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 RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

COMES NOW, defendant, DAVID RIVERA, by and through his undersigned counsel, and pursuant to Federal Rule of Civil Procedure 56, files this response to the plaintiff's motion for summary judgment. In support thereof, the defendant states as follows:

Background

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 participated in a scheme to provide in-kind contributions to Justin Lamar Sternad's Democratic Primary Campaign for Florida's 26th Congressional District. The original 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.

The original complaint further alleged that Mr. Rivera, through Ana Sol Alliegro, instructed Mr. Sternad not to report the donations made to the vendors on his campaign disclosure reports, but instead to claim that they were personal loans made by Mr. Sternad to his own campaign.

On September 24, 2018, this Honorable Court entered its order granting Mr. Rivera's motion to dismiss the initial complaint. (D.E. 31). In its order, the Court found that the original complaint's sole cause of action was based upon an "aiding and abetting" theory. The Court followed the legal analysis and reasoning of *Federal Election Commission v. Swallow*, 304 F. Supp. 3d 113 (D. Utah 2018) and concluded that Congress never intended to create a secondary liability for "helping and assisting another person" in making a contribution in the name of another when it enacted the Federal Election Campaign Act.

In its order, this Honorable Court further explained that where Mr. Rivera **himself** did not make secret donations without Sternad's knowledge, or where Mr. Rivera **himself** used a false name, or where Mr. Rivera **himself** instructed Sternad to falsify his disclosure forms, there was no violation of Title 52 U.S.C. §30122.

Upon the plaintiff's request, this Court permitted the Federal Election Commission to file its amended complaint, wherein it specifically accused Mr. Rivera of directing Ana Sol Alliegro to approach Sternad with an offer to help fund his campaign. The amended complaint goes on to accuse Mr. Rivera himself of delivering cash to vendors to provide its services to the Sternad campaign, and/or that Mr. Rivera personally arranged for cash to be delivered to vendors who provided services to the Sternad campaign. Additionally, the amended complaint accuses Mr. Rivera of concealing these in-kind contributions by directly paying the vendors in cash for the production and distribution of materials for the Sternad campaign. The amended complaint continues with its contention that Ana Alliegro transmitted funds supplied by, or owned by, Mr.

Rivera to the Sternad, campaign and, at Mr. Rivera's direction, Ms. Alliegro transmitted funds from Mr. Rivera to vendors who were supplying services to the Sternad committee.

Argument and Memorandum of Law

None of the above accusations have been established by plaintiff in its motion for summary judgment based upon material facts supported by admissible evidence. No vendor was ever paid by Mr. Rivera in cash, or otherwise. The only person the vendors say paid them directly for the work provided to the Sternad campaign was Ana Alliegro. In order for this Court to grant plaintiff's motion for summary judgement, it must find that plaintiff's statement of undisputed material facts establishes that Mr. Rivera delivered the money used to pay the vendors himself, or that he provided the money to a "straw person" (Ana Alliegro) and/or secretly hid his identity as the party responsible for providing the in-kind contributions to the Sternad campaign. The only "evidence" provided by plaintiff in its statement of material facts which seeks to directly establish Mr. Rivera's violation of Title 52 U.S.C. §30122 is Ana Alliegro's grand jury testimony and the factual proffer adopted by Ms. Alliegro at her change of plea hearing in her criminal case. Ms. Alliegro has not been available for deposition and has not provided the parties any reason to believe that she would be available to testify consistent with the information contained in her grand jury testimony or at the time she pled guilty. In fact, Ms. Alliegro has repudiated the statements she made to the grand jury and has alleged that her acceptance of the factual proffer at her change of plea hearing was coerced. Without some indication that Ms. Alliegro is available to provide testimony at trial implicating Mr. Rivera as a direct violator of §30122, the grand jury testimony provided as support for the plaintiff's motion for summary judgment should not be considered by this Court and stricken.

Although evidence submitted in connection with summary judgment motions need not be presented in an admissible form, the trial court can consider such evidence provided the submitting party demonstrates that it could present that evidence in an admissible form at trial. Federal Rule of Civil Procedure 56(c)(2); *Humphry's and Partners Architects, L.P., v. Lessard Design, Inc*., 790 F.3d 532, 538 (4th Cir. 2015); *Alexander v. CareSource*, 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 F.3d at 538-39.

In the present case, the plea colloquy at the time Ms. Alliegro pled guilty and her subsequent grand jury testimony are blatant hearsay statements and would not be admissible at trial without the declarant being available for cross-examination. As is well documented in our juris prudence, out of court statements given by a witness that is testimonial in nature are not admissible at trial should the declarant not be available for cross-examination, even if such statements are deemed reliable by the court *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004). Specific to our case, unless plaintiff can establish Ms. Alliegro is available as a witness for trial, plaintiff may seek to introduce the grand jury testimony of Ms. Alliegro as substantive evidence. An unavailable witness' grand jury testimony is not sufficiently reliable to be admitted as an exception to the hearsay rule. See *United States v. Lang*, 904 F.2d 618 (11th Cir., 1990). Where the witness is not available for trial and capable of being cross-examined by the opposing party, the grand jury testimony sought to be admitted must be shown by the moving party to meet the very difficult burden of particularized guarantees of trustworthiness. *United States v. HSIA*, 87 F. Sup. 2d 10, 13-

17 (D.C. 2000). Ms. Alliegro had great motive in her criminal case to provide the government with information they most desperately sought in order to implicate David Rivera. If Ms. Alliegro refused to provide such testimony to the grand jury, her punishment would have been more severe. Furthermore, Ms. Alliegro, in subsequent sworn testimony, contends that her "cooperation" was coerced and not voluntary.

Without Ms. Alliegro's presence at trial, Ms. Alliegro's unchallenged and untrustworthy grand jury testimony would be the sole basis to support plaintiff's contention that Mr. Rivera violated Title 52 U.S.C. §30122. However, without the accusations contained in Ms. Alliegro's grand jury testimony being admissible at a trial, plaintiff is left with the same scenario it presented to this Court in its original complaint…that is, Mr. Rivera acted as a secondary aider and abettor to Ms. Alliegro's activities with the Sternad campaign. Taking the evidence provided by all witnesses which are available to testify at trial, including Jenny Nilo, Justin Lamar Sternad, Yolanda Rivas, Henry Barrios, Hugh Cochran, and John Borrero, together with all the physical evidence provided by plaintiff as attachments to its motion for summary judgment, we are left with a conclusion that, if true, Mr. Rivera may have been aware of Ana Alliegro's participation in the Sternad campaign and may have assisted her with advice and suggestions… but there is no evidence that he provided financial assistance or made in-kind contributions. Other than contained in the grand jury testimony of Ms. Alliegro, no evidence implicates David Rivera as a source of funds provided to the Sternad campaign, nor does any available witness testify that they had knowledge that Mr. Rivera paid for the services rendered.

52 U.S.C. §30122 provides:

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

As this Court specifically stated in its order granting the defendant's original motion to dismiss:

> A false name contribution occurs when a person contributes to a candidate but falsely attributes to another person as the source of the contribution. False name contributions include when a person making a contribution of money or anything of value and attributing as the source of the money or thing of value another person when in fact the contributor is the source", 11 CFR §110.4(b)(2)(ii). A conduit contribution achieves the same result when a person provides funds to another person (the conduit) contributes the funds to the candidate. Conduit contributions include when a person provides funds to a conduit (also called a "straw donor"), who then contributes those funds to a candidate or committee without disclosing the true source of the contribution. See e.g. 11 CFR §110.4(b)(2)(i). Thus, sections 110.4 (b)(1)(i) and 110.4(b)(1)(ii) both address the liability of **primary** actors.

However, in following the decision of *Federal Election Commission v. Swallow*, 304 F. Supp. 3d 113 (D. Utah 2018) this Court correctly held then Mr. Rivera cannot be held liable under §30122 where the evidence shows that he may have knowingly helped or assisted another person in making a contribution in the name of another. Such conduct by a secondary actor does not violate §30122. The facts presented by the plaintiff in support of its motion for summary judgement fails to establish admissible evidence which implicates Mr. Rivera as a primary actor violating §30122.

WHEREFORE, based upon the foregoing facts and circumstances, this Court should deny plaintiff's motion for summary judgment and grant the defendant's motion for summary judgment.

Respectfully submitted,

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/s/ Roy J. Kahn
ROY J. KAHN
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **August 22, 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