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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

FEDERAL ELECTION COMMISSION,

Plaintiff,

v.

STEPHEN ADAMS,

Defendant.

CASE NO. CV 07-4419-DSF (SHx)

MEMORANDUM OF DEFENDANT STEPHEN ADAMS' IN OPPOSITION TO PLAINTIFF FEC'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS; DECLARATION OF BRETT G. KAPPEL IN SUPPORT THEREOF

Date:	February 4, 2008
Time:	1:30PM
Courtroom:	840
Trial Deadlines:	
Discovery Cut-off:	March 31, 2008
Pretrial Conf.:	August 11, 2008
Trial:	September 9, 2008

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MEMORANDUM OF STEPHEN ADAMS IN OPPOSITION TO PLAINTIFF FEC'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

I. INTRODUCTION

The FEC Motion to Dismiss Defendant's Third, Fourth, Fifth, and Eighth Affirmative Defenses is premature and seeks to address issues before relevant discovery is provided by the FEC. It also is contrary to the understanding reached by the parties. Defendant Adams made clear that, in narrowing and patiently waiting for response, discovery would need to be provided before any attack on those affirmative defenses.

In telephone conferences to determine which motions would be filed, the agreement among the parties was to file motions only regarding the jurisdictional issues pertaining to Adams' First and Second Affirmative Defenses (see November 27, 2007, letter to FEC from counsel for Adams, Kappel Decl. Ex. A.). The remaining affirmative defenses rely on discovery that the FEC, in a letter dated December 20, 2007, assured Adams that it was "in the process of determining what we may be able to provide you." (Kappel Decl. Ex. B.) In fact, Adams is filing a Motion to Compel Discovery[1] and Joint Stipulation due to the FEC's failure to provide responses to the limited discovery. Now, rather than attempt to resolve the discovery matter as requested in Judge Fischer's Standing Order to the parties, the FEC seeks to prejudice Adams by bringing these claims to the court in spite of the parties' discussion to only address the jurisdictional matter. (Kappel Decl. Ex. A.)

[1] The portion of the Motion to Compel that is attached represents Defendant Stephen Adams' Stipulation. (Kappel Decl. Ex. C.)

II. CONSIDERATION OF THE FEC'S MOTION TO DISMISS THE THIRD, FOURTH, FIFTH AND EIGHTH AFFIRMATIVE DEFENSES IS PREMATURE BECAUSE THE FEC HAS NOT YET PROVIDED THE LIMITED DISCOVERY RELEVANT TO A CONSIDERATION OF THOSE DEFENSES AND, THEREFORE, THAT PORTION OF THE MOTION IS NOT RIPE FOR THE COURT'S CONSIDERATION

In its Memorandum, the FEC has married together this court's consideration of certain affirmative defenses [Third, Fourth, Fifth, and Eighth] with a consideration of defendant Adams outstanding discovery requests. In this regard, the FEC represents to this court that "... Adams has already served irrelevant and burdensome discovery on the Commission regarding his flawed affirmative defenses." Plaintiff's Memorandum in Support of Motion for Partial Judgment ("Memorandum") at 1. Thus, the FEC attempts to justify its premature motion to have this court consider affirmative defenses on the ground that it only seeks "To narrow the issues in the interest of judicial efficiency and to avoid unnecessary discovery ..." Memorandum at 1. This view is based on the FEC's own exaggerated suggestion that "defendant has already commenced aggressive discovery as to the affirmative defenses and issues here, noticing depositions of two senior Commission staff regarding selective prosecution claims and the Commission's prior enforcement of the relevant statutory provisions, and seeking burdensome, intrusive written discovery on this same irrelevant subjects." For this reason, the Commission excuses its premature filing because, in its view, it is conserving the parties' resources by disposing of these defenses without having to address the outstanding discovery issues.

First, the FEC conveniently ignores the several discussions which the parties have had regarding discovery deficiencies and the agreement and understanding which was reached by which defendant Adams agreed to limit his discovery

requests.[2] At the FEC's request, Adams agreed to withdraw and hold the properly served notices for the depositions of two FEC representatives who had knowledge relevant to issues relating to the affirmative defenses. Moreover, by letter dated November 27, 2007, counsel for Adams wrote to Mr. Summers and Ms. Rajan of the FEC referencing "our recent telephone conversations", indicating that Adams had been able to obtain information sought through the interrogatories by alternate means, and suggesting that Adams would focus its request for complete discovery responses on two interrogatories and one request for production of documents. The letter dated November 27, 2007, specifically indicated that Adams would agree to request a supplemental response to Interrogatory No. 8 and Interrogatory No. 9 which seek "all facts, opinions, analysis or information considered or relied upon by the FEC" in making its recommendation to Congress based upon a finding that "individuals ... are unaware of the Act's registration and reporting provision" and "that some small organizations and individuals ... lack the resources and technical expertise to comply with the Act's registration and reporting requirements." In that letter, Adams made clear that "having pled the affirmative defense, we are entitled to the facts and information relevant to a consideration of their effect." Further, in the letter dated November 27, 2007, counsel for Adams explicitly stated:

> **"We cannot agree to a procedure where you move to strike affirmative defenses without providing discovery relevant to the court's consideration of them. We are entitled to know the basis upon which the FEC made**

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[2] The discovery sought by Adams was not, in the first place, very broad reaching, but was quite focused. Adams propounded ten (10) interrogatories and nine (9) requests for production of documents. Adams also noticed two FEC witnesses for deposition. (Kappel Decl. Ex. D.)

representations to Congress in its Legislative Recommendations."

Further, the letter stated that Adams was going to seek to have the FEC produce the referral of the Adams case which is directly relevant to the basis and reason for prosecution. These two interrogatories and the request for production are the subject of the Motion to Compel, which will separately be filed with the U.S. Magistrate.

A Motion to Compel is necessary because the FEC has provided none of the requested information. On December 20, 2007, the FEC responded to the November 27, 2007, letter from Adams' counsel stating that it was "in the process of determining what we may be able to provide you." To date, despite representations that it has been looking, the FEC has not provided any facts, information, reports, writings, or references of any kind that support the recommendations which it made to Congress representing that, in fact, individuals are unaware of the Act's registration and reporting provisions. Moreover, the FEC has provided no information concerning its referral of the Adams violation for prosecution. While it has purported all this time to be looking for information, this was apparently a stall tactic until such time as it could bring its motions prematurely to this court to strike affirmative defenses before this court's consideration of the discovery issues. Moreover, the FEC has failed to even file any formal response indicating its efforts, if any, to find the requested materials. Rather, without much pretense, the FEC now comes to this court asking that affirmative defenses be prematurely considered. As is clear from the attached correspondence, Adams never agreed that these affirmative defenses were ripe for consideration.

The manner in which the FEC has chosen to treat its consideration of the affirmative defenses is equally offensive. Despite clear language to the contrary, the FEC glibly characterizes all of these affirmative defenses as being based on selective prosecution and challenge to agency action. Of course, by crafting the

issue, the FEC can present its canned argument on agency discretion. However, unfortunately for the FEC, its arguments do not address the real issues presented by the language of the affirmative defenses.

Defendant Adams presents to this court the argument that the enforcement in this case raises serious First Amendment and Due Process Clause issues. The Commission's own enforcement records make excruciatingly clear that, until this case, violations of the provisions at issue were virtually never enforced. Under these circumstances, the Due Process Clause precludes the imposition of a penalty on Adams through this enforcement because of a violation of his constitutional rights. When these affirmative defenses are fully and properly briefed, upon the facts and the law, there are cases not considered by the FEC which provide a statement of the rights sought to be preserved by the affirmative defenses. For example, in *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1335-38 (6th Cir. 1978), the Sixth Circuit found that even though Diebold had violated the OSHA regulation, the Due Process Clause prohibited the imposition of a penalty on Diebold for the violation because "a collection of several factors . . . operated together to deprive Diebold of a constitutionally sufficient warning." Among the factors named by the court were: (1) that Diebold and the other members of the affected industry were unaware of the regulation and (2) that the pattern of administration enforcement demonstrated that the regulation had not been generally enforced.

Adams has a right to fully litigate and defend against the Complaint of the FEC by advancing his Third, Fourth, Fifth, and Eighth Affirmative Defenses which raise First Amendment and Due Process Clause issues. The FEC may not avoid discovery of the evidence in its files which may support these defenses by mischaracterizing all of the affirmative defenses as "selective prosecution" – a phrase that does not appear anywhere in Adams Answer.

At this stage in the litigation, the court should demand that the FEC stand by the understanding between the parties that only this court's jurisdiction of the

subject matter of the FEC Complaint against Adams is ripe for determination. This court should allow Adams to proceed with its Motion to Compel before the United States Magistrate. The FEC ignored its duty to conciliate. The FEC now seeks to ignore its duty to respond to discovery. For these actions, which amount to arrogance and impatience with any party seeking to explore the basis for its positions, the FEC seeks deference. To the contrary, it must be held accountable for its actions.

III. PLAINTIFF FEDERAL ELECTION COMMISSION HAS MISCHARACTERIZED DEFENDANT ADAMS' THIRD, FOURTH, FIFTH AND EIGHTH AFFIRMATIVE DEFENSES IN AN EFFORT TO PREVENT DEFENDANT ADAMS FROM OBTAINING DISCOVERY TO ESTABLISH HIS FIRST AMENDMENT AND DUE PROCESS CLAIMS

Even without the discovery, the FEC's Motion to Dismiss the Third, Fourth, Fifth, and Eighth Affirmative Defenses lacks merit. The Commission has seized upon the single word "selectively" in Adams' Fifth Affirmative Defense to make the argument that somehow Adams' Third, Fourth, Fifth and Eighth Affirmative Defenses are all in some way dependent on a claim of selective prosecution. This is a gross mischaracterization of Adams' affirmative defenses and a transparent effort to prevent Adams from obtaining discovery. Adams discovery seeks to support his argument that penalizing him for alleged violations of 2 U.S.C. § 434(g)(2)(A) and 2 U.S.C. § 441d(a)(3) would violate his rights under the First Amendment and the Due Process Clause of the Constitution. Adams' Third and Fifth Affirmative Defenses specifically invoke Adams' rights under the First Amendment and the Due Process Clause and Adams' Fourth and Eighth Affirmative Defenses are dependent upon either a Due Process Clause or First Amendment analysis.

The Commission here seeks to impose a penalty of up to two million dollars ($2,000,000) on Adams for allegedly failing to include a proper disclaimer on

billboards expressly advocating the re-election of President George Bush and Vice President Dick Cheney in the days leading up to the 2004 general election (2 U.S.C. § 441d(a)(3)) and then failing to file the appropriate form with the Commission within the specified time period (2 U.S.C. § 434(g)(2)(A)). The imposition of such a fine on Adams clearly has extremely serious First Amendment implications. Adams' express advocacy of the re-election of his preferred candidates for President and Vice President is core political speech entitled to the highest protection under the First Amendment. The Supreme Court has long held that "[d]iscussion of . . . the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to 'assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley v. Valeo*, 424 U.S. 1, 14-15, 96 S.Ct. 612, 632, 46 L.Ed.2d 659 (1976)(*per curiam*)(*quoting Roth v. United States*, 354 U.S. 476, 484, 77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498 (1957)). More recently, the Supreme Court has ruled that the First Amendment's protection of core political speech is so broad that it entitles the speaker to engage in such speech ***anonymously***. *McIntyre v. Ohio Elections Commission*, 514 U.S.334, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995). *McIntyre* raises extremely grave concerns that the Commission may not constitutionally seek to impose a penalty on Adams for his alleged violation of 2 U.S.C. § 441d(a)(3). *See McIntyre*, 514 U.S. at 376-77, 115 S.Ct. at 1533 (Justices Scalia and Rehnquist, dissenting).

Similarly, courts have held that the Due Process Clause may preclude the imposition of a civil penalty for the violation of a statute or regulation where the existence of the statute or regulation was generally unknown and violations were rarely, if ever, enforced. *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1335-38 (6th Cir. 1978). Both of those elements are present in this case. The specific reporting requirement that Adams is alleged to have violated, 2 U.S.C. § 434(g)(2)(A), was, as

the Commission concedes, Plaintiff's Memorandum at 3, adopted as part of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, § 212(a), 116 Stat. 81 (2002), and was in effect for the first time for the 2003-2004 election cycle. The Commission's own records demonstrate that virtually no one was aware of this reporting requirement at the time of the 2004 general election. In the two months prior to the 2004 general election, a total of ten (10) individuals in the entire United States – including Adams – filed the appropriate form with the Commission to disclose their personal independent expenditures.[3]

The Commission cannot have been surprised at this result. 2 U.S.C. § 434 contains the only reporting requirements in the entire Federal Election Campaign Act that apply to individual persons. Since at least 2002, well before the events that are the subject of this case took place, the Commission has known that individuals were largely unaware that FECA's independent expenditure reporting requirements applied to individual persons rather than just political committees. Indeed, in every year since 2002 that the Commission has made legislative recommendations to Congress, it has asked Congress to change the law specifically because no one is

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[3] Press Release, Federal Election Commission, September Independent Expenditure Disclosure Summarized (Oct. 5, 2004)(no individuals reported filing FEC Form 5); Press Release, Federal Election Commission (Oct. 8, 2004)(no individuals reporting filing FEC Form 5 in the first seven days of October 2004); Press Release, Federal Election Commission, Independent Expenditure Disclosure Summarized (Oct. 20, 2004)(three individuals – George Soros, Lourdes M. Chu and Yaffa Dermer – reported filing FEC Form 5 in the first 18 days of October 2004); Press Release, Federal Election Commission (Oct. 25, 2004)(two individuals – Jonathan J. Halperin and Eric A Barkan – reported filing FEC Form 5 between October 19, 2004 and October 24, 2004); Press Release, Federal Election Commission (Oct. 29, 2004)(five individuals – George Soros, John R. Bona, Fr. Frank Pavone, H. Seward Lawlor, and Jack E. Robinson – reported filing FEC Form 5 between October 25, 2004 and October 28, 2004. There is no explanation why this list does not include Adams, whose FEC Form 5 was filed on October 28, 2004).

aware of this reporting requirement. *See, e.g.*, FEC Legislative Recommendations 2007, recommending that the reporting threshold for filing disclosures of independent expenditures under 2 U.S.C. § 434 be raised because "individuals . . . in some cases, are unaware of the Act's registration and reporting provisions [and] that some small organizations and individuals . . . lack the resources and technical expertise to comply with the Act's registration and reporting requirements . . . ."[4]

Because the Commission has known for so long that the reporting requirements of 2 U.S.C. § 434 applicable to individuals are virtually unknown, it should come as no surprise that the reporting requirement has virtually never been enforced. The Commission correctly notes that an independent expenditure reporting requirement applicable to individuals has been a feature of the FECA for over 30 years, Plaintiff's Memorandum at 17. In that time, nearly a third of a century, the Commission has, prior to this case, sought to impose a penalty on an individual for violating that requirement precisely one (1) time. *See* FEC Conciliation Agreement in Matter Under Review 5123 (Dwight D. Sutherland, Jr.)(attached as Exhibit D to Plaintiff's Memorandum).

Clearly the 2 U.S.C. § 434(g)(2)(A) requirement that individuals file a report with the Commission when they make an independent expenditure was, at the time of the events that are the subject of this case, virtually unknown. Moreover, the Commission's own enforcement records make it excruciatingly clear that, until this case, violations of this provision were virtually never enforced. Under these circumstances, the Due Process Clause precludes the imposition of a penalty on Adams because of "the fundamental principle that statutes and regulations which

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[4] *Available at* http://www.fec.gov/law/legislative_recommendations_2007.shtml#thresholds

purport to govern conduct must give an adequate warning of what they command or forbid." *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1335 (6th Cir. 1978).

Adams' Third, Fourth, Fifth and Eighth Affirmative Defenses raise serious First Amendment and Due Process Clause issues that, upon presentation of the case, may preclude the imposition of any penalty on Adams. The Commission may not prevent discovery of evidence to support these defenses by merely mischaracterizing these affirmative defenses as all related to an affirmative defense of "selective prosecution" – a phrase that does not appear anywhere in Adams' Answer.

IV. THE FEC'S INTERPRETATION OF ITS DUTY TO CONCILIATE UNDER 2 U.S.C. 437g (a)(4)(A)(i) IS CLEARLY ERRONEOUS AND THEREFORE IS ENTITLED TO NO DEFERENCE.

Preliminarily, the court should disregard the FEC's comment that defendant's Answer, which admits only the allegation in the Complaint that this court has jurisdiction over FECA disputes, serves as a waiver of its affirmative defense. It is not only contrary to a correct reading of the Answer, but lack of subject matter jurisdiction cannot be waived. This defense can be raised at any time pursuant to Fed. R. Civ. P. 12(h)(3) which provides:

> "(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

On the merits, it is the FEC's litigation position that of the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 437g(a)(4)(A)(i), only requires the FEC to invite Adams to conciliate to meet the statutory requirement. Memorandum at 18. However, the FEC's grotesquely restrictive interpretation of its duty to conciliate runs directly counter to the statute's legislative history, is unsupported by any case law, and defies common sense. As such, in this case, the FEC position, not founded on any adjudication or rule-making is not entitled to any deference, but this court must interpret the true purpose of the statute.

A. Statutory Mandate

The Supreme Court has held that:

> [t]he interpretation put on the statute by the agency charged with administering it is entitled to deference[5] but the courts are the final authorities on issues of statutory construction. They must reject administrative constructions of the statute, whether reached by adjudication or by rule-making, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.

FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 31-32, 102 S.Ct. 38, 70 L.Ed.2d 23 (1981) [Internal citations in footnote.] [Emphasis supplied.][6] *See also AFL/CIO v. Fed. Election Comm'n*, 177 F. 2d 48 (D.C. Cir. 2001) (agency's interpretation of its own regulation will prevail unless it is inconsistent with the plain terms of the regulation).

Pursuant to *Democratic Senatorial Campaign Comm.*, the court has the power to decide the scope of the FEC's duty to conciliate under FECA to assure that the FEC is complying with Congressional mandates. Because the FEC's interpretation of FECA is contrary to the legislative history and frustrates the mandate of FECA as set by Congress, it must be rejected by the court.

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[5] *NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 275, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974); *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801 13 L.Ed.2d 616 (1965).

[6] *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (*citing SEC v. Sloan*, 436 U.S. 103, 118, 98 S.Ct. 1702, 1711, 56 L.Ed.2d 148 (1978); *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 745-746, 93 S.Ct. 1773, 1784-1785, 36 L.Ed.2d 620 (1973); *Volkswagenwerk v. FMC*, 390 U.S. 261, 272, 88 S.Ct. 929, 935, 19 L.Ed.2d 1090 (1968); *NLRB v. Brown,* 380 U.S. 278, 291, 85 S.Ct. 980, 988, 13 L.Ed.2d 839 (1965).

FECA's conciliation requirement is intended "to limit unjustifiable litigation burdens that might otherwise be imposed on the courts and on individuals against whom a complaint has been filed." H.R. Report No. 94-917 at 4 (1976). The primary objective of the conciliation requirement is for the benefit of those charged with violations and the federal courts so as to "effectively prevent and redress violations, and to winnow out, short of litigation, insubstantial complaints and those matters as to which settlement is both possible and desirable." *Id.* The FEC is required to pursue conciliation towards this objective in a manner designed to accomplish the intended results.

The legislative history makes clear that the "attempt" to conciliate really means an attempt to keep individuals out of court and to clear the court docket of cases that, with a good faith effort, can be resolved short of litigation. However, the FEC's interpretation of the statute - that all that is required is for the FEC to invite Adams to conciliate by penning an opening offer conciliation agreement - runs contrary to the Congressional mandate. "[I]n this delicate first amendment area, there is no imperative to stretch the statutory language…." *Fed. Election Comm'n v. Machinists Non-Partisan Political League*, 655 F.2d 380, 394 (D.C. Cir. 1981)(quoting *Richmond v. United States*, 275 U.S. 331 (1928). The FEC's conduct in this case does not constitute the level of effort mandated by the legislative history or even the case law relied upon by the FEC.

B. <u>FEC's Interpretation of Attempt to Conciliate Does Not Meet Any Standard</u>

The FEC is able to cite no case authority to support a finding that its efforts satisfied its statutory duty. Notably, the FEC did not even meet the conciliation standards outlined in the case which it did cite in its Memorandum. Even in *FEC v. Club For Growth*, 432 F. Supp. 2d 87 (D.D.C. 2006), the FEC had the wherewithal to communicate with the defendant and respond to the defendant's counteroffer in a timely fashion. *Id*. at 91. In *Club For Growth*, the FEC made its initial conciliation

proposal on August 8, 2005 and indicated on August 11, 2005 that it was open to resolving the matter through conciliation and that it would carefully consider the terms of any counterproposal made by Club for Growth. The Club for Growth did make a formal counterproposal on September 14, 2005, which the *FEC formally rejected by letter five days later* on September 19, 2005. Club for Growth made no further effort within the remainder of the statutory conciliation period. All of these conciliation efforts took place within the 90-day maximum conciliation period.

Club for Growth stands for the simple proposition that the statute's requirement that the FEC "attempt" to conciliate, at a minimum, requires that the Commission respond to a legitimate counteroffer within the mandatory conciliation period. In the Adams case, the FEC totally ignored and failed to respond *at all* to a legitimate counteroffer until 62 days after the expiration of the 90-day maximum conciliation period.

A review of the basic definitions of "attempt" and "conciliation" even run counter to the FEC's interpretation of its duty to conciliate. "Attempt" is defined in Black's Law Dictionary as "an act or instance of making an *effort* to accomplish something"; "conciliation" is defined as "a settlement of a dispute in an agreeable manner."[7] Thus, an attempt to conciliate is making an effort to accomplish the settlement of a dispute. Such an effort requires more than simply making an offer. In the Adams case, all the FEC did was present a proposed conciliation agreement. The FEC failed to timely respond to Adams' counterproposal and never attempted to conference the matter with Adams.

The FEC cites *Club For Growth* for the proposition that:

> [T]he statute does not require the Commission to resolve the dispute solely through conciliation, but also expressly

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[7] Black's Law Dictionary 137, 307 (8th ed. 2004).

> sanctions the FEC's use of 'persuasion,' … a process which, by its nature, involves a greater role in convincing and a lesser role in compromising.

Memorandum at 19. But the FEC never even attempted to persuade Adams to accept its proposed conciliation agreement. The FEC does not even adhere to the standards of the case it presents.

Contrary to the arguments made by Plaintiff in its Memorandum - that the statutory language of FECA doesn't instruct the FEC on the nature of its offerings - Adams is only asking the Court to determine whether the effort taken by the FEC in this case can withstand scrutiny when examined against its Congressional mandate. Adams emphatically answers that it cannot. The fact that Adams' counteroffer is within the bounds of any reasonable precedent for such a violation exposes the FEC's lack of interest in any reasonable conciliation.

The FEC further argues that "[t]he Commission's 'attempt' to conciliate does not have to be successful; otherwise, the Commission would never have occasion to initiate a civil enforcement action and its statutory authority to do so would be rendered superfluous." Memorandum at 18. Yet, the statutory language and case law make clear that the occasion to initiate civil action should be reserved for those cases where an attempt to conciliate fails. *EEOC v. The Zia Co.*, 582 F.2d 527 (10th Cir. 1978) (holding that EEOC is expected to act in good faith during conciliation and only if conciliation proves impossible should the EEOC file suit).[8] In the Adams case, the FEC's failure to even respond to Adams' counteroffer until two months after the expiration of the 90-day conciliation period prevents any evaluation of whether settlement was possible. While there is no requirement that conciliation

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[8] On page 20 of the FEC's Memorandum, the FEC agrees that the EEOC enforcement context is "analogous" to the FEC context.

be successful, in order for the FEC to meet its duty to attempt to conciliate; the FEC must, at a minimum, respond to a counteroffer before the end of the statutory conciliation period to discharge its duty. In the Adams case, the FEC simply failed to meet this minimal requirement.

C. High Deference Standard Inapplicable to Adams Case

It is important for the court to note that the FEC's Memorandum does not explicitly claim that it, in fact, conciliated in good faith. The FEC does not argue that there was any meaningful effort at conciliation. Rather, the FEC tries to guide the Court away from its lack of conciliation by ordering the Court to find that the FEC's interpretation of its duty under FECA should be given "high deference". Memorandum at 18. To support its proposition that the court must give "high deference" to the conduct of the conciliation process, the FEC cites *Club For Growth*, *supra* at 4. However, *Club For Growth* relies on *Hagelin v. Fed. Election Comm'n*, 411 F.3d 237 (D.C. Cir. 2005), which does not apply to enforcement actions brought by the FEC pursuant to 2 U.S.C. §437g(a)(6)(A) – the provision of FECA on which this suit was brought. *Hagelin* was a challenge to the FEC's decision to dismiss a complaint filed with the FEC pursuant to 2 U.S.C. §437g(a)(8)(A). Opposition to the FEC's decision to dismiss complaints may be filed in U.S. District Court under 2 U.S.C. §437g(a)(8)(A) and the court may reverse the FEC's dismissal of the complaint only if the court concludes that the FEC's dismissal was "contrary to law." 2 U.S.C. §437g(a)(8)(C). The FEC's complaint against Mr. Adams, however, was brought pursuant to 2 U.S.C. §437g(a)(6)(A), which does not contain the "contrary to law" provision of 2 U.S.C. §437g(a)(8)(C). Therefore, the "high deference" which the FEC is accorded when it takes action to dismiss a complaint filed, not by it, but by a third party, has no application whatsoever to the issue before the court. The FEC seeks cover for its failure to abide by its own statute, where none can be found.

Here, this court must decide whether the FEC has discharged its statutory duty. There is nothing which supports a finding that it did.

D. FEC'S Interpretation Of Its Duty To Conciliate Defies Common Sense

The FEC's principal purpose is to regulate the campaigns of candidates for federal office, including Members of Congress. *See* Amanda S. La Forge, *The Toothless Tiger - Structural, Political and Legal Barriers to Effective FEC Enforcement: An Overview and Recommendations*, 10 Admin. L.J. Am. U. 351, 365 (1996). Congress designed the conciliation process in order to resolve campaign finance violations quickly and confidentially, so that Members could not be attacked during campaigns with baseless allegations. *See AFL/CIO v. Fed. Election Comm'n*, 177 F.2d 48, 63-64 (D.D.C. 2001). It defies credulity to believe that in creating "an agency to oversee members of Congress, Congress" would have given the FEC the power to make "take-it-or-leave-it" offers during conciliation in order to avoid litigation. *See* Kimberly N. Brown, *What's Left Standing? FECA Citizen Suits and the Battle for Judicial Review*, 55 U. Kan. L. Rev. 677, 710 (2007).

If the Court were to ratify the FEC's new interpretation of its conciliation requirement for this litigation – the take-it-or-leave-it approach to negotiating – a new era of *Boulwareism* will be ushered in causing Congress's carefully crafted conciliation process to fail and flooding the federal courts with hundreds of campaign finance cases a year. *See Nat'l Labor Relations Board v. General Electric Co.,* 418 F.2d 736, 762 (1969) ("*NLRB*") (holding that employer was guilty of bad faith in negotiations where employer took a take-it-or-leave-it, unbending approach to negotiations thus emphasizing opposing party's powerlessness). The court in *NLRB* firmly stated that "[s]uch conduct, we find, constitutes a refusal to bargain "in fact,'" *NLRB* at 762 (*citing NLRB v. Katz*, 369 U.S. 736, 743, 82 S.Ct. 1107 (1962) and demonstrates "an absence of subjective good faith." *NLRB* at 763 (citing *NLRB v. Herman Sausage Co.,* 275 F.2d 229, 234 (5th Cir. 1960).

The FEC currently processes roughly 300 enforcement cases per year. FEC Annual Report 2006 at 61. Of that number, only 3 to 5 actually result in a complaint filed in federal district court, meaning that 98% of all cases are resolved through conciliation. The FEC's position in this case is not only inconsistent with FECA and interpreting case law, but with the FEC's own practice.

FECA was drafted to require conciliation because it is generally believed that respondents prefer to quietly settle FEC allegations through the administrative process "rather than subject themselves to litigation, its related publicity, and the potentially higher civil penalties. This small percentage of cases filed in court reflects the belief of many respondents that litigation should be avoided at all cost." Kenneth A. Gross, *The Enforcement of Campaign Finance Rules: A System in Search of Reform*, 9 Yale L. & Pol'y Rev. 279, 285-286 (1991). However, the FEC's new take-it-or-leave-it approach to conciliation will prevent respondents from truly participating in the process of conciliation and correction.

V. CONCLUSION

It is respectfully submitted that this court should grant Defendant Adams' Motion to Dismiss the Plaintiff's Complaint for Failure of Subject Matter Jurisdiction based on the FEC's violation of its statutory duty to attempt to conciliate in good faith and correct any alleged violations before the filing of a Complaint in the United States District Court. Second, this court should rule that the motion of the FEC to dismiss the Third, Fourth, Fifth, and Eighth Affirmative Defenses, which raise serious First Amendment and Due Process Clause issues is premature. These cannot be decided until the discovery sought by Adams is provided either in response to the two interrogatories and one request for production which are at issue or, if the information is unavailable in that form, from the two knowledgeable witnesses who have been noticed for deposition.

DATED: January 18, 2008

VORYS, SATER, SEYMOUR AND PEASE LLP
JOSEPH D. LONARDO
BRETT G. KAPPEL

By: /s/
Brett G. Kappel
Attorneys for Defendant
STEPHEN ADAMS

DECLARATION OF BRETT G. KAPPEL

I, BRETT G. KAPPEL, declare and state as follows:

1. I am an attorney at Vorys, Sater, Seymour and Pease LLP. I have personal knowledge of the facts set forth herein, except as to those stated on information and belief and, as to those, I believe them to be true. If called as a witness, I could and would competently testify to the matters stated herein.

2. Attached hereto as Exhibit A is a true and correct copy of Joseph D. Lonardo's correspondence, dated November 27, 2007, to Harry J. Summers and Claire N. Rajan.

3. Attached hereto as Exhibit B is a true and correct copy of Claire N. Rajan's correspondence, dated December 20, 2007, to Joseph D. Lonardo.

4. Attached hereto as Exhibit C is a true and correct copy of Defendant's draft Motion to Compel Discovery and accompanying Joint Stipulation.

5. Attached hereto as Exhibit D is a true and correct copy of Plaintiff's Combined Responses and Objections to Defendant's Interrogatories and Document Requests.

I declare under penalty of perjury that the foregoing is true. Executed this 18th day of January, 2008 at Washington, D.C.

/s/
BRETT G. KAPPEL