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

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| FEDERAL ELECTION COMMISSION,<br><br>Plaintiff,<br><br>v.<br><br>STEPHEN ADAMS,<br><br>Defendant | Civ. No. 07-4419-DSF (SHx)<br><br>**FEC'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT STEPHEN ADAMS' MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(1)**<br><br>Hearing Date: February 4, 2008<br>Hearing Time: 1:30 p.m.<br>Courtroom: 840<br>Judge: Dale S. Fischer |

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**FEDERAL ELECTION COMMISSION'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION**

Plaintiff Federal Election Commission (FEC or Commission) opposes defendant Stephen Adams' Motion to Dismiss for Lack of Subject Matter Jurisdiction (Def. Mtn. to Dismiss), which is based on defendant's claim that the Commission failed to meet its statutory obligation to attempt to conciliate prior to filing suit. As we showed in our motion for partial judgment on the pleadings and further explain below, the Commission is entitled to judgment on this issue because it met its statutory duty to "attempt" to conciliate the matter through significant pre-litigation contacts with defendant, and in any event, the proper remedy for any failure to meet that standard is not dismissal, but merely an order to engage in further negotiations.

Under the Federal Election Campaign Act (FECA or Act), 2 U.S.C. § 431-55, the Commission is required simply to "attempt" to conciliate, 2 U.S.C. § 437g(a)(4)(A)(i), and the pleadings alone establish that it met that standard. Adams, who has admitted facts sufficient to establish violations of the Act and that "this court has jurisdiction over this suit," Answer ¶ 1, now claims that the case should be dismissed because the Commission failed to conciliate properly. In particular, Adams claims that the Commission did not respond in a reasonable way to his conciliation offers, but he misstates the Commission's duty to conciliate and badly distorts the facts regarding the conciliation in this matter. In fact, the Commission did more than is required under the Act: It made at least one conciliation proposal with a civil penalty that was a small fraction of the maximum penalty available under the Act, and engaged in additional discussions with Adams after conciliation ended that further refute any potential allegation of harm caused by the Commission's actions during conciliation. Adams appears to suggest that the Commission was required to make a conciliation proposal that he

would find reasonable. That is not the standard.

## I. BACKGROUND

Prior to filing this lawsuit, the Commission and Adams engaged in at least three separate rounds of conciliation and settlement negotiations at different stages in the administrative process: (1) "pre-probable cause" conciliation after the Commission found "reason to believe" a violation occurred; (2) the statutorily required conciliation attempt of at least thirty days after the Commission found probable cause to believe a violation occurred; and (3) additional settlement discussions after the Commission informed Adams that it had voted to authorize filing this suit.

As part of the Commission's enforcement process, at least four of the Commission's six members may find "reason to believe" that a violation of the Act has occurred, authorizing the Commission to undertake an investigation. 2 U.S.C. § 437g(a)(2).[1] In some cases where the Commission finds "reason to believe," the Commission authorizes the Office of General Counsel (OGC) to engage in "pre-probable cause" conciliation. *See* 11 C.F.R. § 111.18(d) and Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545 (March 16, 2007) (available at http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-6.pdf) (stating that conciliation after a reason to believe finding is appropriate "when the Commission is certain that a violation has occurred and the seriousness of the violation warrants conciliation.").

In this case, defendant received the benefit of a "pre-probable cause," thirty-day conciliation period after the Commission's finding of reason to believe. The Commission authorized OGC to send Adams a proposed conciliation

[1] For additional details regarding the Commission's enforcement procedures generally, and the enforcement process in which Adams participated, see the Commission's Motion For Partial Judgment As To Certain Affirmative Defenses, filed Jan. 14, 2008, at 4, 6.

agreement. However, the parties did not reach a conciliation agreement. *See* Joint Rule 26(f) Report (filed Oct. 22, 2007) at 17.

Subsequently, at least four Commissioners voted to find "probable cause to believe" that Adams violated the Act. Following this determination, the Commission is required to "attempt" to correct or prevent the violation by engaging in conciliation with the respondent for at least 30 days. 2 U.S.C. § 437g(a)(4)(A)(i). Adams "admits that [the Commission] invited him to enter into a conciliation agreement, which [he contends] was unacceptable in material part, including the levy of an excessive, unwarranted, and unreasonable penalty." Answer ¶ 12. In fact, OGC sent Adams a proposed conciliation agreement, approved by at least four Commissioners, which contained a proposed civil penalty amount of $106,000. Kappel Decl. Ex. C (Conciliation Agreement at 3). Adams responded with a written counteroffer of $31,000, which his counsel described as his "best offer." Kappel Decl. Ex. E at 1.

Adams' counsel now claims without support that this response "made clear that the Defendant was open to continued negotiations," Def. Mtn. to Dismiss at 8, but as the Commission's counsel explained in a letter of April 18, 2007, "we [OGC] have carefully considered your response and believe that it provides an insufficient basis to further consider settlement negotiations within the enforcement process." Kappel Decl. Ex. E at 1. "Your client's 'best offer' is less than a third of the Commission's proposed civil penalty amount." *Id.* at 2. Based upon counsel's characterization of Adams' offer as his "best" and the gross difference between the parties' assessment of an appropriate civil penalty, it did not appear that further negotiations would be productive, *id.*, and Adams did not request further conciliation.[2]

[2] The defendant's own exhibits and statements in filings with this Court show that the Commission attempted conciliation within the meaning of the Act. *See, e.g.*, Def. Mtn. to Dismiss at 6-7; Kappel Decl. Exs. C at 1, D at 1, E at 1-2. Nevertheless, defendant's version of the conciliation process is highly distorted and incomplete. The Commission cannot,

On May 17, 2007, the Commission, by a vote of at least four Commissioners, authorized the General Counsel to institute a civil action for relief in federal court, and on May 22, 2007, OGC sent a letter to Adams' counsel informing him of the Commission's action. Complaint ¶ 13; Answer ¶ 13. After that letter was sent, the Commission's litigation counsel contacted defendant's counsel to discuss settlement. Joint Rule 26(f) Report at 18. Although the Commission has no duty to engage in additional settlement discussions immediately prior to filing suit, it did so to provide the parties with one final opportunity to avoid litigation. Opposing counsel then made a new settlement offer, which was presented to the Commission on June 20, 2007, and rejected. *See id.* Adams received written notice that the Commission had rejected his offer. OGC Letter to B. Kappel, July 2, 2007 (Exhibit A). The Commission then filed this enforcement action.

Adams claims in his motion that "[t]he FEC filed its Complaint with the court on July 3, 2007, ignoring Adams' clear intention to continue conciliation negotiations and its mandatory duty to conciliate." Def. Mtn. to Dismiss at 7. As explained above, however, the Commission only filed its complaint *after* Adams' third offer was voted upon and rejected by the Commission. The Commission did not ignore Adams' proposals; rather, it evaluated and rejected them.

In sum, the Commission not only engaged in the minimum, statutorily required conciliation attempts, but also afforded Adams significant additional

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however, fully respond to defendant's factual presentation because the FECA prohibits the *Commission* from making public any actions or "information derived" in "connection with any conciliation attempt" without the written consent of the respondent and the Commission. 2 U.S.C. § 437g(a)(4)(B)(i). As we explain below, although the details of the parties' conciliation proposals are not a proper subject for this Court's review, if the Court would find additional details regarding the conciliation process necessary to the resolution of this motion, the Commission can provide under seal whatever information the Court would find useful.

settlement opportunities before the finding of probable cause and after voting to file this lawsuit.

## II. THE COMMISSION MET THE STATUTORY CONCILIATION REQUIREMENT THROUGH EXTENSIVE EFFORTS TO REACH AN ACCEPTABLE AGREEMENT WITH DEFENDANT BEFORE FILING SUIT

A complaint will survive a motion to dismiss under Rule 12(b) if it pleads "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, __ U.S. __, 127 S.Ct. 1955, 1960 (2007). Paragraphs 12 and 13 of the Commission's complaint, and defendant's answers thereto, alone provide sufficient facts to withstand Adams' motion to dismiss because Adams admits that the Commission attempted to conciliate this matter. In any event, there are several additional reasons why the motion should be denied.

### A. The Appropriate Standard Is Whether The Commission Made An Attempt To Conciliate

#### *1. The Plain Language And History Of The FECA Dictate That An "Attempt" To Conciliate Is The Appropriate Standard*

When the Commission finds "probable cause" to believe that a violation of the Act has occurred:

> [T]he Commission shall *attempt*, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved. Such *attempt* by the Commission to correct or prevent such violation may continue for a period of not more than 90 days.

2 U.S.C. § 437g(a)(4)(A)(i) (emphasis added). The plain reading of the statute is that the Commission is required only to make an "attempt" to conciliate.

The statute's history highlights the emphasis Congress placed upon the

word "attempt." As originally written, the statute stated that "the FEC is required to make *every endeavor* . . . to correct or prevent such violation by informal methods of conference, conciliation, and persuasion." 2 U.S.C. § 437g(a)(5)(A) (1976). In 1980, Congress removed the words "every endeavor" from the statute and replaced them with "attempt." FECA Amendments of 1979, Pub. L. No. 96-187, Title I, § 108, renumbered § 309, 93 Stat. 1359 (1980); 2 U.S.C. § 437g(a)(4)(A)(i) (1980). Congress made a deliberate decision to amend the standard in a way that significantly lowers the burden on the Commission and the quantity of resources the agency is required to expend upon each of its hundreds of mandatory conciliation efforts. To transform the requirement of an "attempt" into a requirement that the Commission satisfy defendant's demands would ignore this legislative history and the plain language of the statute.

Moreover, it is well-established that agencies like the Commission are entitled to considerable deference when interpreting the statute they administer and enforce. *Chemical Mfrs. Ass'n v. Natural Res. Def. Council, Inc.*, 470 U.S. 116, 125 (1985) ("This view of the agency charged with administering the statute is entitled to considerable deference; and to sustain it, we need not find that it is the only permissible construction . . . but only that [the agency's] understanding of this very 'complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of [the agency]."). The Commission, which has broad discretionary authority over the administration and interpretation of the Act, "is precisely the type of agency to which deference should presumptively be afforded." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981).

*2. Federal Courts Have Evaluated the FECA's Conciliation Requirement Under A Highly Deferential Standard And Found That The Commission Has Satisfied Its Duty to Conciliate In Circumstances Similar To This Case*

Federal courts have considered the FEC's conciliation efforts in two other cases in which the Commission initiated a civil action after unsuccessful conciliation attempts.[3] Recently, in evaluating whether the Commission complied with the statutory requirement that it "attempt" to conciliate, a district court found it appropriate to show "high deference to the agency's action," emphasizing that "the FEC is precisely the type of agency to which deference should presumptively be afforded because the FEC's bipartisan composition makes it especially fit to decide issues charged with the dynamics of party politics." *FEC v. Club For Growth, Inc.*, 432 F. Supp. 2d 87, 91 (D.D.C. 2006) (citation and quotation marks omitted). Club For Growth, like defendant in this case, argued that the court lacked subject matter jurisdiction because the Commission's conciliation offers were allegedly not made in good faith. The court rejected this allegation and denied the defendant's motion to dismiss, stating that the statutory language "requires that the FEC come to the conciliation table, but it doesn't instruct the FEC on the nature of its offerings." *Id*. at 92. Notably, the court also found that "FECA does not require that the FEC attempt to conciliate for 90 days and the court will not write such a requirement into the law." *Id*. at 91, n.3.

In *FEC v. Nat'l Rifle Ass'n of America*, 553 F. Supp. 1331 (D.D.C. 1983), the court denied defendants' motion to dismiss for lack of subject matter jurisdiction, which was in part based upon allegations that the Commission did not conciliate adequately. The Court specifically rejected defendants' argument that the "FEC has an affirmative duty to do more than mail two conciliation offers to the defendants prior to recommending suit." *Id*. at 1338. The Court noted that "[w]here the FEC acts in good faith and reasonably responds to the position of a

[3] Therefore, contrary to Adams' assertion, this is not an issue of first impression. Def. Mtn. to Dismiss at 9.

defendant during conciliation, it satisfies its obligation to attempt conciliation," *id*. at 1339, and "even 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." *Id*.

Here, where the Commission has omitted none of its obligations and continued to entertain settlement offers after the close of formal conciliation, there is no basis for finding that the Commission has failed to "attempt" to conciliate, and Adams cannot show any harm from the alleged lack of conciliation.

*3. The Majority of Courts Assess Analogous EEOC Conciliation Efforts Under a Deferential Standard That Does Not Evaluate the Details of Negotiations or Proposed Agreements*

As the Commission explained in its motion for partial judgment on the pleadings (at 20 & n.11), the Equal Employment Opportunity Commission (EEOC) operates under analogous but not identical provisions regarding pre-suit conciliation. The majority view of other courts, including those in this District, is that courts should evaluate whether the EEOC has met its conciliation requirement under a deferential standard that does not involve analysis of the form or substance of negotiations.

Whether the EEOC made an "'[a]ttempt to conciliate' is the prevailing standard." *EEOC v. Sears, Roebuck & Co. (Sears I)*, 504 F. Supp. 241, 262 (N.D.Ill. 1980) (collecting EEOC cases). Where an attempt was clearly made, defendants often allege that the attempt was not made in "good faith." In determining whether the agency's attempt was in "good faith," courts differ as to the degree of inquiry. *United States v. California Dep't of Corrections*, 1990 WL 145599, at *7 (E.D. Cal. 1990). There are two lines of cases interpreting what

constitutes good faith in conciliation in EEOC cases: (1) the majority view, which applies a deferential standard and looks primarily to whether the EEOC made an attempt to conciliate; and (2) the minority Fifth Circuit view, which requires the court to evaluate the reasonableness and responsiveness of the EEOC's conduct in conciliation negotiations.

The Central District of California and other Ninth Circuit district courts have applied the deferential standard that is followed in the Sixth and Tenth Circuits.[4] *See, e.g.*, *EEOC v. Lawry's Restaurants, Inc.*, 2006 WL 2085998, at *2 (C.D. Cal. 2006) (The EEOC satisfies the conciliation condition "if it provides the employer an opportunity to confront all the issues. . . . Under this approach, the district court does not examine the substance of the parties' negotiations."). In particular, *Lawry's Restaurants* adopted the deferential standard to evaluate whether the EEOC met its duty to conciliate because the standard "comports with the statutory language." *Id*. (citing *EEOC v. Canadian Indemnity Co.*, 407 F. Supp. 1366, 1367 (C.D. Cal. 1976) (denying the employer's motion for partial summary adjudication because the EEOC had discretion to reject defendant's counteroffer during conciliation). Other district courts in the Ninth Circuit have also adopted the deferential majority view in evaluating EEOC conciliation efforts. *See, e.g.*, *EEOC v. Hometown Buffet, Inc.*, 481 F. Supp. 2d 1110, 1113-14 (S.D. Cal. 2007) (the legislative history as well as Supreme Court precedent regarding the deference afforded to administrative agencies demonstrate that a deferential standard is preferred); *California Dep't of Corrections*, 1990 WL 145599, at *7 (noting "[t]he majority of courts appear to defer to the EEOC's

[4] *See, e.g.*, *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984) ("The district court should only determine whether the EEOC made an attempt at conciliation. The form and substance of those conciliations is within the discretion of the EEOC as the agency created to administer and enforce our employment discrimination laws and is beyond judicial review."); *EEOC v. The Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978) ("[A] court should not examine the details of the offers and counteroffers between the parties, nor impose its notions of what the agreement should provide…").

discretion" and holding that "the 'good faith' requirement is properly limited to a good faith effort to allow an out-of-court settlement, rather than a good faith effort to meet the defendant on its own terms."). Adams mentions none of this precedent.

The Fifth Circuit standard on which defendant relies (Def. Mtn. to Dismiss at 4) applies a strict standard that has not been widely adopted. *See EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981) ("[T]he fundamental question is the reasonableness and responsiveness of the EEOC's conduct under all the circumstances."). This standard involves significant analysis by the court of the details of federal agency conciliation efforts, which would enmesh the judiciary in complex administrative proceedings and the workings of federal agencies. As explained *infra* Section B, this minority approach is flawed.

*4. While The EEOC And FEC Conciliation Procedures Are Analogous, They Are Not Identical, And This Court Should Not Impose Requirements That Are Absent From The FECA*

The statutory conciliation requirements of the EEOC and FEC are similar, but the analogy can only be extended so far. There are significant differences in the requirements imposed by the two regulatory schemes. First, the FECA states that the FEC "shall attempt to . . . correct or prevent" a violation, whereas the EEOC statute states that the EEOC "shall *endeavor to eliminate* any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b) (emphasis added). The EEOC's mandate is plainly stronger.

This difference in statutory language derives from the second difference between the two agencies: At its inception, the EEOC could not initiate litigation against employers,[5] whereas the FEC has always had the ability to

[5] Act of July 2, 1964, Pub. L. No. 88-352, Tit. VII, 78 Stat. 253 (codified at 42 U.S.C. § 2000e (1970)).

initiate a lawsuit to correct violations of the FECA. *See generally Buckley v. Valeo*, 424 U.S. 1, 109-11 (1976). When Congress in 1972 granted the EEOC authority to sue, it ensured that the primary mechanism to eliminate discrimination in the workplace would remain the conciliation process. "The conferees contemplate that the Commission will continue to make every effort to conciliate as is required by existing law. Only if conciliation proves to be impossible do we expect the Commission to bring action in Federal district court to seek enforcement." 118 Cong. Rec. 7563 (1972) (remarks of Congressman Perkins). To the extent the EEOC cases demand anything more than an "attempt" to correct or prevent violations, this is grounded in the statute's requirement that the EEOC "endeavor to eliminate" violations and the history and mandate of that agency, which is different from the history and mandate of the FEC.

The third difference between the EEOC and FEC conciliation processes is that if the EEOC "determines that further conciliation efforts would be futile or nonproductive, it shall . . . so notify the respondent in writing." 29 C.F.R. § 1601.25. Although the FEC in fact notified Adams that it did not intend to continue conciliation efforts, Kappel Decl. Ex. E, the FEC has no similar statutory or regulatory notification requirement. Thus, defendant's argument (Def. Mtn. to Dismiss at 10) that the Commission's alleged "failure to give timely notice of the breakdown of the conciliation effort" is a "bar to maintaining an action" is based on language that is simply absent from the FECA.

Despite these differences, defendant relies primarily upon EEOC cases to argue that the FECA requires a high level of responsiveness in conciliation. However, Adams has stretched the EEOC analogy beyond its breaking point. This Court should instead look to *Club For Growth*, which found "the FEC

made an attempt at conciliation — precisely what the statute requires." 432 F. Supp. 2d at 91.

### B. The Court Should Reject Defendant's Request To Embark On A Wide-Ranging Inquiry Into The Parties' Negotiating Positions

For the Court to engage in the kind of inquiry Adams seeks would not only be contrary to the plain language of the FECA, but would also require the Court to delve at this early stage of the case into layers of decision-making normally committed to an agency's discretion. Specifically, the Court would need to: (1) form an opinion as to the merits of the violations alleged and the defenses asserted without the benefit of full briefing on the issues; (2) form an opinion as to the appropriate civil penalty and injunctive relief that should be ordered based on the Court's determination of defendant's liability; (3) second-guess the Commission's prosecutorial discretion to enforce this application of the statute and to seek a particular penalty amount; and (4) based on the Court's evaluation of the first three factors, second-guess the offers and counteroffers made by the agency during the conciliation process to determine whether the agency was reasonable in its position and negotiating strategy. None of these steps is necessary or appropriate to rule on Adams' motion to dismiss.

Recognizing that a detailed inquiry into the conciliation process would constitute an inappropriate review of the Commission's decision-making authority, the court in *Club For Growth* refused, stating: "Essentially, the defendant wants the court to scrutinize what the FEC offered during the negotiations. The court must decline this invitation. A review of the FEC's conciliation offers is a task outside of this court's institutional competence and a role not sanctioned by FECA." 432 F. Supp. 2d at 92.[6]

[6] Although the FECA contains an unusual provision authorizing limited judicial review of the Commission's decision to dismiss an administrative complaint, 2 U.S.C. § 437g(a)(8), it contains no similar provision for any judicial review of the Commission's decision to initiate civil litigation — let alone the Commission's decision-making during the conciliation

Cases decided in the context of the EEOC's stronger obligation to conciliate likewise refuse to examine or evaluate the details of conciliation offers and counteroffers. *See, e.g., EEOC v. The Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978) ("we agree that a court should not examine the details of the offers and counteroffers between the parties, nor impose its notions of what the agreement should provide…"); *Keco Indus.*, 748 F.2d at 1102 ("The district court should only determine whether the EEOC made an attempt at conciliation. The form and substance of those conciliations is within the discretion of the EEOC as the agency created to administer and enforce our employment discrimination laws and is beyond judicial review."); *EEOC v. Hometown Buffet, Inc.* 481 F. Supp. 2d 1110, 1115 (S.D. Cal. 2007) ("[I]t is not the role of this court to assess the reasonableness of the EEOC's efforts. This court's role is limited to reviewing whether the EEOC's efforts afforded the employer an opportunity to confront the issues."); *EEOC v. One Bratenahl Place Condominium Assoc.*, 644 F. Supp. 218, 220 (N.D. Ohio 1986) ("[t]he court, in making this determination, has not judged the 'form and substance' of the conciliations") (quoting *Keco Indus.*, 748 F.2d at 1102)).

### C. Even If The Court Were To Examine The Details Of The Conciliation Process, The Commission Satisfied Its Statutory Requirements And Defendant Suffered No Harm

The Commission satisfied its statutory obligation to conciliate. It offered two conciliation agreements to Adams, engaged in additional conciliation discussions by telephone and mail, and notified him of the Commission's rejection of his counteroffers — all prior to filing this lawsuit. Moreover, Adams does not attempt to demonstrate that he has suffered any harm attributable to the FEC's alleged failures in conciliation. Without such harm,

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process. *See FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 709 (D.C. Cir. 1996) ("we [the judiciary] have no statutory authority to review the FEC's decision to sue").

even if this Court were to find that the Commission erred in the conciliation process, Adams' motion must be denied.

The FECA requires only that the Commission make an attempt to conciliate, and sending just one draft conciliation agreement would satisfy that requirement. As explained *supra* pp. 5-7, the Commission did much more than that. In any event, once Adams had rejected the Commission's first proposed conciliation agreement, no further conciliation was legally required. A respondent's rejection of an offer ends any obligation to conciliate further. *See Keco*, 748 F.2d at 1101-02 ("The EEOC is under no duty to attempt further conciliation after an employer rejects its offer."); *EEOC v. Canadian Indem. Co.*, 407 F. Supp. 1366, 1367 (C.D. Cal. 1976) (EEOC's "rejection of defendant's counteroffer was not an abuse of the Commission's discretion, [and] the statutory prerequisite to suit . . . was met.").

Moreover, Adams fails to demonstrate that he suffered any harm or prejudice from the Commission's alleged failure to attempt to conciliate sufficiently. Without such a demonstration, Adams cannot succeed on his motion to dismiss. "[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." *NRA*, 553 F. Supp. at 1339. Again, the Commission continued to remain open to settlement negotiations after the end of the formal conciliation process — and remains so to this day — and Adams has not explained how he has been prejudiced by the Commission's alleged failures during the original conciliation attempt. Moreover, as we explained in our motion for partial judgment on the pleadings (at 19-20), because there has been no adjudication of defendant's liability, Adams can now

defend himself in this *de novo* litigation and has therefore suffered no prejudice from the conciliation process. *See FTC v. Standard Oil Co. of California*, 449 U.S. 232, 241-42 (1980).

Similarly, Adams claims that because he did not receive a final response within the 90-day window specified for conciliation, this suit should be dismissed, but he fails to allege any harm or prejudice from the purported delay.[7] Def. Mtn. to Dismiss at 7-8. In particular, Adams does not explain how receiving *additional* time prior to the Commission ending conciliation could be characterized as a harm to him. In any event, "there is no presumption or general rule that for every duty imposed upon … the Government and its prosecutors there must exist some corollary punitive sanction for departures or omissions, even if negligent." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 64 (1993) (*quoting United States v. Montalvo-Murillo*, 495 U.S. 711, 717 (1990) (*citing French v. Edwards*, 80 U.S. 506, 511 (1871)). "[I]f a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 (2003) (*quoting James Daniel Good Real Property*, 510 U.S. at 63); *Elings v. Commissioner of Internal Revenue*, 324 F.3d 1110; 1112-13 (9th Cir. 2003); *Beard v. Glickman*, 189 F. Supp. 2d 994, 999 (C.D. Cal. 2001). Absent a clear indication that Congress intended otherwise, such timing provisions are deemed to be "directory," rather than "mandatory." *Brotherhood of Ry. Carmen Div., Transp. Comm. Int'l Union v. Pena*, 64 F.3d 702, 704 (D.C. Cir. 1995). Here, since the Commission is not expressly prohibited from authorizing a civil action

[7] In addition, when Adams' made his best offer of $31,000, his counsel stated in writing to the Commission (Kappel Decl. Ex. D at 5): "If the revised conciliation agreement is acceptable to the Commission, please let me know at your earliest convenience." Counsel's request that the Commission respond only if the agreement were acceptable thus meant that the Commission's silence in response was a rejection of defendant's counteroffer. It is therefore inaccurate to suggest that Adams was in the dark about where the Commission stood at the end of the 90-day period.

if the 90 days for conciliation is exceeded, 2 U.S.C. § 437g(a)(4)(A)(i), the time allotted for conciliation is merely "directory" and this case cannot be dismissed on that basis.

Rather than address these dispositive issues, Adams instead devotes a large portion of his brief to foreshadowing his view of the merits of this case, in an apparent attempt to argue that the Commission's conciliation attempt was unreasonable because it sought a penalty higher than what Adams was willing to pay. If that kind of argument were sufficient to establish that the Commission had failed to conciliate properly, then, under defendant's logic, the Commission might never be able to bring an enforcement action: Any time a respondent thought the Commission was seeking too high a penalty during conciliation, the respondent could refuse to conciliate and then argue that the ensuing enforcement action was improperly brought because of the Commission's failure to conciliate properly. If accepted, that absurd, circular reasoning would block the Commission from implementing the enforcement procedures mandated by Congress.

In any event, Adams' view of the appropriate penalty in this case is mistaken. First, Adams selectively emphasizes a narrow interpretation of the word "correct" in the statute to allege that the Commission should not have sought a civil penalty in this case. Def. Mtn. to Dismiss at 15-16. Adams claims that his reporting violations were "corrected" when he filed his 48-hour notice *seven weeks* late and only days prior to the election, and that he allegedly "corrected" the disclaimer violation on all 435 billboards shortly before the election. However, the Act's disclosure requirements serve compelling state interests — "to aid voters in evaluating those who seek federal office," to "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity," and to provide the

"essential means of gathering the data necessary to detect violations of the contribution limitations." *Buckley*, 424 U.S. at 66-68. Adams' late filing and disclaimer correction cannot undo the harm suffered by members of the public who were ignorant of the sources and other important information regarding a million dollar expenditure leading up to the presidential election.

Moreover, if Adams' notion of "correct" were valid, the Commission might never be entitled to civil penalties in cases involving reporting or disclaimer violations because they could almost always be "corrected" with late reports or modified disclaimers. But that kind of after-the-fact "correction" cannot truly correct the deficit of information when it mattered most to the electorate. In any event, the statute provides for penalties as large as the amount "involved in such violation," 2 U.S.C. § 437g(a)(6)(B), and does not distinguish between among reporting, disclaimer, and other violations. In addition, civil penalties are not exclusively for the purpose of punishment or "correction" of a particular bad actor, but also serve an important deterrent effect. A civil penalty should be fashioned not only to punish the violator, but also to deter the defendant and others who might consider engaging in similar activities in the future. *See United States v. ITT Cont'l Baking Corp.*, 420 U.S. 223, 231-32 (1975). To serve these purposes adequately, a civil penalty must be sufficiently large that potential violators will not regard it as "nothing more than an acceptable cost of violation, rather than as a deterrence to violation." *Id*.

Adams next argues that the Commission negotiated in bad faith because it was not sufficiently "flexible." Def. Mtn. to Dismiss at 7-8. However, "flexibility" in negotiations is not a requirement in the FECA (nor in the EEOC's statute), and to the extent Adams construes language in *Klingler* suggesting

otherwise regarding the EEOC, that reasoning has no basis in the relevant statutory language. *Id.*[8] "Simply put, FECA requires that the FEC come to the conciliation table, but it doesn't instruct the FEC on the nature of its offerings." *Club for Growth*, 432 F. Supp. 2d at 92. *See also United States v. California Dep't of Corrections*, 1990 WL 145599, at *7 (E.D. Cal. 1990) ("the EEOC can refuse any counteroffer; further, it is not required to show that it was flexible in settlement negotiations.").

In addition, Adams accuses the Commission of negotiating in bad faith because he mistakenly believes that "the FEC's civil penalty demand was inconsistent with its own precedent." Def. Mtn. to Dismiss at 10. First, the statute authorizes a civil penalty between $5,500 and 100% of the amount in violation for each non-knowing-and-willful violation. 2 U.S.C. § 437g(a)(6)(B). Because the Commission's offers were less than $2,000,000,[9] the Commission acted in accordance with its own statute. Second, in *FEC v. Furgatch*, 869 F.2d 1256 (9th Cir. 1989), the Ninth Circuit upheld the district court's imposition of a 100% civil penalty for very similar violations: a failure to file the appropriate report for an independent expenditure and a failure to include a disclaimer. Therefore, the FEC precedent, as sanctioned by the Ninth Circuit, is for a penalty in the amount of 100% of the violation. That the Commission offered a penalty of $106,000 is not only within its ambit, but wholly reasonable, in light of *Furgatch*.[10]

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[8] Moreover, the facts in *Klingler* are easily distinguishable. There, the defendant had signed a conciliation agreement that the EEOC had drafted, yet when it was returned, the EEOC refused to sign its own agreement. *Klingler*, 636 F.2d at 106. Despite the EEOC's action, the court found that it had acted in good faith, reversed the lower court's decision entering summary judgment in favor of Klingler, and remanded. *Id*. at 107.

[9] Adams committed both a reporting violation and a disclaimer violation, and the Act permits a penalty up to 100% of the amount in violation for *each* violation; therefore, the maximum statutory civil penalty for Adams' $1,000,000 independent expenditure is $2,000,000.

[10] In a similar enforcement proceeding, MUR 5123 (Dwight D. Sutherland, Jr.) (attached to FEC's motion for partial judgment, filed Jan. 14, 2008, as Exhibit D), respondent paid a $4,875 civil penalty, which was 19% of the amount in violation, $25,750.

Third, the conciliation agreements which Adams cites as relevant precedent are not comparable. Def. Mtn. to Dismiss at 10-13. *See* MUR 4313 (Coalition for Good Government, Inc.) (Kappel Decl. Ex. G) (respondent contended the expenditure concerned pending legislation and the only upcoming election was a straw poll for the Republican Party Convention); MUR 5669 (Frist 2000, Inc.) (Kappel Decl. Ex. H) (failure to properly report a loan that had already been reported to the Commission and been made available to the public through other reports); MUR 5588 (Arizona Republican Party) (Kappel Decl. Ex. I) (half of the amount in violation was attributable to another entity, so penalty was based on half of the amount that Adams claims). Similarly, in the Alternative Dispute Resolution cases to which Adams cites (Def. Mtn. to Dismiss at 13), the Negotiated Settlements state: "It is understood that this agreement will have no precedential value relative to any other matters coming before the Commission." *See* Kappel Decl. Exs. J at 1 and K at 1. Therefore, these ADR cases cannot be used against the Commission to claim that the Commission acted in bad faith during conciliation.

Finally, Adams falsely claims that the Commission failed to take mitigating factors into account during the conciliation process. Def. Mtn. to Dismiss at 15-16. While there is no legal requirement that the Commission consider all mitigating factors, the Commission in fact considered those presented by Adams. As OGC explained to Adams' counsel in writing: "I also told you that the Commission had thoroughly considered your arguments for mitigation of the civil penalty, especially concerning advice of counsel,[11] and relayed that the

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[11] Adams continues to maintain (Def. Mtn. to Dismiss at 15-16), that his advice of counsel defense should warrant a reduction in the civil penalty. For a number of reasons, this defense can neither bar this action nor serve as a proper mitigating factor. Adams himself did not seek legal advice and he failed to follow the advice provided to him indirectly. *See* Kappel Decl. Ex. M at 2 ("If Mr. Adams decides to proceed further, he may wish [to] retain his own counsel to assist him in this matter.").

Commission considered the filing of a report of independent expenditure for Mr. Adams' $1 million expenditure nearly seven weeks late to be a very serious violation." Kappel Decl. Ex. E at 1.

In sum, the Commission made the requisite attempt to conciliate, reasonably responded to counteroffers, acted in good faith, and proposed a civil penalty consistent with the statute and relevant precedent, and Adams has not alleged or demonstrated any harm from the Commission's actions.

## III. FAILURE TO CONCILIATE PROPERLY WOULD NOT CREATE A JURISDICTIONAL BAR TO THIS ACTION

Even if Adams could demonstrate that the Commission's conciliation attempts were statutorily deficient, the remedy he seeks is inappropriate. As the Commission explained in its motion for partial judgment at 19-20, failure to conciliate is not a jurisdictional issue, but only provides grounds to stay the action for the parties to engage in further conciliation. *See EEOC v. California Teachers Ass'n*, 534 F. Supp. 209, 213 n.3 (N.D. Cal. 1982) ("Even if we were to decide that further conciliation attempts were in order, we would simply stay the proceedings for that purpose. We would not dismiss for lack of jurisdiction … . The sufficiency of a conciliation effort by the EEOC does not present a jurisdictional question, so long as a conciliation attempt has been made."); *see also EEOC v. Grimmway Enterprises, Inc.*, 2007 WL 1725660, at *6 (E.D. Cal. 2007) ("The sufficiency of a conciliation effort by the EEOC does not present a jurisdictional question, so long as a conciliation attempt has been made."). *But cf. EEOC v. Pierce Packing Co.*, 669 F.2d 605 (9th Cir. 1982) (when the EEOC failed entirely to conduct an independent investigation, did not make any reasonable cause determination *and* did not conciliate, but instead relied upon a prior settlement agreement as a substitute for those actions, dismissal for lack of jurisdiction was appropriate).

Defendant misleadingly quotes *EEOC v. The Zia Co.*, 582 F.2d 527 (10th Cir. 1978), in support of his argument that a failure to conciliate is a jurisdictional bar. Def. Mtn. to Dismiss at 4-5 ("Further, in *The Zia Co.*, . . . the court held that 'failure to give notice of the breakdown of the conciliation effort also has been held to be a bar to maintaining an action.' "). Adams quotes the court's statement of what *other* courts have held, but omits the court's actual holding in *The Zia Co.* (582 F.2d at 533):

> We hold that the court had jurisdiction over the parties and the cause of action. The inquiry into the duty of "good faith" on the part of the EEOC is relevant to whether the court should entertain the claim, or stay the proceedings for further conciliation efforts, not to its power over the cause.

Thus, the holding in *The Zia Co.* does not support defendant's claim that failure to conciliate is jurisdictional, and other cases that Adams relies upon also held that dismissal or adverse summary judgment is far too harsh a sanction for a failure to conciliate. *EEOC v. Klingler Electric Corp.*, 636 F.2d 104, 107 (5th Cir. 1981) ("summary judgment is far too harsh a sanction to impose on the EEOC even if the court should ultimately find that conciliation efforts were prematurely aborted."); *EEOC v. Sears, Roebuck & Co. (Sears II)*, 650 F.2d 14, 19 (2d Cir. 1981) ("Overall we think it would have been preferable for the district court to stay proceedings to promote renewed conciliation rather than dismiss the action.").

In sum, even if this Court were to find the Commission failed to make the appropriate attempt to conciliate, dismissal of the entire action, as sought by Adams, is not the appropriate remedy.

## IV. THE COMMISSION'S CURRENT STATUS IS NOT RELEVANT TO PAST CONCILIATION EFFORTS

Defendant makes the outlandish claim that the current status of the Commission "make[s] the FEC's lack of good faith conciliation even more egregious." Def. Mtn. to Dismiss at 17. However, the number of Commissioners currently serving on the Commission bears no relevance to whether the Commission acted inappropriately when it had a quorum of Commissioners. At every stage of the enforcement process in this matter, a quorum of Commissioners voted and approved each finding and authorization by a vote of four or more Commissioners, in accordance with the statute. *See supra* pp. 2-4. Specifically, by at least four votes the Commission authorized its General Counsel to initiate this civil action, and Adams does not dispute that fact. The Commission's counsel continue to represent the Commission lawfully before the federal courts.

## CONCLUSION

For the reasons stated above, defendant's motion to dismiss for lack of subject matter jurisdiction should be denied.

Respectfully submitted,

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