No. 09-50296

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant,
v.
PIERCE O'DONNELL, Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California

BRIEF *AMICUS CURIAE* OF THE FEDERAL ELECTION COMMISSION

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INTRODUCTION

This Brief *amicus curiae*, submitted by the Federal Election Commission[1] ("Commission") in support of Appellant the United States pursuant to Fed. R. App. P. 29(a), addresses the question presented by Appellant: "Whether the district court erred by holding that the prohibition that '[n]o person shall make a contribution in the name of another person,' 2 U.S.C. § 441f, did not apply where defendant solicited others to purportedly contribute in their names to a presidential candidate, with defendant actually providing them the money (by reimbursement or advancement), resulting in defendant secretly contributing $26,000 in the names of 13 other people." (Gov't Open. Br. at 1.) The district court's decision — which lacks a single source of Commission or judicial support and which, in fact, contradicts Commission regulations, advisory opinions, enforcement actions and numerous federal judicial decisions — reflects a fundamental misunderstanding of the purpose of section 441f in particular and of the provision's role in the broader context of the Federal Election Campaign Act, 2 U.S.C. §§ 431-455 ("FECA" or "Act") as a whole. If affirmed, the district court's unprecedented interpretation of section 441f — which contradicts over thirty years of Commission and judicial interpretations of section 441f — could undermine the government's ability to fulfill the policies of deterring actual and apparent corruption and providing voters

[1] No party or counsel for a party has authored this brief in whole or in part.

with information on the sources of federal candidates' funding.

In light of the Commission's "primary and substantial responsibility for administering and enforcing the Act," *Buckley v. Valeo*, 424 U.S. 1, 109 (1976), the Commission's views on the meaning and purpose of section 441f may materially assist this Court in deciding this appeal. The Commission thus respectfully submits this Brief explaining how the statute fits within FECA's statutory scheme of campaign finance laws, detailing the Commission's and federal courts' long-standing interpretation of section 441f, and explaining why this Court should reverse the district court's anomalous interpretation of that provision — an interpretation that would render the provision virtually meaningless.

INTEREST OF THE AMICUS CURIAE, THE FEDERAL ELECTION COMMISSION

The Commission is the independent agency of the United States government with exclusive jurisdiction to administer, interpret, and civilly enforce the Act. The Commission is empowered to "formulate policy" with respect to the Act, 2 U.S.C. § 437c(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [the] Act," 2 U.S.C. § 437d(a)(8); to issue advisory opinions construing the Act, 2 U.S.C. §§ 437d(a)(7), 437f; and to civilly enforce the Act, 2 U.S.C. § 437g. In consideration of these broad statutory powers, the Supreme Court has observed that "the Commission is precisely the type of agency

to which deference should presumptively be afforded." *FEC v. Democratic Senatorial Campaign Comm.* ("*DSCC*"), 454 U.S. 27, 37 (1981).

This appeal seeks review of a district court decision that disregarded Commission regulations and precedent. Because the resolution of Appellant's challenge could affect the enforceability and validity of section 441f as it has been interpreted by the Commission and courts for over thirty years, the Commission has a substantial interest in this case.

BACKGROUND

A. The Interests Served by FECA

Congress enacted FECA "to limit the actuality and appearance of corruption" associated with the federal electoral process. *Buckley*, 424 U.S. at 26, 66-68. FECA, as amended,[2] addresses these compelling governmental interests through a comprehensive scheme that, *inter alia*, (1) limits the dollar amount of contributions by individuals and multi-candidate political committees to candidates for federal office, 2 U.S.C. § 441a(a); (2) requires disclosure of the original source of all campaign contributions "including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit," *id.*

[2] FECA was originally adopted in 1971 and has since been substantially amended four times. *See* FECA Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974); FECA Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976); FECA Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980); Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 (2002).

§ 441a(a)(8); and (3) prohibits campaign contributions by corporations and unions from their general treasury funds, *id.* § 441b(a), by federal government contractors, *id.* § 441c(a), and by foreign nationals, *id.* § 441e(a)(1).

The Supreme Court has upheld FECA's contribution limits and comprehensive disclosure requirements. It has recognized the importance of deterring actual and apparent corruption "spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." *Buckley*, 424 U.S. at 25. The disclosure requirements further provide the electorate with information on campaign financing "to aid the 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 enable the Commission to "gather[] the data necessary to detect violations of the contribution limitations." *Id.* at 66-68.

B. The Prohibition on Making Contributions in the Name of Another

The Act includes 2 U.S.C. § 441f, which complements the contribution limits, disclosure requirements, and source restrictions by independently prohibiting their violation through deceptive means: "No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution and no person shall knowingly accept a

contribution made by one person in the name of another person."[3] Section 441f thus "prevent[s] the circumvention of the ban on corporate and union contributions," "prevent[s] circumvention of the limits on contributions by individuals and groups . . . and the prohibition on contributions by foreign nationals," and "ensures that proper disclosure of the actual sources of campaign contributions occurs in federal elections." *Mariani v. United States*, 80 F. Supp. 2d 352, 368 (M.D. Pa. 1999) (certifying constitutional questions to *en banc* Third Circuit); *see Goland v. United States*, 903 F.2d 1247, 1251 (9th Cir. 1990) (Section 441f prevents "circumvent[ion] [of] these restrictions," including through the "use of 'conduits'"); FEC Advisory Op. 1986-41, *available at* http://saos.nictusa.com/aodocs/1986-41.pdf (last visited Sept. 23, 2009) (Section 441f "serves to insure disclosure of the source of contributions to Federal candidates and political committees as well as compliance with the Act's limitations and prohibitions.").

SUMMARY OF ARGUMENT

By misinterpreting the scope of conduct prohibited by section 441f, the decision below undermines that provision; emasculates FECA's disclosure requirements; weakens the government's ability to enforce FECA's restrictions on

[3] The prohibition on making contributions in the name of another was formerly codified in 18 U.S.C. § 614(a) (1970 Supp. V). That statute was repealed and reenacted in amended form effective May 11, 1976, subject to a savings provision, Pub. L. 94-283, § 114, 90 Stat. 475 (1976), which maintained the vitality of the repealed act until the effective date of the recodification. *See United States v. Hankin*, 607 F.2d 611, 612 & n.1 (3d. Cir. 1979).

contributions from certain sources including corporations, labor organizations, and foreign nationals; and thwarts detection of violations of FECA's contribution limits. The district court's reasoning, which sought to resolve a misperceived anomaly in FECA's statutory scheme, is flawed for at least three reasons.

First, section 441f's plain language prohibits making concealed contributions in the names of straw donors, and it has been universally interpreted to that effect in a specific Commission regulation, Commission advisory opinions and enforcement decisions, and numerous federal judicial decisions. With the single exception of the decision below, this collective body of administrative and judicial authority uniformly interprets section 441f as prohibiting not simply the act of "making a contribution[] and providing a false name" (GER 3), but, more broadly, any "contribution in the name of another," including "[g]iving money or anything of value, all or part of which was provided to the contributor by another person (the true contributor) without disclosing the source of money or the thing of value . . ." 11 C.F.R. 110.4(b)(2)(i).

This body of authority should have done more than inform the district court's interpretation of section 441f: The Commission's "construction of a statutory scheme it is entrusted to administer" should have been accorded "considerable weight." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). Under *Chevron*, the Commission's interpretation of

section 441f is entitled to deference as long as it represents a "permissible construction of the statute." *Id.* at 843; *see also DSCC*, 454 U.S. at 39. It does.

Second, basic principles of statutory construction support the government's interpretation of section 441f as broadly prohibiting any contribution made in the name of another person. The government's interpretation is consistent with FECA's overarching purpose as well as section 441f's specific role in FECA's statutory scheme of facilitating enforcement of FECA's contribution limits, disclosure requirements, and source restrictions. By contrast, the district court's unprecedented interpretation of section 441f facilitates *circumvention* of these vital, corruption-fighting measures.

Finally, the government's interpretation of section 441f is consistent with the legislative history of section 441f in particular and FECA as a whole. Although little direct legislative history exists on the Act's prohibition against contributions in the name of another, the legislative history of subsequent FECA amendments confirms that the prohibition encompasses concealed contributions funneled through conduits.

ARGUMENT

I. THE DISTRICT COURT SHOULD HAVE DEFERRED TO THE COMMISSION'S INTERPRETATION OF SECTION 441f

A. The Commission's Long-Standing Interpretation of Section 441f

The Commission, exercising its "extensive rulemaking and adjudicative powers," and its authority "to render advisory opinions with respect to activities possibly violating the Act," *Buckley*, 424 U.S. at 110; *see* 2 U.S.C. § 437d, has repeatedly and uniformly interpreted the meaning and scope of section 441f. Consistent with section 441f's anti-circumvention purpose, the Commission, for over 30 years, has stated that the provision prohibits *all* contributions made in the name of another, including contributions ostensibly made in the name of a straw contributor that have been advanced or reimbursed by an undisclosed true contributor.

This interpretation is reflected, *inter alia*, in the Commission's implementing regulations originally promulgated in 1977, which list as one example of making "contributions in the name of another" "[g]iving money or anything of value, all or part of which was provided to the contributor by another person (the true contributor) without disclosing the source of money or the thing of value . . . ." 11 C.F.R. § 110.4(b)(2)(i). *See infra* Section I.B.

Commission advisory opinions rely upon this interpretation: "the Act and Commission regulations prohibit the making and knowing acceptance of

contributions in the name of another . . . . This includes the reimbursement or other payment of funds by one person to another for the purpose of making a contribution." FEC Advisory Op. 1996-33, 1996 WL 549698, at *2 (citing 2 U.S.C. § 441f; 11 C.F.R. § 110.4(b)). *See also* FEC Advisory Op. 1995-19, 1995 WL 455822, at *2 ("A contribution by a person who is reimbursed in advance or afterward by another person or entity is unlawful under the Act because it is a 'contribution in the name of another.'") (citing 2 U.S.C. § 441f; 11 C.F.R. § 110.4(b)(1)(i)); FEC Advisory Op. 1991-38, 1992 WL 51228, at *2 (cautioning that under section 441f, campaign committee treasurer "may not be used as a conduit for payments from prohibited sources or persons attempting to make contributions to the committee through [the treasurer]").

The Commission was first asked in 1986 to opine on the permissibility of an employer-employee reimbursement scheme similar to that alleged here. *See* FEC Advisory Op. 1986-41, *supra* p. 5. Explaining that section 441f "insure[s] disclosure of the source of contributions to Federal candidates and political committees as well as compliance with the Act's limitations and prohibitions," *id.* at 2, the Commission concluded that the proposal "to pay additional compensation to certain employees to enable such employees to meet demands on them for contributions to [the employer's] PAC . . . would constitute the making of a contribution in the name of another and is prohibited by section 441f." *Id.* at 3.

The Commission's regulatory interpretation of section 441f also underlies its actions in more than 40 civil enforcement matters over the past 20 years. Indeed, since 1990, the Commission has successfully concluded 45 civil enforcement matters in which over 220 respondents violated section 441f by participating in illegal schemes to reimburse contributions ostensibly made by others. *See* Addendum. Those civil enforcement matters resulted in the imposition of over $6.1 million in civil penalties. *See id.*[4]

[4] The Department of Justice likewise has obtained numerous criminal judgments against defendants who violated section 441f by participating in concealed conduit-contribution schemes. *See, e.g.*, *United States v. Jinnah*, No. 2:06-cr-00383-GHK (C.D. Cal.) (Docket Nos. 97, 100); *United States v. Spencer*, No. 06-CR-60041-MGC-1 (S.D. Fla.) (Docket Nos. 1, 22); *United States v. Deloach*, No. 06-CR-20583 (S.D. Fla.) (Docket Nos. 1, 36, 111); *United States v. Noe*, No. 06-CR-00796 (N.D. Ohio) (Docket Nos. 1, 38); *United States v. Alford*, No. 06-CR-00069 (N.D. Fla.) (Docket Nos. 27, 142, 241); *United States v. Maloof*, No. 04-CR-60055 (S.D. Fla.) (Docket Nos. 38, 42, 53); *United States v. Wade*, No. 06-CR-00049-RMU (D.D.C.) (Docket Nos. 6, 31); *United States v. Schoenburg*, No. 2:07-cr-00357-SS (C.D. Cal.) (Docket Nos. 1, 38); *United States v. Troha*, No. 07-CR-050 (E.D. Wis.) (Docket Nos. 13, 21); *United States v. Berglund*, No. 06-CR-00191-RMU (D.D.C.) (Docket Nos. 5, 14); *United States v. Koceja*, No. 2:06-cr-00239-AEG-1 (E.D. Wis.) (Docket Nos. 2, 8); *United States v. Utter*, No. 05-CR-201 (E.D. Wis.) (Docket Nos. 16, 23). *See also United States v. Pierce-Santos* (No. 09-14 (EGS) (D.D.C.) (Docket No. 14); *United States v. Hsu*, No. 07-Cr-1066 (S.D.N.Y.) (Docket No. 23, Minute Entry of May 18, 2009). At least one such defendant has moved to have his sentence vacated based on the decision below in this case. *See United States v. Gill*, No. CV 09-05664 CAS (C.D. Cal.), Motion to Vacate, Set Aside or Correct Sentence, dated Aug. 3, 2009.

B. The Commission's Interpretation of Section 441f Should Have Been Accorded *Chevron* Deference

"As in all statutory construction cases, [the court must] begin with the language of the statute . . . 'to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (citation omitted). Here, the language of section 441f plainly covers all contributions made in the name of another person, including a donor's use of a concealed conduit. When a donor contributes through a concealed conduit, the true source of the contribution is the donor, despite the nominal use of the conduit's name. *See, e.g.*, *FEC v. Weinsten*, 462 F. Supp. 243, 250 (S.D.N.Y. 1978) (finding "no ambiguity in the statutory language" of section 441f and holding that defendant's reimbursement of concealed conduits violated statute).

Even if section 441f were found to have any ambiguity, and even if the district court's unprecedented interpretation of section 441f were itself reasonable, the court's outright rejection of the Commission's reasonable interpretation was improper. "[T]he Commission is precisely the type of agency to which deference should presumptively be afforded." *DSCC*, 454 U.S. at 37. Indeed, "Congress has vested the Commission with 'primary and substantial responsibility for administering and enforcing the Act,' providing the [Commission] with 'extensive rulemaking and adjudicative powers,'" as well as the "authori[ty] to 'formulate

general policy with respect to the administration of th[e] Act,'" and "the 'sole discretionary power' to determine in the first instance whether or not a civil violation of the Act has occurred." *Id.* (citing *Buckley*, 424 U.S. at 109, 110, 112, n.153; 2 U.S.C. § 437d(a)(9)). "For these reasons," where, as here, the district court looked beyond the statute's plain language to ascertain its meaning (GER 5-7), "the FEC's interpretation of the Act should [have] be[en] accorded considerable deference.'"[5] *United States v. Kanchanalak*, 192 F.3d 1037, 1049 (D.C. Cir. 1999) (citing *Orloski v. FEC*, 795 F.2d 156, 164 (D.C. Cir. 1986); *Fulani v. FEC*, 147 F.3d 924 (D.C. Cir. 1998); *Republican Nat'l Comm. v. FEC*, 76 F.3d 400 (D.C. Cir. 1996); *LaRouche v. FEC*, 28 F.3d 137 (D.C. Cir. 1994)).

"Such deference is especially warranted here, for Congress has twice amended [FECA] since" the Commission issued its regulation explaining the scope of section 441f "but has not overruled" the Commission's interpretation. *CFTC v. Schor*, 478 U.S. 833, 845-46 (1986). "'Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.'" *Forest Grove School Dist. v. T.A.*, __

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[5] Moreover, in the same context presented here, courts have held that the fact "[t]hat criminal liability is at issue does not alter the fact that [the Commission's] reasonable interpretations of [FECA] are entitled to deference." *Kanchanalak*, 192 F.3d at 1047 n.17 (citing *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 703-05 (1995)); *see also In re Sealed Case*, 223 F.3d 775, 779 (D.C. Cir. 2000) ("[d]eference [to Commission interpretations of FECA] is due as much in a criminal context as in any other").

U.S. __, 129 S. Ct. 2484, 2492 (June 22, 2009) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)). Indeed, the Supreme Court has held that "[w]here, as here, 'Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation'" — Congress itself characterized section 441f as the "conduit contribution ban" when it increased the penalties for violating the provision in the 2002 amendments encompassed in BCRA, *see* 116 Stat. 108 (2002) — courts "cannot but deem that construction virtually conclusive." *Schor*, 478 U.S. at 846 (citation omitted).

Here, "[t]he Commission's position on the question before [the courts] is clear" and "consistently has [been] adhered to" since 1977. *DSCC*, 454 U.S. at 37. "[T]he task for the [district court] was not to interpret the statute as it thought best but rather the narrower inquiry into whether the Commission's construction was 'sufficiently reasonable' to be accepted by a reviewing court." *Id.* at 39 (citations omitted). It was: the district court itself acknowledged that the government's interpretation "may reflect the spirit of FECA." (GER 7.) The court nevertheless erred because it believed the government's interpretation failed to "accord with the plain language of § 441f read in conjunction with" other parts of the Act. (*Id.*) But as discussed *infra* in Section III, no such conflict exists.

II. COURTS UNIFORMLY INTERPRET SECTION 441F AS PROHIBITING THE FUNNELING OF SECRET CONTRIBUTIONS THROUGH STRAW DONORS

The question presented here is not one of first impression. On the contrary, three U.S. courts of appeals — including this Court — and numerous federal district courts have recognized that section 441f prohibits concealed contributors from making contributions through the undisclosed reimbursement of one or more straw donors. *See Mariani v. United States*, 212 F.3d 761, 775 (3d Cir. 2000) (en banc); *United States v. Serafini*, 233 F.3d 758, 763 (3d Cir. 2000); *Kanchanalak*, 192 F.3d at 1042; *United States v. Sun-Diamond Growers of Calif.*, 138 F.3d 961, 969 (D.C. Cir. 1998); *Goland*, 903 F.2d at 1251; *U.S. v. Hankin*, 607 F.2d 611, 612 (3d Cir. 1979); *United States v. Sun-Diamond Growers of Calif.*, 941 F. Supp. 1277, 1281 (D.D.C. 1996); *Weinsten*, 462 F. Supp. at 249-50.[6] The Supreme Court has even observed that section 441f's deterrence of "corruption by conduit," *i.e.*, "donations by parents through their minor children to circumvent contribution limits applicable to the parents," may have explained the lack of evidence offered in support of the since-overturned prohibition on contributions by minors in former section 318 of BCRA. *McConnell v. FEC*, 540 U.S. 93, 232 (2003).

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[6] *See also Fieger v. Gonzales*, No. 07-CV-10533-DT, 2007 WL 2351006, at *2 (E.D. Mich. Aug. 15, 2007); *FEC v. Kopko*, Civ. No. 91-CV-7764 (E.D. Pa. May 22, 1992) (court-approved settlement of section 441f enforcement action involving reimbursed contributions) (complaint and judgment included in Addendum). *See also* cases cited *infra* p. 17.

A. Courts Recognize That Section 441f's Prohibition of Concealed Contributions Through Undisclosed Straw Donors Fulfills FECA's Underlying Policy Objectives

Among the cases invoking the Commission's interpretation of section 441f are a decision from this Court recognizing the statute's anti-circumvention role within FECA's broader scheme and a Third Circuit decision rejecting a constitutional challenge to section 441f in recognition of its fulfillment of the Supreme Court-approved government interests underlying FECA's disclosure requirements. *See Mariani*, 212 F.3d at 766; *Goland*, 903 F.2d at 1251. Both decisions interpret section 441f as prohibiting the conduct alleged here: Mariani "ma[de] campaign contributions . . . through enlisting company employees and others to forward contributions to the candidates that were thereafter reimbursed," *Mariani*, 212 F.3d at 764, and Goland financed a candidate's political ads by "arrang[ing] for 56 persons to make payments . . . to the media company with the understanding that Goland would reimburse them, which he apparently did," *Goland*, 903 F.2d at 1251.

In *Goland*, this Court devoted 3 pages of the 13-page opinion to a detailed background of FECA that not only summarized its various provisions but also explained the historical context in which the Act was passed and discussed the Supreme Court's evaluation of the constitutionality of its provisions. *Goland*, 903 F.2d at 1249-51. Signaling section 441f's complementary relationship to FECA's

other provisions, this Court explained that "[t]he Act prohibits the use of 'conduits' to circumvent these restrictions . . ." *id.* at 1251, and expressly referenced section 441f's anti-circumvention role in FECA's broader scheme.

The district court's novel interpretation of section 441f — that the statute "unambiguous[ly] . . . does *not* prohibit soliciting and reimbursing contributions" (GER 5 (emphasis added)) — fundamentally conflicts with this Court's acknowledgment in *Goland* that the statute prevents circumvention of FECA's other restrictions, 903 F.2d at 1251, as well as the Third Circuit's holding in *Mariani* that section 441f survives constitutional scrutiny *because* its "[p]roscription of conduit contributions (with the concomitant requirement that the true source of contributions be disclosed) would seem to be at the very core of the [Supreme] Court's analysis [in *Buckley*]," 212 F.3d at 775. Yet the district court inexplicably dismissed *Goland* and *Mariani* as irrelevant. (GER 6.) Both decisions, however, directly address the meaning of section 441f and do so while explaining FECA's overall regulatory structure.

B. The Decision Below is An Outlier

In addition to this Court's and the Third Circuit's analyses, a number of district courts have enforced the Government's interpretation of section 441f by entering judgments, or declining to overturn them, where defendants violated the statute by engaging in conduct like that alleged here. *E.g., Sun-Diamond Growers*,

941 F. Supp. at 1281 (declining to dismiss indictment where defendant was convicted under section 441f); *FEC v. Williams*, Civ. No. 93-6321-ER (C.D. Cal. Jan. 31, 1995) (granting summary judgment to Commission where defendant violated section 441f "in that Defendant made 22 contributions totaling $22,000 in the names of others" by "advancing or reimbursing" $1,000 to each of those 22 individuals); *FEC v. Lawson*, Civ. No. 6:90-2116-9 (D.S.C. Apr. 8, 1991) (default judgment regarding bonus paid to employee to effect contribution to House candidate); *FEC v. Rodriguez*, Civ. No. 86-687-CIV-T-10 (M.D. Fla. Oct. 28, 1988) (default judgment regarding reimbursement of individual contributions to presidential candidate); *FEC v. Wolfson*, Civ. No. 85-1617-CIV-T-13 (M.D. Fla. Feb. 6, 1986) (summary judgment regarding reimbursement of individual contributions to presidential candidate).[7] *See also* cases cited *supra* p. 10 n.4.

In *Sun-Diamond Growers*, for example, the defendant obtained contribution checks "from several employees" and "reimburs[ed] the individuals that advanced the campaign contributions." 941 F. Supp. at 1281. The defendant was convicted of violating several provisions of FECA, including section 441f. *Id.* at 1279. In denying the defendant's motion to dismiss certain counts of the indictment, including the section 441f counts, the district court observed that if the defendant's

[7] The complaints and judgments in *Lawson* and *Rodriguez*, summary judgment order and memorandum in *Wolfson*, and summary judgment order in *Williams* are included in the attached Addendum.

deceptive conduit-reimbursement scheme "were permitted in connection with an election, the judicially recognized purpose of FECA would be emasculated." *Id.* at 1281 (footnote omitted).

No other court has embraced the district court's novel interpretation that permits precisely the type of deceptive conduct that "emasculate[s]" the "judicially recognized purpose of FECA." *Id.* The decision below is thus best "regard[ed] . . . as an outlier, inconsistent with the weight of authority" concerning the purpose and scope of section 441f. *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 937-38 (9th Cir. 2006).

III. THE GOVERNMENT'S INTERPRETATION OF SECTION 441f PROMOTES THE CLEAR PURPOSE OF BOTH SECTION 441f AND FECA AS A WHOLE

A. Section 441f Must Be Interpreted In a Manner Consistent With Its Specific Purpose and the Broader Policy Underlying FECA

The fundamental objective of statutory interpretation is to give effect to the intended purpose of a statute. This Court has thus held that even where a statute's meaning is apparent from its plain language, courts "may not adopt a plain language interpretation of a statutory provision that directly undercuts the clear purpose of the statute." *Albertson's Inc. v. Comm'r of Internal Revenue*, 42 F.3d 537, 545 (9th Cir. 1994); *see also Pressley v. Capital Credit & Collection Serv., Inc.*, 760 F.2d 922, 924 (9th Cir. 1985) (same). Indeed, "even when [a statute's] plain meaning did not produce absurd results but merely an unreasonable one

'plainly at variance with the policy of the legislation as a whole,' [the Supreme Court] has followed that purpose, rather than the literal words." *Albertson's*, 42 F.3d at 545 (quoting *United States v. Amer. Trucking Ass'ns*, 310 U.S. 534, 543 (1940) (citations omitted)). *See also Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983).

When a statute's meaning cannot be ascertained from its plain terms, courts may employ canons of statutory interpretation to understand "the text, structure, purpose, and history" of a statute, *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004); the Supreme Court has cautioned, however, that "canons are tools designed to help courts better determine what Congress intended, not to lead courts to interpret the law contrary to that intent." *Scheidler v. Nat'l Org. for Women, Inc.*, 547 U.S. 9, 23 (2006) (citation omitted).

Here, section 441f not only plainly prohibits defendant's alleged conduct, canons of statutory interpretation also support the government's reasonable interpretation of section 441f.

B. The Government's Interpretation of Section 441f Complements Other FECA Provisions, Including Section 441a(a)(8)'s Regulation of *Disclosed* Conduit Contributions

The government's interpretation of section 441f is harmonious with both FECA's overarching anti-corruption purpose and section 441f's specific anti-circumvention role in FECA's broader scheme. In particular, section 441f's

prohibition of reimbursing contributions made through straw contributors *that conceal the identity of the true contributor* works in tandem with section 441a(a)(8). The latter provision, unlike section 441f, contemplates a scenario in which a contributor is seeking not to conceal his identity but rather to make legitimate, earmarked contributions through the *disclosed* use of a conduit or intermediary. *See* 2 U.S.C. § 441a(a)(8). Section 441a(a)(8) provides that in such a scenario, the "original source" is deemed to have made a contribution to the candidate-recipient and must be disclosed. *Id.* In other words, contributions up to the limits in section 441a(a) can legitimately be made through an intermediary or conduit, as long as the transaction is fully disclosed.

Thus, sections 441a(a)(8) and 441f serve different, but complementary purposes. The former requires disclosure for lawful conduit contributions within the statutory limits, while section 441f prevents circumvention of all contribution limits, the specific disclosure requirement in section 441a(a)(8), and FECA's source restrictions. Interpreting section 441f to prohibit reimbursing contributions made through straw contributors that conceal the identity of the true contributor also facilitates detection of violations of these other requirements.

C. The District Court's Analysis Relied On a Misunderstanding of the Scope of Section 441f

The district court correctly stated that *if* section 441f broadly proscribed *all* conduit contributions regardless of whether the true source of the contribution was

disclosed, it might conflict with section 441a. (*See* GER 4 ("[If] § 441f covered indirect contributions made through a conduit, that would mean such contributions were never allowed.").) The notion that section 441f might proscribe *all* conduit contributions, however, was mistaken. The district court thus never considered whether the *proper* interpretation of section 441f is reconcilable with the language of section 441a. It is. The only "conduit" contributions proscribed by section 441f are those in which the identity of the contribution's true source is *concealed*. And no portion of section 441a or any other FECA provision permits concealed contributions in any form.

The court's mistaken interpretation of section 441f also contributed to its misplaced concern over the absence from section 441f of the words "indirectly," "conduit," or "intermediary." The district court mistakenly concluded that because section 441f does not explicitly prohibit "indirect[]" contributions, or those passed through an "intermediary" or "conduit," then the opposite must be true. Not so. As explained above, some indirect or conduit contributions are legal, while others are not; the touchstone is whether conduit contributions have been concealed.

D. The Decision Below Yields an Absurd Result

1. The district court's interpretation of section 441f emasculates the provision's anti-circumvention function

Defendant concedes that "[t]he reason for the ban [in section 441f] . . . is . . . so that the public will know where money is coming from when someone makes a

contribution." (GER 147-48.) As one commentator has observed, however, "making a campaign contribution while maintaining anonymity is difficult to do without using a conduit." Robert D. Probasco, *Prosecuting Conduit Campaign Contributions — Hard Time for Soft Money*, 42 S. Tex. L. Rev. 841, 876 (2001). "[T]o maintain anonymity while avoiding use of a conduit, the donor would have to make the donation in cash . . . , by a cashier's check (on which the issuing bank usually notes the source's name), or by money order." *Id.*

The district court's conclusion that section 441f "unambiguous[ly]" permits one of the principal means of circumventing FECA's source restrictions and disclosure requirements fails to accord with section 441f's specific purpose of *preventing* circumvention of FECA's other requirements. If contributors could legitimately donate to candidates by using straw donors, evasion of FECA's contribution limits and reporting requirements would be much easier. Indeed the conduct alleged here "clearly falls within the parameters of the type of behavior that would lead to the corruption of the political process, or at a minimum, to the appearance of corruption of the political process." *Sun-Diamond*, 941 F. Supp. at 1281.

The decision below thus interprets the statute in a manner that "defeat[s] the plain purpose of the statute." *Bob Jones Univ.*, 461 U.S. at 586. And even if the "unambiguous" plain terms of the statute actually supported such an interpretation,

the interpretation would be no more permissible because it "directly undercuts the clear purpose of the statute," *Albertson's*, 42 F.3d at 545, and is "'plainly at variance with the policy of [FECA] as a whole." *Amer. Trucking Ass'ns*, 310 U.S. at 543-44 (footnote omitted).

2. The decision below is internally inconsistent

Notwithstanding its interpretation of section 441f, the district court separately concluded that defendant may be criminally liable under 18 U.S.C. § 1001 for causing a false statement "'that his employees had made contributions . . . when, in fact . . . O'Donnell had made those contributions by providing his money to those individuals . . . to make those contributions.'" (GER 8 (quoting Indictment at 8).) This conclusion was based on the court's correct understanding that "'§ 434(b) of FECA requires political committees to report the 'true source' of hard money contributions; thus, statements identifying conduits as the source of funds were not literally true.'" (GER 10 (quoting *Kanchanalak*, 192 F.3d at 1042 (citation and internal quotation marks omitted).) "Principles of consistent usage in statutory interpretation must, however, be applied consistently." *Kanchanalak*, 192 F.3d at 1047.

The court's two conclusions are inconsistent and irreconcilable. The premise of the section 1001 count — that the reported contributions were actually made by defendant, the true source of the funds contributed — is the same premise

the court rejected in its construction of section 441f. Although the section 441f and section 1001 counts are predicated on the *same* underlying transactions, the district court described those transactions in substantively different terms for purposes of each count: The decision wrongly concludes that defendant did not violate section 441f when he "reimburs[ed] . . . employees for contributions *they* made," while correctly sustaining the section 1001 count for causing a materially false statement that defendant's employees had made contributions because "*O'Donnell had made those contributions by providing his money to those individuals . . . to make those contributions*." (*Compare* GER 7, *with* GER 8 (quoting Indictment at 8) (emphases added).)

The district court's failure to reconcile its novel interpretation of section 441f with its other holding further demonstrates its unreasonable interpretation of that provision.

E. The Government's Interpretation of Section 441f is Consistent with FECA's Legislative History

FECA's history demonstrates that section 441f prohibits undisclosed contributions funneled through conduits, rather than merely prohibiting making contributions under a false name. For the nearly half century prior to FECA's enactment, the nation's chief campaign finance laws were the Federal Corrupt Practices Act of 1925 ("FCPA"), Title III of the Act of Feb. 28, 1925, 43 Stat. 1073, which provided for regular reporting by certain political committees and

prohibited corporate political contributions, and the 1940 amendments to the Hatch Act ("Second Hatch Act"), Act of July 19, 1940, Ch. 640, Pub. L. No. 753, § 13, 54 Stat. 767-72, which prohibited persons from contributing more than $5,000 in any calendar year in connection with any federal campaign. Riddled with loopholes, these laws contained no enforcement provisions and were routinely circumvented, often through the use of intermediaries. *See generally* Congressional Quarterly, *Cong. Campaign Finances: History, Facts, and Controversy* 33-35 (1992); Frank J. Sorauf, *Money in American Elections* 33 (1988); Robert E. Mutch, *Campaigns Congress, and Courts: The Making of Federal Campaign Finance Law* 24-40 (1988).

Individuals often evaded these laws by contributing through conduits, sometimes called "dummy" contributors. *See* Sorauf, *supra*, at 33; Alexander Heard, *The Costs of Democracy* 359 (1960). Alexander Heard, who would later serve as Chairman of President Kennedy's Commission on Campaign Costs, described a lawyer who funneled $30,000 in campaign contributions through various intermediaries as a "classic illustration" of how individuals evaded the $5,000 limit on federal contributions. Heard, *supra*, at 359. Wealthy donors

frequently gave more than $5,000 by privately subsidizing contributions of relatives. *See* Congressional Quarterly, *supra*, p. 34.[8]

Similarly, corporations used conduits to evade the prohibition on corporate contributions by reimbursing executives for their contributions. *See* Sorauf, supra, at 33. Testimony developed by the Senate Subcommittee on Privileges and Elections in 1956 showed that corporations circumvented the law by "pay[ing] or prepay[ing] bonuses with the explicit or tacit understanding that part of such remuneration shall be spent in campaign contributions." Staff of Subcomm. on Privileges and Elections, 85th Cong., Report on 1956 General Election Campaigns ("Gore Report") (Comm. Print 1957) at 24.[9]

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[8] In a 1971 floor debate over the proposed FECA prior to its enactment, Senator Scott observed that a "loophole" existed by which "a man of influence" could evade the contribution limits by giving money through his friends. (*See* GER 5.) Although the district court referenced Senator Scott's observation and reasoned that "[i]f 441f prohibited using one's friends as conduits for contributions there would be no 'loophole' to fill" (*id.*), it is unclear whether Senator Scott was referring to a loophole in the proposed FECA, or in the pre-existing law, which did not include section 441f or an analogue. The better view appears to be the latter; such a statement would be consistent with the history of evasion of the pre-FECA laws through the use of conduits. And even if it were the former, because this debate included no mention of the proposed prohibition on contributions in the name of another, Senator Scott's remark is of limited use in divining the meaning of Section 441f's forerunner.

[9] In a 1966 message to Congress proposing election reforms, President Johnson summarized the weaknesses of the FCPA and Second Hatch Act: "Too narrow in their scope when passed, they are now obsolete. . . . [M]ore loophole than law. They invite evasion and circumvention." Letter to the President of the Senate and to the Speaker of the House Transmitting Proposed Election Reform

In 1971, Congress acted to close various loopholes in the campaign finance laws and included among the provisions of the Federal Election Campaign Act of 1971 the prohibition against contributions in the name of another.[10] Pub. L. No. 92-225, § 310, 86 Stat. 3, 19. As initially enacted, the prohibition specified that "[n]o person shall make a contribution in the name of another person, and no person shall knowingly accept a contribution made by one person in the name of another person." In 1974, Congress moved the prohibition to the criminal code at 18 U.S.C. § 614, and amended it to additionally prohibit anyone from "knowingly permit[ting] his name to be used to effect" a contribution in the name of another. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101(f), 88 Stat. 1263, 1267-68. The content of the provision has not since changed. In 1976, however, Congress returned the prohibition to Title 2, at 2 U.S.C. § 441f. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, §§ 112, 201(a), 90 Stat. 475, 494.

Act of 1966 (May 26, 1966), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=27617 (last visited Sept. 23, 2009).

[10] *See*, *e.g.*, 117 Cong. Rec. 30,071 (daily ed. Aug. 5, 1971) (statement of Sen. Mansfield) ("This act closes those loopholes so that the public will know where the political obligations lie."); 117 Cong. Rec. 29,325 (daily ed. Aug. 4, 1971) (statement of Sen. Symington) ("[FECA] . . . goes far toward closing these and other loopholes which exist in the present law.").

Although very little legislative history from the 1971 enactment specifically discusses the prohibition against contributions in the name of another, members of Congress have since repeatedly explained that the prohibition encompasses conduit contributions. During House floor debate over the 1976 amendments to FECA, a question arose regarding the reporting obligation of a person who gives another cash to purchase a ticket to a fundraiser. Representative Mathis cautioned that "there is a provision in the law that provides for criminal penalties for using another as a conduit for funds. One cannot give money for another."[11] 122 Cong. Rec. H2606 (daily ed. Mar. 31, 1976).

In a 1998 report, the House Government Reform and Oversight Committee repeatedly referred to section 441f as covering "conduit contributions." *See, e.g.,* H. R. Rep. No. 105-829 ("Investigation of Political Fundraising Improprieties and Possible Violations of Law") pt. 1, at 178 (describing "contributions in the name of another" as "conduit contributions"), at 182 (same), pt. 4 at 4019 (referring to section 441f as a "conduit contribution" provision) (1998). In another 1998 report, the House Committee on Standards of Official Conduct explained that "[i]t is

[11] Although Representative Mathis did not identify the provision that imposed criminal penalties for using another as a conduit, his actual words and the lawfulness of properly attributed and reported earmarked contributions, *see* 2 U.S.C. § 441a(a)(8), strongly suggest that he was referring to the prohibition of contributions in the name of another.

illegal for any person to make a contribution to a federal candidate by using the name of another person. 2 U.S.C. § 441f. Such a contribution is commonly referred to as a 'conduit contribution.'" H. R. Rep. No. 105-797 ("In the Matter of Representative Jay C. Kim") at 94 n.658 (1998).

Amendments to FECA in 2002 make clear that members of Congress understood the prohibition on contributions in the name of another to encompass concealed conduit contributions. In section 315 of BCRA (codified as amended at 2 U.S.C. § 437g(d) (2002)), Congress enhanced the civil and criminal penalties for violations of the prohibition against contributions in the name of another, a prohibition described in an analysis of the bill placed into the record by one of its sponsors as "the conduit contribution prohibition in 2 U.S.C. § 441f." 148 Cong. Rec. S1991-02, S1994 (daily ed. Mar. 18, 2002). Congress, in fact, even titled the provision "Increase in Penalties Imposed for Violation of Conduit Contribution Ban." 116 Stat. at 108.[12] Compared to Congress's repeated, unambiguous characterizations of section 441f, the two fragments of legislative debate mentioned by the district court — the latter relied on by the court to help construe a term not even found in section 441f ("indirect") and touching on a different

[12] BCRA, *inter alia*, increased the maximum criminal penalty from the greater of $10,000 or 200 percent of the contribution involved to $50,000 or 1,000 percent of the amount involved. 116 Stat. at 108.

FECA provision (2 U.S.C. § 441b) — shed little light on the meaning of the prohibition against contributions in the name of another.

Finally, the district court's construction of section 441f conflicts with the cardinal purpose of the 1971 Act. At inception, FECA replaced individual contribution limits, Pub. L. No. 92-225, § 203, 86 Stat. 3 (1972) (repealing 18 U.S.C. § 608), with more rigorous disclosure requirements aimed at revealing the actual source of a candidate's support. *See, e.g.*, S. Rep. No. 92-229, at 1859 (1971) ("reject[ing] placing a limitation on individual contributions," in part, because "[f]ull disclosure makes such a limitation unnecessary"). The district court's interpretation of section 441f as only prohibiting contributions under a false name cannot be reconciled with this stated purpose of the 1971 Act. Under the court's narrow reading, contributions through straw donors — from FECA's enactment until enactment of the Act's earmarking provision in 1974 — would have been left entirely unregulated, neither unlawful nor otherwise subject to disclosure.

CONCLUSION

For all the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

Thomasenia P. Duncan
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General Counsel

David Kolker (D.C. Bar No. 394558)
Associate General Counsel

Kevin Deeley
Assistant General Counsel

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September 23, 2009

ADDENDUM

TABLE OF CONTENTS OF ADDENDUM

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Table of Federal Election Commission's Civil Enforcement of Section 441f From December 1990 through the Present That Includes Respondents' Participation in Undisclosed Conduit-Contribution-Reimbursement Schemes[1]

Matter Under Review ("MUR")	Date of Resolution (date(s) of Conciliation Agreement(s))	Number of Respondents	Total Amount Civil Penalties Imposed
MUR 2837	12/19/1990	2	$200
MUR 2893	03/25/1991	7	$71,500
MUR 3125	01/30/1991	2	$200
MUR 4399	08/01/1997	2	$10,500
MURs 4322, 4650	05/27/1999 10/12/1999	5	$100,000
MUR 4434	01/18/2000	1	$4,000
MURs 4530, 4531, 4642, 4909	05/04/1998 09/21/1998 12/04/1998 07/22/1999 02/04/2000 05/09/2000 08/25/2000 09/13/2000 11/27/2000 06/21/2001 07/02/2001 08/23/2001 10/03/2001 10/05/2001 11/15/2001 12/05/2001 12/06/2001 12/12/2001 06/18/2002 09/04/2002 09/11/2002	24	$699,750
MUR 4547	09/13/2000 08/23/2001 12/06/2001	5	$2,000

[1] Documents supporting the data reflected in this Table are publicly available on the Federal Election Commission's website through the "Enforcement Matters"/"Enforcement Query System" links. *See* http://www.fec.gov.

Matter Under Review ("MUR")	Date of Resolution (date(s) of Conciliation Agreement(s))	Number of Respondents	Total Amount Civil Penalties Imposed
MUR 4646	10/29/1999 01/04/2000	7	$50,750
MUR 4748	08/23/2000	4	$1,000
MURs 4818, 4933	12/09/2003 12/31/2003 01/14/2004 01/28/2004 02/02/2004 03/18/2004 06/24/2004 06/29/2004	12	$569,500
MUR 4834	12/15/1998	1	$10,000
MUR 4871	02/21/2001 09/17/2001	8	$24,600
MUR 4876	03/23/1999	2	$20,000
MUR 4879	05/20/1999	1	$200,000
MUR 4884	05/26/1999	5	$209,000
MUR 4885	03/09/2000	3	$30,000
MUR 4901	09/13/2001 11/28/2001	2	$8,800
MUR 4931	11/21/2002 12/13/2002 01/03/2003 05/16/2003 07/17/2003	15	$849,000
MURs 5017, 5205	01/08/2002 08/16/2002	4	$33,400
MUR 5027	09/05/2000 12/11/2000	2	$82,000
MUR 5029	10/12/2000	1	$19,500
MUR 5041	02/21/2001 05/04/2001	4	$62,500
MUR 5092	03/26/2003 05/14/2003 05/17/2003	3	$10,000
MUR 5101	05/20/2003	1	$14,000
MUR 5187	12/03/2002	4	$477,000

Matter Under Review ("MUR")	Date of Resolution (date(s) of Conciliation Agreement(s))	Number of Respondents	Total Amount Civil Penalties Imposed
MUR 5305	09/30/2005 11/04/2005	6	$159,000
MUR 5357	12/17/2003	19	$168,000
MUR 5366	06/21/2006	4	$59,500
MUR 5386	10/24/2005	6	$151,000
MUR 5398	06/07/2005 03/27/2006	4	$200,000
MUR 5405	04/20/2005	2	$275,000
MUR 5453	09/17/2004 01/15/2005 01/26/2005 08/09/2005 10/11/2005 11/03/2005 11/07/2005 12/16/2005	11	$156,169
MUR 5496	07/12/2007 01/31/2008	4	$49,000
MUR 5504	06/29/2009	5	$155,000
MUR 5628	10/14/2005	1	$85,000
MUR 5643	03/14/2005	5	$8,000
MUR 5666	10/31/2007	3	$1,042,000
MUR 5765	02/08/2007	5	$17,000
MUR 5784	08/29/2007	3	$9,000
MUR 5871	09/15/2008	7	$65,500
MUR 5927	04/13/2009	1	$6400
MUR 5948	01/03/2008	8	$3,400
MUR 6186	05/22/2009	1	$6,000
	TOTALS	**222 Respondents**	**$6,174,169 in civil penalties**

Received MAY 1 1992

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Microfiche

FEDERAL ELECTION COMMISSION,

Plaintiff,

v.

EDWARD E. KOPKO,

Defendant.

No. 91-CV-7764

FILED

STIPULATION AND ORDER

JUN 5 1992

MICHAEL E. KUNZ, Clerk
By _____ Dep. Clerk

STIPULATION AND ORDER

This is an action for declaratory, injunctive and other appropriate relief pursuant to the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431 et seq. The parties, through plaintiff's counsel and defendant pro se, now stipulate and agree to the entry of this order as evidenced by the signatures hereto;

92 JUN 29 AM 11:59 RECEIVED FEDERAL ELECTION COMMISSION

I. IT IS HEREBY DECLARED that defendant Edward E. Kopko violated 2 U.S.C. § 441f as alleged in plaintiff's complaint this action;

II. IT IS HEREBY ORDERED that defendant Edward E. Kopko is permanently enjoined from making contributions to federal candidates in the names of other persons, pursuant to 2 U.S.C. § 441f; and

III. IT IS FURTHER ORDERED that defendant Edward E. Kopko shall pay to the plaintiff Federal Election Commission, in settlement of this action, a civil penalty in the amount of

ENTERED: 6-5-92

CLERK OF COURT

,500 (one thousand five hundred dollars) within ten days of the entry of this order.

The undersigned parties hereby stipulate and agree to the entry of the foregoing order.

Respectfully submitted,

Lawrence M. Noble
General Counsel

Richard B. Bader
Associate General Counsel

Stephen E. Hershkowitz
Assistant General Counsel

V. Colleen Miller
Attorney

FOR THE PLAINTIFF
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 219-3400

Edward E. Kopko

FOR THE DEFENDANT
First Federal Building
111 East Norwegian Street
Pottsville, PA 17901
(717) 621-3300

92 JUN 11 PM 3:27

SO ORDERED, this 22 day of May, 1992, in Philadelphia, PA.
The clerk shall close the docket for statistical purposes
6-8-92
Copies to Counsel

Edward N. Cahn
United States District Judge

EC

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FEDERAL ELECTION COMMISSION,
999 E Street, N.W.
Washington, D.C. 20463

Plaintiff,

v.

EDWARD E. KOPKO,
111 East Norwegian Street
Pottsville, PA 17901

Defendant.

FILED DEC 10 1991

Complaint for Declaratory, Injunctive and Other Appropriate Relief

91-CV-7764

COMPLAINT FOR DECLARATORY, INJUNCTIVE AND OTHER APPROPRIATE RELIEF

Jurisdiction

1. This action seeks declaratory, injunctive and other appropriate relief pursuant to the express authority granted to the Federal Election Commission (the "Commission") by the Federal Election Campaign Act of 1971, as amended (the "Act"). 2 U.S.C. §§ 431 et seq. This Court has jurisdiction over this suit pursuant to 28 U.S.C. § 1345 as an action brought by an agency of the United States expressly authorized to sue by an act of Congress.

Venue

2. Venue is properly found in the Eastern District of Pennsylvania in accord with 2 U.S.C. § 437g(a)(6)(A) as the defendant can be found, resides and/or transacts business in this district.

Parties

3. Plaintiff Federal Election Commission is the independent agency of the United States government empowered with exclusive

jurisdiction with respect to the administration, interpretation and civil enforcement of the Federal Election Campaign Act of 1971, as amended. See generally, 2 U.S.C. §§ 437c(b)(1), 437d(a) and 437g. The Commission is authorized to institute investigations of possible violations of the Act, 2 U.S.C. § 437g(a)(1) and (2), and has exclusive jurisdiction to initiate civil actions in the United States district courts to obtain judicial enforcement of the Act. 2 U.S.C. §§ 437c(b)(1) and 437d(e).

4. The defendant, Edward E. Kopko, ("Kopko") conducts business at the First Federal Building, 111 East Norwegian Street, Pottsville, Pennsylvania, 17901.

Administrative Proceedings

5. In the normal course of its supervisory responsibilities and acting on the basis of information supplied by the defendant, on November 14, 1989, the Commission, by an affirmative vote of at least four of its members, found reason to believe that the defendant had violated 2 U.S.C. § 441a(a)(8), a provision of the Act, and Commission regulation 11 C.F.R. § 110.6(c). Subsequently on April 3, 1990 the Commission by an affirmative vote of at least four of its members, decided to take no further action with regard to the possible violations of 2 U.S.C. § 441a(a)(8) and 11 C.F.R. § 110.6(c). However, on April 3, 1990, the Commission found reason to believe that Kopko violated 2 U.S.C. §§ 441a(a)(1)(A) and 441f, provisions of the Act. The Commission notified Kopko of these reason to believe findings by letter dated April 13, 1990.

6. The Commission's General Counsel notified the

defendant, by letter dated April 18, 1991, that the General Counsel was prepared to recommend that the Commission find probable cause to believe the violations of the Act by the defendant had occurred and provided the defendant with a brief stating the position of the General Counsel on the legal and factual issues of the case. Defendant was then provided an opportunity to respond to the General Counsel's brief, pursuant to 2 U.S.C. § 437g(a)(3).

7. On June 4, 1991, the Commission, by an affirmative vote of at least four of its members, found probable cause to believe that Edward E. Kopko violated 2 U.S.C. §§ 441a(a)(1)(A) and 441f.

8. Pursuant to 2 U.S.C. § 437g(a)(4), the Commission notified the defendant of its findings of probable cause, by letter dated June 7, 1991, and offered the defendant an opportunity to correct, through conciliation, those violations. Thereafter, the Commission endeavored, without success, for a period of not less than thirty (30) days to correct such violations by the informal methods of conference, conciliation and persuasion, and to enter into a conciliation agreement with the defendant.

9. Unable through informal methods to secure an acceptable conciliation agreement, the Commission determined, on September 11, 1991 by the affirmative vote of at least four of its members, to authorize the initiation of this civil suit for relief in federal district court against the defendant. See 2 U.S.C. § 437g(a)(6). By letter dated September 29, 1991, the Commission notified the defendant of its action.

10. The plaintiff Commission has satisfied all the jurisdictional requirements which are prerequisites to filing this suit.

Violation of Law

11. Plaintiff incorporates herein by reference the allegations in paragraphs 1 through 10.

12. 2 U.S.C. § 441a(a)(1)(A) provides that no person shall make contributions to any candidate or his authorized political committee with respect to any election for Federal office which, in the aggregate, exceed $1,000. Pursuant to 11 C.F.R. § 110.1(g), monies paid to a political committee to retire debts resulting from elections are considered contributions for purposes of the Act.

13. 2 U.S.C. § 441f provides that no person shall make a contribution in the name of another person.

14. In 1989, Kopko was a candidate for the office of District Attorney for Schuylkill County, Pennsylvania.

15. Kopko arranged for Alexander Haig, a former presidential candidate, to appear on his behalf in Schuylkill County on June 27, 1989.

16. In connection with Alexander Haig's appearance, Kopko agreed to cause $3,000 to be donated to Alexander Haig's campaign committee, Haig for President.

17. Kopko obtained checks for $250 each from twelve of his friends and relatives.

18. Kopko delivered those checks to the Haig for President committee. At that time, the Haig for President Committee had

outstanding debts resulting from Alexander Haig's campaign for president.

19. Kopko later reimbursed those twelve friends and relatives for their contributions to the Haig for President committee.

20. Kopko violated 2 U.S.C. § 441a(a)(1)(A) by making a $3,000 contribution to the Haig for President committee, an authorized political committee of a candidate for Federal office.

21. Kopko violated 2 U.S.C. § 441f by making contributions in the names of twelve other persons.

PRAYER FOR RELIEF

Wherefore, the plaintiff Federal Election Commission requests that this Court:

I. Declare that the defendant Edward E. Kopko violated 2 U.S.C. § 441a(a)(1)(A) by contributing more than $1,000 to the campaign committee of a candidate for federal office;

II. Declare that the defendant Edward E. Kopko violated 2 U.S.C. § 441f by making contributions in the names of others to a campaign committee of a candidate for federal office;

III. Assess a civil penalty against Edward E. Kopko of $5,000 for each violation, pursuant to 2 U.S.C. § 437g(a)(6)(A);

IV. Permanently enjoin Edward E. Kopko from further similar violations of the Federal Election Campaign Act of 1971, as amended;

V. Award the plaintiff Federal Election Commission its costs in this action; and

VI. Grant the plaintiff Federal Election Commission such other relief as may be appropriate.

Respectfully submitted,

Lawrence M. Noble
General Counsel

Richard B. Bader
Associate General Counsel

Stephen E. Hershkowitz
Assistant General Counsel

V. Colleen Miller
Attorney
(PA Bar No. 41529)

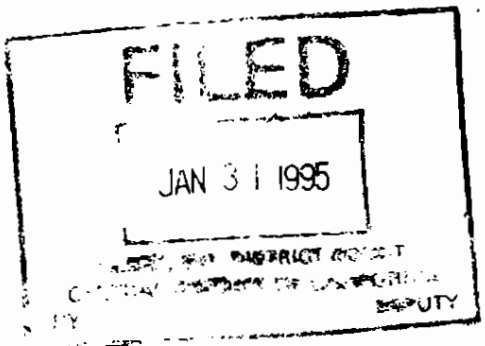
December 16 1991

FOR THE PLAINTIFF
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 219-3400

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FIRST CLASS MAIL, POSTAGE PREPAID, TO ALL COUNSEL (OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF RECORD IN THIS ACTION ON THIS DATE.

DATED: 1/31/95

DEPUTY CLERK



UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FEDERAL ELECTION COMMISSION, Plaintiff, v. LARRY R. WILLIAMS, Defendant.	No. CV 93-6321-ER (Bx) ORDER RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT

The parties cross-Motions for Summary Judgment came before the Honorable Edward Rafeedie on January 26, 1995. The parties stipulated to waive oral argument on these motions, which Stipulation was approved by the Court.

The Court, having considered the Motions, the opposing and reply papers, and all other matters presented to the Court, HEREBY ORDERS, as follows:

1. The Defendant's Motion for Summary Judgment is DENIED and the Plaintiff's Motion for Summary Judgment is GRANTED, for the reasons stated below:

a) The Court does not believe the presence of ex officio members on the Commission makes the Commission's actions constitutionally infirm under the separation of powers doctrine. Under the reasoning of Buckley v. Valeo, 96 S. Ct. 612 (1976), the 2 ex officio members do not hold

an "Office Under the United States" and therefore there is no violation of Art. I, § 6, cl. 2 of the Constitution--which prohibits members of either the House or the Senate from holding such an Office. Moreover, the Court believes that the presence of those members on the Commission does not violate separation of powers principles, because they were entrusted with an advisory role--and could not vote on Commission action. Although the Court is cognizant of the D.C. Circuit's decision in FEC v. NRA Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993), cert. dismissed (Dec. 1994), the Ninth Circuit's decision in Lear Siegler, Inc. v. Lehman, 842 F.2d 1102 (9th Cir. 1988) compels a different result. Because the ex officio members do not vote, it does not appear Congress sought to usurp an executive function. Thus, the focus of the separation of powers inquiry must shift to whether their presence on the Commission "impermissibly undermines" the executive branch's role. Commodities Futures Trading Commission v. Schor, 106 S. Ct. 3245, 3261 (1986). Quite simply, it does not appear that this is the case.

b) Further, even if it were, the de facto authority doctrine would permit the Commission's acts to stand. The Supreme Court implemented this doctrine with respect to an earlier version of the Act in Buckley, and there appears to be no reason to depart from its reasoning. As a result, even if the Commission's actions were constitutionally defective, the de facto doctrine would permit them to stand.

c) The Court does not believe that the Act's

provisions are unconstitutionally vague. The Court believes that the statutory provisions are not so vague that "the ordinary person exercising ordinary common sense [could not] sufficiently understand and comply with" them. U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548 (1973).

d) Nor does the Court find merit in Defendant's position that because the Commission did not seek an estimation of its claims in Bankruptcy Court, it has waived its right to enforce a civil penalty or is estopped from doing so. There seems to be no dispute that the penalties would be non-dischargeable in Defendant's bankruptcy. Thus, this situation seems analogous to In re Hanna, 872 F.2d 829 (8th Cir. 1988), in which the Eighth Circuit held that post-petition interest on a non-dischargeable tax debt was collectible, despite the failure to have the amount estimated by the bankruptcy court.

e) Finally, the Court is not persuaded that Defendant has suffered prejudice as a result of an excessive delay in the prosecution of this action.

f) With respect to the issue of whether Defendant's conduct violated the Act, the underlying facts are not disputed: Defendant purchased 40 Super Bowl tickets, for $100 each or a total of $4,000, from the Philadelphia Eagles and made them available to a campaign committee for Jack Kemp's 1988 presidential campaign. The tickets were to be used as part of a promotion to obtain contributions: in return for a $1000 contribution, a contributor would receive

a free ticket.

Similarly, there is no dispute that Defendant either advanced or reimbursed $1,000 to 22 individuals who made $1,000 contributions to the Kemp campaign.

Finally, there appears to be no dispute that Defendant contributed $1,694 on his own behalf to the Kemp campaign.

g) The Act prohibits both making contributions in another person's name and individual contributions in excess of $1,000. 2 U.S.C. §§ 441a(a)(1)(A), 441f. It appears clear to the Court that Defendant's conduct in either advancing or reimbursing the $1,000 to the 22 individuals violates the prohibition of making contributions--including loans, advances or gifts for the purpose of influencing an election--in another person's name. This constitutes a violation of 2 U.S.C. § 441f, in that Defendant made 22 contributions totalling $22,000 in the names of others to the Jack Kemp for President Committee and Victory '88.

Similarly, by virtue of the fact that his total contributions-through his own and others' names--total $27,694,[1] it is clear that Defendant contributed $26,694 in

---

[1] Defendant Williams apparently does not dispute the fact that he made actual and in-kind contributions totalling $5,694 (the $4,000 for the tickets, plus $1,694 of other contributions); added to the $22,000, his total contributions were $27,694.

The Court notes that even if the $1,000 advances/reimbursements to the 22 individuals did not constitute a violation of 2 U.S.C. § 441f, the $22,000 would still be included with respect to the excess contributions made in Defendant's own name. If the transactions were viewed as re-sales--i.e., that Defendant purchased a ticket worth $1,000 from each individual--Defendant's contribution of the tickets to the campaign committees should be valued at fair market value, which based on the re-sale to Defendant, would be at least $1,000.

excess of the statutory limit of $1,000.

Further, there is no doubt Defendant knew of the Act's prohibitions. This is sufficient to establish willfulness under the Act, because a defendant's belief that he did not violate the Act is not a defense. Defendant's citation to Cheek v. United States, 498 U.S. 192 (1991) is inapposite because that case dealt with criminal penalties for tax evasion. More to the point is Davis v. United States, 961 F.2d 867, 871 (9th Cir. 1992), which held that in a civil context, wilfulness is a voluntary, conscious and intentional act and that bad faith need not be proven.

2. Accordingly, the Court believes civil penalties under 2 U.S.C. § 437g(a)(6)(C) should be imposed in the amount of $10,000.00. In addition, the Court enjoins Defendant from similar violations of the Act for a period of 10 years from the date of this Order, based on Defendant's continuing belief he committed no wrong-doing.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by United States mail, copies of this Order on counsel for the parties in this matter.

Dated: January 31, 1995

EDWARD RAFEEDIE
United States District Court Judge

FILED

APR 8 1991

ANN A. BIRCH, CLERK
U.S. DISTRICT COURT

91 APR 12 AM 11:50

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

FEDERAL ELECTION COMMISSION,

Plaintiff,

v.

MARK LAWSON,

Defendant.

CA No. 6:90-2116-09

DEFAULT JUDGMENT

91 APR 12 PM 12:57

DEFAULT JUDGMENT

Upon consideration of the plaintiff Federal Election Commission's motion for default judgment against defendant Mark Lawson,

IT IS HEREBY ORDERED that the plaintiff's motion be and the same hereby is GRANTED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that

1. Defendant Mark Lawson violated 2 U.S.C. § 441f;

2. Defendant Mark Lawson shall pay to the Federal Election Commission within ten (10) days from the date of entry of this judgment a $5,000 civil penalty for violating 2 U.S.C. § 441f;

3. Defendant Mark Lawson is permanently enjoined from knowingly permitting his name to be used to effect a contribution in the name of another person to any candidate for federal office.

Dated April 8, 1991

Dennis W. Shedd

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

ORIGINAL FILED

SEP 26 1990

ANN A. BIRCH, CLERK
U. S. DISTRICT COURT

FEDERAL ELECTION COMMISSION,
999 E Street, N.W.
Washington, D.C. 20463
(202) 376-5690,

Plaintiff,

v.

MARK LAWSON
350 Fair Forest Way
Suite #220
Greenville, South Carolina 29607
(803) 288-9379

Defendant.

Civil Action No.

COMPLAINT

COMPLAINT FOR DECLARATORY, INJUNCTIVE AND OTHER APPROPRIATE RELIEF

Jurisdiction.

1. This action seeks declaratory, injunctive and other appropriate relief pursuant to the express authority granted the Federal Election Commission (the "Commission") by the Federal Election Campaign Act of 1971, as amended (the "Act") (codified at 2 U.S.C. §§ 431 et seq). This court has original jurisdiction over this suit pursuant to 28 U.S.C. § 1345 as an action brought by an agency of the United States government expressly authorized to sue by an Act of Congress. See 2 U.S.C. §§ 437d(a)(6) and 437g(a)(6)(A).

Venue.

2. Venue is properly found in this district in accord with 2 U.S.C. § 437g(a)(6)(A) as the defendant can be found, resides or transacts business in this district.

Parties.

3. Plaintiff Federal Election Commission is the independent agency of the United States government empowered with exclusive primary jurisdiction over the administration, interpretation and civil enforcement of the Act. See generally 2 U.S.C. §§ 437c(b)(1), 437d(a) and 437g. The Commission is authorized to institute investigations of possible violations of the Act, 2 U.S.C. §§ 437g(a)(1) and (2), and has exclusive jurisdiction to initiate civil actions in the United States district courts to obtain judicial enforcement of the Act. 2 U.S.C. §§ 437c(b)(1) and 437d(e).

4. Defendant Mark Lawson resides at 350 Fair Forest Way, Suite #7207, Greenville, South Carolina, 29607. During the time in question, defendant Mark Lawson was employed by Robin's Mens Store of Anderson, South Carolina.

Administrative Proceedings.

5. In the normal course of carrying out its supervisory responsibilities, on November 12, 1986, the Commission, by the affirmative votes of at least four of its members, found reason to believe that Mark Lawson violated 2 U.S.C. § 441f, a provision of the Act, and initiated an investigation into that apparent violation. Defendant was notified of the Commission's actions by letter dated November 21, 1986. See 2 U.S.C. § 437g(a)(2).

6. The Commission's General Counsel notified defendant Mark Lawson, by letter dated April 27, 1989, that the General Counsel was prepared to recommend that the Commission find probable cause to believe that he had violated 2 U.S.C. § 441f, and provided him

with a brief stating the position of the General Counsel on the factual and legal issues of the case. See 2 U.S.C. 437g(a)(3).

7. On October 3, 1989, the Commission, by the affirmative votes of at least four of its members, found probable cause to believe that Mark Lawson violated 2 U.S.C. § 441f and thereafter endeavored for a period of not less than thirty (30) days to correct such violation by the informal methods of conference, conciliation and persuasion, and to enter into a conciliation agreement with him. Defendant was notified of the Commission's finding of probable cause by letter dated October 6, 1989. See 2 U.S.C. § 437g(a)(4)(A)(i).

8. Unable through informal methods to secure an acceptable conciliation agreement, the Commission, on June 5, 1990, determined, by the affirmative vote of at least four of its members, to authorize the initiation of this civil suit for relief in federal district court against defendant Mark Lawson. See 2 U.S.C. § 437g(a)(6). Defendant was notified of the Commission's June 5, 1990 action by letter dated June 7, 1990.

9. The plaintiff Commission has satisfied all jurisdictional requirements that are prerequisites to filing this suit.

Statement of Claim

10. Plaintiff incorporates herein by reference the allegations contained in paragraphs 1 through 9, inclusive.

11. The Federal Election Campaign Act of 1971, as amended ("the Act") provides that no person shall make a contribution in the name of another person or knowingly permit his name to be

used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person. 2 U.S.C. § 441f.

12. Robin Tallon, Jr., was a candidate for the House of Representatives in 1982. The Tallon for Congress Committee was Mr. Tallon's principal campaign committee for his 1982 campaign.

13. Defendant Mark Lawson knowingly permitted his name to be used to effect a contribution of $1,000 to the Tallon for Congress Committee, as follows: defendant received a $1,500 bonus from his employer, Robin's Mens Store of Anderson, on April 12, 1982 in order to make a $1,000.00 contribution on April 14, 1982 to the Tallon for Congress Committee.

14. Defendant violated 2 U.S.C. § 441f, by knowingly permitting his name to be used to effect a contribution by Robin's Mens Store of $1,000 to the Tallon for Congress Committee.

PRAYER FOR RELIEF

WHEREFORE, the plaintiff Federal Election Commission prays that this Court:

1. **Declare that defendant Mark Lawson violated 2 U.S.C. § 441f;**
2. **Assess a civil penalty against defendant Mark Lawson of the greater of five thousand dollars ($5,000) or an amount equal to 100 percent of the amount involved in the violations by defendant. See 2 U.S.C. § 437g(a)(6)(B);**
3. **Permanently enjoin defendant Mark Lawson from further**

violations of 2 U.S.C. § 441f;

4. Award the plaintiff Federal Election Commission its costs in this action; and

5. Grant the plaintiff Federal Election Commission such other relief as may be appropriate.

Respectfully submitted,

Lawrence M. Noble
General Counsel

Richard B. Bader
Associate General Counsel

David H. FitzGerald
Assistant General Counsel

V. Colleen Miller
Attorney

September 4, 1990

FOR THE PLAINTIFF
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 376-8200

FILED

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

OCT 28 5 11 PM '88

CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

FEDERAL ELECTION COMMISSION,

Plaintiff,

-vs- CASE NO. 86-687 Civ-T-10

CESAR RODRIGUEZ,

Defendant.
_____/

FINAL ORDER AND DEFAULT JUDGMENT

Upon consideration of the plaintiff Federal Election Commission's motion for default judgment against defendant Cesar Rodriguez,

IT IS HEREBY ORDERED that the plaintiff's motion be and the same hereby is granted.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that

1. Defendant Cesar Rodriguez violated 2 USC §441f by knowingly assisting in the making of contributions in the name of another;

2. Defendant Cesar Rodriguez is permanently enjoined from similar future violations of the Federal Election Campaign Act of 1971, as amended;

3. Defendant Cesar Rodriguez shall pay to the plaintiff Federal Election Commission, within fifteen (15) days from the date of entry of this default judgment, a civil penalty in the total amount of five thousand dollars ($5,000.00) pursuant to 2 USC §437g(a)(6)(B).

AO 72A ⊕
(Rev. 8/82)

4. Defendant Cesar Rodriguez shall pay the plaintiff Federal Election Commission, within fifteen (15) days from the date of entry of this order and judgment, the additional sum of $22.95. This amount represents the total costs which have been incurred to date by or on behalf of the Commission in this action.

IT IS SO ORDERED.

DONE and ORDERED at Tampa, Florida, this 28th day of October, 1988.

William Hodges

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

FEDERAL ELECTION COMMISSION, 999 E Street, N.W. Washington, D.C. 20463 (202) 376-5690, Plaintiff, v. CESAR RODRIGUEZ 2510 South Dundee Street Tampa, Florida 33620 Defendant.	)	Civil Action No. _____ COMPLAINT

COMPLAINT FOR DECLARATORY, INJUNCTIVE AND OTHER APPROPRIATE RELIEF

Jurisdiction

1. This action seeks declaratory, injunctive and other appropriate relief pursuant to the express authority granted the Federal Election Commission (the "Commission" or "FEC") by sections 307(a)(6) and 309(a)(6)(A) of the Federal Election Campaign Act of 1971, as amended (the "Act" or "FECA"), codified at 2 U.S.C. §§ 437d(a)(6) and 437g(a)(6)(A). This court has original jurisdiction over this suit pursuant to 28 U.S.C. § 1345 as an action brought by an agency of the United States expressly authorized to sue by an Act of Congress.

2. Venue is properly found in the Middle District of Florida, in accord with 2 U.S.C. § 437g(a)(6)(A) as all defendants can be found, reside or transact business in this district.

Parties

3. Plaintiff Federal Election Commission is the agency of the United States government empowered with exclusive primary jurisdiction to administer, interpret and enforce the Federal Election Campaign Act of 1971, as amended. See generally 2 U.S.C. §§ 437c(b)(1), 437d(a) and 437g. The FEC is authorized to institute investigations of possible violations of the Act, 2 U.S.C. § 437g(a)(2), and has exclusive jurisdiction to initiate civil actions in the United States district courts to obtain judicial enforcement of the Act. 2 U.S.C. §§ 437c(b)(1) and 437d(e).

4. During the time in question, the defendant Cesar Rodriguez was an individual businessman living in Tampa, Florida.

Administrative Proceedings

5. Acting upon information ascertained in the normal course of carrying out its supervisory responsibilities, the Commission, by the affirmative vote of at least four of its members, found reason to believe on January 3, 1984, that the defendant violated 2 U.S.C. § 441f, a provision of the Federal Election Campaign Act of 1971, as amended (the "Act"), and initiated an investigation of that violation. The defendant was notified of the Commission's determination by letter dated January 5, 1984. See 2 U.S.C. § 437g(a)(2).

6. On September 27, 1985, the Commission's General Counsel notified the defendant that he was prepared to recommend that the

Commission find probable cause to believe that violations of the Act by defendant had occurred. The General Counsel provided the defendant with a brief stating the position of the General Counsel on the legal and factual issues of the case. See 2 U.S.C. § 437g(a)(3).

7. On November 19, 1985, the Commission, by the affirmative vote of at least four of its members, found probable cause to believe that the defendant violated provisions of the Act and thereafter endeavored for a period of not less than thirty (30) days to correct such violations by the informal methods of conference, conciliation and persuasion, and to enter into a conciliation agreement with the defendant. Defendant was notified of the Commission's action by letter dated December 11, 1985. See 2 U.S.C. § 437g(a)(4)(A)(i).

8. Unable through informal methods to secure an acceptable conciliation agreement, the Commission, on April 1, 1986, determined, by the affirmative vote of at least four of its members, to authorize the initiation of this civil suit for relief in federal district court against the defendant. See 2 U.S.C. § 437g(a)(6). Defendant was notified of the Commission's action by letter dated April 4, 1986.

9. The plaintiff Commission has satisfied all jurisdictional requirements which are prerequisites to filing this suit.

Statement of Claims

COUNT 1

10. Plaintiff incorporates herein by reference the allegations contained in paragraphs 1 through 9, inclusive.

11. The FECA at 2 U.S.C. § 441f, prohibits any person from making or accepting a contribution made by one person in the name of another person.

12. During the 1980 election, the defendant, on behalf of Allen Wolfson, approached various individuals and solicited contributions to the Carter/Mondale Presidential Committee. The defendant promised each individual that he would be reimbursed for the contribution. The defendant subsequently reimbursed each individual for his contribution.

13. The defendant accepted contributions made by one person in the name of another.

PRAYER FOR RELIEF

WHEREFORE, the plaintiff Federal Election Commission prays that this court:

(1) Declare that defendant Cesar Rodriguez violated 2 U.S.C. § 441f by accepting contributions made by one person in the name of another person.

(2) Assess a civil penalty of the greater of five thousand dollars ($5,000) or an amount equal to 100 percent of the amount involved in the violations against the defendant Cesar Rodriguez for violations of 2 U.S.C. § 441f. See U.S.C. § 437g(a)(6)(B).

(3) Permanently enjoin defendant from further violations of the Federal Election Campaign Act of 1971, as amended;

(4) Award the plaintiff Federal Election Commission its costs and attorneys' fees in this action; and

(5) Award such other and further relief as the court deems appropriate.

Respectfully submitted,

Charles N. Steele
General Counsel

Ivan Rivera
Assistant General Counsel

Robert E. Pease
Attorney

May 27, 1986

FOR THE PLAINTIFF
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 376-8200

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FEDERAL ELECTION COMMISSION,

Plaintiff,

vs. Case No. 85-1617-Civ-T-13

ALLEN Z. WOLFSON,

Defendant.
_____/

SUMMARY JUDGMENT

This Court having fully considered plaintiff's motion for summary judgment,

IT IS HEREBY ORDERED that:

1. As the defendant has not responded as required by the Court's Order of January 24, 1986, and as there are no genuine issues of material fact and the plaintiff is entitled to a judgment as a matter of law, the motion for summary judgment of the plaintiff, the Federal Election Commission, is GRANTED.

2. Defendant Allen Z. Wolfson violated 2 U.S.C. §441a(a)(1)(A) by making aggregated contributions in excess of $1,000 to the authorized political committees of candidates for federal office.

3. Defendant Allen Z. Wolfson violated 2 U.S.C. §441f by making contributions in the names of other persons to the authorized political committees of candidates for federal office.

4. Defendant Allen Z. Wolfson shall be permanently enjoined from further violations of the Federal Election Campaign Act of 1971, as amended.

5. Defendant Allen Z. Wolfson shall pay a civil penalty of $52,000.00.

6. Defendant Allen Z. Wolfson shall pay the Commission's cost and attorneys' fees in this action.

DONE AND ORDERED in Chambers at Tampa, Florida, this 6TH day of February, 1986.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
Tampa Division

FEDERAL ELECTION COMMISSION,	)	
	)	
Plaintiff,	)	Civil Action No. 85-1617-Civ-T-13
	)	
v.	)	
	)	PLAINTIFF'S MEMORANDUM IN
ALLEN Z. WOLFSON,	)	OPPOSITION TO DEFENDANT'S
	)	MOTION AND IN SUPPORT OF
Defendant.	)	PLAINTIFF'S MOTION

PLAINTIFF FEDERAL ELECTION COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED, AND IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This civil action for declaratory, injunctive and other appropriate relief is brought by the plaintiff Federal Election Commission ("the Commission" or "FEC") pursuant to the express authority granted the Commission by Sections 307(a)(6) and 309(a)(6)(A) of the Federal Election Campaign Act of 1971, as amended (the "Act" or "FECA"), codified at 2 U.S.C. §§437d(a)(6)[1] and 437g(a)(6). The Commission's complaint, filed October 7, 1985, alleges, inter alia, that defendant Allen Z. Wolfson violated 2 U.S.C. §§441a(a)(1)(A) and 441f by making

1/ This section permits the Commission, inter alia, to initiate civil actions for injunctive, declaratory, or other appropriate relief, in its own name, through its general counsel. Defendant has claimed that Plaintiff's counsel somehow have no authority to bring this law suit. Motion to Dismiss at 2, ¶6.

aggregated contributions in excess of $1,000 to the authorized political committees of candidates for Federal office, and by making contributions in the names of other persons to these same authorized political committees. In its complaint, the Commission asks this Court, inter alia, to declare that defendant Wolfson violated 2 U.S.C. §§441a(a)(1)(A) and 441f, permanently enjoin defendant Wolfson from further violations of the Act, and to assess a remedial civil penalty. Complaint at 7.

Defendant has now moved this Court pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for an order dismissing this action for failure to state a claim upon which relief can be granted. He offers numerous grounds to support this motion. Included among them are that since defendant pleaded guilty in a criminal case (arising out of the same transactions complained of in the instant civil law suit) to violating 2 U.S.C. §441a(a)(1)(A), and agreed to and did pay a $25,000 criminal fine, the plaintiff Commission is collaterally estopped from bringing the pending matter since it places the defendant again in jeopardy in violation of the Fifth Amendment of the Constitution; that assessment of a civil penalty would be unfair under the circumstances; that injunctive relief would be improper in this case; and that the instant action is barred by laches or a statute of limitations.

As the FEC will demonstrate, it has properly alleged each of the elements necessary to show violations of 2 U.S.C. §441a(a)(1)(A) and 441f by defendant.2/ Consequently, dismissal of the complaint for failure to state a claim would be inappropriate. Scheuer v. Rhodes, 416 U.S. 232 (1974). In addition, the Commission now moves this Court pursuant to Rule 56 of the Federal Rules of Civil Procedure to enter an order granting summary judgment in favor of the plaintiff Commission. As the Commission will demonstrate, no genuine issues of material fact exist with respect to the allegations in the Commission's complaint or the defendant's affirmative defenses, and the Commission is entitled to judgment as a matter of law. Accordingly, the Commission's motion for summary judgment should be granted.

STATEMENT OF THE CASE

This action involves illegal campaign contributions made by defendant Wolfson and several of his associates during the 1980 election campaign.

2/ Defendant contends that plaintiff has failed to allege that Wolfson "knowingly and wilfully" violated the Act. Motion to Dismiss at p. 1, ¶2. There is no "knowing and willful" proof requirement in the provisions the Commission alleges have been violated by Wolfson. Nor is there such a requirement to be found in the provision authorizing the remedial measures sought by the Commission. See 2 U.S.C. §437g(a)(6)(B). The Commission is not seeking relief under 2 U.S.C. §437g(a)(6)(C). That section provides for a civil penalty not greater than $10,000 or 200% of the amount involved in a "knowing and willful" violation of the Act. The Commission is not seeking to establish that Wolfson knowingly and willfully violated the Act.

On August 30, 1984, Wolfson was deposed while he was incarcerated at the Federal Correctional Facility in Summit, Kentucky.3/ In the course of his deposition testimony, Wolfson explained the details of the scheme underlying this action. See attached Exhibit. Defendant Wolfson solicited numerous contributions of $1,000 each, totaling approximately $60,000, and made all but eight contributions in the names of others (by means of reimbursing the contributors) to the Carter/Mondale Presidential Committee (hereinafter "CMPC") and to the Citizens for Gunter Committee ("CGC") in violation of 2 U.S.C. §§441a(a)(1) and 441f. See Complaint ¶24 and ¶25. Specifically, the defendant's scheme arose out of a request from Richard Greco, chairman of the

3/ This matter was brought to the Commission's attention as a referral from the Department of Justice. The Department of Justice and the grand jury in Tampa, Florida conducted an investigation into suspected illegal campaign contributions by Allen Z. Wolfson and several of his associates during the 1980 election campaign. In a four count indictment issued by the grand jury in Tampa (U.S.D.C. for the Middle District of Florida), Wolfson was charged with:

1. violating 2 U.S.C. §441a(a)(1) by knowingly and willfully making excessive contributions to the Carter/Mondale Presidential Committee;

2. violating 2 U.S.C. §441f by knowingly and willfully making contributions in the names of others to the Carter/Mondale Presidential Committee;

3. violating 2 U.S.C. §441a(a)(1) by knowingly and willfully making excessive contributions to the Citizens for Gunter Committee; and

(Footnote continued on following page.)

board of the Metropolitan Bank of Tampa ("the Bank") and former mayor of Tampa, and Donald Regar, president of the Bank, that Wolfson solicit contributions totaling approximately $60,000 (with $30,000 going to each Committee) for CMPC and CGC. See Exhibit, pp. 29-30, 32-38, 41-43. According to Wolfson (in his deposition testimony, see, e.g., Exhibit at p. 33-34), the request by Greco and Regar was not in any way intended to have Wolfson solicit the contributions illegally. Wolfson did extensive business with the Bank and thought it would be in his best interest to "ingratiate" himself (Exhibit at p. 29) with the Officers of the Bank; he thus felt compelled to comply with Greco and Regar's request except that he chose to do so by means of an unlawful scheme. Under the scheme, Allen Z. Wolfson or an associate of Wolfson (either Louis Rocha, Jr. or Cesar Rodriguez)

(Footnote continued from previous page.)

4. violating 2 U.S.C. §441f by knowingly and willfully making contributions in the names of others to the Citizens for Gunter Committee.

Wolfson's associates and many of the conduits for the contributions were given immunity from criminal prosecution in return for their grand jury testimony against Wolfson. Wolfson was the only individual prosecuted by the Department of Justice in this case. A plea agreement was reached between Wolfson and the Department of Justice whereby Wolfson pled guilty to count one of the indictment (the 2 U.S.C. §441a(a)(1) violation with respect to the Carter/Mondale Presidential Committee) and agreed to pay a $25,000 fine. The remaining counts in the indictment were dismissed as part of the plea agreement. Complaint ¶7-¶9.

approached 45 individuals,[4] all of whom are respondents in the underlying administrative matter and all of whom were business associates, friends or employees of Wolfson, Rocha or Rodriguez. Each of the individuals was asked to make a contribution to CMPC or CGC or both, with the understanding that they would be reimbursed for their contributions by Wolfson.[5] Except in the case of eight administrative respondents, all of the respondents were, in fact, reimbursed by Wolfson.[6] Following the solicitations, each of the administrative respondents made either a single contribution or several contributions to CMPC and/or CGC by giving checks to either Wolfson or his associates, Rocha or Rodriguez. Thirty-six of the respondents were reimbursed by Allen Z.

4/ Louis Rocha, Jr., Cesar Rodriguez, Robert Cleveland, Sondra Peace, Debbie Wolfson, Charles Savage, Joseph Alfano, George Allen, Jr., Patricia Allen, Ronald K. Bell, Gerald W. Bobier, Stephen W. Boynton, J.R. Clark, Jr., Steven Cleveland, W.O. Davenport, Lea Dumas, Harry B. Deval, Marcello Echevarria, Dr. John Eloian, James Garrett, Reba Diane Guzzo, Robert Guzzo, Wendell L. Hall, Noreen Dumas Hoagland, Thomas F. Johnson, Jr., Roseanna Kelly, T.K. Knight, Thomas P. Lee, Horace Langshaw, Michael Long, Denise Peace Nassif, Frederick E. Nassif, William R. Nellis, Elizabeth Osborne, Michael D. Owens, Susan Owens, Renee Peace, Vicki Rima, Arlis Roberts, Mario Sosa, James D. Sota, Raymond Tassinari, Charles Tonkin, II, Daniel J. Valdez and William I. Wolfson.

5/ All of the administrative respondents listed in footnote 4 except George Allen, Jr., Patricia Allen, Gerald W. Bobier, W.O. Davenport, Dr. John Eloian, Arlis Roberts, Mario Sosa and Debbie Wolfson were so assured.

6/ The administrative respondents listed in footnote 5 were not reimbursed.

Wolfson with checks drawn on the account of Certified Financial Consultants, Inc. (CFC), a Florida corporation controlled by Allen Z. Wolfson and his wife, Debbie Wolfson.7/ The checks were generally signed by Wolfson or his wife, Debbie, and each contained a memo entry alleging a business purpose for the checks. The memo entries typically indicated that the checks were issued either for "consulting" or "real estate commissions." The remaining respondent8/ was reimbursed with a personal check from Allen Z. Wolfson. See Exhibit, p. 48-80.

On January 3, 1984, the Commission,9/ found reason to believe that Allen Z. Wolfson violated 2 U.S.C. §441a(a) by making aggregated contributions in excess of $1,000 to the authorized political committees of candidates for federal office (in the form of contributions made in the names of others).

7/ CFC is no longer active; it was involuntarily dissolved by the state of Florida for failure to file its 1982 Annual Report.

8/ Daniel J. Valdez.

9/ Plaintiff Federal Election Commission is the agency of the United States government empowered with exclusive primary jurisdiction to administer, interpret and enforce the Federal Election Campaign Act of 1971, as amended. See generally 2 U.S.C. §§437c(b)(1), 437d(a) and 437g. The FEC is authorized to institute investigations of possible violations of the Act, 2 U.S.C. §437g(a)(2), and has exclusive jurisdiction to initiate civil actions in the United States district courts to obtain judicial enforcement of the Act. 2 U.S.C. §§437c(b)(1) and 437d(e).

Complaint at ¶10. On that same date, the Commission also found reason to believe that Wolfson violated 2 U.S.C. §441f by making contributions to the authorized political committees of candidates for Federal office in the names of other persons. Id.

Section 441a(a)(1)(A) of Title 2, United States Code, prohibits any person from making contributions to the authorized political committee of a candidate running in an election for Federal office which, in the aggregate, exceed $1,000. Complaint at ¶5. In this matter, both CMPC and CGC were authorized political committees of candidates running for election to Federal office. As explained previously, Wolfson, in his deposition testimony, acknowledged making contributions to CMPC and CGC which, in the aggregate, greatly exceeded the $1,000 per person contribution limitation prescribed in 2 U.S.C. §441a(a)(1)(A). The fact that Wolfson made these contributions in the names of other persons and made no contributions in his own name does not remove Wolfson from liability under this section; it has precisely the opposite effect. The fact that Wolfson fully reimbursed these individuals for their contributions, either through a corporation which he controlled (CFC) or, in one case, by means of his own personal check, brings these violations within the purview of that section of the Act since it results in Wolfson making

excessive contributions, albeit in the names of others, to CMPC and CGC. Wolfson has acknowledged in his deposition testimony, reimbursing 37 of the respondents in this matter (either through CFC or by means of his personal funds); and insofar as that admission by Wolfson has been corroborated by several additional sources (including information obtained from the Department of Justice and statements from the conduits), those reimbursements by Wolfson to the 37 conduits constituted contributions made by Wolfson to CMPC and CGC in the names of other persons, i.e., the conduits. The making of contributions in the name of another is specifically prohibited by 2 U.S.C. §441f. Complaint at ¶6.

The Commission subsequently notified the defendant of its actions by letter informing him that under the Act he had an opportunity to demonstrate that no action should be taken against him, and inviting the defendant to submit any factual or legal materials which he believed would be relevant to the Commission's consideration of these matters. The Commission then initiated an administrative investigation into the alleged violations. Complaint at ¶10. Following the completion of its administrative investigation, the Commission's General Counsel recommended that the Commission find probable cause to believe that defendant Wolfson had violated the Act and so notified the defendant in a

brief setting forth the legal and factual issues involved. Complaint at ¶11. Defendant was invited to submit a reply brief. After due consideration the Commission found probable cause to believe that defendant Wolfson violated 2 U.S.C. §§441a(a)(1)(A) and 441f. The Commission thereafter endeavored to correct the violations through conciliation; unable to settle the case it then authorized the initiation of the instant civil suit for relief against defendant Wolfson. Complaint at ¶13.

ARGUMENT

THE COMMISSION'S COMPLAINT STATES A CLAIM UPON WHICH RELIEF CAN BE GRANTED

2 U.S.C. §437g(a)(6)(A) authorizes the Commission to "institute a civil action for relief, including a permanent . . . injunction, . . . or any other appropriate order (including an order for a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution . . . involved in such violation)" in the appropriate United States district court. Section 437g explicitly states that the actions that the FEC may bring are civil. See also fn. 1, supra. Since it is undisputed that the Commission has discharged its procedural responsibilities with respect to defendant Wolfson in the administrative proceeding, and since the Commission has alleged facts in the

instant Complaint sufficient to support the alleged violations of the Act, the Commission has clearly stated a cause of action, and this Court clearly has jurisdiction to grant the prayed for relief. See 2 U.S.C. §437g(a)(6)(B). See also Scheuer v. Rhodes, supra.

I. The Defendant's Former Conviction On A Criminal Charge Does Not Bar This Civil Action to Recover A Statutory Penalty For The Same Conduct.

It is a matter of record that on April 27, 1983, defendant Wolfson pleaded guilty in a criminal prosecution to one count of a four count indictment, viz., knowingly and willfully violating 2 U.S.C. §441a(a)(1)(A), and agreed to pay a fine of $25,000, pursuant to 2 U.S.C. §437g(d). See Complaint at ¶8 and ¶9. See also Motion to Dismiss at pp. 2-3. By judgment dated May 17, 1983, defendant was duly convicted of the charge. And it is conceded that the instant civil action stems from the same conduct for which the defendant was criminally prosecuted. Nevertheless, it is respectfully submitted that the judgment of conviction in the criminal prosecution does not bar this subsequent civil action based in part upon the offense[10/] of which the defendant

10/ It is important to note that the Commission's Complaint alleges that defendant Wolfson violated 2 U.S.C. §441f--making a contribution in the name of another person--as well as 2 U.S.C. §441a(a)(1)(A). Complaint at ¶25. Defendant Wolfson stands convicted of only the latter provision. Complaint at ¶9.

stands convicted. Indeed, the defendant's guilty plea likely establishes an admission against the defendant's interest. See United States v. Podell, 572 F.2d 31 (2d Cir. 1978). See also Kelley v. Carr, 567 F. Supp. 831 (W.D. Mich. 1983).

Authorities support the proposition that a defendant's former conviction (or acquittal) of a criminal charge does not bar a civil action brought against him for the same conduct. See United States v. One Assortment of 89 Firearms, 465 U.S. 354, 104 S. Ct. 1099, 79 L.Ed.2d. 361 (1984) (acquittal); United States ex rel. Marcus v. Hess, 317 U.S. 537, 63 S. Ct. 379, 87 L.Ed. 443, reh. den. 318 U.S. 799, 63 S. Ct. 756 (1943) (conviction), followed in United States ex rel. Ostrager v. New Orleans Chapter, A.G.C.A., 317 U.S. 562, 63 S. Ct. 393, 87 L.Ed. 458 (1943); Helvering v. Mitchell, 303 U.S. 391, 58 S. Ct. 630, 82 L.Ed. 917 (1938)(acquittal); United States v. Glidden Co., 119 F.2d 235 (6th Cir. 1941), cert. den. 314 U.S. 678, 62 S. Ct. 182, 86 L.Ed. 542 (conviction). See 42 A.L.R.2d. 636-637. These cases uniformly hold that the general rule is that a former adjudication in a criminal action does not generally bar a subsequent civil action stemming from the same conduct, unless the subsequent civil action seeks to impose a "quasi-criminal" penalty.

> Congress may impose both a criminal and civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally for the same offense.

Helvering v. Mitchell, supra at 399 (emphasis added). Cases holding that conviction (or acquittal) is a bar to any action to recover a penalty have been distinguished on the ground that they did not involve civil administrative sanctions. See Murray & Sorenson, Inc. v. United States, 207 F.2d 119 (1st Cir. 1953).11/ Otherwise the penalty and the criminal sentence are viewed as parts of one punishment which the legislature has the authority to impose for one offense, although recoverable in two suits, one crimimal and the other civil.12/ United States ex rel. Marcus v. Hess, supra.

Defendant Wolfson here blithely concludes that the plaintiff now is seeking to impose "an exaction as punishment." Motion to Dismiss at p. 4. In other words, Defendant argues that by seeking a civil penalty pursuant to 2 U.S.C. §437g(a)(6), the Commission is seeking a "quasi-criminal" penalty, and that for that reason the instant law suit is barred. Are the penalties set out in

11/ Defendant argues, Motion to Dismiss at p. 4, that courts do not agree as to whether a defendant's former conviction (or acquittal) of a criminal charge bars a civil action against him to recover a statutory exaction for the same conduct pointing to a line of rather ancient cases holding that a former conviction (or acquittal) operates as a bar.

12/ As in other statutes, Congress has seen fit to provide a range of criminal penalties to complement the civil remedies (2 U.S.C. §437g(a)(6)) in the FECA. See 2 U.S.C. §437g(d). Therefore, defendants unsupported contentions of unfairness and lack of congressional intent are without merit. Motion to Dismiss at p. 1, ¶3, p. 2, ¶4 and p. 5.

2 U.S.C. §437g really "quasi-criminal" in nature? At least two courts have expressly held that they are not.

In Federal Election Commission v. Weinsten, 462 F. Supp. 243 (S.D.N.Y. 1978), the court flatly rejected the argument that the penalties set out in 2 U.S.C. §437g are really "quasi-criminal," holding that Congress' language is dispositive and the penalties [in the Act] are . . . civil in nature." Id. at 252. Again, in Federal Election Commission v. Lance, 617 F.2d 365 (5th Cir. 1980), aff'd 635 F.2d 1132 (5th Cir.) (en banc), cert. denied 453 U.S. 917 (1981), the Court, by embracing the language of Weinsten, supra, expressly rejected the argument that the civil penalty provisions at issue in this case--2 U.S.C. §437g(a)(6)--are criminal in nature. Id. at 370-371. Thus, notwithstanding defendant's "conclusion" to the contrary, it is settled in this jurisdiction that the Act's civil penalty provisions found at 2 U.S.C §437g(a)(6) are civil in nature. Accordingly, the defendant Wolfson's prior conviction is not a bar to this lawsuit. The Commission, therefore, is entitled to judgment on defendant's affirmative defense as a matter of law.

II. Injunctive Relief Is Approriate.

Defendant has suggested that an element of the relief sought by the plaintiff--injunctive relief--is inappropriate. Motion to Dismiss at p. 5. Plaintiff respectfully submits that by its

prayer that defendant be permanently enjoined from further violations of the Act, it seeks a suitable remedy.

In determining whether an injunction should issue, the court must determine whether there is a "reasonable likelihood that the wrong will be repeated." S.E.C. v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1100 (2d Cir. 1972). That the illegal activity has ceased, however, does not automatically justify the denial of an injunction. United States v. Parke, Davis & Co., 362 U.S. 29, 47-48, 80 S. Ct. 503, 4 L.Ed.2d. 505 (1960). In fact, "past violations may [as they do here] justify an inference that the defendant is likely to violate the law in the future if not enjoined." S.E.C. v. Management Dyn., Inc., 515 F.2d 801, 807 (2d Cir. 1975). Furthermore, for purposes of the defendant's motion, the complaint may not be dismissed for failure to state a claim unless it is beyond a doubt that plaintiff can prove no set of facts entitling it to relief. See Scheuer v. Rhodes, supra. With due regard to these principles, plaintiffs demand for injunctive relief must not be dismissed.

III. This Civil Action Is Not Barred By Any Statute of Limitations Nor Is It Barred by Laches.

The defendant asserts as an affirmative defense to the prosecution of this suit that the Commission's civil action is barred by laches or a statutory limitation period. As the Commission will demonstrate, there is no time limit to the FEC's power to seek a civil remedy pursuant to 2 U.S.C. §437g.

In fact, the Act's statutory framework does include a limitation period of three years.

> No person shall be prosecuted, tried, or punished for any violation [of the Act] unless the indictment is found or the information is instituted within 3 years after the date of the violation.

2 U.S.C. §455(a). That provision only refers, however, to the institution of an "information" or "indictment;" it makes no reference whatsoever to the initiation of a civil action, such as the instant suit brought pursuant to 2 U.S.C. §§437d(a)(6) and 437g(a)(6)(A), which authorize the Commission to initiate only civil actions to enforce the Act. Thus, the language of the statute suggests that the limitation period applies only to criminal prosecutions by the Department of Justice for violations of the Act.[13/] Federal Election Commission v. Lance, 617 F.2d at 371-372.

The legislative history of Section 455, which was enacted as part of the 1974 amendments to the Act, supports this literal reading of the statute. Lance, 617 F.2d at 372. That history demonstrates that Congress distinguished between civil and criminal penalties, and intended Section 455 to apply only to criminal prosecutions. The Senate Conference Report, for example, S. Rep. No. 93-1237, 93d Cong., 2d Sess. (1974), reprinted in [1974] U.S.

13/ The Justice Department has exclusive jurisdiction with respect to criminal enforcement of the Act.

Code Cong. & Admin. News, pp. 5587, 5618, 5668-5669, explains that the Section 455 limitations period applies to the bringing of a "criminal action" (emphasis added).14/ See also H. Rep. No. 93-1239, 93d Cong., 2d Sess. (1979). Accordingly, it is clear that Section 455 does not bar civil enforcement actions brought by the FEC. See Lance, 617 F.2d 372. See also Federal Election Commission v. Lance, 635 F.2d 1132, 1138 (5th Cir.) (en banc), cert. denied 453 U.S. 917 (1981) ("We adopt in full those portions of the panel opinion rejecting Lance's arguments that the subpoena should be quashed because . . . the statute of limitations bars the investigation . . .").

Congress did not provide for a statute of limitations that would be applicable to civil actions brought by the FEC to enforce the Act, and contrary to defendant's suggestion, Motion to Dismiss at p. 5, "there is no general federal period of limitations for civil actions." Lance, 617 F.2d 372. Moreover, state statutes of limitation are not applicable to enforce rights of the sovereign, see, e.g., Equal Employment Opportunity Commission

14/ Prior to 1974, the provisions for enforcement of the Act by the Department of Justice (the Commission was not established until 1975) were solely criminal. The 1974 amendments to the Act contained a provision authorizing for the first time civil actions to enforce the Act, see P.L. No. 93-443, §314, starting a process which culminated in the 1976 "decriminalization" of much of FECA by shifting to Title 2 of the United States Code many sections previously contained in the criminal code, including the Act's contribution limitation provisions.

v. Griffin Wheel Co., 511 F.2d 456 (5th Cir. 1975). As the court concluded in Lance, there is "no time limit to the FEC's power to seek a Section 437g remedy." Lance, 617 F.2d at 372. In any event, defendant Wolfson has failed to show how he is prejudiced by the Commission's pending civil action. Indeed, the underlying facts supporting this action are established both in the criminal prosecution and by the defendant's own admissions in the administrative deposition appended hereto as plaintiff's exhibit. Defendant disputes none of the plaintiff's allegations. Once again, the Commission is entitled to judgment on defendant's affirmative defense as a matter of law.

In sum, as the foregoing discussion shows, the Commission's complaint is sufficient to state a claim which entitles it to relief. It is well settled that, in passing on a motion to dismiss for failure to state a claim, the allegations of the complaint should be construed favorably to the pleader. Scheuer v. Rhodes at 236. See also Conley v. Gibson, 355 U.S. 41, 45-46 (1957). And there is no dispute that defendant engaged in the activity complained of. He freely admits undertaking these transactions and relies instead, on numerous defenses hoping to undercut this Court's jurisdiction. Plaintiff submits that these defenses are not well taken. No genuine issues of material fact exist with

respect to any of the plaintiff's allegations or the affirmative defenses asserted by defendant Wolfson.

For all of these reasons, defendant's motion to dismiss should be denied, and the Court should grant the Commission's motion for summary judgment.

CONCLUSION

For the foregoing reasons, defendant's Motion to Dismiss for failure to state a claim should be denied, and the Commission's motion for summary judgment should be granted.

Respectfully submitted,

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December 26, 1985

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