Allen Dickerson (*pro hac vice*)
Tyler Martinez (*pro hac vice*)
Owen Yeates (Utah Bar No. 13901)
INSTITUTE FOR FREE SPEECH
124 S. West Street, Suite 201
Alexandria, Virginia 22314
Telephone: 703.894.6800
Facsimile: 703.894.6811
adickerson@ifs.org
tmartinez@ifs.org
oyeates@ifs.org

Scott C. Williams (Utah Bar. No. 6687)
SCOTT C. WILLIAMS, LLC
43 East 400 South
Salt Lake City, Utah 84111
Telephone: 801.220.0700
Facsimile: 801.364.3232
scwlegal@gmail.com

Scott E. Thomas (*pro hac vice*)
BLANK ROME, LLP
1825 Eye Street N.W.
Washington, D.C. 20006
Telephone: 202.420.2601
Facsimile: 202.420.2201
sthomas@blankrome.com

Counsel for Defendant John Swallow

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

FEDERAL ELECTION COMMISSION, *Plaintiff*, v. JEREMY JOHNSON and JOHN SWALLOW, *Defendants*.	Case No. 2:15-cv-00439-DB **DEFENDANT JOHN SWALLOW'S REPLY IN SUPPORT OF MOTION FOR CLARIFICATION** District Judge Dee Benson

Mr. Swallow's Motion for Clarification ultimately asks this Court what briefing it requires, and what briefing it intended, to decide Mr. Swallow's Rule 12(c) motion and the Federal Election Commission's response ("FEC" or "Commission"). It is not a forum in which the parties may manufacture a competitive advantage by manipulating the Court's rules. That is why Mr. Swallow

explained his conversations with the FEC, including its desire for further briefing, and while stating his position, nevertheless asked this Court to decide which of two plausible readings of its order was intended.

The Commission has responded by seeking an additional reply brief while simultaneously arguing that Mr. Swallow is time-barred from filing the very opposition brief to which that reply would respond. *See* Commission's Response to Motion for Clarification at 4 n.3, (Dec. 18, 2017), ECF No. 108 ("FEC Response"). Its aggressive position is misguided and, ultimately, self-defeating. Mr. Swallow's last brief was filed on December 4, and the FEC appears to believe things should stay that way. Consequently—even under its theory—any reply to that brief was due yesterday, December 18, and the Commission has forfeited its right to reply.

That result is consistent with Mr. Swallow's preference, as explained in this motion. *See* Motion for Clarification ("Mot"), ECF No. 105. Because the extant briefing fully informed the Court on the issues and arguments underlying Mr. Swallow's 12(c) motion, Mr. Swallow requested that the Court clarify that the briefing had concluded under the terms of the Court's scheduling order. And because the FEC summarily argued its cross-motion, and in fact relied entirely on the arguments raised in its memorandum in opposition, he similarly rested his opposition to the FEC's cross-motion on his Rule 12(c) reply brief. Consequently, that brief responded to the "matters raised in the [FEC's] memorandum in opposition," DUCivR 7-1(b)(2), and briefing was at an end.

Nevertheless, recognizing that the Parties disagreed, he submitted the question of further briefing to the Court's discretion and awaited the Court's direction. The FEC, by contrast, without pointing to any arguments newly raised in Mr. Swallow's Rule 12(c) reply, or to any arguments in opposition to Mr. Swallow's defense not already raised in its opposition brief, demands a full

additional brief and over a month in which to draft it. *See* FEC Response and Motion for Extension to File Reply, ECF No. 109.

The FEC reorders the language of the Court's scheduling order and appeals to the discretionary provisions of the local rules in a vain attempt to justify a sur-reply. But, to state the obvious, a court's order supersedes the local rules. *See, e.g., Cross v. Fleet Res. Ass'n Pension Plan*, No. WDQ-05-0001, 2007 U.S. Dist. LEXIS 98985, at *17-18 (D. Md. July 3, 2007) (unpublished); *see also* DUCivR (noting throughout that rules are in effect "unless otherwise ordered by the court"). Thus, if the Court's scheduling order precludes reply briefing on the FEC's cross-motion, then that order supersedes any local rule.[1]

And the Court's scheduling order here appears to supersede the local rules regarding the briefing of Rule 12(c) motions.[2] The order stayed "*[a]ll proceedings* in this matter, including discovery and *any other deadlines*," with two explicit exceptions. ECF No. 91 at 1 (emphasis added). First, it allowed Mr. Swallow to file "a motion for judgment on the pleadings . . . and then briefing and potentially argument on any such motion." *Id*. Second, it simply and clearly stated 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." *Id*. at 2. That is, despite the explicit terms of the scheduling order staying all proceedings

[1] Indeed, such an action would be consonant with other Courts' local rules. *See, e.g., Planck v. Schenectady Cty.*, No. 1:12-CV-0336(GTS/DRH), 2012 U.S. Dist. LEXIS 76241, at *4-5 (N.D.N.Y. June 1, 2012) (unpublished) (noting rules controlling sur-replies created by cross motions).

[2] Accordingly, when Mr. Swallow learned of the Commission's intention to file a reply supporting its cross-motion, he asked the Court to clarify how he and the FEC should proceed. *See* Motion for Clarification, ECF No. 105 at 4 n.3.

and deadlines other than those explicitly permitted therein, the order specifically permitted briefing on the motion, but not for the cross-motion, and recognized that the FEC's cross-motion would merely be an extension of the "issues raised by defendant Swallow."

Thus, the language of the order indicates either that the Court did not contemplate briefing on a cross-motion, or that—following the pattern of other courts—briefing on the cross-motion would be included in, identical with, and restricted to the briefing on the principal motion. And the FEC was compelled to at least partially admit the latter point, referring to the "briefing on Swallow's motion—which most logically includes briefing on the cross-motion it triggered." FEC Response at 3. In either case, the FEC was entitled only to its opposition brief.

That result is proper because the FEC's cross-motion intended to do nothing other than respond to Mr. Swallow's affirmative defense and—with no additional argument—ask that the affirmative defense be removed from the case. Indeed, the FEC admits that the "Court's order requir[ed] the FEC's cross-motion to address only the issues raised by Swallow's Rule 12(c) motion." FEC Response at 6. So the cross-motion was merely a response limited to the arguments raised in Mr. Swallow's motion—in other words, part of the FEC's opposition. Following the normal course of procedure, Mr. Swallow's reply would be limited to responding to the arguments in the FEC's opposition, and no further sur-replies would be needed or permitted.

But, even assuming the FEC had filed a true cross-motion, it failed to brief the cross-motion as such. That is, there was no argument directed specifically and only to the cross-motion. Thus, either the cross-motion was summarily briefed, *see* Mot. at 2-3, or the only arguments in favor of the cross-motion are those supporting the FEC's opposition to Mr. Swallow's Rule 12(c) motion. In the first case—if the FEC's arguments in opposition are in fact separate from the arguments in

favor of its cross-motion—then the cross-motion was summarily briefed and the Court should deny it for failure to prosecute. *See, e.g.*, *Leathers v. Leathers*, 856 F.3d 729, 751 (10th Cir. 2017) (applying *Birch v. Polaris Indus., Inc.*, 812 F.3d 1238, 1249 (10th Cir. 2015) in "declining to consider" inadequately briefed argument); *United States v. Stuckey*, 255 F.3d 528, 531 (8th Cir. 2001) ("declin[ing] to consider conclusory or summary arguments"); *Invest Almaz v. Temple-Inland Forest Prods. Corp.*, 243 F.3d 57, 69 (1st Cir. 2001) (same); *Whitley v. Corizon, Inc.*, No. 2:13CV86 DDN, 2013 U.S. Dist. LEXIS 145726, at *7 (E.D. Mo. Oct. 9, 2013) (unpublished) (same); *see also United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs."). In the second case, Mr. Swallow was precluded from raising any new arguments, and there is nothing for the FEC to reply to.

Even making all the assumptions the FEC requests—that the Court's scheduling order did not supersede the local rules, that the FEC has raised a true cross-motion rather than merely responding to Mr. Swallow's arguments, and that the FEC has more than summarily briefed the cross-motion—the FEC has forfeited the right to file a reply in support of its cross-motion. The only opposition to the FEC's cross-motion was Mr. Swallow's December 4, 2017 reply in support of his Rule 12(c) motion, which also opposed the FEC's cross-motion (albeit with the same brevity the FEC used to argue it in the first place). Def. John Swallow's Reply Mem. at 10 (Dec. 4, 2017), ECF No. 104 ("For the reasons given here and in Mr. Swallow's Motion, this Court should deny the FEC's cross-motion, grant judgment on the pleadings, and vacate 11 C.F.R. § 110.4(b)(1)(iii)."). Indeed, the FEC identifies Mr. Swallow's Rule 12(c) reply as a source of undue prejudice absent the right to make an additional reply. *See* FEC Response at 4 (arguing that a ruling cutting off briefing after the reply "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"). On its own terms, this can only mean that the FEC believes Mr. Swallow's reply in fact *did* oppose the Commission's cross-motion.

Yet, despite repeatedly citing DUCivR 7-1 throughout its response, the FEC let pass the deadline required by that rule. That is, since Mr. Swallow timely filed his reply brief on December 4, 2017, any additional reply to it would have been required by December 18, 2017. *See* DUCivR 7-1(b)(3)(A) ("A reply memorandum to such opposing memorandum may be filed at the discretion of the movant *within fourteen (14) days* after service of the opposing memorandum." (emphasis added)). Thus, the FEC has exercised its discretion to forego filing any reply within the relevant period. Consequently, its request for an extension from some non-existent January 2 deadline is moot. *See* ECF 109.

Furthermore, the FEC cannot argue that the anticipation of a later filing by Mr. Swallow justified a different deadline. Mr. Swallow's Rule 12(c) reply and motion for clarification are clear that, absent the Court's request for further briefing, he intended his Rule 12(c) reply to be his final response in support of his motion and in opposition to the FEC's cross-motion.[3] Thus, until this Court ordered otherwise, there would not be another brief triggering the right to file a reply at a later date.

In essence, the FEC wants to have its cake and to eat it too. It wants to claim that Mr. Swallow's December 4, 2017 reply triggered a right for it to make a sur-reply, but it does not wish

[3] While the FEC did not want to work on any filing between December 18, 2017, and January 2, 2018, because of the two federal holidays and vacations, ECF No. 109 at 1, it has not given any indication why it was unable to prepare its response by the actual deadline, December 18, 2017.

to be bound by the 14-day deadline for that brief. At the same time, the Commission wants to act as if some non-existent brief was filed on December 18, 2017, so that it would have had until January 2, 2018 to respond to whatever that phantom brief might have contained.[4] The FEC needs to choose one theory or the other. But either way, it currently has no right to a further brief. Assuming the right to reply ever existed, the Commission either missed the deadline to respond to the Rule 12(c) reply, or there is as yet no brief to which it may reply.

Mr. Swallow believes that the Court has been fully informed by the parties' Rule 12(c) briefing. But as he has already stated, he would happily file additional briefing if it would assist the Court. In that case, Mr. Swallow would respectfully ask that the Court modify the deadlines requested in the alternative in his Motion for Clarification, since they have passed. Consequently, if the Court orders additional briefing, Mr. Swallow respectfully requests that his expanded brief be due January 12, 2018, and that the FEC's reply be due January 26, 2018.[5]

Respectfully submitted,

/s/ Allen Dickerson

[4] The Commission does this while simultaneously arguing that, because the brief was *not* filed on December 18, it cannot be filed at all. FEC Response at 4 n.3. This is an aggressive position in any event, but for these purposes, it is simply incoherent. The Commission cannot reply to something that has not been written, and that it believes should not be written.

[5] Mr. Swallow learned yesterday, on December 18, 2017, from the FEC Response and Motion for Extension, that the Commission intended to hold Mr. Swallow to the December 18, 2017 deadline for any briefing requested by the Court, even though the Court had not ordered additional briefing. The FEC's request would thus foreclose any additional briefing by Mr. Swallow while simultaneously requesting an extension for the Commission. Counsel for Mr. Swallow immediately contacted the FEC to likewise request an extension for Mr. Swallow, so that he could file an expanded reply/opposition should the Court request additional briefing. The FEC's attorney reasonably responded that, given the hour, the Commission might not be able to provide a response before the deadline passed. That proved to be the case.

Scott C. Williams (Utah Bar. No. 6687)
SCOTT C. WILLIAMS, LLC
43 East 400 South
Salt Lake City, Utah 84111
Telephone: 801.220.0700
Facsimile: 801.364.3232
scwlegal@gmail.com

Scott E. Thomas (*pro hac vice*)
BLANK ROME, LLP
1825 Eye Street N.W.
Washington, D.C. 20006
Telephone: 202.420.2601
Facsimile: 202.420.2201
sthomas@blankrome.com

Allen Dickerson (*pro hac vice*)
Tyler Martinez (*pro hac vice*)
Owen Yeates (Utah Bar No. 13901)
INSTITUTE FOR FREE SPEECH
124 S. West Street, Suite 201
Alexandria, Virginia 22314
Telephone: 703.894.6800
Facsimile: 703.894.6811
adickerson@ifs.org
tmartinez@ifs.org
oyeates@ifs.org

Counsel for Defendant John Swallow

Dated: December 19, 2017

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing using the court's CM/ECF system. A Notice of Docket Activity will be emailed to all registered attorneys currently participating in this case, constituting service on those attorneys:

For Plaintiff FEC

Lisa Stevenson
lstevenson@fec.gov
Sana Chaudhry
schaudhry@fec.gov
Claudio J. Pavia
cpavia@fec.gov
Harry J. Summers
hsummers@fec.gov
Kevin Deeley
kdeeley@fec.gov
Kevin Paul Hancock
khancock@fec.gov
FEDERAL ELECTION COMMISSION
999 E Street N.W.
Washington, D.C. 20463
Phone: 202.694.1650

For Defendant Jeremy Johnson

John D. Lauritzen
jd.lauritzen@chrisjen.com
Karra J. Porter
karra.porter@chrisjen.com
CHRISTENSEN & JENSEN, PC
257 East 200 South, Suite 1100
Salt Lake City, UT 84111
Phone: 801.323.5000

Dated: December 19, 2017

/s/ Allen Dickerson
Allen Dickerson