UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-CV-22643-SCOLA

FEDERAL ELECTION COMMISSION,	
Plaintiff,	
v.	
DAVID RIVERA,	
Defendant.	

MOTION TO DISMISS COMPLAINT

Comes Now, defendant DAVID RIVERA, by and through his undersigned counsel, and pursuant to Federal Rule of Civil Procedure 12(b)(6), respectfully files this motion to dismiss the complaint for failure to state a cause of action upon which relief can be granted. In support of this motion, Mr. Rivera states the following:

Factual Allegations In Complaint

- 1. Plaintiff alleges that David Rivera and Ana Sol Alliegro offered to provide financial support to Justin Lamar Sternad's primary campaign for Florida's 26th Congressional District against democrat Joseph Garcia. (Complaint, paragraph 14 and 15).
- 2. The complaint further alleges that Mr. Rivera contributed \$69,426.20 through "in-kind contributions" to Sternad's campaign by delivering payments directly to vendors involved in providing campaign services to Mr. Sternad's campaign committee. (Complaint paragraphs 13, 16 through 21).

- 3. Sternad is alleged to have been fully aware that Rivera was the source of the funds used to pay for the services of the vendors providing campaign literature for his election, when he signed and mailed multiple disclosure reports to the Federal Election Commission ("FEC") in which he concealed the source of the contributions by falsely reporting them as loans from his personal funds to his election committee. (Complaint, paragraph 22).
- 4. Plaintiff now accuses Mr. Rivera of violating the Federal Election Campaign Act by having made these "in-kind contributions" to the vendors for the benefit of Mr. Sternad's election campaign.

Argument and Legal Analysis

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).

The single count complaint in the instant case alleges that David Rivera ("donor") made several in-kind contributions to vendors in order to benefit the campaign of Justin Lamar Sternad ("candidate"). In doing so, the Federal Election Commission contends that Mr. Rivera, as a donor, violated 52 U.S.C. §30122 (formally 2 U.S.C. §441(f)) of the Federal Election Campaign Act ("FECA"). 52 U.S.C. §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 effect such contribution, and no person shall knowingly accept a contribution made by one person in the name of another person". In addition, plaintiff contends that Rivera's conduct violated the similarly worded federal regulation 11 C.F.R. 110.4(b)(1)(ii). This regulation is similarly titled **Contributions in the Name of Another** and states that "no person shall knowingly help or assist any person in making a contribution in the name of another".

Because FECA imposes limits on individual campaign contributions made directly to candidates, the above statutory section and regulation serve a very important purpose in eliminating efforts by donors to circumvent the limitations imposed by the act. For example, the instant statute and regulation prohibit donors from providing sums of money in excess of the limitations through third parties so that the third parties can make individual contributions to a candidate, and have each contribution be below the statutory limit. Additionally, §30122 prohibits a donor from reimbursing third parties who have made donations in their own name. (See *U.S. v. Whitmore*, 776 F.3d 1074 (9th Cir. 2015; *U.S. v. O'Donnell*, 608 F.3d 546 (9th Cir. 2010).

But what the statute does not prohibit is a donor making direct payments to vendors on behalf of a candidate as alleged in this complaint. A donor who directly pays a vendor for the benefit of a candidate is not in violation of the statute. Such a donation is considered an "in-kind contribution" to the candidate. Although the dollar value of an "in-kind contribution" may be

subject to limits and should be reported, the act of paying for the service on behalf of a candidate is not improper.

In the present case Mr. Rivera is accused of paying the vendors directly and did not utilize "third parties". The complaint makes it very clear that Rivera allegedly hired the same vendors that he had used for his own previous campaigns. (Complaint, paragraph 16). Although the complaint states that Mr. Rivera did not want his name to appear on the invoices of the vendors, the Sternad campaign was fully aware of the identity of the donor of the in-kind contributions. Had the candidate, Mr. Sternad, disclosed the true and known source of the contributions made to the vendors, there would not have been any violation of FECA. Instead, the candidate, who allegedly knew at the time he filed his campaign disclosure forms that Rivera was the donor, chose to lie about the donation.

A violation of §30122 would have occurred had the facts in the complaint shown that third parties paid the vendors on behalf of Mr. Rivera. There is no allegation within the four corners of the complaint alleging that Mr. Rivera either reimbursed third parties or provided funds to third parties so that they could pay the vendors and effectively hide the source of the donation from the Sternad campaign. The vendors served only as expenses to the campaign, which were paid by a donor. Mr. Rivera is alleged to be the sole donor. No "third party" is alleged to have paid the vendors on behalf of the donor. The candidate was allegedly informed that the "in-kind" contributions were being made by Rivera, but it was the candidate who chose not to disclose Mr. Rivera as the source of the in-kind contribution. The failure to properly disclose the true facts on his campaign disclosure forms falls on the shoulders of the candidate, not the donor.

The only remaining theory upon which the plaintiff may rely in supporting its allegation of a §30122 violation would be if Rivera somehow aided and abetted the candidate in the candidate's

misrepresentations of the source of the donation on his disclosure forms. However, aiding and

abetting the candidate in providing false statements on the disclosure forms would violate a

different statute, not §30122 (see Section 30104, Reporting Requirements). In addition, the

plaintiff did not allege that Rivera ordered, instructed, or requested the candidate not to disclose the

source of the contributions. The complaint states something quite different. The plaintiff alleges

that it was Alliegro who instructed candidate Sternad to conceal the source of the contributions by

falsely reporting them as loans from his personal funds to the Sternad committee (Complaint,

paragraph 22).

In conclusion, upon a close review of the facts alleged in this complaint, there is no basis to

support the allegations of the Federal Election Commission that Mr. Rivera violated 52 U.S.C.

30122, the prohibition against making contributions in the name of another person. Therefore, the

Court should enter its order dismissing the complaint for failure to state a cause of action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **November 22, 2017**, 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