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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 MOTION FOR PARTIAL FINAL JUDGMENT** District Judge Dee Benson

Defendant John Swallow, by and through undersigned counsel, respectfully requests an entry of partial final judgment pursuant to Federal Rule of Civil Procedure 54(b).[1] That rule

[1] Counsel for Mr. Swallow corresponded with counsel for the Commission regarding partial final judgment for Mr. Swallow, and the FEC intends to oppose the motion.

provides that "the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties." *Id*. In order to grant partial final judgment, the Court must determine two distinct issues: (I) that the claims and parties subject to the partial final judgment are both separable from the rest of the ligation and (II) that "there is no just reason for delay" in granting partial final judgment. *N.M. ex rel. State Eng'r v. Trujillo*, 813 F.3d 1308, 1316 (10th Cir. 2016).

I. The claims against Mr. Swallow are separable from the rest of the ligation.

In determining whether partial final judgment is appropriate, the district court is to "act as a 'dispatcher' -- weighing the historic federal policy disfavoring piecemeal appeals against the inequities that may result if a litigant is required to await resolution of the entire case before appealing." *Gross v. Pirtle*, 116 F. App'x 189, 193-94 (10th Cir. 2004) (quoting and applying *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980)). Factors to consider are whether "the claims under review [are] separable from the others remaining to be adjudicated and whether the nature of the claims already determined [are] such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals." *Curtiss-Wright*, 446 U.S. at 8. Both factors are satisfied in this instance, and therefore partial final judgment for Mr. Swallow is appropriate.

a. Granting partial final judgment will be based on separable facts and claims.

First, "Rule 54(b)'s finality requirement is only satisfied if the claims resolved are distinct and separable from the claims left unresolved." *Old Republic Ins. Co. v. Durango Air Serv.*, 283 F.3d 1222, 1225 (10th Cir. 2002) (citing *Okla. Tpk. Auth. v. Bruner*, 259 F.3d 1236, 1241 (10th Cir. 2001) and *McKibben v. Chubb*, 840 F.2d 1525, 1528-29 (10th Cir. 1988)) (internal quotation marks omitted). To determine separability, courts "concentrate[] on two factors: (1) the factual

overlap (or lack thereof) between the claims disposed of and the remaining claims, and (2) whether the claims disposed of and the remaining claims seek separate relief." *Okla. Tpk. Auth.*, 259 F.3d at 1242 (quoting Moore's Federal Practice 3d § 202.06[2]).

The claims against each defendant in this case are based on different facts[2] and legal theories. The FEC's claims against Mr. Swallow were that he "caused, helped, and assisted" Mr. Johnson. Amend. Compl. at 17 ¶ 77 (third cause of action, the only one against Mr. Swallow).[3] This Court has already resolved the Commission's legal claim against Mr. Swallow by dismissing it and vacating the underlying administrative rule. Mem. Decision and Order at 10 (April 6, 2018), ECF No. 120. As the District Court for the District of Columbia has held, "[a]n order is 'final' within the meaning of Rule 54(b) if it is the 'ultimate disposition of an individual claim entered in the course of a multiple claims action.'" *Jewler v. Dist. of Col.*, 198 F. Supp. 3d 1, 3 (D.D.C. 2016) (quoting *Curtiss-Wright*, 446 U.S. at 7). Because this Court has resolved the only claim against Mr. Swallow and the remaining facts and claims are distinct, the parties are consequently

[2] The factual claims against Mr. Swallow are separable from those against Mr. Johnson. The Commission's claims were based on alleged political speech from Mr. Swallow. According to the FEC, Mr. Swallow said that Senator Lee would be "choosing the next U.S. Attorney," and that "hav[ing both the Senator and the U.S. Attorney] in [Mr. Johnson's] corner" would be helpful "if the federal government comes after [the online] poker" industry, whose transactions were processed by Mr. Johnson's companies. Amend. Compl. at 4 ¶ 11, 9 ¶ 30 (Feb. 24, 2016), ECF No. 36. In contrast, the FEC's claims against Mr. Johnson are based are based on allegations of direct financial transactions between Mr. Johnson and other persons acting as conduits. *Id*. at 7 ¶ 23 ("Johnson entered into arrangements or understandings with his straw donors that they would contribute funds to Shurtleff's campaign and that Johnson would supply them with the funds for those contributions."); *cf. id*. at 9 ¶32 ("Johnson's straw donors transmitted funds to Lee's campaign. . . . Johnson supplied his straw donors with those funds . . .").

[3] Such secondary liability is independent of any principal liability alleged against Mr. Johnson. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176 (1994) ("[A]iding and abetting liability reaches persons who do not engage in the proscribed activities at all . . ."). The Amended Complaint did not allege any conspiracy cause of action.

severable. *See, e.g.*, *McHenry v. City of Ottawa*, No. 16-2736-DDC-JPO, 2017 U.S. Dist. LEXIS 206445, at *8 (D. Kan. Dec. 15, 2017) (unpublished) (granting a Rule 54(b) motion where a "plaintiff pursue[d] a different legal theory against the non-shooting officers compared to the other defendants").

b. Granting partial final judgment will create no appellate redundancy.

Second, for this case, "no appellate court would have to decide the same issues more than once even if there were subsequent appeals." *Curtiss-Wright*, 446 U.S. at 8; *cf. Gross*, 116 F. App'x at 193-94. This Court granted Mr. Swallow's Motion to Dismiss because the regulation upon which the FEC relied is invalid. That regulation is the only basis of the claims against Mr. Swallow, and is not the basis of the claims against Mr. Johnson. *Compare* Amend. Compl. 17 ¶¶ 73 and 75 *with* ¶ 77.

FEC's claims against Mr. Swallow were based on a theory of secondary liability, relying entirely upon 11 C.F.R. § 110.4(b)(1)(iii), a rule of the Commission's own making. Mem. Decision and Order at 2 ("The Commission admits that its case against Mr. Swallow is based on the CFR, which was adopted in 1989."). This Court has already rejected the Commission's theory and vacated 11 C.F.R. § 110.4(b)(1)(iii). *Id.* at 10. In contrast, the FEC's claims against Mr. Johnson are based in statute and different theories of liability. Amend. Compl. 17 ¶ 73 (first cause of action against Mr. Johnson under 52 U.S.C. § 30116(a)(1)(A)); *id.* ¶ 75 (second cause of action against Mr. Johnson under 52 U.S.C. § 30122)).

Any further appellate review of the FEC's claims against Mr. Swallow would be based on the sufficiency of 11 C.F.R. § 110.4(b)(1)(iii) on administrative law grounds applying *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *Central Bank*

of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994). By contrast, any appellate review of the FEC's claims against Mr. Johnson would be based on its application of the Federal Election Campaign Act. These are entirely separate legal claims.

II. There is no just reason for delay in granting judgment for Mr. Swallow.

Under Federal Rule of Civil Procedure 54(b), for this Court to grant partial final judgment, it must "determine[] that there is no just reason for delay." The appellate courts instruct that this must be a separate determination. *Stockman's Water Co., Ltd. Liab. Co. v. Vaca Partners, Ltd. P'ship*, 425 F.3d 1263, 1265 (10th Cir. 2005) (citing *Curtiss-Wright*, 446 U.S. at 8); *Okla. Tpk. Auth.*, 259 F.3d at 1242.[4] Because Mr. Swallow has successfully defeated the FEC's claims, he sees no reason to delay the finality of this Court's judgment as to himself.

The case against Mr. Swallow has gone on quite long enough. And the other parties agree that the FEC's claims against Mr. Swallow are resolved. The FEC, along with counsel for Mr. Johnson, filed a Joint Stipulation and [Proposed Order] to Extend or Clarify Stay at 3-4 (June 4, 2018), ECF No. 122 (counsel for both the FEC and Mr. Johnson, signing).[5] In that Joint Stipulation, the FEC notes that this Court's original "Stay Order created a limited exception for certain cross-motions related to defendant John Swallow on legal grounds, *which have now been resolved*." *Id.* at 1 n.1 (emphasis added). It is telling that the FEC captions its filing as only between it and Mr. Johnson. *Id.* at 1. And the Commission did not contact counsel for Mr. Swallow before submitting

[4] The Tenth Circuit applies "[a] two-tiered standard of review" where this Court's "determination of the certified order's finality is subject to *de novo* review because it is a question of law," but the "determination that there is no just reason for delay is reviewed only for abuse of discretion." *Okla. Tpk. Auth.*, 259 F.3d at 1242 (internal citations omitted).

[5] The Court has granted that extended stay without substantive modification of the Commission's filing. *See* Joint Stipulation and Order to Extend or Clarify Stay (June 13, 2018), ECF No. 123.

a Joint Stipulation, which is further evidence that the Commission acts as though the case against Mr. Swallow is complete.

There is no reason why Mr. Swallow should continue to wait on the final resolution of the FEC's suit against Mr. Johnson, which continues to be delayed by sentencing complexities occasioned by Mr. Johnson's unrelated criminal conviction and may not be resolved for some time. This Court has ruled decisively as regards Mr. Swallow. If the FEC wishes to appeal that ruling, it should do so separately. Otherwise, Mr. Swallow should be released from further proceedings.

Therefore, because there remains no lawful claim against Mr. Swallow, and because there is no just reason to delay resolution of the claims against him—especially as there is likely to be a substantial wait while this Court resolves the legally distinct claims against Mr. Johnson—Mr. Swallow respectfully seeks certification of partial final judgment under Federal Rule of Civil Procedure 54(b).

Pursuant to DUCivR 54-1(b), a [Proposed] Partial Final Judgment is filed concurrently with this document.

Respectfully submitted,

/s/ Allen Dickerson

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Dated: July 26, 2018