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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

_____)	
FEDERAL ELECTION COMMISSION,)	
)	
Plaintiff,)	Case No. 2:15-cv-00439-DB
)	
v.)	
)	RESPONSE TO MOTION
JEREMY JOHNSON, et al.,)	FOR CLARIFICATION
)	
Defendants.)	District Judge Dee Benson
_____)	

**PLAINTIFF FEDERAL ELECTION COMMISSION’S RESPONSE TO
DEFENDANT JOHN SWALLOW’S MOTION FOR CLARIFICATION**

Plaintiff Federal Election Commission (“FEC” or “Commission”) respectfully requests that the Court deny defendant John Swallow’s attempt to deprive the FEC of a reply brief in support of its November 20, 2017 cross-motion for partial judgment on the pleadings. The FEC is entitled to file a reply brief under DUCivR 7-1(b) and nothing in this Court’s September 20, 2017 order alters that. (*See* Joint Stipulation and Order to Stay Proceedings ¶ 1 (Docket No. 91) (“Order”).) Swallow’s motion to clarify that Order is therefore unnecessary and meritless in that it advocates a flawed interpretation of the Order that is inconsistent with the Local Rules. The Court should thus reaffirm what is already clear under the Local Rules and the Order: Swallow’s

opposition to the FEC's cross-motion is due by today, December 18, 2017, and the Commission may file a reply thereafter.¹

Pursuant to the Order, this case was stayed with the exception that Swallow was permitted to file "a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) . . . , and [] briefing and potentially argument on any such motion would proceed in the normal course under DUCivR 7-1." (Order ¶ 1.) Swallow filed his motion on October 23, 2017. (*See* Docket No. 98.) The Order further provided that "[b]y its deadline to respond to defendant Swallow's Rule 12(c) motion, plaintiff Commission may cross-move under Rule 12(c) on any issues raised by defendant Swallow's Rule 12(c) motion." (Order ¶ 1.) On November 20, 2017, the FEC responded to Swallow's motion and filed a cross-motion for partial judgment on the pleadings. (*See* FEC's Mem. in Opp'n to Def. John Swallow's Mots. to Dismiss and for J. on the Pleadings and in Supp. of Cross-Mot. for Partial J. on the Pleadings (Docket No. 103); FEC's Cross-Motion for Partial J. on the Pleadings (Docket No. 102).)² Then, on December 4, 2017, Swallow filed a reply brief in support of his motion, which also asked the Court to deny the FEC's cross-motion. (*See* Def. John Swallow's Reply Mem. (Docket No. 104) ("Def.'s Reply Mem.")). In addition, Swallow filed a motion for clarification, seeking a ruling that the Order precludes further briefing on the FEC's cross-motion. (*See* Def. John Swallow's Mot. for

¹ Swallow acknowledges that if the Local Rules apply to the FEC's cross-motion, as they should, then his opposition brief is due today. (*See* Def. John Swallow's Mot. for Clarification at 4 (Docket No. 105).) The FEC's reply brief would then normally be due by January 2, 2018, but counsel for Swallow has consented to an extension of that deadline to January 12, 2018, given the intervening holidays. (*Id.* at 4 n.3.) The Commission will file a separate unopposed motion requesting that extension today. Even if Swallow does not file an opposition by today, December 18, 2017, the Commission should still be permitted to file a reply by January 12, 2018, given that Swallow's December 4, 2017 reply memorandum is effectively also an opposition to the FEC's cross-motion. (*See* Def.'s Reply Mem. at 10 (Docket No. 104) (arguing that "this Court should deny the FEC's cross-motion").

² Pursuant to DUCivR 7-1(b)(1)(A), the FEC's cross-motion incorporated the briefing contained in the FEC's opposition brief.

Clarification (Docket No. 105) (“Motion”).) In the alternative, Swallow asks the Court to “clarify” that he may file an opposition to the FEC’s cross-motion by today, and that the FEC may then reply. (*Id.* at 4.)

This District’s Local Rules authorize a moving party to file a reply brief as of right. *See* DUCivR 7-1(b). That remains true regardless of whether the moving party filed a motion or cross-motion. *See id.* at 7-1(b)(1)(A) (describing a cross-motion as a type of motion); *see, e.g., Higgins v. Shalala*, 876 F. Supp. 1224, 1226 (D. Utah 1994) (recognizing that a party filing a cross-motion “retains the opportunity to file a reply brief”). Nothing in the Court’s Order purports to take away the FEC’s right under DUCivR 7-1(b) to file a reply brief. On the contrary, the Order states that Swallow may file a Rule 12(c) motion, and that if he does, the FEC may cross-move “on any issues raised by defendant Swallow’s Rule 12(c) motion,” and that briefing on Swallow’s motion — which most logically includes briefing on the cross-motion it triggered — “would proceed in the normal course under DUCivR 7-1.” (*See* Order ¶ 1.)

The Order therefore requires no clarification and the Court should deny Swallow’s attempt to circumvent the Local Rules by manufacturing a supposed ambiguity in the Order. *See Mohammed v. City of Morgan Hill*, No. 5:10-CV-05630 EJD, 2011 WL 5085497, at *1 (N.D. Cal. Oct. 25, 2011) (“[W]here an order or direction of the court is clear . . . clarification is unnecessary.”). Swallow incorrectly asserts that the “Order did not anticipate an additional round of briefing.” (Mot. at 2.) But even assuming the Order is ambiguous, the default Local Rule allowing a reply as of right must control in the face of any ambiguity; the Order did not need to expressly authorize the Commission to file a reply. Indeed, the Order also does not expressly authorize the FEC to file a memorandum in support of its cross-motion, and yet Swallow does not dispute that the FEC was allowed to file such a brief under DUCivR 7-1. (*See*

Mot. at 2-3 (asserting that the FEC did not argue *enough* in its brief supporting its cross-motion.) Swallow's selective objection makes apparent that the clarification motion is simply an attempt to deny the FEC the last word on its cross-motion to which it is entitled.

In any event, for multiple reasons, Swallow's strained reading of the Order is wrong and in fact constitutes a request for modification of the Order. First, the Order states no affirmative intent to supersede the default procedural rules, as would be expected given the Order's affirmation that briefing on Swallow's motion would "proceed in the normal course under DUCivR 7-1." (Order ¶ 1.) Second, the Order entered a joint stipulation drafted by the parties, including the FEC, and so Swallow's argument amounts to a claim that the FEC intended to silently forego its right to full briefing on its cross-motion. Third, Swallow's interpretation is unwarranted because it would unduly prejudice the FEC, given that Swallow's reply brief in support of his Rule 12(b) and 12(c) motions ask the Court to "deny the FEC's cross-motion." (Def.'s Reply Mem. at 10.) Swallow is thus attempting to get the last word on the FEC's cross-motion by seeking a ruling precluding further briefing.³ Such a ruling would be prejudicial to the Commission because it would deprive it of the opportunity to reply to Swallow's arguments opposing the FEC's cross-motion. Swallow should not be allowed this unfair advantage.

There is also nothing about the substance of the Commission's cross-motion that justifies Swallow's request to deny the FEC a reply brief. First, under DUCivR 7-1(b), a moving party's right to a reply brief does not hinge on the substance of the arguments in the party's motion, and

³ Swallow repeatedly emphasizes his compliance with the shorter page and time limits applicable to reply briefs, as opposed to opposition briefs, under the Local Rules. (*See* Mot. at 2, 3.) That Swallow has thus far chosen to file only a reply brief is of no moment here. As he acknowledges (Mot. at 4), he could still proceed in the normal course and file a full-length opposition to the FEC's cross-motion by today's 28-day deadline under DUCivR 7-1(b)(3)(A). Moreover, Swallow was aware of the FEC's position prior to filing his reply brief and could have chosen not to address the FEC's cross-motion in his reply. (*See* Mot. at 3.) Having done so, Swallow should not now be allowed to deprive the FEC of its reply brief.

Swallow cites no authority stating otherwise.⁴ Second, the cross-motion’s attack on “the defense raised in Mr. Swallow’s Motion” does not make the cross-motion improper, as Swallow claims (Mot. at 3) — it makes the cross-motion compliant with this Court’s Order, which limited any FEC cross-motion to “issues raised by defendant Swallow’s Rule 12(c) motion” (Order ¶ 1). Third, the FEC has not failed to “materially argue” its cross-motion because that motion incorporated the FEC’s opposition to Swallow’s motions to dismiss and for judgment on the pleadings, as Swallow asserts. (Mot. at 2.) The Local Rules authorize a party filing a cross-motion to incorporate its opposing memorandum. *See* DUCivR 7-1(b)(1)(A).⁵

Fourth and finally, Swallow mischaracterizes the Commission’s cross-motion as “provid[ing] no independent basis for relief” and not constituting a “true cross-motion.” (Mot. at 3.) In fact, the FEC’s cross-motion explicitly seeks relief that the FEC would not receive but for its cross-motion — judgment on the pleadings against Swallow’s third affirmative defense in his answer. (*See* FEC’s Cross-Mot. for Partial J. on the Pleadings; Def. John Swallow’s Answer to Am. Compl. at 37-38 (Docket No. 45).) Even if this Court were to deny Swallow’s Rule 12(c) motion, Swallow’s legally insufficient third affirmative defense would remain in the Answer absent the FEC’s cross-motion. While there is overlap between the FEC’s reasoning for why the Court should deny Swallow’s motion and grant the FEC’s cross-motion, that overlap is

⁴ The out-of-District cases that Swallow cites (*see* Mot. at 4) are inapposite. *See Planck v. Schenectady Cty.*, No. 1:12-CV-0336 GTS/DRH, 2012 WL 1977972, at *2 (N.D.N.Y. June 1, 2012) (noting that under the local rules of the jurisdiction, the party was not entitled to file a reply on its cross-motion without leave of court); *Carlwood Dev. Inc. v. United States*, No. 2:10-CV-01773-RLH-PAL, 2011 WL 69374, at *1 (D. Nev. Jan. 10, 2011) (finding that the filing of the government’s cross-motion itself was improper).

⁵ Swallow bizarrely suggests that the FEC’s cross-motion improperly incorporates “separate briefing against another party.” (Mot. at 3 n.2.) However, the FEC’s cross-motion simply cites as precedent this Court’s ruling on a prior, similar motion in this case dismissing Swallow’s co-defendant’s legally insufficient affirmative defenses. (*See* FEC’s Cross-Mot. for Partial J. on the Pleadings at 2.)

appropriate and entirely unsurprising given this Court's order requiring the FEC's cross-motion to address only the issues raised by Swallow's Rule 12(c) motion. (Order ¶ 1.) Nothing in the Local Rules or the Order conditions the Commission's right to fully brief its cross-motion on whether the cross-motion asserts particular bases for its requested relief.

Accordingly, because the Order requires no clarification, the Court should reaffirm that Swallow's opposition to the FEC's cross-motion is due by December 18, 2017, and that the Commission may file a reply thereafter.

Respectfully submitted,

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December 18, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2017, I electronically filed plaintiff Federal Election Commission's Response to Defendant John Swallow's Motion for Clarification with the Clerk of the United States District Court for the District of Utah by using the Court's CM/ECF system, which sent notification of such filing to the following:

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