IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTARIAN NATIONAL COMMITTEE, INC.	)	**Civ. No. 11-562 (RLW)**
Plaintiff	)	
v.	)	
FEDERAL ELECTION COMMISSION,	)	**REPLY TO DEFENDANT'S RESPONSES TO PLAINTIFF'S FACTS**
Defendant.	)	

PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSES TO PLAINTIFF'S FACTS SUBMITTED FOR CERTIFICATION

Plaintiff Libertarian National Committee ("LNC") hereby submits the following reply to the "Defendant's Response to Plaintiff's Facts Submitted for Certification" ("Defendant's Response") that Federal Election Commission ("FEC") filed on July 6, 2012 (Docket No. 28-1).

Defendant's Responses are frequently argumentative and conclusory, exceeding the record and undermining the goals of the fact certification process. A brief rebuttal is warranted.

I. **Defendant's facts submitted for certification are argumentative and posit legal conclusions, while Plaintiff's merely state largely incontrovertible facts.**

The purpose of the fact certification process is to determine where the parties agree and identify relevant background information that is beyond dispute or can be conclusively demonstrated under the Federal Rules of Evidence. Fact certification is *not* designed to highlight where the parties disagree, or to assess the merits of contentious merits issues. Instead, these questions are addressed once the case is considered *on the merits* – that is, before the Court of Appeals. But Defendant's Response is replete with examples of argumentative allegations posited as "facts" or "responses."

For example, Plaintiff offers the following for certification: "The Libertarian Party does not associate with the dead and does not maintain deceased members. Redpath Decl., ¶ 8; Kraus Decl., ¶ 4." This fact is relevant because the Supreme Court has viewed contributions to

political parties as being primarily associative, rather than expressive, and upheld contribution limits on that specific basis. *Buckley* v. *Valeo*, 424 U.S. 1, 24, 28 (1976). As this is an as-applied challenge, Plaintiff is entitled, if not required, to offer facts that distinguish the circumstances here from that upon which the Supreme Court has previously spoken.

Rather than explain why this fact is not established by the evidence or otherwise relevant, Defendant objects "to this fact to the extent it implies the legal proposition that it is possible to engage in First Amendment protected-association with a deceased person. *See, e.g.*, *Whitehurst v. Wright*, 592 F.2d 834, 840 (5th Cir. 1979) ('After death, one is no longer a person within our constitutional and statutory framework, and has no rights of which he may be deprived.')."

This "objection" attempts to argue the merits of the case, an activity inappropriate at this stage of litigation. Even setting aside the fact that Plaintiff does not assert the proposition of Constitutional law that Defendant somehow extrapolates, it is wholly inappropriate to cite dicta from the Fifth Circuit during fact certification proceedings in the D.C. District Court. *See, e.g., Global Network Communs., Inc.* v.*City of New York,* 458 F.3d 150, 157 (2d Cir. 2006) ("[a] court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings") (internal quotation marks omitted).[1] And, aside from cherry-picking dicta, the Commission's response relies on nothing in rebutting Plaintiff's citation to the record actually developed in this litigation.

Similarly, the LNC proposes the following fact:

> A political party's federal office candidates cannot reliably count on receiving money from particular bequests in many cases. A prospective donor might defy the odds and outlast actuarial or medical predictions—or change his or her mind. Redpath Decl., ¶ 10.

Plaintiff's Proposed Facts, ¶ 37. This would appear to be common sense. As noted earlier, for

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[1]Of course, the plaintiff here is the LNC, not Burrington or his Estate. And whatever the merits of *Whitehurst*'s observation, the Supreme Court has held that individuals do enjoy constitutional protection in making bequests that are enforceable by third parties after death. *Hodel v. Irving*, 481 U.S. 704 (1987).

example, when Burrington made his bequest, Barack Obama was an unsuccessful Congressional primary candidate, and Bob Barr was a conservative Republican member of the House. Neither Burrington, nor Barr, nor any party official, could have predicted Burrington's bequest would become relevant ahead of the 2008 election that would see Barr, of all people, as the Libertarian nominee.

Defendant responds with a smattering of objections:

> The Commission objects to this fact as vague, ambiguous, speculative and lacking foundation to the extent it claims that unnamed "federal office candidates cannot reliably count on receiving money from particular bequests in many cases." The record demonstrates that individuals have named specific federal candidates and officeholders in their bequests. (FEC Facts ¶ 128.) Finally, the Commission objects to this fact to the extent it suggests that it is legally relevant whether a federal candidate or officeholder could count on receiving money from a particular bequest, given that candidates and officeholders place substantial value on contributions to their political parties without regard to how the party uses the contributions. (*See id*. ¶¶ 73-75.)

Def. Rsp. ¶ 37.

The contrast is marked. Plaintiff suggests only that a particular situation exists in some cases, and makes no absolute assertions. Defendant, on the other hand, furnishes a lengthy response that has no basis in law and does nothing to further clarify facts relevant to this case. *See also* Def. Rsp. ¶ 31 (objecting to the use of the phrase "leaving bequests," then baldly making the legal assertion that "leaving a bequest is not a form of political expression," which it reasserts throughout its Response).

Perhaps more importantly, Defendant's Response does not engage with what Plaintiff actually asserts: not that specific candidates have not been named in bequests, but that those named persons *cannot rely* on the promised bequest ever being received. Defendant says nothing to rebut this assertion. *See also* Def. Rsp. ¶ 8 (Plaintiff asserting that its party's ballot access costs *typically* exceed its other expenditures, and Defendant "objecting" on the grounds that such is not always the case).

II. In contrast to the Defendant's Response, Plaintiff's proposed facts do not go beyond the record.

Defendant's Response is replete with assertions that extend beyond the record. This renders a process intended to streamline discovery cumbersome, undermining judicial efficiency. For example, Plaintiff offers the following for certification:

> An additional $160,734.00 in 2008 would have had a material impact on LNC's ability to advocate for and elect its candidates, covering nearly the entirety of LNC's operating deficit that year. Exh. B; Redpath Decl., ¶ 11. That same amount of money in 2010 would have more than sufficed to cover the Party's ballot access costs. Id.

Plaintiff's Proposed Facts, ¶ 50. This factual assertion is supported both by testimony and by exhibits in the record, as cited by the Plaintiff. But Defendant objects, inter alia, on the following grounds:

> There is no evidence that an additional $160,734 would have caused the LNC to spend more on candidate support that year. Second, the record reflects that the LNC's ability to "elect its candidates" would likely be harmed, not improved, were it able to accept unlimited bequeathed contributions, such as Burrington's bequest. The LNC claims that FECA violates the First Amendment rights of *all* national party committees, and thus if the LNC prevails in this litigation, all national parties, including its major-party rivals, would be able to accept unlimited bequeathed contributions, putting the LNC at a further competitive disadvantage in elections. *Cf. Buckley v. Valeo*, 424 U.S. 1, 33 (1976)…"

Def. Rsp. ¶ 50.

It is striking that the Defendant alleges that Plaintiff's proposed fact (which is supported by two sources) goes beyond the record, but in the same breath makes an assertion that is not only wholly unsupported by the record, but contains a "*Cf.*" cite to the Supreme Court's seminal campaign finance case. In short, the Commission's response includes a bald and unsupported conclusion, not directly supported by a leading Supreme Court decision. These simply are not factual objections, and contrast markedly with the modest and limited factual assertion to which Defendant objects.

III. In contrast to the Defendant's conclusory assertions, Plaintiff relies on the FEC's own findings.

One characteristic Defendant and Plaintiff share is their willingness to rely on the FEC's findings. Indeed, the Defendant goes so far as to *object to its own findings and rules*, which Plaintiff cites in a good faith effort to streamline this discovery process.

For example, Plaintiff offers the following fact for certification, citing the record as well as an advisory opinion issued by the Defendant:

> Although the term 'person,' as used in 2 U.S.C. § 441a(a)(1), is not specifically defined to include an individual's testamentary estate, Defendant FEC extends this definition to include testamentary estates. Exh. C, Admission No. 4; Exh. D, FEC Advisory Opinion 2004-02; Exh. E, FEC Advisory Opinion 1999-14.

LNC Proposed Fact 21. In response, the FEC posits the following as an "objection:"

> FECA defines the term 'person,' which is used in 2 U.S.C.§ 441a(a)(1), as including 'an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons.' 2 U.S.C. § 431(11). In advisory opinions, "the Commission has concluded that the testamentary estate of a decedent is the successor legal entity to the testator and qualifies as a 'person' under the Act that is subject to the same limitations and prohibitions applicable to the decedent in the decedent's lifetime." FEC Advisory Op. 2004-02 (citing FEC Advisory Op. 1999-14).

Here, not only does Defendant object to its own advisory opinion, it does not even manage to distinguish the fact Plaintiff offers for certification; it merely restates and expounds upon the Plaintiff's proposed fact.

Similarly, FEC objects to LNC's Proposed Facts 43, 44, 46, 47, and 49, all fairly based on the FEC's own submission. FEC's objection to Proposed Fact 43 is merely semantic. The whole point of this fact is that FEC does not track political contributions *as* received from testamentary bequests, and that is clear enough from the FEC's cited declaration. FEC objects to proposed fact 44, "Attempts to search FEC's database for records of testamentary bequests produce underinclusive results. Clark Decl., ¶¶ 3, 4," by offering that

> because recipients do not always report that a contribution or donation was made from bequeathed funds, the number of records reflecting contributions and donations made from bequeathed funds most likely does not reflect the actual number of contributions and donations that have in fact been made from bequeathed funds.

FEC Resp. 44. This is not an objection—it is an admission rephrasing the proposed fact.

Similarly, the other objections in this series, to facts 46, 47, and 49, also tend to focus on the distinction between donations, which are subject to contribution limits, and bequests, which represent the raw total of the amounts that a decedent has left behind. But Plaintiff's factual submissions fully account for this distinction. Indeed, that distinction lies at the heart of the points LNC advance—bequests frequently outstrip contribution limits, and FEC's application of contribution limits to bequests has a substantial impact on the receipt of bequeathed funds.

These sorts of "objections" achieve nothing and fail to advance the fact certification process. *See also* Def. Rsp. ¶ 20 (Plaintiff citing the FEC's website, Defendant's "objection" merely parroting the source Plaintiff cited.); Def. Rsp. ¶ 22 (Defendant failing to object to any assertions Plaintiff makes, and merely restating fact Plaintiff offers for certification); Def. Rsp. ¶ 24 (Plaintiff noting amount of bequest at issue, Defendant "objecting" by specifying how that dollar amount was determined. Plaintiff does not disagree with Defendant here, but points out that this fact certification process is not a specificity competition, but a means to expedite discovery by eliminating intercession regarding matters not at issue).

IV. Defendant's Responses suffer from a number of individual errors consistent with these systemic weaknesses.

While the systemic weaknesses described *supra* encompass Plaintiff's response to many of Defendant's objections, others suffer from individual weaknesses of law or logic. In particular, many of Defendant's "objections" in fact go to the weight, and not the admissibility, of Plaintiff's proposed facts. For instance, Plaintiff submits that "In the last presidential election year, "ballot access" was LNC's largest budgetary item, at $510,257, drawn against available

resources of $1,280,103. Redpath Decl., ¶ 5; exh. B. Candidate support that year totaled a mere $500. Id." Plaintiff's Proposed Facts, ¶ 7. Defendant objects to this proposed fact "to the extent it suggests that the LNC's ballot access spending *caused* the LNC to spend little on candidate support." Def. Rsp. ¶ 7 (emphasis in original). But Plaintiff does not assert in its proposed facts that ballot access spending caused the LNC to spend little on candidate support. *See also* Def. Rsp. ¶ 6 (discussed, *infra*). The D.C. Circuit might agree or disagree with the significance LNC places on this evidence, but the disput e here goes to weight, not relevance or admissibility. The fact is that the D.C. Circuit might well agree that a political party that spends $500 on candidate support and $510,257 on ballot access could be significantly impacted by a quarter-million dollar bequest.

As for the FEC's cherry-picking of data from 2007 and 2009, showing comparatively little money spent on ballot access, Def. Rsp. ¶ 8—those were not election years. Nor does it matter that LNC opted not to go bankrupt and spend every last cent of "available" money each year on candidate support. The FEC should argue the meaning of these facts to the D.C. Circuit, not to this Court.

Indeed, many of the FEC's objections go to weight, not admissibility. LNC officials have testified that they meet many people who believe the LNC is not viable, but FEC objects on grounds of foundation and speculation, as no such individuals are specifically offered up for involvement in this litigation. Def. Rsp. ¶¶ 9-11. The FEC misunderstands the meaning of "foundation" and "speculation." LNC officials plainly have a firm basis to describe their interactions with the public, and the public's reaction to LNC, over the course of their many years of service to the party. FEC's argumentative objection that the party holds no appeal beyond its current membership, Def. Rsp. ¶10, is belied by its failure to object to Facts 12 and 13, that the party might achieve greater success if it only had more money.

Likewise, the FEC objects to the assertion that the Estate remains an escrowee under the Agreement by which the bank will distribute the remaining Burrington Estate funds, and claims that "the escrow agreement appears to grant the Libertarian Party complete discretion to 'alter[] or amend[] from time to time' how the funds are invested." Def. Rsp. 28 (citing Exh. G, Dkt. 25-9, ¶ 2).

But the moneys are not being donated to the LNC by the Escrow Agent bank; they are donated by Burrington by and through his Estate, and the Agreement provides that it "shall bind and benefit the Estate . . ." Exh. G, Dkt. 25-9, ¶ 8. The claim that LNC has "complete discretion" to direct the investment is wrong. The paragraph FEC quotes provides that the bank "shall invest [the funds] in bank accounts or certificates of deposit," Dkt. 25-9 ¶ 2, and further ties the LNC's cited "discretion" to Exhibit B of the agreement, *id.*, which provides that the money can be invested in "the Money Market Checking Account and/or certificate(s) of deposit at Mercantile Bank of Michigan; and (b) funds in the Money Market Checking Account may be invested in certificate(s) of deposit at Mercantile Bank of Michigan." Dkt. 25-9, p. 8. In other words, the LNC has "discretion" to direct that the escrowed funds may earn interest at the Mercantile Bank of Michigan—which is very different than most investors' idea of "complete discretion."

Plainly, Plaintiff has not asserted propositions of constitutional law in its facts submitted for certification (a marked contrast to Defendant's proposed facts). Defendant's objection does not serve to clarify facts that are beyond dispute, *because it does not oppose any fact Plaintiff submitted*. Instead, they are merely an attempt by Defendant to argue the merits of this case (in a manner that, like many of Defendant's other assertions, is argumentative, conclusory, violative of the Federal Rules of Evidence, and goes beyond the record). *See also* Def. Rsp. ¶ 6 (objecting to a "characterization" Plaintiff does not posit, "to the extent it suggests" causation—even though Plaintiff neither makes such a characterization nor argues causation); Def. Rsp. ¶ 2

(objecting to Plaintiff's assertion of Defendant's authority to enforce BCRA, noting that this authority is civil only, in the context of this unquestionably civil action. Plaintiff concedes that Defendant's BCRA enforcement authority is only civil, but in the context of a civil action, this is unneccesary).

Conclusion

Plaintiff objects to Defendant's frustration of 437h's collaborative process, which seeks to identify uncontroverted facts in facilitation of efficient and fair judicial disposition. It is one thing to attempt to characterize facts in a manor favorable to one's client, but it is wholly another to make argumentative and conclusory allegations that extend beyond the record, object to one's own findings, and attempting to argue the merits at the fact-certification stage.

Under Section 437h, what the facts mean, what they prove or do not prove, is a matter for the appellate court. Here, it is enough to show that each of Plaintiff's proposed facts is established by the competent evidence cited in its support.

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Respectfully submitted,

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