UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

FEDERAL ELECTION COMMISSION,

Plaintiff,

v.

DAVID RIVERA,

Defendant.
_____/

DAVID RIVERA'S REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant David Rivera, by and through his undersigned counsel, respectfully submits this reply to plaintiff Federal Election Commission's memorandum in opposition to defendant's motion for summary judgment and, in support thereof, states as follows:

In order to establish the absence of sufficient facts to support a claim, the United States Supreme Court spoke to the requirements of Rule 56(c) of the Federal Rules of Civil Procedure:

> By its very terms, [Rule 56(c)] provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgement; the requirement is that there be no *genuine* issue of *material* fact.
>
> As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will probably preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. See generally 10A C. Wright, A. Miller, and M. Kane, Federal Practice and Procedure Section 2725, pp. 93-95 (1983). This materiality inquiry is independent of and separate from the question of the incorporation of the evidentiary standard into the summary judgment determination. That is, while the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs.

> *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 247-248, 106 S.Ct. 2505, 2512, 91 L.Ed. 2d 202 (1986)).

The Supreme Court further clarified the necessity for a party opposing a motion for summary judgment to establish that the facts it alleges are **genuine**:

> …At the summary judgment stage, the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. …[T]here is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. (Citations omitted). If the evidence is merely colorable (citations omitted), or is not significantly probative, (citations omitted), summary judgment may be granted.
>
> *Id.* at 249-250, 2511.

In the present case, the defendant need only show the **non-existence** of any material fact which supports the single count alleged in the complaint *i.e.* that Mr. Rivera was the source of payments and/or in-kind services to the Sternad campaign, and that he "took measures to conceal his involvement and the source of the contributions". The gravemen of this allegation is financial in nature. As this Court is well aware Title 52 U.S.C. §30122 and the accompanying regulations of the Federal Election Commission require that the defendant be the party responsible for the contributions made to the Sternad campaign, and having done so in the name of another person. Evidence establishing Mr. Rivera as the source of funds and/or making contributions himself in the name of another would be the material fact that could defeat the defendant's motion for summary judgment. Unfortunately for the plaintiff, there is no material fact submitted in its pleadings which shows that Mr. Rivera was the **source** connected with a **financial** transaction. Without a single genuine material fact establishing Mr. Rivera's direct involvement in a financial transaction on behalf of the Sternad campaign, the underlying basis for the violation of Title 52 U.S.C. §30122 is absent.

A financial transaction which is directly linked to Mr. Rivera as the source is the most essential element to be proven in this case. A moving party is entitled to summary judgement if the non-moving party has failed to make a showing sufficient to establish the existence of an essential element to that party's case. *Celotex Corporation v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed. 2d 265 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment", *Dulany v. Carnahan*, 132 F.3d 1234, 1237 (8th Cir. 1997) (quoting *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986)).

At no time did Mr. Rivera make in-kind contributions to the vendors while taking steps to hide his identity as the source. Plaintiff goes to great lengths in its effort to associate Mr. Rivera to Ms. Alliegro's participation with and assistance to the Sternad campaign. Although Mr. Rivera denies participating in or assisting Ms. Alliegro with her management of the Sternad campaign, even if such participation was true, that action by itself, without a financial component, would not be a violation of §30122.

For example, if the evidence in this case could establish that Mr. Rivera urged or arranged for Ms. Alliegro to assist the Sternad campaign as part of a scheme, this fact would be insufficient to establish the material fact necessary for a violation of §30122. [1] If the evidence in this case could establish that Mr. Rivera was aware of other persons funding the Sternad campaign with cash or

[1] Similarly, as has been recently reported in the media, Kanye West's presidential bid has been promoted and assisted by the Republican Party in at least 5 states. See Washington Post, August 9, 2020; New York Times August 4, 2020 (updated August 10, 2020). By promoting and assisting a spoiler candidate, the Republican Party could be seen as unethical, sneaky, etc., but without financial assistance being given to candidate West, there is no violation of the FEC regulations or §30122.

other in-kind services, without Mr. Rivera being the source of the funds or the party who was proven to directly give the in-kind contributions, this fact would be insufficient to deny the motion for summary judgement. If the evidence could establish that Mr. Rivera assisted another party in making a donation to the Sternad campaign (without evidence establishing that he was the source) such conduct as an "aider and abettor" does not violate §30122 see *FEC v. Swallow,* 304 F. Supp. 3d 1113 (D. Utah 2018). Without possessing material facts to support a financial transaction essential to a violation of §30122, plaintiff reverts to assumptions, conclusions, and an inadmissible grand jury transcript of Ana Alliegro.

As previously stated herein, a non-moving party must not only present material facts in opposition to its opponent's motion for summary judgment, but the material facts must be **genuine.** A factual dispute is "genuine" and summary judgment would be precluded if the evidence presented in support of and in opposition to the motion is so contradictory that, if presented at trial, a judgment could enter for either party. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2511, 91 L.Ed. 2d 202 (1986). Because the grand jury transcript of Ana Alliegro's testimony is unadulterated hearsay and not admissible at trial, such a document should not be considered by the Court as containing "genuine material facts". In attempting to raise a genuine material issue of fact in its response to the defendant's motion for summary judgment, plaintiff has the burden of establishing that it has the ability to present such evidence in an admissible form at trial. See Federal Rule of Civil Procedure 56(c)(2). Unless the plaintiff can establish **in good faith** that Ms. Alliegro is available to testify to the facts contained in the grand jury testimony, the transcript should not be considered by the Court's as containing genuine material facts in opposition to defendant's motion for summary judgment.

In making the determination of whether the defendant's motion for summary judgement should be granted, the Court should also consider applicable burdens of proof. If the plaintiff is unable to sufficiently adduce evidence that could lead a reasonable jury to conclude that the plaintiff has satisfied his burden of proof, its claim is subject to an unfavorable summary disposition. *Eisenburg v. Insurance Company of North America*, 815 F.2d 1285, 1288-1289 (9th Cir. 1987) (citing *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2512, 91 L.Ed. 2d 202 (1986)).

Being left without any evidence to support its claim that Mr. Rivera provided financial support and/or in-kind contributions to the Sternad campaign and intentionally hid his identity, plaintiff is left with only assumptions, conclusions, and inuendo. Throughout its memorandum in opposition to defendant's motion for summary judgment and in its opposing statement of material facts, the FEC sets forth conclusions and arguments without the required genuine material facts to support it. A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials in a pleading, an **unsubstantiated assertion** that a fact issue exists will not suffice. *Morris v. Covan Worldwide Moving Inc.*, 144 F.3d 377, 380 (5th Cir. 1998). "[T]he non-moving party must set forth specific facts showing the existence of a "genuine" issue concerning every essential component of its case" *Id.* The district court must, in considering a defendant's motion for summary judgement, view the evidence "through the prism of the substantive evidentiary burden" *Anderson v. Liberty Lobby Inc.*, 106 S.Ct. at 2513 (1986).

In conclusion, the plaintiff has stacked inuendo on top of assumption, on top of conclusion in its argument that Mr. Rivera was the party responsible for monetary donations and/or in-kind contributions to the Sternad campaign and that he hid his identity as the true source. The only document which the plaintiff has supplied to the Court in an effort to support its claim of a violation

of 52 U.S.C. §30122 is an inadmissible grand jury transcript of Ana Alliegro. Unless Ms. Alliegro is available to testify at trial and make herself available to cross-examination, the Court should not consider the grand jury testimony as a genuine material issue of fact. *Humphry's and Partners Architects, L.P. v. Lassard Design Inc*., 790 F.3d 532, 538 (4th Cir. 2015), *Alexander v. Pair Source,* 576 F.3d 551, 558 (6th Cir. 2009); *Jones v. UPS Ground Freight,* 683 F.3d 1283, 1294 (11th Cir. 2012) ("the most obvious way that hearsay testimony can be reduced to admissible form is to have the hearsay declarant testify directly to the matter at trial"). The submitting party bears the burden of showing that the evidence would be admissible as presented, or that it could be presented in admissible form at the time of trial. See *Humphry's,* 790 at 538-539.

Defendant's motion for summary judgment should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **August 31, 2020**, 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