UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-CV-22643 COOKE/GOODMAN

FEDERAL ELECTION COMMISSION,

Plaintiff,

vs.

DAVID RIVERA,

Defendant.

DEFENDANT'S REPLY TO THE FEDERAL ELECTION COMMISSION'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

David Rivera ("Rivera") replies to the Federal Election Commission's Opposition to his Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Motion to Dismiss") and states:

The Federal Election Commission ("FEC") urges this Court to deny Rivera's Motion to Dismiss for the following reasons:

1. Rivera did not comply with this Court's "meet and confer" local rule;

2. That the applicable statute of limitations, 28 U.S.C. § 2462 is non-jurisdictional;

3. The FEC's single cause of action was timely filed under the "repeated wrong" doctrine and thus was within the statute of limitations; and

4. The FEC complied with its pre-suit notice and conciliation requirements as to both its original and amended complaints.

The FEC is incorrect on all accounts.

A. This Court's "Meet and Confer" Obligation Does Not Apply to Motions for Involuntary Dismissal of a Claim.

The FEC asserts at footnote 1 of its brief that the Court should deny Rivera's Motion because the undersigned did not file a "meet and confer" certificate of compliance under Local Rule 7.1(a)(3). While the FEC is correct that the undersigned did not meet and confer prior to

filing Rivera's motion, motions for involuntary dismissal of an action are ***exempt*** from this Court's "meet and confer" requirement. Accordingly, no violation of Local Rule 7.1(a)(3) occurred.

B. 28 U.S.C. § 2462 is Jurisdictional.

At footnote 3 of its brief, the FEC cites United States v. Hines, 2017 WL 6536574, at *2 (M.D. Fla. Dec. 21, 2017) for the proposition that 28 U.S.C. § 2462 is non-jurisdictional. Hines was decided in view of U.S. v. Wong, 575 U.S. 402, 409 (2015). Wong held that absent a clear statement from Congress that a statute of limitations is intended to be jurisdictional, it should be treated as non-jurisdictional. Id. at 409.

Importantly, 28 U.S.C. § 2462 states that a claim filed in violation of its terms "***shall not be entertained*** . . ." Id. (emphasis added). The phrase "shall not be entertained" is a clear statement by Congress that 28 U.S.C. § 2462 is jurisdictional. Judge King ruled as such in S.E.C. v. Graham, 21 F. Supp. 3d 1300, 1308 (S.D. Fla. 2014), aff'd in part, rev'd in part and remanded sub nom. Sec. & Exch. Comm'n v. Graham, 823 F.3d 1357 (11th Cir. 2016). However, since Hines, the Sixth and Eleventh Circuits, following the reasoning of other courts, have also found the phrase, "shall not be entertained," jurisdictional, albeit in the context of a different statute, 28 U.S.C. 2255(e). See, Taylor v. Owens, 990 F.3d 493, 498 (6th Cir. 2021); United States v. Wheeler, 886 F.3d 415, 425 (4th Cir. 2018) (finding in view of Wong, "[i]ndeed, a 'plain reading of the phrase 'shall not entertain' demonstrates that 'Congress intended to, and unambiguously did strip the district court of the power to act ... unless the savings clause applies.'") (citations omitted).

Although 28 U.S.C. § 2462 was not at issue in Taylor and Wheeler, both cases addressed whether the phrase "shall not be entertained" is jurisdictional. Both circuits found that it is. Hines, therefore, is no longer authoritative law. Accordingly, if the FEC did not timely commence this case under 28 U.S.C. § 2462, this Court lacks subject matter jurisdiction to entertain this case.

claims.

C. The FEC Failed to Timely Commence this Case Under 28 U.S.C. § 2462.

Under 28 U.S.C. § 2462, an action for civil penalty must be ". . . commenced within five years from the date when the claim first accrued. . ." Id. Even though only one cause of action was alleged in this case, the FEC construes each of Rivera's alleged in-kind contributions as stand-alone violations (or "a repeated wrong"), akin to successive acts of theft or misappropriation, each subject to its own statute of limitations analysis, separately actionable if having occurred within the five years preceding the July 14, 2017 filing date of the original complaint. However, unlike theft or misappropriation, a contribution to a political campaign is not *malum in se*. That is, for a political contribution to be made in the name of another, something more than the contribution itself is required. FEC's lead counsel, Greg Mueller, explained this to the Court at the hearing on Rivera's Motion to Dismiss the Amended Complaint on April 16, 2019:

> THE COURT: So you're saying if Mr. Rivera pays for in-kind services and is not disclosed by the campaign, that is a violation?
>
> MR. MUELLER: And there's the element - - it takes a little bit more than that. Directed the campaign to file false disclosure reports with the FEC, disclosing it as a campaign or contribution by the candidate to his own campaign. So it's a contribution in the name of another when they make the contribution and say, don't attribute this to me, attribute it to yourself. That's the heartland of a Section 30122 violation and it's what happened here.

See, D.E. 49, *Trans. of Hearing on Motion to Dismiss Amended Complaint*, *April 16, 2019*, at pp. 16-17, lns. 25; 1-10.

> THE COURT: So tell me how, given the facts alleged in this Complaint, the violation of the statute occurred?
>
> MR. MUELLER: Yes, Your Honor. The defendant took cash, went to a vendor and said, I want you to prepare these campaign materials. He then provided direction to others to explain to the campaign how to report it so it would be a self-contribution and, in doing so, he made a false name contribution. It wasn't from him. It was reported to the FEC as being from the candidate himself to the

campaign.

Id. at pp. 17-18, lns. 25; 1-8.

> THE COURT: Okay. So it's a violation of the campaign, but this is FEC versus Mr. Rivera. Why is the violation for Mr. Rivera?
>
> MR. MUELLER: Because he engaged in the course of conduct and made a contribution in the name of another by making these in-kind contributions, by providing instructions to the campaign on how to report them so it wouldn't be detected as a violation.
>
> THE COURT: So because he informed the campaign, listen, don't put down on this form that I paid the printer. You put down on the form that this was either a loan or self -funded by the candidate. That's where we get into trouble, right?
>
> MR. MUELLER: Right, correct, Your Honor.

Id. at p. 24, lns. 4-16.

Thus, according to the FEC, Rivera's alleged July-August 2012 in-kind contributions are actionable in this case only if Rivera ***directed*** Sternad to falsify their origin. However, there is no evidence that Rivera ever did so. Sternad testified that it was Ana Alliegro who directed him to falsify his FEC Reports. D.E. 142-8, *Deposition of Justin Sternad, Sept. 19 2019*¸ at p. 51, lns. 13-25. And Alliegro only recalled, after "speaking" with Rivera, advising Sternad to falsify the origin of the May-June 2017 direct contributions, which were omitted in both the original and amended complaint.[1] D.E. 142-5, *Alliegro's Grand Jury Testimony*, at p. 32-33, lns. 18-25; 1-2.

The FEC tries to bridge this gap in proof with allegations that Rivera made efforts to avoid a paper trail between himself and the vendors. However, that argument dead ends. As shown, the alleged wrong, "the heartland of § 30122," in this case was Rivera allegedly ***misleading the FEC***

[1] In its Summary Judgment Order, the Court noted that Alliegro's instructions to Sternad about falsifying the origin of contributions was in relation to money deposited in Sternad's campaign account: "After speaking with Rivera, Alliegro advised Sternad to report the funds that were deposited into the Sternad Campaign TD Bank account in Washington, D.C. to the FEC as a 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.' However, those funds were not a loan." D.E. 163, *Order Granting FEC's Motion for Summary Judgment*, at p. 18. (internal citations omitted).

and the public at large by instructing Sternad to falsify the in-kind contributions as personal loans. Therefore, there can be no violation of § 30122 if the reporting "in the name of another" is not by fault of Rivera. Following Mr. Mueller's argument, unless Sternad lied at Rivera's direction, Rivera's alleged July-August 2012 in-kind contributions were not made by him in the name of another, even if he sought to conceal his contacts with the vendors. Avoiding a paper trail does not equate to a directive to a third party to lie to the FEC.

Here, Sternad first falsely reported the direct contributions as personal loans on July 10, 2012 in his FEC 3 Report, on Alliegro's advice. See, D.E. 142-5, *Alliegro's Grand Jury Testimony*, at p. 32-33, lns. 18-25; 1-2. Thus, based on the available evidence, the FEC's claim against Rivera first accrued on or before July 10, 2012, more than five years before the FEC filed its case on July 14, 2017. In the absence of proof that Rivera ever directed Sternad to falsify the origin of the subsequent July-August 2012 in-kind contributions, the FEC cannot prove a § 30122 violation that fell within the five-year statute of limitations governing this case. Accordingly, under 28 U.S.C. § 2462, this case was not timely filed and must be dismissed with prejudice because the Court, for the reasons explained above, lacks jurisdiction to entertain it.

D. The FEC Did Not Comply with its Pre-Suit Notice and Conciliation Duties.

i. <u>The FEC Did Not Comply with its Pre-Suit Notice and Conciliation Duties With Regard to the Original Complaint</u>.

While the FEC has notice obligations throughout its pre-suit process, the most critical phase of its pre-suit protocol commences when the FEC's general counsel decides to ask the FEC to vote on probable cause. At that juncture, the FEC's general counsel must give the respondent advanced notice of her intent to ask for a Commission vote and provide the respondent with a brief outlining the legal and factual issues in the case, to which the respondent may respond in writing and may also request a probable cause hearing. 52 U.S.C. § 30109(a)(3); 11 C.F.R. § 111.16;

Procedural Rules for Probable Cause Hearings, 72 Fed. Reg. 64919 (Nov. 19, 2007). If the Commission subsequently finds probable cause, "the Commission shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved." 52 U.S.C. § 30109(a)(4)(A)(i). The FEC did not dispute in its Opposition brief that these requirements are jurisdictional. See, Fed. Election Comm'n v. Nat'l Rifle Ass'n of Am., 553 F. Supp. 1331, 1333 (D.D.C. 1983).

The FEC says it complied with its pre-suit obligations, but its Opposition brief proves otherwise. First, the FEC concedes that UPS returned the "probable cause" letter and brief it sent to Rivera, noting that delivery was refused, but offered no evidence that it was Rivera who refused it. D.E. 172, at p. 11. Remarkably, the FEC said nothing about its U.S. Post Office "Priority Mail" package, which was also returned because the addressee was unknown. In short, it is undisputed that Rivera never received either of the two packages that the FEC sent to him forwarding its probable cause documents. The FEC also claims that it emailed its probable cause documents to Rivera; however, it offered no evidence of delivery, such as a read or delivery receipt. Id. Thus, there is also no evidence that Rivera ever received the FEC's probable cause letter and brief by email.

Most disturbing, the FEC offered evidence that Rivera, in September 2013, designated a lawyer, Yesenia Collazo, Esq., to ". . . receive notifications and other communications from the Commission and to act on my behalf before the Commission." D.E. 172-1, *Declaration of Ana Pena-Wallace, April 14, 2021*, at ¶ 3, and attached FEC Documents Bates Nos. 0253 – 0255. The FEC offered no evidence that it ever sent Ms. Collazo its probable cause letter and brief. Rather, it appears the FEC ignored Ms. Collazo after encountering difficulties in reaching her following a

three year pause in its investigation, deciding instead to correspond ***directly*** with her client, Rivera. The impropriety in contacting another lawyer's client without her permission needs no explanation. See, Local Rule 11.1 (lawyers admitted to practice in this district are subject to Florida Bar Rules); R. Regulating Fla. Bar 4-4.2(a) ("In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter," unless the opposing lawyer consented). Most significantly, the FEC cannot credibly claim it gave requisite notice to Rivera by email when it chose to ignore a lawyer Rivera designated years earlier to receive FEC correspondence on his behalf.

The same holds true about the FEC's efforts to conciliate. Putting aside the fact that conciliation must be preceded by proper notice and an opportunity to respond, which did not occur here, it is ludicrous that the FEC would argue that it met its conciliation obligations by having a single phone call with Rivera **knowing** that he was represented by counsel. The FEC was duty bound to refrain from direct communications with Rivera while he was represented and the FEC offered no evidence that Ms. Collazo ever withdrew as Rivera's counsel.

Lawyers represent their clients in settlement negotiations. A lawyer's ex-parte settlement discussion with another lawyer's client is improper, even if the offending lawyer works for the government. See, Bedoya v. Aventura Limousine & Transp. Serv., Inc., 861 F. Supp. 2d 1346, 1358 (S.D. Fla. 2012) (finding plaintiff's ex-parte settlement offer to one of the defendants, with knowledge that he was represented by counsel, violated Florida Bar Rule 4–4.2, even if the communication was made in connection with another forum); see also, R. Regulating Fla. Bar Preamble ("every lawyer is responsible for observance of the Rules of Professional Conduct."). By all indications, the FEC never sent conciliation correspondence to Ms. Collazo or otherwise

communicated with her about the topic. Instead, the FEC chose to send a proposed Conciliation Agreement directly to Rivera at an address it knew was no longer valid and to engage Rivera in a single phone conversation about a Conciliation Agreement he had not seen, which he had directed the FEC years earlier to send to his counsel, whom the FEC knew was authorized to act on his behalf. Whatever difficulties the FEC had in reaching Collazo, all communications should have been directed to her and under no circumstance was the FEC justified in circumventing her and engaging in direct communications with Mr. Rivera. It was Collazo's duty to directly communicate with Rivera about conciliation, not the FEC's. Given all of these circumstances, the FEC clearly did not discharge its duty to conciliate.

ii. The FEC Failed to Comply with its Pre-Suit Notice and Conciliation Duties With Regard to the Amended Complaint.

Finally, the FEC contends that the legal and factual allegations in the amended complaint were not subject to separate pre-suit notice and conciliation efforts, arguing that they were "reasonably related" to each other and to the allegations in the administrative proceedings. See, D.E. 172, *FEC's Opposition Brief*, at p. 13. Even after Rivera attached a comparison chart (D.E. 171-17) of the explicitly different factual and legal allegations between the original and amended complaint, the FEC claims that "The Commission did not seek to incorporate new factual allegations or new statutory violations unrelated to those that the Commission approved during its three votes." D.E. 172, *FEC's Opposition Brief*, at p. 14. The FEC's position is disingenuous.

The FEC's general counsel requested the Commission to find probable cause against Rivera based on the factual and legal analysis in her probable cause brief. See, D.E. 172-1 at *FEC Bates 00872-00873).* The Commission found probable cause based on those allegations on June 1, 2017, and then authorized general counsel to file the original complaint on July 11, 2017. See, D.E. 171-7, *FEC Letter to David Rivera Forwarding Proposed Conciliation Agreement (June 2,*

2017) and D.E. 171-8, *FEC Certification Authorizing Office of General Counsel to File a Civil Suit (July 11, 2017)*. The original complaint, therefore, is based on the factual and legal allegations in general counsel's April 28, 2017 probable cause brief.

The probable cause brief alleged that Rivera knowingly and willfully ***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)(1)(iii). D.E. 171-6, *Letter from FEC to David Rivera Forwarding Probable Cause Brief,* at *FEC Bates No. 00318-00319 (April 28, 2017)*. It appears that the FEC chose to accuse Rivera of secondary liability (assisting in the making) rather than primary liability (making) because the sources of the contributions were unknown.[2] Id. *at FEC Bates No. 00327*. Acting general counsel, Lisa J. Stevenson, ***specifically requested*** the Commission to find probable cause that Rivera assisted in the making of contributions to another. D.E. 172-1 at *FEC Bates 00872-00873.* And in its transmittal to Rivera of its proposed Conciliation Agreement, the Commission stated that it had found probable cause that Rivera had assisted in making contributions in the name of another. See, D.E. 171-7, *FEC Letter to David Rivera Forwarding Proposed Conciliation Agreement (June 2, 2017).* Indeed, Rivera was asked to admit in the Conciliation Agreement that he had assisted in the making of direct and in-kind contributions in violation of 52 U.S.C. § 30122 and 11 C.F.R. § 110.4(b)(1)(iii). Id., at FEC Bates No. 00882, ¶¶ 9, 11. And as this Court is well aware, the FEC's sole claim against Rivera in the original complaint was for assisting in making contributions in the name of another. See, D.E. 31, *Order on Motion to Dismiss*, at p. 5.

Thus, prior to filing the amended complaint, the Commission never considered whether Rivera had ***primary liability***, that is, whether he was the source of and had made the contributions

[2] To date, even after Sternad's amendments of his FEC 3 Disclosure, the FEC's website still shows the sources of the disputed contributions as "unknown contributions." See, https://www.fec.gov/data/receipts/?committee_id=C00505529&two_year_transaction_period=2012&cycle=2012&line_number=F3-11AI&data_type=processed.

at issue. FEC's general counsel never drafted a probable cause brief on the issue. The FEC was never asked to vote on the issue. Rivera was never given pre-suit notice and an opportunity to respond to the issue. Nor was the issue ever the subject of conciliation discussions. The new theory of primary liability nevertheless found its way into the amended complaint, supported by new factual allegations that led this Court to award the FEC a civil penalty of $456,000.00.

Contrary to the FEC's position, primary and secondary liability in this case are not "reasonably related." One is actionable and the other is not. One resulted in the dismissal of a complaint and the other in the award of a civil penalty. Given the magnitude of difference in the viability of these two legal theories, and the nature of the facts required to support them,[3] the FEC had no right to introduce primary liability into this case until the theory and supporting facts had been vetted and voted on by the Commission, after Rivera had been given notice and an opportunity to address the issue and only after conciliation discussions addressing the issue had occurred – all of which the FEC was required to do pursuant to its jurisdictional pre-suit procedures.

CONCLUSION

In sum, this Court lacks subject matter jurisdiction over this case. The case was filed outside the statute of limitations and in violation of the Commission's pre-suit obligations, all of which are jurisdictional in nature. Accordingly, David Rivera respectfully requests that this cause be dismissed with prejudice for lack of subject matter jurisdiction.

[3] As previously noted, in her probable cause brief, FEC general counsel affirmatively represented to the Commission that the source of the contributions was unknown. Without any further evidentiary presentation to the Commission, FEC counsel alleged in the amended complaint that Rivera was the source of these contributions, an allegation it needed to make to support a claim for primary liability. The Commission never vetted or voted on the sufficiency of the evidence supporting this change in position. Given the magnitude of these changes in view of the genesis and subsequent dismissal of the original complaint, the FEC's explanation that these changes were driven by inartful pleading in the original complaint is disingenuous.

Dated: April 21, 2021

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 21, 2021, 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 or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s Jeffrey D. Feldman
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SERVICE LIST

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