

Daniel A. Petalas, Acting General Counsel (dpetalas@fec.gov)
Lisa J. Stevenson, Deputy General Counsel – Law (lstevenson@fec.gov)
Kevin Deeley, Acting Associate General Counsel (kdeeley@fec.gov)
Harry J. Summers, Assistant General Counsel (hsummers@fec.gov)
Kevin P. Hancock, Attorney (khancock@fec.gov)
FOR THE PLAINTIFF
FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463
(202) 694-1650

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

| | | |
|------------------------------|---|---------------------------|
| _____ |) | |
| FEDERAL ELECTION COMMISSION, |) | |
| |) | |
| Plaintiff, |) | Case No. 2:15-cv-00439-DB |
| |) | |
| v. |) | |
| |) | OPPOSITION TO |
| JEREMY JOHNSON, |) | MOTION TO DISMISS |
| |) | |
| Defendant. |) | District Judge Dee Benson |
| _____ |) | |

**PLAINTIFF FEDERAL ELECTION COMMISSION’S MEMORANDUM
IN OPPOSITION TO DEFENDANT’S MOTION TO DISMISS**

Plaintiff Federal Election Commission (“FEC” or “Commission”) requests that the Court deny defendant Jeremy Johnson’s untimely and meritless motion to dismiss. The Complaint alleges that Johnson violated the Federal Election Campaign Act (“FECA”) by knowingly and willfully using the names of other persons to contribute to federal candidates in amounts in excess of applicable contribution limits. Johnson’s motion to dismiss that Complaint fails for three independent reasons. First, it is untimely under Federal Rule of Civil Procedure 12. Johnson filed his motion three weeks after the August 18, 2015 deadline — a deadline he acknowledged in his executed waiver of service of summons. Second, even if timely, Johnson’s motion fails on its merits because, contrary to his claims, the FEC properly filed the Complaint.

The day before the FEC filed suit, the Chief Judge of this District granted FEC counsel special provisional admission to the Bar for this case. Finally, even if this Court were to conclude that the FEC should nevertheless apply for admission *pro hac vice* or retain local counsel, the proper remedy would not be dismissal, but an order directing the FEC to take any necessary procedural steps. Johnson's motion should be denied.

BACKGROUND

On June 19, 2015, the Commission filed the Complaint and a motion requesting that the Court waive the local counsel requirement of DUCivR 83-1.1(d) for the FEC. (Docket Nos. 2, 4.) The FEC requested that waiver as a matter of course in light of the agency's exclusive jurisdiction and independent litigating authority to prosecute civil FECA violations. (See Docket Nos. 4, 14.)

Two days earlier, on June 17, this Court's clerk's office had informed the FEC that its attorneys could seek special provisional admission to the Court's Bar for this case, since otherwise the FEC would have had to retain local counsel to file an application for *pro hac vice* admission. Decl. of Kevin P. Hancock ("Hancock Decl.") ¶ 4; see DUCivR 83-1.1(d). The next day, June 18, the clerk's office e-mailed the FEC a Certificate of Admission form and an electronic case filing registration form. (Hancock Decl. ¶ 5; Exh. B.) Four FEC attorneys completed and returned those forms to the clerk's office. (Hancock Decl. ¶ 5; Exh. B.) The Chief Judge of this District then signed and so-ordered FEC counsel's Certificates of Admission, granting FEC counsel special provisional admission to this Court's Bar. (Hancock Decl. ¶¶ 3, 6; Exhs. A-B.) The clerk's office told the FEC that as a result its lawyers could "practice here in our court on th[i]s specific case" and would "not have to go through the Pro Hac Vice process." (Hancock Decl. ¶ 6; Exh. C.) The FEC then filed this suit the next day, June 19. (Docket No. 2.)

Also on June 19, the FEC served its Complaint, civil cover sheet, Motion for Waiver of Local Counsel Rules, and a Notice of Lawsuit and Request for Waiver of Service for Summons on Johnson via first class mail and UPS. (Docket No. 4-3; Hancock Decl. ¶ 8; Exh. E.) The FEC also e-mailed Johnson a copy of the Complaint, civil cover sheet, and the Notice of Lawsuit and Request for Waiver of Service for Summons. (Hancock Decl. ¶ 8; Exh. D.)

About a week later, Johnson's counsel filed notices of appearance. (Docket Nos. 5-6.) The next day, on June 26, the FEC forwarded to Johnson's counsel the e-mail the FEC had sent to Johnson on June 19, including that e-mail's attached copies of the Complaint, civil cover sheet, and Notice of Lawsuit and Request for Waiver of Service for Summons. (Hancock Decl. ¶ 10; Exh. F.)

On July 20, Johnson's counsel e-mailed the FEC an executed Waiver of Service of Summons for Johnson. (Hancock Decl. ¶ 11; Exh. G.) In that e-mail, Johnson's counsel stated, "[W]e believe an answer to the complaint is due on or before August 18, 2015." (Exh. G.) The FEC replied the next day and agreed that "an answer to the complaint is due on or before August 18, 2015 as a result of the waiver." (Hancock Decl. ¶ 12; Exh. H.) Johnson's attorney then confirmed that Johnson would file either an answer or dispositive motion "by the deadline." (Exh. H.)

A day later, on July 22, the FEC filed Johnson's executed Waiver of Service of Summons. (Docket No. 9.) In that executed Waiver, Johnson acknowledged that he was required to serve "an answer or motion under Federal Rule of Civil Procedure 12 . . . within sixty (60) days after June 19, 2015 (date request was sent)." (*Id.* at 3.) Form language on the Waiver further states that unless a "response to the complaint" is served on time, "a default judgment may be taken against th[e] defendant." (*Id.*) After the FEC filed Johnson's Waiver, the Court's

electronic docket entry stated that Johnson's answer was due on August 18, 2015. (*See* Docket No. 9.)

On August 5, Johnson filed an opposition to the FEC's Motion for Waiver of Local Counsel Rules (Docket No. 10), which Johnson previously told the Court he would not file until the FEC's "Complaint and Motion . . . have been served" (Def.'s Notice of Intent to Oppose Mot. for Waiver of Local Counsel Rules at 1 (Docket No. 7)). In that opposition, Johnson asserts that the FEC should have sought *pro hac vice* admission before filing the Complaint. (Def.'s Mem. in Opp'n to Pl.'s Mot. for Waiver of Local Counsel Rules at 5-6 (Docket No. 10).)

Three weeks after Johnson's August 18 deadline to respond to the Complaint, Johnson had not responded to the Complaint or requested an extension. (Hancock Decl. ¶ 15.) FEC counsel called defense counsel to confer regarding why Johnson had yet to respond. (*Id.* ¶ 16.) Minutes after that conference, Johnson filed a motion to dismiss. (*Id.*; *see* Def.'s Mot. to Dismiss Pl.'s Compl. ("Def.'s Br.") (Docket No. 13).)

The Commission now opposes Johnson's motion to dismiss.

ARGUMENT

I. STANDARD OF REVIEW

Johnson's motion does not specify which Rule 12(b) motion to dismiss he asserts, although it appears that he challenges the factual basis for the Court's subject matter jurisdiction under Rule 12(b)(1). When reviewing such a challenge, the "district court may not presume the truthfulness of the complaint's factual allegations." *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). The Court "has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts." *Id.* Where, as here, the

jurisdictional question is not intertwined with the merits of the case, the Court’s “reference to evidence outside the pleadings does not convert the motion to a Rule 56 motion.” *Id.*

II. JOHNSON’S MOTION IS UNTIMELY

Under Rule 12, a defendant who has waived service under Rule 4(d) must file a responsive pleading “within 60 days after the request for a waiver was sent” and must file any motion to dismiss “before pleading.” Fed. R. Civ. P. 12(a)(1)(A)(ii), (b). As a result, the form Waiver of Service of Summons that Johnson executed instructed him to file “an answer or motion under Federal Rule of Civil Procedure 12” within 60 days after June 19, 2015, the date the FEC sent him the waiver. Docket No. 9; *see supra* pp. 3-4. Johnson’s answer or motion to dismiss was therefore due by August 18, 2015, as Johnson’s counsel acknowledged in e-mails with the FEC. *See supra* p. 3. Nevertheless, Johnson did not respond to the Complaint until filing his motion to dismiss on September 8, 2015 — three weeks after it was due. *Id.* p. 4. This failure was not justified by Johnson’s new-found and incorrect belief (*see* Def.’s Br. at 3 & n.2) that the Complaint was improperly filed, as he claims. *See infra* Part III; *see also Easley v. Pettibone Mich. Corp.*, 990 F.2d 905, 908 (6th Cir. 1993) (“A defendant cannot ignore the reality of a complaint, whether or not it contains a valid claim or whether properly or improperly filed, and must respond to it.”); *Serv. Emps. Int’l Union Nat’l Indus. Pension Fund v. Hamilton Park Health Care Ctr., Ltd.*, 304 F.R.D. 65, 70 (D.D.C. 2014) (“[F]ailing to answer or respond to the complaint [is] not a permissible litigation strategy.”). Johnson’s untimely motion should therefore be denied. *Cf. Heber v. United States*, 145 F.R.D. 576, 577 (D. Utah 1992) (“[T]he filing of a late answer is analogous to a motion to vacate a default.” (internal quotation marks omitted)).

III. THE COMPLAINT WAS PROPERLY FILED BECAUSE FEC COUNSEL WERE ADMITTED TO PRACTICE IN THIS DISTRICT AT THE TIME OF FILING

The Court should deny Johnson's motion for the additional reason that the FEC's attorneys were admitted to practice in this District before filing the Complaint, *see supra* p. 2, contrary to Johnson's claims (*see* Def.'s Br. at 1-3). As Johnson recognizes, a complaint has been validly filed if it was "filed by a properly licensed or admitted attorney." (*Id.* at 2, ¶ 7.) On June 18, the Chief Judge signed four orders granting FEC counsel special provisional admission to the Bar of this Court. (Exh. A.) Those orders state that FEC counsel's "admission will remain in effect during the pendency of [this] case." (*Id.*) Also, the clerk's office informed the FEC that these orders would allow its lawyers to practice in this District on this case without moving for *pro hac vice* admission. (Exh. C.) The FEC then properly filed the Complaint. (Docket No. 2.)

Johnson's assertion that "no Complaint has properly been filed" is not only wrong, it is directly at odds with his repeated acknowledgments of the Complaint's validity and his duty to respond by August 18 in his waiver of service of the summons, communications with FEC counsel, and filings with this Court. *See supra* pp. 3-4.

IV. THE COURT SHOULD NOT DISMISS THE COMPLAINT EVEN IF IT DETERMINES THAT *PRO HAC VICE* ADMISSION OR LOCAL COUNSEL IS APPROPRIATE IN THIS CASE

Even if this Court were to conclude that the Commission's attorneys should seek *pro hac vice* admission or retain local counsel, the Complaint should not be dismissed, as Johnson requests. (Def.'s Br. at 1-3.) The proper remedy would be an order directing the FEC's attorneys to apply for *pro hac vice* admission or retain local counsel within a reasonable period of time. *See LaFleur v. Teen Help*, 342 F.3d 1145, 1150 (10th Cir. 2003) (affirming ruling where a Utah federal district court ordered plaintiff "to obtain local counsel within twenty days" and then waited seven months before dismissing for plaintiff's failure to do so).

Johnson points to no local rule that would require the Court to treat the FEC's Complaint and other previous filings as invalid because they were not filed by local counsel (*see* Def.'s Br. at 1-3), and the FEC is aware of no such rule, *cf.* DUCivR 83-1.1(d)(2) (requiring local counsel to file only *pro hac vice* applications); *see also* Dist. of Utah CM/ECF and E-filing Admin. Proc. Manual at 1, ¶ I.A.1 (Mar. 21, 2015) ("All attorneys who are members of the Bar of this Court or admitted to practice *pro hac vice* are eligible to register to become e-filers."), <http://www.utd.uscourts.gov/documents/utahadminproc.pdf>.

Finally, dismissal would be particularly inappropriate here because Johnson has suffered no prejudice, but a dismissal might grant him an opportunity to try to evade responsibility for his FECA violations on statute of limitations grounds upon the Commission's re-filing of the Complaint.

CONCLUSION

For the foregoing reasons, the Commission requests that the Court deny Johnson's motion to dismiss.

Respectfully submitted,

Daniel A. Petalas (dpetalas@fec.gov)
Acting General Counsel

Lisa J. Stevenson (lstevenson@fec.gov)
Deputy General Counsel – Law

Kevin Deeley (kdeeley@fec.gov)
Acting Associate General Counsel

October 9, 2015

Harry J. Summers (hsummers@fec.gov)
Assistant General Counsel

/s/ Kevin P. Hancock
Kevin P. Hancock (khancock@fec.gov)
Attorney

FOR THE PLAINTIFF
FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463
(202) 694-1650

CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2015, I electronically filed plaintiff Federal Election Commission's Memorandum in Opposition to Defendant's Motion to Dismiss with the Clerk of the United States District Court for the District of Utah by using the Court's CM/ECF system, which sent notification of such filing to the following counsel:

Karra J. Porter, Esq.
Scott T. Evans, Esq.
CHRISTENSEN & JENSEN, P.C.
Karra.Porter@chrisjen.com
Scott.Evans@chrisjen.com
Attorneys for Defendant Jeremy Johnson

/s/ Kevin P. Hancock
Kevin P. Hancock (khancock@fec.gov)
Attorney
FEDERAL ELECTION COMMISSION