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**STEPHEN ADAMS**

**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)

**DEFENDANT STEPHEN ADAMS' REPLY BRIEF IN RESPONSE TO PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(B)(1)**

Date: February 4, 2008
Time: 1:30 PM
Courtroom: 840

**Trial Deadlines:**
**Discovery Cut-off: March 31, 2008**
**Pretrial Conf.: August 11, 2008**
**Trial: September 9, 2008**

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## I. INTRODUCTION

After extensive briefing, Defendant Stephen Adams' ("Defendant" or "Adams") Motion to Dismiss for Lack of Subject Matter Jurisdiction comes down to a straightforward question: did the Federal Election Commission ("Plaintiff" or "FEC") satisfy its mandatory duty to make a good faith and reasonable effort to conciliate its enforcement action when it failed to respond, in any way, to Adams' legitimate counteroffer to the FEC's initial settlement proposal, but waited until *62 days after expiration* of the statutory conciliation period to advise Adams that the FEC had decided to sue him in federal court?

The FEC all but concedes that its lackluster performance in the conciliation process did not meet the standards established by several Equal Employment Opportunity Commission ("EEOC") cases addressing a similar statutory requirement. The FEC seeks to have this court excuse its failure by arguing that the standard requiring a good faith effort, including a reasonable response, should be regarded as a minority rule - one to which the FEC should not be held. The FEC incorrectly represents to this court that the somewhat relaxed standard, albeit on different facts, in the *Equal Employment Opportunity Commission ("EEOC") v. Keco Indus.*, 748 F.2d 1097 (6th Cir. 1984) ("*Keco*") should control this case. However, in *Keco*, and cases that follow it, the courts excuse the failure to conciliate only when the respondent either flat out rejects conciliation attempts or makes no meaningful attempt to conciliate.[1] *See Keco*, 748 F.2d at 1101-1102 ("Conciliation

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[1] *See United States v. California Department of Corrections*, 1990 WL 145599 at 7 (E.D. Cal.) (the "CDC had ample opportunity to make a formal counteroffer or to otherwise avoid litigation" and failed to do so); *EEOC v. Elrod*, 1987 WL 6872 (N.D. Ill. 1987) (finding EEOC had attempted to conciliate when it made a series of overtures to which defendants refused to undertake any significant dialogue, outright rejected EEOC's initial settlement proposals, and refused to offer any serious counterproposals).

efforts broke down only after Keco rejected the EEOC's overtures"); accord *Fed. Election Comm'n v. Nat'l Rifle Ass'n of Am.*, 553 F. Supp. 1331, 1336, 1339 (D.D.C. 1983) ("NRA") (FEC acted in good faith and its response was reasonable because "here the defendant did not express a willingness to negotiate, but repeatedly refused to concede liability and respond on the merits to the FEC's proposals"). Moreover, in all of these cases, the agency acted reasonably and made repeated efforts to conciliate with the respondents, but the court found that it was the respondents who flatly rejected the overtures. This bears no similarity to Adams' response.

## II. *ASPLUNDH* AND *KLINGLER* PROVIDE THE CONTROLLING VIEW IN JUDGING THE DUTY TO CONCILIATE WHEN THE RESPONDENT ENGAGES IN CONCILIATION.

Adams argues that the appropriate and more widely accepted standard to apply to cases like Defendant Stephen Adams' case - where the respondent has made an effort to conciliate - can be found in *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256 (11th Cir. 2003) (Kappel Decl. Ex. A) ("*Asplundh*") and in *EEOC v. Klingler Electric Corp.*, 636 F.2d 104 (5th Cir. 1981) ("*Klingler*") (Kappel Decl. Ex. B).[2] The FEC's entire opposition to this position rests on the view that *Klingler* has

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[2] No court, in any jurisdiction, has addressed the issues presented in this case as concisely as the courts analyzing Equal Employment Opportunity Commission cases. Both Adams and the FEC agree (through their pleadings) that the court may rely on the "analogous" EEOC cases, which are "instructive in determining whether the statutory prerequisites to [filing] suit have been satisfied" under the Federal Election Campaign Act. FEC's Motion for Partial Judgment on the Pleadings at 20 & n.11; Stephen Adams' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) at 4. Despite the FEC's subsequent back peddling in its Memorandum at 10-12, stating that the EEOC "operates under an analogous but not identical provisions," in an effort to discredit Adams arguments, it is important for the court to note that the FEC relies on 12 EEOC cases and only 5 FEC cases in the same Memorandum, yet asks the court to differentiate between the EEOC cases when they relate to Defendant's argument, and not its own. The FEC's hypocrisy on this point is

not been widely adopted.[3] To the contrary, the relevant EEOC case reflects that the *Asplundh* and *Klingler* standards have been followed in the Ninth, Tenth and Eleventh Circuits, as well as in district courts located in the Fourth and Sixth Circuits.

The *Asplundh* case, not previously mentioned in any of the briefs, is directly on point. In *Asplundh*, the U.S. Court of Appeals for the Eleventh Circuit considered a situation wherein the EEOC sent an initial conciliation agreement to the respondent and then ignored the respondent's efforts to conciliate by failing to "respond … or even acknowledge" the respondent's letter seeking an "opportunity to discuss the issues." *Asplundh*, 340 F.3d at 1258. Instead of replying to the respondent's letter, the EEOC sent another letter … indicating that "efforts to conciliate this charge … were unsuccessful and that further conciliation efforts would be futile or non-productive." *Id.* at 1258-1259. The facts in *Asplundh* are quite similar to what occurred in the Adams case.[4]

In *Asplundh*, the EEOC argued that its efforts "constituted a bona fide effort to conciliate." *Id.* at 1259. In refusing the EEOC's analysis of its conduct, the court stated, "we reject the Commission's position that it had no legal obligation to

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alarming. The FEC cannot have it both ways.

[3] FEC's Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss ("FEC's Memorandum") at 10.

[4] In *Adams*, upon commencement of the mandatory conciliation period, the FEC sent a proposed conciliation agreement to Adams. Also during the mandatory time period, Adams responded to the FEC's letter with a counterproposal and a request to the FEC to respond to the counterproposal. Instead of timely responding to Adams counterproposal, the FEC sent a letter to Adams 62 days after the mandatory conciliation period had expired stating that it was terminating conciliation because the statutory time period had elapsed. *See* Adams' Motion, Statement of Facts and Procedural History at 5-7.

respond to [respondent's] letter.[5] *Id.* at 1260. "The duty to conciliate is at the heart of Title VII"[6] and an "all or nothing approach on the part of a government agency … will not do."[7] "Nothing less than a reasonable effort to resolve … the issues raised" by the respondent is appropriate.[8] "Under these circumstances, it cannot be said that the EEOC acted in good faith. In fact, its conduct 'smacks more of coercion than of conciliation.'"[9]

This is the standard. Where the respondent engages in conciliation, the agency must meaningfully respond to meet its obligation - "the fundamental question is the reasonableness and responsiveness of the [FEC's][10] conduct under all circumstances." *Klingler*, 636 F.2d at 107; NRA, 553 F. Supp. at 1339 (FEC satisfies its obligation to attempt conciliation where it acts in good faith and reasonably responds to the position of a defendant); *EEOC v. Pierce Packing Co.*, 669 F.2d 605, 608-609 (9th Cir. 1982) ("*Pierce Packing*") (good faith attempts at conciliation were absent and "EEOC's disregard for such promulgated regulations is the apex of unreasonableness); *EEOC v. The Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978) (holding that EEOC is required to act in good faith in its conciliation efforts"); *EEOC v. One Bratenahl Place Condo. Ass'n*, 644 F. Supp. 218 (N.D. Ohio

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[5] The FEC's posture that Adams should have read months of silence as a rejection of his counteroffer is not worthy of response. The FEC has a mandatory duty to engage willing respondents in conciliation.

[6] *EEOC v. Radiator Specialty Co.*, 610 F.2d 178 (4th Cir. 1979).

[7] *EEOC v. Pet, Inc., Funsten Nut Div.*, 612 F.2d 1001, 1002 (5th Cir. 1980).

[8] *Asplundh* 340 F.3d at 1260 (citing *EEOC v. Klingler Electric Corp.*, 636 F.2d 104, 107 (5th Cir. 1981).

[9] *Id.* (citing *EEOC v. Pet, Inc., Funsten Nut Div.*, 612 F.2d at 1002).

[10] The original quote involved the conduct of the EEOC. As discussed in n.2, the EEOC cases and statutes are analogous and instructive in analyzing the statutory prerequisites imposed on the FEC by FECA. *FEC v. NRA,* 553 F.Supp. 1331, 1334, 1338 (D.D.C 1983).

1986) ("*Bratenahl Place*") (the issue to be addressed is whether or not the EEOC undertook a good faith effort to conciliate the claims; EEOC must make a sincere and reasonable effort to negotiate).

Of course, *Asplundh* and *Klingler* do not require government agencies to accept whatever counterproposal a respondent offers. What the courts require is a good faith attempt at conciliation that can be deduced from the conduct of the parties. This requires, at least, a response, a conversation if you will, in a "reasonable and flexible manner, to the reasonable attitudes" of a respondent interested in conciliating the alleged violations. *Klingler*, 636 F.2d at 107. The FEC failed to meet this standard under any objective view of the facts in the Adams matter.

## III. A REVIEW OF THE LEGISLATIVE HISTORY AND THE FACTS OF OTHER CASES CITED BY THE FEC AMPLIFY WHAT LITTLE EFFORT THE FEC MADE TO CONCILIATE THE ALLEGED VIOLATIONS IN THE ADAMS CASE.

Congress focused on establishing a fair time period for conciliation during its debate on the Federal Election Campaign Act ("FECA"). The FEC must conciliate within that mandatory time period for conciliation. The complete legislative history of the 1979 Act, ignored in the FEC's briefs, establishes that the current 90-day conciliation period was provided to protect the due process rights of respondents.

In the congressional hearings leading up to the 1979 Act, the FEC recommended that the existing 30-day mandatory conciliation period be cut in half to just 15 days to assist the "FEC in handling complaints more quickly, and prevent[] abuse of [the] mandatory conciliation period to delay enforcement action close to an election."[11] In considering the FEC's recommendation, however,

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[11] *Federal Election Campaign Act Amendments, 1979: Hearing Before the Senate Committee on Rules and Administration*, 96th Cong. 1st Sess. 97 (July 31, 1979)

Congress heard testimony that raised very grave concerns that FECA's existing conciliation procedures infringed on constitutional due process guarantees:

> The possibility of a "conciliation" agreement is the carrot for respondents. The threat of a lawsuit is the stick. Since many of the respondents cannot afford a court case, and since some cannot even afford to have a lawyer for the compliance proceeding, they tend to accept whatever the FEC offers by way of "conciliation" agreements. I put the word "conciliation" in quotes because most of the agreements I have read have nothing to do with genuine conciliation, which means "overcoming distrust or hostility" or "winning someone over." Rather, the agreements have to do with closing files on terms that make the FEC's enforcement record look impressive.
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> Because financial pressures and fear of adverse publicity lead many respondents to reach "conciliation" agreements, relatively few issues involving the FEC are brought to court. The FEC regularly pushes up to, and sometimes beyond, the limits of its authority. It makes strange interpretations of the election act. Yet, thanks to the compliance procedure set forth in the election act, the FEC is rarely challenged in court. This is ironic because, when it is seriously challenged on enforcement actions, it often loses.[12]

In response to such testimony, Congress rejected the FEC's recommendation that the minimum 30-day conciliation period be cut in half and instead tripled the length of the conciliation period to 90 days. Clearly, Congress indicated that a longer conciliation period was required to preserve the due process rights of respondents.

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*reprinted in* Federal Election Commission, *Legislative History of the Federal Election Campaign Act Amendments of 1979* at 103 (October 1983).

[12] *Federal Election Campaign Act Amendments, 1979: Hearing Before the Senate Committee on Rules and Administration*, 96th Cong. 1st Sess. 160 (July 31, 1979) (statement of Mary Meehan, Treasurer, Committee for a Constitutional Presidency) *reprinted in* Federal Election Commission, *Legislative History of the Federal Election Campaign Act Amendments of 1979* at 166 (October 1983).

With this legislative history in mind, the court should evaluate the FEC's position that "sending just one draft conciliation agreement" satisfies the conciliation requirement. FEC's Memorandum at 14. The conciliation requirement established by the *Asplundh* case easily dislodges such a notion. Moreover, case authorities discredit the FEC's fall-back position that "pre-probable cause" discussions and settlement discussions following the filing of charges can be credited to satisfy the duty to conciliate required by the statute. FEC's Memorandum at 2. The courts have held that neither conciliation attempts prior to reasonable cause findings[13] nor offers of "settlement discussions" after charges have been filed satisfy the conciliation required prior to filing suit.[14] Conciliation, as statutorily mandated, and settlement are two completely different tools. *Pierce Packing*, 669 F.2d at 608. "Conciliation contemplates charge, notice, investigation and determination of reasonable cause." Id. While settlement discussions may take place either prior to probable cause determinations or following charges, "it may not replace these preludes to a civil action." *Id.*

Not a single case cited by the FEC stands for the proposition that the FEC satisfies its duty to conciliate by merely extending an offer and then walking away from the "conciliation table" without a conversation about the terms of the proposed agreements. In *EEOC v. Lawry's Restaurants*, 2006 WL 2085998 (C.D. Cal. 2006), "[a]fter more than a year of conciliation negotiations" the court held that "given the

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[13] *See EEOC v. Westvaco Corp.*, 372 F. Supp. 985 (D. Md. 1974) (EEOC filed suit without a formal reasonable cause determination and without an opportunity for informal conciliation; held that an agency of the federal government should be held to a higher standard of compliance with federal law and its own regulations despite the deference it is ordinarily due).

[14] *See Patterson v. American Tobacco Co.*, 535 F.2d 257, 271-272 (4th Cir. 1976) (EEOC admits it had not attempted conciliation before filing suit and made an offer to conciliate while suit was pending).

efforts to settle this matter" the EEOC had fulfilled its duty to conciliate.[15] *Id.* at 2. The FEC also asks the court to ignore, in deference to the agency, Adams substantial showing that his counteroffer was reasonable and certainly worthy of response given that he sought legal advice prior to acting and had corrected the alleged violations about two years before the conciliation process began.[16] This, in effect, asks the court to ignore the relevant facts.

## IV. FAILING TO SATISFY THE DUTY TO CONCILIATE IS A JURISDICTIONAL BAR THAT REQUIRES DISMISSAL AS THE APPROPRIATE REMEDY.

In *Asplundh*, 340 F.3d at 1261, the Court of Appeals held that the EEOC "failed to make a bona fide effort to conciliate [the] case in a reasonable and responsive manner and that the remedy of dismissal and the award of attorney's fees by the district court was not an abuse of discretion."[17] This ruling is consistent with

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[15] The EEOC invited Lawry to participate in conciliation by providing an initial conciliation agreement. The parties then "met and discussed the [respondent's first] counterproposal." *Id.* at 1. The respondent sent another counterproposal and "[o]ver the next five months, the parties engaged in discussions and exchanged letters in an attempt to settle the matter." A counterproposal was eventually offered by the EEOC. *Id.* In *FEC v. Club for Growth*, 432 F.Supp.2d 87, 91 (D.D.C. 2006) "the parties met to discuss conciliation," an offer was eventually extended by the FEC and a counterproposal was offered by Club For Growth. The FEC ultimately responded to Club For Growth's conciliation offer by indicating that it was unacceptable. This case stands for nothing more than, at the very least, a reasonable response, which can be a rejection to a counterproposal, is required.

[16] It is undisputed that Adams corrected all the alleged violations before the general election and *two years before* the conciliation process began. Second, the FEC's n.11 on page 20 of FEC's Memorandum argues that advice of counsel cannot "serve as a proper mitigating factor" when Adams "failed to follow the advice provided to him indirectly." Actually, Adams followed the substantive legal advice to the letter.

[17] *See also EEOC v. Pierce Packing Co.*, 669 F.2d 605, 609 (9th Cir. 1982) (affirming dismissal of EEOC's action and awarding attorneys' fees to defendant

other courts holding that the requirement to conciliate is jurisdictional.[18] Furthermore, the *Asplundh* court opined **"conciliation is at the heart of [the statute]. In its haste to file the instant lawsuit, with lurid, perhaps newsworthy,[19] allegations, the EEOC failed to fulfill its statutory duty to act in good faith to achieve conciliation, effect voluntary compliance, and to reserve judicial action as a last resort. Under these circumstances, the sanction of dismissal, awarding attorneys' fees, is not an unreasonable remedy or an abuse of the district court's discretion."** The same can be said here - see the FEC press release following the filing of charges against Adams. (Kappel Decl. Ex. C.) Moreover, the FEC's cavalier dismissal of the harm Adams has suffered is a testament of the FEC's lack of concern for its statutory duty to conciliate such claims.

Incredibly, the FEC argues that even if the FEC failed to meet its duty, the

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where EEOC acted unreasonably failing to engage in conciliation and filing suit); *NRA*, 553 F.Supp at 1333 (where the FEC fails to comply with the mandatory prerequisites to suit, dismissing the suit for want of subject matter jurisdiction is applicable in certain cases).

[18] *See United States v. California Department of Corrections*, 1990 WL 145599 (E.D. Cal. 990) ("[t]he Ninth Circuit has held that the conciliation requirement is a jurisdictional prerequisite to suit, absent a good faith effort to allow an out of court conciliation"); *Patterson v. American Tobacco Co.*, 535 F.2d 257, 272 (4th Cir. 1976) (court dismissed complaint finding respondent's willingness to negotiate negated EEOC's contention that timely conciliation would have been unsuccessful); *EEOC v. Lawry's Restaurants Inc.*, 2006 WL 2085998 (C.D. Cal. 2006) at 1 ("[g]enuine investigation, reasonable cause determination and conciliation are jurisdictional conditions that the EEOC must satisfy before it may bring suit) (citing *Pierce Packing*); *EEOC v. Westvaco Corp.*, 372 F. Supp. 985, 993 (D. Md. 1974) (EEOC's actions were bald and unambiguous violations of the plain language of its own rules, which were intended to provide an opportunity for conciliation … it could be persuasively argued that these failures without more would justify dismissal).

[19] *See Asplundh* at 1261 & n. 3.

court should ignore its failure to meet its mandatory duty within the required time frame and simply stay this action to allow the parties to engage in further conciliation. FEC's Memorandum at 20. Contrary to the FEC's view, its current inability to conciliate - based on its having only two commission members - is extremely relevant to the court's consideration of this issue.[20] Here, the only remedy available to the court is to dismiss this case for lack of subject matter jurisdiction. *Asplundh*, 340 F.3d at 1261 (citing *Pierce Packing*.) Moreover, dismissal is the appropriate remedy even absent this circumstance. "Accordingly, where the FEC fails … to comply with the mandatory prerequisites to suit, an enforcement suit is premature, and the court, must stay the action pending cure by the FEC, or in certain cases dismiss the suit for want of subject matter jurisdiction." *NRA*, 553 F. Supp. at 1333. As previously stated, cure by the FEC in this case at this time is impossible, and Adams has suffered enough.

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[20] FEC provides expressly that "[t]he Commission may not enter into a conciliation agreement under this clause except pursuant to an affirmative vote of 4 of its members." 2 U.S.C. 437g(a)(4)(A)(i). The FEC currently only has two members and, it is precluded by statute from accepting any new conciliation agreement that might be negotiated by counsel for the parties.

## V. CONCLUSION

For the foregoing reasons, the Plaintiff's Complaint should be dismissed for lack of subject matter jurisdiction.

DATED: January 28, 2008

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By: /s/
Alexander H. Cote
Attorneys for 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 *EEOC v. Asplundh, Tree Expert Co.*, 340 F.3d 1256 (11th Cir. 2003).

3. Attached hereto as Exhibit B is a true and correct copy of *EEOC v. Klingler Electric Corp.*, 636 F.2d 104 (5th Cir. 1981).

4. Attached hereto as Exhibit C is a true and correct copy of the July 11, 2007, Federal Election Commission News Release regarding Stephen Adams.

I declare under penalty of perjury that the foregoing is true. Executed this 28th day of January, 2008 at Washington, D.C.

BRETT G. KAPPEL