly and willfully violated 52 U.S. §30122 and 11 C.F.R. §110.4(b)(1)(iii) by making contributions in the name of another when he caused, directed, and assisted in the making of contributions in the name of others to Justin Lamar Sternad's 2012 primary campaign in Florida's 26th U.S. Congressional District. The last act alleged in the original complaint occurred in August, 2012 when Mr. Sternad signed and mailed his final disclosure report to the FEC. This Honorable Court granted Mr. Rivera's motion to dismiss the original complaint,

but has now permitted the FEC to file an amended complaint. The amended complaint was filed on October 22, 2018, more than six (6) years after the activity alleged therein concluded. The statute of limitations applicable to all actions brought by the Federal Election Commission seeking civil penalties is five (5) years. See *Federal Commission v. The Christian Coalition*, 965 F. Supp. 66 (District of Columbia 1997); *Federal Election Commission v. National Right to Work Committee, Inc*., 916 F.Supp. 10 (D. of Columbia 1996); *Federal Election Commission v. National Republican Senatorial Committee*, 877 F.Supp. 15 (D. of Columbia 1995).

The original complaint in this Cause was filed by the Federal Election Commission approximately one month before the expiration of the five year statute of limitations. The FEC has now filed an amended complaint that alleges a violation of the statute and a federal regulation different than it set forth in its original complaint. The original complaint relied upon 11 C.F.R. §110.4(b)(1)(iii) in its accusation that Mr. Rivera knowingly helped or assisted another in contributing money or in-kind donations in the name of another. This Court granted the defendant's motion to dismiss, relying in part on *Federal Election Commission v. Swallow*, 304 F.Supp. 3d 113 D. Utah 2018). In its Amended complaint, the FEC now relies on 11C.F.R. §110.4(b)(1)(i), which prohibits direct contributions made in the name of another. The FEC is now claiming that Mr. Rivera acted as a "primary actor" by having made in-kind contributions himself, and that he acted in some way that caused these donations to be in the name of another person.

An amended complaint filed beyond the statute of limitations can withstand an attack for violation for the statue of limitations only where 1) the original pleading itself was timely filed, and 2) the amended pleading relates back to the date on which the original pleading was filed *Walker v. Fulton County School District*, 624 F. Appx. 683, 685-686 (11th Cir. 2015). An amended complaint can only relate back to the date of the filing of the original complaint if the amended

complaint sets forth a claim arising from the same conduct, transaction, or occurrence as set out in the original pleading Fed.R.Civ.P. 15(c) (1) (B).

One critical element that a Court must consider in determining if a claim relates back to the original complaint is whether the original complaint gave the defendant notice of acts newly asserted in the proposed amended complaint. *Moore v. Baker*, 989 F.2d 1129, 1131 (11th Cir. 1993). Here, in its amended complaint, the FEC newly contends that Mr. Rivera directly paid cash and, therefore, attempted to conceal his identity as the donor. There allegations were not contained in the original complaint. The amended complaint does not involve the same conduct, transaction, or occurrences as those raised in the original complaint. The new facts not alleged in the original complaint are as follows:

> A). Paragraph 1 of amended complaint: "Rivera then delivered cash to vendors providing service to the committee or arranged for cash he controlled to be delivered…." (Original Complaint, paragraph 1: At Rivera's direction, Alliegro then delivered funds or arranged for them to be delivered to Sternad, his principle campaign committee, and vendors providing services to the committee");
>
> B). Paragraph 13 of amended complaint: "During the democratic primary, Rivera secretly provided cash to vendors who provided Services for Sternad's primary campaign" (Original Complaint, paragraph 13: "During the democratic primary, Rivera carried out a scheme to secretly provide funds to Sternad's primary campaign").
>
> C). Paragraph 14 of amended complaint: "Rivera directed Alliegro to approach Sternad with an offer of Rivera helping to fund Sternad's campaign." (Original Complaint, paragraph 14: "Rivera directed Alliegro to approach Sternad with the offer to help fund his campaign."
>
> D). Paragraph 15 of amended complaint: "Alliegro…offered to transmit Rivera's funds to Sternad's campaign" (Original Complaint, paragraph 15: "Alliegro…offered to provide funds for his campaign");
>
> E). Paragraph 16 of amended complaint: "[Rivera] concealed contributions…by delivering cash himself or through intermediaries to vendors providing services. (Not contained in original complaint);

> F). Paragraph 17 of amended complaint: "Rivera attempted to conceal his contributions by providing undisclosed funds directly to the vendors." (Original Complaint, paragraph 17: "Rivera attempted to conceal his involvement in the scheme to provide undisclosed funds to the vendors."
>
> G). Paragraph 18 of amended complaint: "Rivera made 5 payments for in-kind contributions through cash delivered to vendors. Rivera's funds were hand delivered to the vendors by himself, by Alliegro at his direction, or by courier service". (Original Complaint, paragraph 18: "funds were hand delivered in cash by…Alliegro and others were delivered in cash…by a courier service");
>
> H). Paragraph 20 of amended complaint: "…following instructions from Rivera that were conveyed by Alliegro, Sternad falsely reported contributions as loans from his personal funds to the Sternad committee". (Original Complaint, paragraph 22: "Rather, upon Alliegro's instructions, Sternad concealed the source of the contributions by falsely reporting them as loans from his personal funds to the Sternad committee");

In its amended complaint, the FEC newly contends that Mr. Rivera directly paid cash and directly attempted to conceal his identity. These allegations were not contained in the original complaint. The amended complaint does not involve the same conduct, transaction, or occurrences as those raised in the original complaint. An amended complaint will not relate back where the amended complaint "had to include additional facts to support the new claim. *Echlin v. Peacehealth*, 887 F.3d 967, 978 (9th Cir. 2018).

The underlying question for a Rule 15(c) analysis is "whether the original complaint adequately notified the defendant[s] of the basis for liability the plaintiffs would later advance in the amended complaint. (Citations omitted)…"the pertinent inquiry, in this respect, is whether the original complaint gave the defendant fair notice of the newly alleged claims". *Glover v. Federal Deposit Insurance Corporation*, 698 F.3d 139, 146 (3rd Cir. 2012). Because there is no "relation

back", the amended complaint should be dismissed for violation of the five year statute of limitations.

WHEREFORE, based upon the foregoing facts and circumstances, the defendant, David Rivera, respectfully requests this Court enter its Order dismissing the amended complaint in this cause.

Respectfully submitted,

ROY J. KAHN, P.A.
800 Brickell Avenue, Suite 1400
Miami, Florida 33131
Tel: (305) 358-7400
Fax: (305) 358-7222

/s/ Roy J. Kahn
ROY J. KAHN
Florida Bar No. 224359
rjk@roykahnlaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **February 1, 2019**, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record and emailed.

/s/ Roy J. Kahn
ROY J. KAHN