

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

FEDERAL ELECTION COMMISSION,)

Plaintiff,)

v.)

Civil Action No. 15-cv-17-LPS

CHRISTINE O'DONNELL,)

FRIENDS OF CHRISTINE O'DONNELL,)

and CHRIS MARSTON, in his capacity)

as Treasurer of Friends of Christine)

O'Donnell,)

Defendants.)

DEFENDANTS' ANSWER AND COUNTERCLAIMS

Defendants hereby answer the "Plaintiff Federal Elections Commission's Complaint For Civil Penalty, Declaratory, Injunctive, And Other Appropriate Relief" dated January 5, 2015 (the "Complaint") and bring Counterclaims for Declaratory Judgment against Plaintiff Federal Election Commission ("FEC"), as follows:

1. The first, third, and fourth sentences of the averment of Paragraph 1 are **Denied**. The second sentence of the averment is admitted. The fifth sentence of the averment constitutes a legal conclusion to which no response is required, but to the extent that a response is necessary, it is **Denied**.

JURISDICTION AND VENUE

2. The averment constitutes a legal conclusion to which no response is required, but to the extent that a response is necessary it is **Denied**.

3. Admitted that this Court has jurisdiction over this action. Otherwise, **Denied**.

4. Admitted that venue is proper in the District of Delaware. Otherwise, **Denied**.

THE PARTIES

5. The averment constitutes a legal conclusion to which no response is required, but to the extent that a response is necessary it is **Denied**.

6. Admitted.

7. The first two sentences of the averment are admitted. The second two sentences of the averment constitute legal conclusions to which no response is required, but to the extent that a response is necessary they are **Denied**.

8. Admitted that: a) pursuant to Order of this Court Chris Marston has been substituted for Matthew Moran as a Defendant, in his capacity as Treasurer of Friends of Christine O'Donnell; and b) Chris Marston recently became the Treasurer after Mr. Moran's resignation from the position. Otherwise, **Denied**.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

9. The averment constitutes a legal conclusion to which no response is required, but to the extent that a response is necessary it is **Denied**.

10. The averment constitutes a legal conclusion to which no response is required, but to the extent that a response is necessary it is **Denied**.

11. The averment constitutes a legal conclusion to which no response is required, but to the extent that a response is necessary it is **Denied**.

12. The averment constitutes a legal conclusion to which no response is required, but to the extent that a response is necessary it is **Denied**.

FACTUAL BACKGROUND

13. Admitted that a Lease was entered into for a townhouse located in the residential community known as Greenville Place at 1242 Presidential Drive from Mid-Atlantic Realty Co.,

Inc. in 2010 by Friends of Christine O'Donnell and that the Lease speaks for itself. Otherwise, **Denied.**

14. Admitted.

15. **Denied.**

16. The first sentence of the averment is admitted. As to the second through fourth sentences of the averment, it is admitted that the documents speak for themselves. Otherwise, **Denied.**

17. Admitted that the documents speak for themselves. Otherwise, **Denied.**

ADMINISTRATIVE PROCEEDINGS

18. Admitted that a written submission was made by a Washington, D.C.-based organization, which is funded by liberal political activists, based purely upon political considerations aimed at attacking Christine O'Donnell's candidacy and enhancing the likelihood of success of the Democratic candidate for the United States Senate from Delaware. Otherwise, Defendants are without sufficient information to form a belief as to the truth of this averment, and therefore it is **Denied..**

19. Admitted that the documents speak for themselves. Otherwise, **Denied.**

20. Admitted that the documents speak for themselves. Otherwise, **Denied.**

21. Admitted that the documents speak for themselves. Otherwise, **Denied.**

22. Admitted that the documents speak for themselves. Otherwise, **Denied.**

23. Admitted that the documents speak for themselves. Otherwise, **Denied.**

24. Admitted that the documents speak for themselves. Otherwise, **Denied.**

25. The averment constitutes a legal conclusion to which no response is required, but to the extent that a response is necessary, it is **Denied.**

FIRST CAUSE OF ACTION

26. Paragraphs 1 through 25 are hereby incorporated by reference, as if fully set forth herein.

27. **Denied.**

28. **Denied.**

31.[sic] **Denied.**

AFFIRMATIVE DEFENSES

32. Defendants allege and assert the following defenses in response to the allegations in the Complaint, undertaking the burden of proof only as to those defenses deemed affirmative defenses by law, regardless of how such defenses are denominated herein. In addition to the affirmative defenses described below, Defendants specifically reserve all rights to allege additional affirmative defenses that become known through the course of discovery.

**First Affirmative Defense
(Failure to State a Claim)**

33. The Complaint fails to state a claim upon which relief may be granted.

**Second Affirmative Defense
(Claims Barred by Safe Harbor)**

34. The FEC's claims are barred based upon the "Safe Harbor" provisions of 52 U.S.C. § 30111(e), to-wit: reliance upon FEC Regulations that: (a) permit the use of campaign funds to lease a campaign headquarters in connection with a campaign for Federal office; (b) do not prohibit a campaign committee from subleasing a portion of such space in a campaign headquarters to a candidate as a residence; and (c) specify that a contribution or donation shall be considered to be converted to personal use if the contribution or amount is used to fulfill any

commitment, obligation, or expense of a person that would exist *irrespective of the candidate's election campaign* or individual's duties as a holder of Federal office.

**Third Affirmative Defense
(11 C.F.R. § 113.1(g)(1)(i)(E) is Facially Unconstitutional)**

35. The expenditure limitations specified in 11 C.F.R. § 113.1(g)(1)(i)(E) are facially unconstitutional.

**Fourth Affirmative Defense
(52 U.S.C. § 30111(e) is Unconstitutional as Applied to Defendants)**

36. The expenditure limitations specified in 52 U.S.C. § 30111(e) are unconstitutional as applied to Defendants.

PRAYER

WHEREFORE, Defendants respectfully request that this Court enter Judgment in their favor and against the FEC as follows:

- A. That Defendants did not violate 52 U.S.C. § 50114(b), or any other applicable rules and regulations regarding this provision, under the facts and circumstances.
- B. That the expenditure limitations specified in 11 C.F.R. § 113.1(g)(1)(i)(E) are facially unconstitutional.
- C. That the expenditure limitations specified in 52 U.S.C. § 30111(e), or any other applicable rules and regulations regarding this provision, are unconstitutional as applied to Defendants.
- D. That the FEC's claims for disgorgement and any other Judgment awards or civil penalties are denied.

- E. That the FEC's request for Permanent Injunction on the grounds that there is no irreparable harm and that the FEC is not entitled to Judgment as a matter of law is denied.
- F. That the Defendants be awarded their attorneys' fees based upon the Bad Faith Exception to the American Rule, as the FEC's claims and causes of action were brought without any adequate basis in law or fact.
- G. That Defendants be awarded their court costs and litigation expenses under the Equal Access to Justice Act, 28 U.S.C. § 2412, as the prevailing party.
- H. That Defendants be granted any such other and further relief that the Court deems just and proper.

COUNTERCLAIMS

Pursuant to Federal Rule of Civil Procedure 13, Defendants assert the following counterclaims against the FEC.

1. Defendants seek a declaration by this Court that they did not violate 52 U.S.C. § 50114(b), or any other applicable rules and regulations regarding this provision, under the facts and circumstances.
2. Defendants seek a declaration by this Court that the expenditure limitations specified in 11 C.F.R. § 113.1(g)(1)(i)(E) are facially unconstitutional.
3. Defendants seek a declaration by this Court that the expenditure limitations specified in 52 U.S.C. § 30111(e), or any other applicable rules and regulations regarding this provision, are unconstitutional as applied to Defendants.

JURISDICTION AND VENUE

4. This is an action for declaratory judgment under 28 U.S.C. § 2201, *et seq.* This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1338(a).

5. The FEC has availed itself of the jurisdiction of this Court. Venue is proper in this Court under 28 U.S.C. § 1391(b).

COUNT I – DECLARATORY JUDGMENT
NO STATUTORY VIOLATION

6. The FEC's complaint hinges on an overly broad reading of 52 U.S.C. § 30114(b) to support its allegation that Friends of Christine O'Donnell's funds were converted to the personal use of Christine O'Donnell.

7. The explicit language of 52 U.S.C. § 30114(b) applies to circumstances in which campaign funds are used to pay the candidate's rent that would have existed irrespective of the candidate's election campaign.

8. In contrast, the explicit language of 52 U.S.C. § 30114(b) does not apply to circumstances in which a candidate pays the campaign to use a portion of the campaign's office space, the rent for which would have been incurred by the campaign irrespective of the candidate's decision to occupy the premises.

9. Regardless, Friends of Christine O'Donnell would have incurred the costs to lease the campaign headquarters irrespective of Christine O'Donnell's subsequent decision to sublease a portion of the space. Indeed, the campaign committee would have incurred greater costs but for her decision to sublease a portion of the space and reimburse Friends of Christine O'Donnell for the pro-rata, fair market value based upon her specific, proportionate use of such space.

10. Even if 52 U.S.C. § 30114(b) were to apply to the facts and circumstances in this matter, the FEC's claims are barred based upon the "Safe Harbor" provisions of 52 U.S.C. § 30111(e).

11. Specifically, Defendants relied upon FEC Regulations that: (a) permit the use of campaign funds to lease a campaign headquarters in connection with a campaign for Federal office; (b) do not prohibit a campaign committee from subleasing a portion of such space in a campaign headquarters to a candidate as a residence; and (c) specify that a contribution or donation shall be considered to be converted to personal use if the contribution or amount is used to fulfill any commitment, obligation, or expense of a person that would exist *irrespective of the candidate's election campaign* or individual's duties as a holder of Federal office.

12. As such, Defendants did not violate 52 U.S.C. § 30114(b), or any other applicable rules and regulations regarding this provision, under the facts and circumstances.

COUNT II – DECLARATORY JUDGMENT
11 C.F.R. § 113.1(g)(1)(i)(E) IS FACIALLY UNCONSTITUTIONAL

13. The U.S. Supreme Court subjects expenditure limits to "the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976). Under exacting scrutiny, the FEC may regulate expenditures only if such regulation promotes a compelling interest and is *the least restrictive means* to further the articulated interest. *See Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

14. Expenditures do not corrupt or give the appearance of corruption as a matter of law. In *Citizens United v. FEC*, 558 U.S. 310, 359-60 (2010), the U.S. Supreme Court said that neither influence over elected officials, nor access to elected officials, nor favoritism by elected officials, nor the appearance of influence or access constitutes corruption. Simply put, the only

kind of corruption that justifies limiting political contributions is *quid pro quo* corruption, which the Court defines as “dollars for political favors.” *Id.* (quoting *FEC v. Nat’l Conservative PAC*, 470 U.S. 480, 497 (1985)).

15. Therefore, the FEC has no anti-corruption interest in outright banning the expenditures at issue in the Complaint.

16. Even if the FEC had a compelling interest in regulating such expenditures, there is a less restrictive means to further the articulated interest. For example, the FEC permits a campaign committee to rent part of an office building owned or leased by the candidate for use in his or her campaign, as long as it pays not more than the fair market value for the space. *See FEC Advisory Opinion* 1995-08. Similarly, the FEC has also permitted a campaign committee to use campaign funds to pay rent and utility costs for the use of office space in the same rental property that also contains the personal residence of the candidate. *See FEC Advisory Opinion* 2000-02.

17. As such, the expenditure limitations specified in 11 C.F.R. § 113.1(g)(1)(i)(E) are facially unconstitutional.

COUNT III – DECLARATORY JUDGMENT
52 U.S.C. § 30111(e) IS UNCONSTITUTIONAL AS APPLIED

18. The U.S. Supreme Court subjects expenditure limits to “the exacting scrutiny applicable to limitations on core First Amendment rights of political expression.” *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976). Under exacting scrutiny, the FEC may regulate expenditures only if such regulation promotes a compelling interest and is *the least restrictive means* to further the articulated interest. *See Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

19. Because Friends of Christine O'Donnell would have incurred the costs to lease the campaign headquarters irrespective of Christine O'Donnell's subsequent decision to sublease a portion of such space, her decision to sublease a portion of the space and reimburse the campaign committee for the pro-rata, fair market value of such space was not corrupting and does not give the appearance of corruption. Rather, Christine O'Donnell's decision to pay the pro-rata, fair market value based upon her specific, proportionate use the space imputes the opposite.

20. Because Christine O'Donnell's reimbursements to Friends of Christine O'Donnell were not corrupting and did not give the appearance of corruption, the FEC has no anti-corruption interest in imposing a per se violation against Defendants.

21. As such, the expenditure limitations specified in 52 U.S.C. § 30111(e) are unconstitutional as applied to Defendants.

PRAYER FOR RELIEF

WHEREFORE, Defendants respectfully request that this Court enter Judgment in their favor and against the FEC as follows:

- A. Declare that Defendants did not violate 52 U.S.C. § 50114(b), or any other applicable rules and regulations regarding this provision, under the facts and circumstances.
- B. A declaration that the expenditure limitations specified in 11 C.F.R. § 113.1(g)(1)(i)(E) are facially unconstitutional.
- C. A declaration that the expenditure limitations specified in 52 U.S.C. § 30111(e), or any other applicable rules and regulations regarding this provision, are unconstitutional as applied to Defendants.

- D. Deny the FEC's claims for disgorgement and any other Judgment awards or civil penalties.
- E. Deny the FEC's request for Permanent Injunction on the grounds that there is no irreparable harm and that the FEC is not entitled to Judgment as a matter of law.
- F. Award Defendants their attorneys fees based upon the Bad Faith Exception to the American Rule, as the FEC's claims and causes of action were brought without any adequate basis in law or fact.
- G. Award Defendants their court costs and litigation expenses under the Equal Access to Justice Act, 28 U.S.C. § 2412, as the prevailing party.
- H. Grant Defendants any such other and further relief that the Court deems just and proper.

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