Thomasenia P. Duncan
David Kolker
Harry J. Summers (CA Bar #147929)
Claire N. Rajan (CA Bar #238785)
crajan@fec.gov
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650
(202) 219-0260 (facsimile)

ATTORNEYS FOR THE PLAINTIFF
FEDERAL ELECTION COMMISSION

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

FEDERAL ELECTION COMMISSION, Plaintiff, v. STEPHEN ADAMS, Defendant	Civ. No. 07-4419-DSF (SHx) **FEC'S REPLY TO DEFENDANT STEPHEN ADAMS' OPPOSITION TO FEC'S MOTION FOR PARTIAL JUDGMENT AS TO CERTAIN AFFIRMATIVE DEFENSES** Courtroom: 840 Judge: Dale S. Fischer

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FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL JUDGMENT AS TO CERTAIN AFFIRMATIVE DEFENSES

Plaintiff Federal Election Commission (FEC or Commission) has moved for partial judgment as to certain affirmative defenses raised by defendant Stephen Adams. In his opposition, Adams argues that the Commission has mischaracterized four of his defenses as being rooted in a claim of selective prosecution, even though he does not deny that these defenses all rest on his claim that he has been unconstitutionally singled out for enforcement of the independent expenditure disclosure provisions of the Federal Election Campaign Act, 2 U.S.C. §§ 431-55 (FECA or Act), based on his status as an "individual" person. Consistent with his attempt to disavow a selective prosecution defense, Adams neither refutes our showing about the heavy burden a defendant bears in making such a defense, nor alleges any impermissible grounds such as race or religion that were the supposed basis for the Commission's decision to bring this action.

Having essentially conceded that his selective prosecution defense must fail, Adams relies on broad claims that enforcement against him would violate his First Amendment and Due Process rights because the Commission has allegedly not enforced the relevant statutory provisions rigorously enough in the past. But as we demonstrated in our opening brief, these arguments are foreclosed as a matter of law; in response, Adams offers nothing that refutes the dispositive authority.

Adams also argues that the Commission's motion is premature because he has not obtained discovery as to the challenged affirmative defenses. However, the point of a motion under Fed. R. Civ. P. 12(c) is that the challenged claims cannot stand as a matter of law, regardless of information Adams could obtain through discovery. Accordingly, this Court should enter

judgment on the pleadings as to Adams' First, Second, Third, Fourth, Fifth, and Eighth affirmative defenses.

I. THE COMMISSION IS ENTITLED TO JUDGMENT AS TO DEFENDANT'S THIRD, FOURTH, FIFTH, AND EIGHTH DEFENSES, WHETHER THEY ARE BASED ON SELECTIVE PROSECUTION OR OTHER CONSTITUTIONAL CLAIMS

Adams' affirmative defenses asserting selective prosecution and/or related constitutional claims based on his status as an individual should be dismissed because, as we have shown (FEC Mtn. for Partial Jmt. 10-17), there is no set of facts under which Adams can prevail.

As a preliminary matter, Adams contends that the Commission agreed to seek judgment only as to his conciliation defenses. Defendant's Memorandum In Opposition To Plaintiff FEC's Motion For Partial Judgment (Def. Opp.) at 1. However, there was no such agreement. The Commission's counsel has always maintained that its motion would seek judgment regarding the selective prosecution and conciliation affirmative defenses. *See, e.g.*, Joint Rule 26 Report at 15 ("The Commission currently intends to file a motion for judgment on the pleadings as to the affirmative defenses related to alleged selective enforcement and the alleged failure to conciliate as required by the Act."). The letter that Adams cites from FEC counsel makes no mention of these motions. Kappel Decl. Ex. B. At no point did FEC counsel agree to limit the scope of this motion, nor is Adams' agreement required for the Commission to make such a motion.[1]

[1] Adams notes that counsel conferred as to "which motions would be filed." Def. Opp. at 1. FEC counsel did confer regarding its motion, pursuant to Local Rule 7-3, and, in the interest of efficiency, asked whether Adams' counsel would agree to simultaneous briefing and hearing for the parties' dispositive motions. Counsel also discussed certain responses to Adams' written discovery, in an attempt to resolve any discovery disputes without the need for judicial action. However, FEC counsel never agreed that "only this court's jurisdiction of the subject matter of the FEC Complaint against Adams is ripe for determination." Def.

A. Several Of Adams' Defenses Amount To An Untenable Claim Of Selective Prosecution

Adams argues (Def. Opp. at 5) that the Commission "mischaracteriz[es] all of [his] affirmative defenses as 'selective prosecution,'" even though his Fifth Affirmative Defense is that the Commission cannot "selectively enforce" the Act against him. Regardless of his semantics, Adams continues to discuss several of his defenses in terms that effectively present a selective prosecution defense. For example, Adams' erroneous contention that the Commission has not enforced the independent expenditures provisions against anyone else amounts to an argument that the Commission selectively enforced the law against Adams. Indeed, the theme of Adams' Third, Fourth, Fifth, and Eighth defenses seems to be that the Commission cannot enforce the provisions at issue against him as an individual because the agency has allegedly failed to adequately publicize or enforce the provisions in the past. By any name, this is a selective prosecution defense.

In any event, Adams' opposition fails to respond to the Commission's main arguments regarding these defenses. *See* FEC Mtn. for Partial Jmt. at 10-17. Adams does not dispute that the Commission's decision to sue is not reviewable. *See* FEC Mtn. for Partial Jmt. at 10-12. *See, e.g.*, *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 709 (D.C. Cir. 1996) (the judiciary has "no statutory authority to review the FEC's decision to sue"). Adams also does not dispute that a selective prosecution defense cannot be applied to him based on his status as an individual person or a class of one. *See* FEC Mtn. for Partial Jmt. at 12-16; *Falls v. Town of Dyer, Indiana*, 875 F.2d 146, 148 (7th Cir. 1989) ("Selectivity is not the same as applying the law to one person alone. A government legitimately could enforce

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Opp. at 5-6. Adams also claims that "the FEC seeks to prejudice Adams by bringing [discovery] claims to the court," *id*. at 1. In mentioning defendant's discovery requests, however, the Commission merely emphasized one reason why its motion for partial judgment on the pleadings should be granted promptly: to prevent discovery and related disputes regarding information that, as a matter of law, is irrelevant to the case.

its law against a few persons (even just one) to establish a precedent, ultimately leading to widespread compliance. The prosecutor may conserve resources for more important cases.").

B. To The Extent Adams' Defenses Are Based On The First Amendment, They Are Precluded As A Matter Of Law

Adams argues (Def. Opp. at 6) that his affirmative defenses "specifically invoke" his First Amendment rights or are "dependent upon" First Amendment analysis. However, in support he provides only one paragraph of generalizations (Def. Opp. at 6-7), without addressing our showing that his defenses that invoke or depend upon the First Amendment have long been foreclosed by Supreme Court and Ninth Circuit precedent. *See* FEC Mtn. for Partial Jmt. at 2-4.

As we explained, the Supreme Court has upheld mandatory disclosure of independent expenditures over $250 that expressly advocate the election or defeat of a clearly identified federal candidate. *Buckley v. Valeo*, 424 U.S. 1, 82 (1976) (Independent expenditure reporting is "a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view."). The Court found the disclosure furthered two compelling government interests, to stem apparent and actual corruption and to provide vital information to the electorate. *Id.* at 80-81. Of course, the specific provision Adams violated applies only to independent expenditures of $10,000 or more. *See* 2 U.S.C. § 434(g)(2).

Moreover, the Ninth Circuit has considered and rejected a First Amendment defense for the same types of violations that occurred in this case. In *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), defendant paid $25,000 to place full-page advertisements in *The New York Times* and *The Boston Globe* advocating the defeat of President Carter in the 1980 presidential election. Following enforcement proceedings and unsuccessful conciliation attempts, the Commission

sued to enforce the Act, and Furgatch moved to dismiss on First Amendment grounds. Relying upon *Buckley*, the Ninth Circuit found that independent expenditure disclosure requirements *further* the First Amendment interests of voters by providing necessary information to the electorate regarding election-related speech. "One goal of the First Amendment . . . is to ensure that the individual citizen has available all the information necessary to allow him to properly evaluate speech. . . . Therefore, disclosure requirements, which may at times inhibit the free speech that is so dearly protected by the First Amendment, are indispensible to the proper and effective exercise of First Amendment rights." *Id*. at 862. The Court also held that independent expenditure disclosure requirements serve to "deter or expose corruption, and therefore to minimize the influence that unaccountable interest groups and individuals can have on elected federal officials." *Id.* The Court concluded that the Act's disclosure provisions serve an important congressional policy and a very strong First Amendment interest. Properly applied, they will have only a "'reasonable and minimally restrictive' effect on the exercise of First Amendment rights." *Id*. (quoting *Buckley*, 424 U.S. at 82). Adams fails to mention *Furgatch* in his opposition.

Rather than address the precedent that controls here, Adams cites dissenting opinions in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), a case about whether an individual who spent $100 on leaflets opposing a school tax levy could remain anonymous despite a state disclosure statute. Def. Opp. at 7. In the majority opinion, the Court in *McIntyre* distinguished the Ohio law from the disclosure provisions upheld in *Buckley* on the grounds that the state law was not sufficiently narrow and that ballot contests do not engender the same potential for actual or apparent corruption that exists in candidate elections. 514 U.S. at 354-56. Moreover, the fundamental issue in *McIntyre* was whether the First Amendment protected the anonymity of the speech at issue. In this case, Adams

has made no claim that he is entitled to anonymity, and he has supplied no factual basis for such a claim, given that he placed his name on the 435 billboards for which he spent $1,000,000.

C. To The Extent Adams' Defenses Are Based On Due Process, They Are Precluded As A Matter of Law

Adams also argues that his defenses are based on the Due Process Clause, but he repeatedly cites only one wholly inapposite Sixth Circuit case to justify his claims, *Diebold, Inc. v. Marshall*, 585 F.2d 1327 (6th Cir. 1978). Def. Opp. at 7-10. In that case, Diebold was fined $190 for violating an OSHA safety regulation, but the reviewing administrative law judge found that a second, conflicting regulation exempted the company from the first regulation. The Occupational Safety and Health Review Commission reversed the ALJ and Diebold filed suit, claiming a due process violation. The court concluded that the regulations could not constitutionally have been applied to Diebold because they were too vague, based on three factors: (1) the "inartful drafting" of the conflicting regulations; (2) the particular safety mechanism at issue had been "rarely used" in practice; and (3) "confirmation of industry practice by the pattern of administrative enforcement" by a majority of ALJs, who had not required the safety mechanism. *Diebold*, 585 F.2d at 1336. The court noted that although "none of these factors is particularly compelling on its own, their cumulative effect is such that we cannot ignore it." *Id*. at 1337.

The current case is radically different. Adams makes no claim that the FECA provisions at issue are vague. The statutory language requiring reporting and disclaimers for independent expenditures is clear. 2 U.S.C. §§ 431(17), 434(g)(2)(A), and 441a(d). Moreover, when the Supreme Court decided *Buckley*, it foreclosed a vagueness challenge to the reporting requirements for independent expenditures. By narrowly construing the Act to require

individuals to disclose "expenditures" only if they "expressly advocate the election or defeat of a clearly identified candidate," 424 U.S. at 80, the Court explained that it was thereby eliminating any potential problems stemming from vagueness or overbreadth, *id.* at 79-80. Adams does not deny that his expenditures expressly advocated the election of President Bush.

Ignoring *Buckley*, Adams relies (Def. Opp. 5, 7-8) on *Diebold* and argues that "[t]he Commission's own records demonstrate that virtually no one was aware of this reporting requirement at the time of the 2004 general election." Def. Opp. at 8. In fact, however, the Commission's records demonstrate that knowledge about the reporting requirements was very high. For example, between January 1, 2003 and August 31, 2004, more than $65.8 million in independent expenditures were reported by individuals, political committees, and other organizations.[2] In stark contrast to the facts in *Diebold*, it is clear that many people and groups understood the reporting requirements.

Adams' attempts to use the third *Diebold* factor are also unpersuasive. The *Diebold* court found that the majority of ALJs addressing the issue in the past had found the safety mechanism was not required, as it was exempted under the second, conflicting regulation. Adams suggests (Def. Opp. at 7) that this pattern is similar to the Commission's alleged practice of not enforcing the provisions at issue here. To the contrary, there is no pattern here of judicial determinations in Adams' favor, no vague regulation, no conflicting statutory or regulatory provisions, and no history of non-enforcement. Adams asserts (Def.

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[2] The FEC Record, *Statistics: Independent Expenditures for September and October*, Vol. 30, No. 12 at 7 (Dec. 4, 2004) (this number is underinclusive as reports were still being processed at the time of printing of this article) (available at http://www.fec.gov/pdf/record/2004/dec04.pdf). *See also* FEC Press Release *2004 Presidential Campaign Financial Activity Summarized* (Feb. 3, 2005) (available at http://www.fec.gov/press/press2005/20050203pressum/20050203pressum.html) (noting that individuals, parties, and other groups reported to the Commission spending $192.4 million independently advocating the election or defeat of presidential candidates in the 2004 campaign).

Opp. at 9) that there is only one enforcement case involving independent expenditures by an individual, MUR 5123 (Dwight D. Sutherland, Jr.), but ignores the Ninth Circuit's decision in *Furgatch* (cited in the FEC's Mtn. for Partial Jmt. at 4, 14). Adams also ignores FEC enforcement proceedings and alternative dispute resolution matters cited in his own Motion to Dismiss at 10-13.[3]

Similarly, in apparent support of his Fourth Affirmative Defense that 2 U.S.C. § 434(g)(2)(A) "has not been affectively [*sic*] promulgated or disclosed to the general public" (Answer at 7), Adams does little more than assert (Def. Opp. at 8) that "virtually no one was aware of this reporting requirement at the time of the 2004 general election." But he also concedes (Def. Opp. at 8 & n.3) that ten people filed the required form in the two months prior to that election alone. Adams fails to explain why he should be excused from complying with a statute when others were able to do so. He does not dispute that the specific reporting provision at issue was enacted well over two years prior to the independent expenditures at issue in this case, and he fails even to respond to our showing that Congress did all that was required under Supreme Court precedent to enact and publish the statute. *See* FEC Mtn. for Partial Jmt. at 16-17; *Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982) ("[A] legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply.").

Adams also suggests (Def. Opp. at 8-9) that the Commission's legislative recommendations regarding increasing the threshold for the annual reporting of

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[3] The Commission has also entered into conciliation agreements with groups that violated 2 U.S.C. § 434(g)(2)(A) in 2004 by making independent expenditures in excess of $10,000 but failing to report them within 48 hours. *See* Matter Under Review (MUR) 5729 (American Society of Anesthesiologists PAC) (Exhibit A); MUR 5809 (Christian Voter Project) (Exhibit B).

independent expenditures in excess of $250 show that "no one is aware of this reporting requirement." The 2007 recommendation does include the unremarkable statement that "some" are unaware of that reporting requirement. However, the $250 threshold was set in 1979 and is not indexed for inflation. 2 U.S.C. § 434(c)(1) (1980). The recommendations do not suggest any change in the $10,000 threshold at issue in this case. 2 U.S.C. § 434(g)(2)(A). In discussing this language from the recommendation, Adams omits the key subsequent sentence: "Increasing the registration and reporting thresholds to compensate for inflation would not affect the Commission's ability to capture *significant financial activity* as intended by Congress when it enacted the FECA." 2007 Legislative Recommendation (available at http://www.fec.gov/law/legislative_recommendations_2007.shtml) (emphasis added). This omitted sentence makes clear that the recommendation distinguished between whether this $250 threshold should be raised and the disclosure of "significant financial activity," such as Adams' $1,000,000 independent expenditure.[4]

For these reasons, the Commission is entitled to judgment as to Adams' Third, Fourth, Fifth, and Eighth Affirmative Defenses.

II. THE COMMISSION IS ENTITLED TO JUDGMENT AS TO DEFENDANT'S CONCILIATION DEFENSES

Adams devotes nearly half of his opposition to an attempt to support his First and Second Affirmative Defenses (Def. Opp. at 10-17). We have already shown (FEC Opposition to Defendant's Motion to Dismiss (FEC Opp.) at 5-20;

[4] During September 2004, when Adams should have reported his $1,000,000 independent expenditure, only six political organizations reported higher independent expenditure totals, among them the Democratic National Committee, the National Republican Congressional Committee, MoveOn PAC, the Democratic Congressional Campaign Committee, and the National Republican Senatorial Committee. *See* FEC Press Release, *September Independent Expenditure Disclosure Summarized* (Oct. 5, 2004) (available at http://www.fec.gov/press/press2004/20041005indepexp.html).

FEC Mtn. for Partial Jmt. at 17-20) that these defenses cannot succeed because the Commission met the statutory requirement that it "attempt" to conciliate. *See* 2 U.S.C. § 437g(a)(4)(A)(i). The Commission showed (FEC Opp. at 7-10) that courts addressing the FECA conciliation requirement, and the majority of those examining the analogous EEOC conciliation requirement, have declined to inquire into the details of parties' conciliation efforts, provided that the agency made an "attempt" to conciliate. The pleadings alone establish that fact, and the Commission is entitled to judgment on those defenses.

Adams quotes from the FECA's 1976 legislative history in his effort to justify his unduly expansive interpretation of the conciliation requirement. Def. Opp. at 12 (quoting H.R. Report No. 94-917 (1976)). However, that legislative history relates to a more stringent requirement — that the agency make "every endeavor" to conciliate — that was *removed* from the Act 28 years ago. *See* FEC Opp. at 5-6 (explaining that in 1976 the statute stated "the FEC is required to make every endeavor" to conciliate, but it was amended in 1980 to require that the "Commission shall attempt" to conciliate).

The Commission is entitled to deference in interpreting the FECA requirement that it "attempt" to conciliate. Adams cites (Def. Opp. at 11) *FEC v. Democratic Senatorial Campaign Comm. (DSCC)*, 454 U.S. 27, 37 (1981), in support of his argument that the FEC's interpretation is entitled to no deference. However, the Supreme Court in *DSCC* reversed the court of appeals' finding that the agency was entitled to no deference, stating that "the Commission is precisely the type of agency to which deference should presumptively be afforded." *Id*. The Court explained that the Commission is entitled to deference because Congress has "vested the Commission with primary and substantial responsibility for administering and enforcing the Act," "extensive rulemaking and adjudicative powers," authority "to formulate general policy

with respect to administration of this Act," and authority to determine whether a violation has occurred. *Id.* at 37, 43 (internal quotation marks omitted).

As we have explained (FEC Opp. at 13-20), even if the Court were to decide that judicial inquiry into the details of the Commission's conciliation efforts is appropriate, the Commission has satisfied its obligations in this case and Adams has suffered no harm resulting from the alleged lack of effort to conciliate. The Commission engaged in three separate rounds of settlement negotiations, and sent Adams at least one proposed conciliation agreement that included a proposed civil penalty that was a small fraction of the maximum authorized penalty. *Id*. at 2-4. Moreover, Adams has made no attempt to demonstrate any harm or prejudice as a result of any perceived defect in the Commission's conciliation efforts, as would be required to justify any relief. "[E]ven where the FEC may be found to have inadequately performed or omitted one or more of its notice or conciliation obligations, such error may be excused where the act or omission was not intentional and where it caused no harm or prejudice to the defendants with respect to their participation in the pre-suit and conciliation process." *FEC v. Nat'l Rifle Ass'n of America*, 553 F. Supp. 1331, 1339 (D.D.C. 1983).

Finally, Adams does not respond *at all* to the Commission's showing that failure to conciliate is not a jurisdictional bar. FEC Mtn. for Partial Jmt. at 19-20. Instead, the appropriate remedy for a failure to conciliate is simply to stay the case for further conciliation. Adams does not seek to stay these proceedings, but to have the alleged conciliation defect serve as a bar to this suit, an extraordinary outcome for which he provides no legal support.

Defendant's conciliation defenses cannot succeed as a matter of law.

CONCLUSION

For the reasons stated above, the Commission's motion for partial judgment on the pleadings should be granted, and judgment entered for the Commission as to defendant's First, Second, Third, Fourth, Fifth, and Eighth Affirmative Defenses.

Respectfully submitted,

/s/
Thomasenia P. Duncan
General Counsel

/s/
David Kolker
Associate General Counsel

/s/
Harry J. Summers
Assistant General Counsel
(CA Bar #147929)

/s/
Claire N. Rajan
Attorney
(CA Bar #238785)

FOR THE PLAINTIFF
FEDERAL ELECTION
COMMISSION
999 E Street, NW
Washington, D.C. 20463
(202) 694-1650
(202) 219-0260 (fax)

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