UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMBAT VETERANS FOR CONGRESS POLITICAL ACTION COMMITTEE and DAVID H. WIGGS, TREASURER

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION

Defendant.

Civil Case No. 1:11-cv-02168 CKK

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Dan Backer (D.C. Bar No. 996641)
DB Capitol Strategies PLLC
209 Pennsylvania Avenue SE
Suite 2109
Washington, DC 20003
(202) 210-5431
dbacker@dbcapitolstrategies.com

Attorney for Plaintiffs

Of Counsel:
Paul D. Kamenar (D.C. Bar No. 914200)
3523 Woodbine Street
Chevy Chase, MD 20815
(202) 603-5397
paul.kamenar@gmail.com

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Plaintiffs Combat Veterans For Congress PAC and David H. Wiggs in his official capacity as Treasurer respectfully submit this Memorandum of Points and Authorities in Support of their Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 7(h).

PRELIMINARY STATEMENT

This motion for summary judgment challenges, under 2 U.S.C. § 437g(a)(4)(C)(iii), the legality of the November 4, 2011 Final Determination by the Federal Election Commission ("FEC" or "Commission") which allegedly found Plaintiffs Combat Veterans for Congress Political Action Committee ("CVFC PAC") and its current Treasurer, David H. Wiggs, liable for the late filing of three disclosure reports with the FEC and imposed fines totaling $8,690 upon the Plaintiffs for those alleged violations of the Federal Election Campaign Act ("FECA" or "the Act"). These fines relate to what the Administrative Record demonstrates is the knowing, willful, and/or reckless conduct of a malfeasant former Treasurer who violated the Act by failing to timely file certain reports. As will be demonstrated, liability for such malfeasance lays exclusively with the *former* Treasurer, Michael Curry, in his personal capacity according to the applicable sections of the United States Code, the Code of Federal Regulations, the FEC's Explanations and Justifications for such regulations, and other various materials published by the Commission, all of which place the responsibility for filing disclosure reports on the Treasurer rather than the committee itself.

As a preliminary matter, this motion also raises the question of whether the FEC sanctions are even valid inasmuch as it did not follow the proper procedure in imposing civil money penalties on the Plaintiffs. In particular, it appears that the Commissioners did not

affirmatively vote by 6-0 as the Commission certified in the Administrative Record filed with this Court to "find reason to believe" that plaintiffs violated FECA. A minimum of four affirmative votes is necessary pursuant to 11 C.F.R. § 111.9 for the Commission to make a "Reason To Believe" finding. Rather, for the three sets of late filings, it appears from information released two days ago by the FEC of the actual ballots in this case, the affirmative votes were 3-0, 2-0, and 3-0, and even those Commissioners voting simply "did not object to" a staff report that recommended the Commission *should* find reason to believe, but never themselves made the requisite finding. Furthermore, before imposing sanctions, the law required the FEC to give Plaintiffs "an opportunity to be heard before the Commission" in person, a procedure which the FEC provides for alleged violators of other provisions of FECA. 2 U.S.C. § 437g(a)(4)(C)(ii).

The record also shows that the Commission is in receipt of substantial evidence and correspondence from CVFC PAC documenting that it "employed our best effort to file in a timely manner, but we were prevented from doing so by unforeseen circumstances beyond our control as outlined in 11 C. F. R., 111.35 (b)." Administrative Fine 2355–Administrative Record 048 (hereinafter, the administrative record will be referred to in the following format: AF#-AR#, where "#" refers to the relevant fine and record page number). CVFC PAC used its "best efforts" to "obtain substantial missing information as quickly as humanely [sic] possible, assembled and audited that information in a timely manner, expending approximately 600 man hours of work, reconstructed the donor information in the proper electronic format, and fully complied with FEC Reporting requirements." AF2355-AR049. CVFC PAC was forced to correct problems caused by the willful or reckless conduct of its former Treasurer and is challenging the FEC's narrow definition of "best efforts" and its refusal to either abate or

mitigate the fine imposed on the committee and its current Treasurer under the circumstances. The Administrative Record clearly shows that the Commission did not even consider this information, and was arbitrary and capricious in not considering the information, even assuming that the Commission was justified in not imposing sole liability on the malfeasant treasurer.

The Commission's failure to impose these penalties and pursue such a flagrant malfeasant Treasurer violates the language and spirit of the Act and is contrary to, among other things, the Commission's regulations and its Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings. See 70 Fed. Reg. 1 (Jan. 3, 2005). The Commission's actions in finding liability and assessing fines in this matter against Plaintiffs instead of the former Treasurer, or at least mitigating the fine against Plaintiffs, is arbitrary, capricious, an abuse of discretion or a failure to exercise discretion and otherwise not in accordance with law; implicates the procedural and Due Process rights of the Plaintiffs; and violates the Plaintiffs' Due Process and First Amendment rights.

The Commission's refusal to adhere to the law, despite the Plaintiffs' numerous requests that it do so, is an open invitation for treasurers to abuse and violate the campaign finance regulatory regime as wrongdoers would have no legal impediment to engage in malfeasance, and then abandon committees which would have to deal with the legal and financial repercussions. The Commission's determination will tend to destroy public confidence in the very statutory scheme the Commission is charged with enforcing, and is so obviously contrary to the clearly stated law promulgated by Congress as to be wholly unreasonable.

STATEMENT OF FACTS

I. DESCRIPTION OF COMBAT VETERANS FOR CONGRESS PAC

Plaintiff CVFC PAC is a non-partisan, non-connected political action committee registered with the Federal Election Commission. CVFC PAC raises and disburses funds for the purpose of influencing Federal elections. It endorses, contributes to, and otherwise supports the election of carefully vetted candidates who are combat veterans of any active or reserve component of the United States Military, and who meet other ideological and/or policy related standards determined by the organization.

On October 19, 2009, CVFC PAC registered with the FEC as a non-connected political action committee by filing an FEC Form 1, Statement of Organization, pursuant to 11 C.F.R. § 102.1(d). CVFC PAC's Statement of Organization named Michael Curry as both Treasurer and Custodian of Records. AF2355-AR076.

II. PAST TREASURER'S KNOWING, WILLFUL AND/OR RECKLESS VIOLATIONS OF FECA

On October 15, 2010, the 2010 October Quarterly Report became due, and Mr. Curry did not timely file.

On October 19, 2010, Mr. Curry telephoned the FEC Reports Analysis Division ("RAD") analyst assigned to CVFC PAC, James R. McAllister "to let [Mr. McAllister] know that the committee failed to get their 2010 [October Quarterly Report] in on time because the group was completely 'swamped'. [Mr. McAllister] urged him to get [the report] in as soon as possible and [Mr. Curry] said it would be in by the end of the week." AF2312-AR078.

On October 21, 2010, the 12-Day Pre-General Election Report became due, and Mr. Curry did not timely file.

On November 3, 2010, Mr. Curry telephoned Mr. McAllister to apologize for not submitting the 2010 October Quarterly Report on time. Mr. Curry said he "would try to get it in by the end of the week." AF2312-AR078.

On November 4, 2010, the FEC sent Mr. Curry a Notice of Failure to File regarding the October 2010 Quarterly Report. The notice states: "[t]he failure to timely file this report may result in civil money penalties, an audit or legal enforcement action." AF2199-AR035

On November 8, 2010, Mr. Curry telephoned Mr. McAllister "to say that he needed help itemizing activity [Mr. McAllister] talked [Mr. Curry] through creating a new report and itemizing an individual contribution to get him started. [Mr. Curry] said he would call back if he had any further questions." AF2312-AR078.

On November 8, 2010, CVFC PAC filed an amended Statement of Organization naming Mr. Backer as Assistant Treasurer, but still listing Mr. Curry as CVFC PAC's Treasurer and Custodian of Records. AF2312-AR085.

On November 21, 2010, Mr. Curry electronically filed the 2010 October Quarterly Report, thirty seven (37) days after it became due (Accessible on the FEC's website at http://query.nictusa.com/cgi-bin/dcdev/forms/C00469239/516567/).

On December 2, 2010, the 30-Day Post-General Election Report became due, and Mr. Curry did not timely file.

On December 2, 2010, Mr. Curry called Mr. McAllister "to get clarification for the coverage dates for the [Post-General Election Report]. AF2199-AR022.

On December 13, 2010, Captain Joseph R. John, Chairman of CVFC PAC, called Mr. McAllister because "Mr. Curry, was on his way out as the committee's Treasurer and he wanted to know what he needed to do to change the Treasurer. [Mr. McAllister] explained the committee

needed to submit [an F1 Statement of Organization] that showed the new Treasurer once a new one was chosen. [Capt. John] then asked if the committee needed to file the [Pre-General Election Report] and [Post-General Election Report] and [Mr. McAllister] said that committee definitely needed to file the [Post-General Election Report] and *may need* [emphasis added] to file the [Pre-General Election Report] based on whether the committee made expenditures to influence a federal election from 10/2/10-10/13/10. [Mr. McAllister] told [Capt. John] that the reports would be late but that he should submit them as soon as possible in order to mitigate any fines or penalties. [Capt. John] then asked whether the reports needed to be filed electronically, and [Mr. McAllister] said that because the committee had filed electronically on previous records, they would need to keep filing electronically for future submissions." AF2199-AR022.

On December 15, 2010, Mr. Curry telephoned Mr. McAllister to "ask about resigning as Treasurer of the PAC. [Mr. McAllister] explained that as far as the FEC was concerned, Mr. Curry was still listed as the Treasurer for the PAC and would be considered the Treasurer until the committee submitted an [F1 Statement of Organization] that showed a new Treasurer…". AF2199-AR022.

On December 15, 2010, the Commission purportedly found Reason to Believe ("RTB") by an affirmative vote of 6-0 that CVFC PAC and its then-Treasurer Curry violated 2 U.S.C. § 434(a) by failing to timely file the October Quarterly Report by October 15, 2010, and transmitted that information to Mr. Curry. AF2199-AR008. In fact, as further described herein and in the attached Declaration of the Plaintiffs' counsel, Dan Backer, the Plaintiffs learned only two days ago that this Certification that six Commissioners affirmatively voted appears to be inaccurate. Only three of the six Commissioners affirmatively voted (four being necessary under FECA to find reason to believe) and even those three did not actually "find reason to believe";

rather, they merely "did not object" to the staff report recommending that the Commissioners *should* find reason to believe. See 2 U.S.C. § 437g(a)(2).

On December 22, 2010, the FEC sent a Request for Additional Information ("RFAI") regarding the October 2010 Quarterly Report(Accessible on the FEC's website at http://images.nictusa.com/pdf/772/10030522772/10030522772.pdf).

On January 4, 2011, Mr. Backer in his capacity as assistant Treasurer called Mr. McAllister to "check in on the committee's status with [RFAIs]. [Mr. Curry] had not responded to [RFAIs] regarding the 2010 [April] and [October] reports, dated 8/4/10 and 12/22/10, respectively. Both reports had excessive individual contributions and omitted contributor information…." AF2199-AR023.

On January 11, 2011, the delinquent Pre-Election Report and Post- Election Reports**,** which were due on October 21, 2010 and December 2, 2010, respectively, were filed. See CVFC PAC's list of filings accessible on the FEC's website at http://images.nictusa.com/cgi-bin/fecimg/?C00469239.

On January 12, 2011, an amended F1 Statement of Organization was filed that replaced Mr. Curry as Treasurer with David Wiggs. AF2199-AR078-079.

On January 25, 2011, after identifying and correcting the gross errors in the 2010 reports prepared by Mr. Curry, CVFC PAC filed amended versions of the April 2010 Quarterly Report, the July 2010 Quarterly Report, (neither of which were the subject of any enforcement action) the October 2010 Quarterly Report, the Pre-Election Report and the Post-Election Report. See CVFC PAC's list of filings accessible on the FEC's website at http://images.nictusa.com/cgi-bin/fecimg/?C00469239).

On January 25, 2011, Mr. Backer called Mr. McAllister "to let [Mr. McAllister] know that [Mr. Backer] had amended the 2009 [Year End Report] and all of the 2010 reports and that they should all be okay and answer the [RFAIs] the FEC had sent the committee." AF2199-AR023.

On February 4, 2011, Mr. Backer returned a voice message left by Sari Pickerall, an FEC employee, regarding the [RTB] issued by the FEC of which Mr. Backer was not previously aware. "[Ms. Pickerall] stated that [the FEC] had no response from [CVFC PAC] regarding the fine. [Mr. Backer] wanted to know when the letter was delivered and [Ms. Pickerall] told him someone had signed for it on 12/28/2010. [Mr. Backer] stated that address was older and the Treasurer at the time, Michael Curry, must have received the letter and never told them about it. [Mr. Backer] wanted to know if it was posted on the [FEC] website and [Ms. Pickerall] stated that it was not." AF2199-AR024.

On February 4, 2011 Capt. John called Ms. Pickerall and stated "Michael Curry walked out in October and did not file the reports. [Capt. John] stated that he is now aware that the reports were not filed timely that he believes Michael Curry (Treasurer at the time) is responsible and gave [Ms. Pickerall] Mr. Curry's telephone number and address." AF2199-AR024.

On February 16, 2011, Capt. John called Sari Pickerall and "stated that [Mr. Curry] walked out on them and did not share any of the fine information with them. The committee then hired an outside auditor and then filed reports. [Capt. John] questioned as to whether or not consideration was given to committees with situations like this. [Capt. John] was concerned as Mr. Curry was receiving the correspondence of the committee. [Ms. Pickerall] stated the correspondence will go to the current address on the committee's Statement of Organization." AF2199-AR026.

On March 11, 2011, the FEC purportedly found reason to believe by an affirmative vote of 6-0 that CVFC PAC's Pre-General Election Report was filed after the deadline of October 21, 2010. AF2312-AR020. However, as with the first reason to believe on December 15, 2010, this Certification also appears to be false. Instead of six affirmative votes, there were only two affirmative votes (four being necessary under FECA) and those two votes were also merely a "do not object" vote to the staff report.

On March 22, 2011, Mr. John sent a letter to the FEC to challenge the RTB finding with respect to the October 2010 Quarterly Report by asserting that the conduct of the former Treasurer, Mr. Curry, made it impossible for CVFC PAC to timely file and that the PAC exercised its best efforts. AF2199-AR086.

On March 23, 2011, Capt. John sent a letter to the FEC to challenge the RTB finding with respect to the Pre General Election Report by asserting that the conduct of the former Treasurer, Mr. Curry, made it impossible for CVFC PAC to timely file and that the PAC exercised its best efforts to obtain the bank records and other information, retain a bookkeeper to conduct an audit, and take other steps necessary to file the three reports as soon as practicable under the circumstances. AF2312-AR030. In the letter, Capt. John specifically identified former Treasurer, Mr. Curry as the only person with access to "ten months of records, bank deposit slips, the bank statements, personal information on Web site donors, the personal records on each of the estimated 210 donors, the password to make electronic reports, and the knowledge of how to electronically submit FEC Reports." *Id.* Additionally, Capt. John articulated that best efforts were employed to "obtain substantial missing information as quickly as humanely [sic] possible, assembled and audited that information in a timely manner, expending approximately 600 man

hours of work, reconstructed the donor information in the proper electronic format, and fully complied with FEC Reporting requirements." AF2312–AR031.

On March 25, 2011, the FEC purportedly found reason to believe by an affirmative vote of 6-0 that CVFC PAC's 30 Day Post-General Election Report was filed after the deadline of December 2, 2010. AF2355-AR014. However, as with the reason to believe findings on December 15, 2010 and March 11, 2011, this Certification also appears to be false. Instead of six affirmative votes, there were only three affirmative votes (four being necessary under FECA) and those three votes were also simply a "do not object" vote to the staff report.

On March 31, 2011, Capt. John sent a letter to the FEC challenging the RTB finding with respect to the Post General Election Report by asserting CVFC PAC employed its best efforts to remedy its former Treasurer's neglect and that the conduct of the former Treasurer, Mr. Curry, made it impossible for CVFC PAC to submit "the 2010 FEC Pre-Election and Post-Election Reports by unforeseen abrupt work stoppage by the Treasurer …his actions were completely out of our control; [CVFC PAC] had to wait for hard copies of bank documents, obtain back end donor information from the Web site hosting company, and had to await for letter responses from donors to obtain their employer information before [CVFC PAC] could complete the audit and submit the reports.". AF2355 – AR051. Capt. John identified former Treasurer, Mr. Curry as the only person with access to "ten months of records, bank deposit slips, the bank statements, personal information on Web site donors, the personal records on each of the estimated 210 donors, the password to make electronic reports, and the knowledge of how to electronically submit FEC Reports." AF2355 – AR050. Furthermore, Capt. John specified CVFC PAC efforts "to obtain substantial missing information as quickly as humanely [sic] possible, assembled and audited that information in a timely manner, expending approximately 600 man hours of work,

reconstructed the donor information in the proper electronic format, and fully complied with FEC Reporting requirements." AF2355 – AR051.

On June 15, 2011, Dayna C. Brown, Reviewing Officer for the Office of Administrative Review (OAR), while not disputing Capt. John's statement of reasons for the late filing, sent CVFC PAC the Recommendation of the Reviewing Officer regarding the RTB for the October 2010 Quarterly Report affording the respondents only 10 days to file a written response to the Recommendation. AF2199-AR044-046**.**

On June 17, 2011, Dayna C. Brown, Reviewing Officer for the Office of Administrative Review (OAR) sent CVFC PAC the Recommendation of the Reviewing Officer regarding the RTB for both the Pre- and Post-General Election Reports. AF2312-AR051-054.

On June 24, 2011, counsel for CVFC PAC filed a written response to the Reviewing Officer Recommendation regarding the October 2010 report, the Pre-General Election Report and the Post-General Election Report that clearly established the factual and legal basis why Mr. Curry was solely liable, in his personal capacity, for the knowing, willful, and reckless conduct that precipitated these fines. AF2312-AR097-099.

On August 18, 2011, the Office of General Counsel ("OGC") submitted a Memorandum to Dayna Brown providing legal guidance on the disposition of these actions. AF2312-AR100-104. Notably, the OGC in Part III heading of its memorandum concluded that CVFC PAC's allegations "**MIGHT JUSTIFY PURSUING [THE FORMER] TREASURER PERSONALLY.**" *Id.* at 3 (emphasis added). The memorandum also noted that the "Commission could conclude that [Mr. Curry's] actions constituted a reckless failure to fulfill his duties as treasurer." *Id.* at 4. More significantly, the OGC noted that the Commission "could

consider Mr. Curry's actions as possible mitigating factors in determining the civil penalty for the Committee's violations." *Id*. at 5.

On October 12, 2011, the FEC's Chief Compliance Officer, Patricia Carmona and Reviewing Officer Dayna Brown, made a Final Determination Recommendation to the Commission for all three late filings AF#s 2199, 2312, and 2355 that CVFC PAC and its new Treasurer David Wiggs violated 2 U.S.C. § 434(a) and to assess respective penalties of $4,400, $3,300, and $990 against them for an aggregate of $8690. AF2312-AR106-108. Notably, Ms. Brown requested that "the Commission consider the issue of the [former] Treasurer's personal responsibility in these matters." *Id*. at 3.

Report	**Due**	**Filed**	**RTB Date**	**Final Determination**	**Fine Amount**	**Fine#**
2010 October Quarterly Report	October 15, 2010	November 21, 2010	December 15, 2010	October 27, 2011	$4,400	AF #2199
12-Day Pre-General Election Report	October 21, 2010	January 11, 2011	March 11, 2011	October 27, 2011	$3,300	AF #2312
30-Day Post-General Election Report	December 2, 2010	January 11, 2011	March 25, 2011	October 27, 2011	$990	AF #2355

On October 27, 2011, 125 days since the CVC PAC's response of June 24, the Commission by a notational vote without meeting and without providing the Plaintiffs with an opportunity to be heard, summarily "approved" by a vote of 6-0 the Reviewing Officer's recommendation that the Commissioners make a Final Determination. However, the Commissioners did not themselves act on that recommendation and did not explicitly make a finding or Final Determination that plaintiffs in fact violated 2 U.S.C. § 434(a) for filing late the October Quarterly Report, the 12-Day Pre-Election, and the 30-Day Post-Election Report. See

Backer Declaration, Ex. 3. The Commissioners further purported to asses a civil monetary penalties or fines against them instead of the former Treasurer in his personal capacity for each such late filing in the amount of $4,400, $3,300, and $990, respectively, for an aggregate amount of $8,690. AF2312-AR118-119. However, the Commission failed to exercise its discretion and address the request by its Reviewing Officer that the Commission consider the issue of the former Treasurer's personal liability or whether his actions would be a mitigating factor in determining the civil penalties against CVFC PAC. The Commission also did not give CVFC PAC an opportunity to be heard in person before the full Commission before making its Final Determination.

On November 4, 2011, notice of the alleged Final Determination was sent to CVFC PAC by certified mail. AF2312-AR120. Notice was received by mail on November 10, 2011.

On November 23, 2011, CVFC PAC's counsel sent a letter by courier to the Chair of the Commission requesting expedited action that the Commission vacate its Final Determination as being premature inasmuch as it did not give the respondents a hearing before the full Commission as required by 2 U.S.C. § 437g(a)(4)(C)(ii). AF2312-AR127-129. Alternatively, the Commission was asked to reconsider the matter since it neglected to consider the personal liability of the former Treasurer as being solely liable for the fine or at a minimum to mitigate the penalty on CVFC PAC and its current Treasurer, and preserving its procedural and substantive rights, including its claim that its Due Process and First Amendment rights were violated. *Id.*

On December 9, 2011, subsequent to commencement of this action on December 7, 2011, a response was received from the FEC denying the Plaintiff's request for reconsideration, a hearing, and mitigation of the fine. AF2312-AR139.

ARGUMENT

"A party is entitled to summary judgment if the pleadings, depositions, and affidavits demonstrate that there is no genuine issue of material fact in dispute and that the moving party is entitled to judgment as a matter of law." *EMILY's List v. Federal Election Commission*, 569 F. Supp.2d 18, 34 (D.D.C. 2008), citing Fed. R. Civ. P. 56(c) and *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994).

Plaintiffs herein rely on the contents of the Administrative Record submitted by Defendant and the attached Declaration of Dan Backer with Exhibits 1 – 3 as to all facts, eliminating any question as to any genuine issue of material fact. As the foregoing demonstrates, the Plaintiffs are entitled to judgment as a matter of law.

I. THE COMMISSION'S PURPORTED FINDING OF LIABILITY AND IMPOSITION OF CIVIL MONEY PENALTIES ARE NULL AND VOID BECAUSE THE COMMISSIONERS FAILED TO CAST THE REQUISITE AFFIRMATIVE FOUR VOTES TO FIND REASON TO BELIEVE PLAINTIFFS VIOLATED THE REPORTING REQUIREMENTS OF 2 U.S.C. § 434(A)

In order to initiate an enforcement action against the Plaintiffs or any other person under FECA, whether internally generated as here or in response to a filed complaint, the Commission must first determine "by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed" a violation of FECA. 2 U.S.C. § 437g(a)(2). That statutory requirement is repeated verbatim in the Commission's regulations. See 11 C.F.R. § 111.9. With respect to initiating an enforcement action for those who file disclosure reports late or not at all, the language is virtually identical. See 11 C.F.R. § 111.32 ("If the Commission determines, by an affirmative vote of at least four (4) of its members, that is has reason to believe that a

respondent has violated 2 U.S.C. § 434(a)….”). As further described in the accompanying Declaration of Dan Backer, those requisite affirmative votes were not cast in this case. Accordingly, the enforcement proceedings were unlawful as well as the finding of liability and imposition of civil money penalties. On those grounds alone, the Commission's determinations must be set aside because, at a minimum, it was "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

As noted in the Statement of Facts, the three enforcement actions for the three reports in question were each purportedly initiated by an affirmative vote of at least four Commissioners as required by law. Indeed, the Commission's Secretary and Clerk, Shawn Woodhead Werth, certified in each of the three enforcement matters on three separate occasions that the Commission "Decided by a vote of 6-0 to (1) find reason to believe that COMBAT VETERANS FOR CONGRESS PAC, and WIGGS, DAVID H. MR. as treasurer violated 2 U.S.C. § 434(a) and make a preliminary determination that the civil money penalty would be the amount indicated on the report. . . ." Commissioners Bauerly, Hunter, McGahn II, Peterson, Walther, and Weintraub *voted affirmatively for the decision.* See RTB Certifications at AF2199-AR008; AF2312-AR020, and AF2355-AR014.

On its face, these Certifications indicate that the Commission's six affirmative votes satisfied the statutory requirement of a minimum of four affirmative votes necessary for Commission action. The Administrative Records filed in this case by the Commission for each of these three actions, however, excluded the ballots that were signed by the Commissioners recording their respective votes. Instead, the Commission provided only blank voting ballots used by the Commissioners for the two reporting enforcement stages, i.e., the Reason To Believe stage and the Final Determination stage (see AF2199-AR001 (Reason To Believe); AF2199-

AR101 (Final Determination); AF2199-AR126 (memorandum from Commission counsel); AF2312-AR001 (Reason To Believe); AF2312-AR008 (resubmission of Reason To Believe); AF2312-AR105 (Final Determination ballot); AF2312-ARAR130 (memorandum from Commission counsel); AF2355-AR001 (Reason To Believe); AF2355-AR098 (Final Determination); and AF2355-AR123 (memorandum from Commission counsel)), followed by the respective Certifications of Administrative Fines by the Commission Secretary attesting to the fact that six affirmative votes were cast in all three cases and at every stage of the enforcement proceeding. See AF2199-AR008 (Reason To Believe); AF2199-AR114 (Final Determination); AF2199-AR134 (denying request to withdraw Final Determination); AF2312-AR018 (Reason To Believe); AF2312-AR118 (Final Determination); AF2312-AR138 (denying request to withdraw Final Determination); AF2355-AR012 (Reason To Believe); AF2355-AR111 (Final Determination); and AF2355-AR131 (denying request to withdraw Final Determination). However, that does not appear to be the case.

Two days ago, in response to a request by undersigned counsel, Commission attorneys provided counsel with the actual ballots cast in this case. See Declaration of Dan Backer, June 7, 2012 attached hereto. Those ballots show that the affirmative votes cast allegedly to find Reason to Believe were 3-0 in AF2199; 2-0 in AF2312; and 3-0 in AF2355. Backer Decl., Exhibit 3. The actual breakdown of all the votes in these three proceedings provided by the Commission to undersigned counsel is as follows:

Signed 24-Hour No-Objection Ballot Votes for Reason to Believe on AF# 2199 Dated December 15, 2010

Commissioner Bauerly	Do Not Object
Commissioner Walther	Do Not Object (signed by another)
Commissioner Weintraub	Do Not Object

Signed 24-Hour No-Objection Ballot Votes for Reason to Believe on AF# 2312 Dated March 11, 2011

Commissioner Walther	Do Not Object (signed by another)
Commissioner Weintraub	Do Not Object (signed by another)

Signed 24-Hour No-Objection Ballot Votes for Reason to Believe on AF# 2355 Dated March 25, 2011

Commissioner Bauerly	Do Not Object
Commissioner Walther	Do Not Object (signed by another)
Commissioner Weintraub	Do Not Object

Signed Ballot Votes for Final Determination Recommendation on AF#'s 2199, 2312, and 2355 Dated October 26, 2011

Commissioner Bauerly	I approve the recommendation(s) (signed by another)
Commissioner McGahn	I approve the recommendation(s)
Commissioner Petersen	I approve the recommendation(s) (signed by another) (submitted after stated ballot deadline)
Commissioner Hunter	I approve the recommendation(s) (submitted after stated ballot deadline)
Commissioner Walther	I approve the recommendation(s) (signed by another)
Commissioner Weintraub	I approve the recommendation(s)

Signed Ballot Votes to Approve Recommendation denying reconsideration of Final Determination on AF#'s 2199, 2312, and 2355 Dated December 6, 2011

Commissioner Walther	I approve recommendation(s) (signed by another)
Commissioner Weintraub	I approve the recommendation(s)
Commissioner Petersen	I approve the recommendation(s) (submitted after stated ballot deadline)
Commissioner Bauerly	I approve the recommendation(s) (signed by another)
Commissioner Hunter	I approve the recommendation(s)
Commissioner McGahn	I approve the recommendation(s) (via email)

Clearly, the Commission did not meet the minimum four affirmative votes that the law and Commission regulations require to even initiate any of the three enforcement actions at the initial Reason To Believe stage. And even with respect to the votes that were cast, there also appears to be some question as to whether some were late or improperly signed by another. Accordingly, this Court can and should summarily set aside the Commission's determinations in this case because they were "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). These votes were entered on a ballot captioned "**24 HOUR NO-OBJECTION MATTER**" (although it is more accurately a *29* Hour matter since the transmittal time is 11:00

a.m. and the ballot deadline is 4:00 p.m. the next day) and the ballot requires the Commissioner to mark either "I do not object to the attached report" or "I object to the attached report." This kind of notational voting allows the Commission to avoid the meeting requirements of the Government in the Sunshine Act. 5 U.S.C. § 552b(g). All of these ballots should be made part of the Administrative Record in this case.

But even if there were the requisite four votes cast on the 24 Hour No-Objection ballot, the validity of those votes would be suspect. Those Commissioners who did vote simply "did not object to" a staff report that recommended the Commission *should* find reason to believe, but the Commissioners themselves never made the recommended finding. This is hardly the requisite "affirmative vote" finding reason to believe. It does not even affirmatively approve of the staff recommendation. The voting Commissioner merely "does not object" to the recommendation, and thus is more of a negative rather than an affirmative finding of Reason To Believe.

That kind of "affirmative voting to find reason to believe" would be equivalent to this Court simply stating it had "no objection" to the FBI executing a search warrant without affirmatively finding that the Agent's Affidavit showed there was probable cause to issue the warrant. See U.S. Dist. Ct. Form AO 93, **Search and Seizure Warrant** ("I find that the affidavit(s)….establish probable cause to search and seize the person or property") While the Commission may argue that this is close enough for government work, this kind of agency disregard for their statutory duties and requirements should not be tolerated.

While the Commissioners did cast six votes at the Final Determination stage of these three proceedings, the ballot for those votes are only somewhat better as affirmative votes than the defective "no objection" vote at the Reason To Believe stage. The ballots cast at the Final

Determination stage of the enforcement proceeding simply notes that the Commissioner does "approve the recommendation" by the staff but does not actually act on or carry out the recommendation the staff made to the Commission, namely, that it "[m]ake a Final Determination that in AF# 2199 that the Combat Veterans for Congress PAC and David H. Wiggs, in his official capacity as Treasurer, violated 2 U.S.C. § 434(a) and, assess a civil money penalty of $4,400" and "Adopt the Reviewing Officer recommendation for AF#2199….in making the Final Determination." See October 12, 2011 Memorandum from Chief Compliance Officer Patricia Carmona to the Commission, AF2355-AR099. Here, there is a double recommendation to the Commission, namely, that the staff recommend the Commission adopt another recommendation of the Reviewing Officer. If the Commission were acting on the staff recommendation, it should expressly make the Final Determination, adopt the Reviewing Officer's recommendation, and assess the civil money penalty. See 11 C.F.R. § 111.37(a) (the Commissioner will make the determination that "the respondent has violated 2 U.S.C. § 434(a) and the amount of the civil penalty"). Admittedly, 11 C.F.R. § 111.37(d) does provide that when the Commission "makes a Final Determination" the statement of reasons will consist of the reasons provided by the reviewing officer for the recommendation. But the Commissioners are required to make the Final Determination, not simply approve a memo that recommends that they do so. In any event, this particular regulation where the Commission adopts by reference the statement of reasons in the reviewing officer's report has no counterpart to the Reason To Believe finding.

For the foregoing reasons, the Court must set aside the Final Determinations made in this case as there were never the requisite four affirmative votes to initiate these enforcement

proceedings and thus the agency action was "without observance of procedure required by law." 5 U.S.C. § 706(2)(D)

II. THE FORMER TREASURER OF CVFC PAC IS SOLELY LIABLE IN HIS PERSONAL CAPACITY FOR HIS KNOWING, WILLFUL, AND/OR RECKLESS FAILURE TO TIMELY FILE REPORTS

A. Treasurers, Not Committees, Are Required Under FECA and FEC Regulations and Policies to File Reports and Are Personally Liable For Failure to Comply With Their Responsibilities Under the Act.

Under FECA, "Each treasurer shall file reports of receipts and disbursements in accordance with the provisions of this subsection. The Treasurer shall sign each such report." 2 U.S.C. § 434(a)(1). Congress placed the responsibility to file reports squarely on Treasurers, not on Committees. See also 2 U.S.C. § 432(c) (Treasurers to keep account of committee records); § 432(d) (Treasurers to maintain records for three years). Congress clearly intended through FECA to impose personal liability on Treasurers as the only statutory officer required for the formation and operation of political committees. Congress did not impose reporting obligations on political committees themselves, or committee Chairmen or other committee officers.

For political committees such as CVFC PAC, "Each treasurer of a political committee, and any other person required to file any report or statement under these regulations and under the Act, shall be *personally* responsible for the timely and complete filing of the report or statement and for the accuracy of any information or statement contained in it." 11 C.F.R. § 104.14(d) (emphasis added). *See also 11 C.F.R. § 114.12* ("Notwithstanding the corporate status of the political committee, *the treasurer remains personally responsible* for carrying out their respective duties under the Act.") (emphasis added). Since the Treasurer plays a "pivotal role" in the statutory framework regulating campaign finance, the Act "holds him *personally*

responsible for the committee's recordkeeping and reporting duties." *FEC v. Toledano*, 317 F3d 939, 947 (9th Cir. 2002) (emphasis added). *See also FEC Advisory Opinion 1995-10* ("[T]reasurer's liability [is] distinct from liability of committee for FECA violations, and since Congress chose to hold an individual, the treasurer, responsible for compliance with FECA it follows that 'an individual will also stand responsible for his indiscretions as a treasurer"), citing and quoting *FEC v. Dramesi for Congress Comm.*, No. 85-4039 (MHC) (D.N.J. Sept. 5, 1990) (unpublished opinion).

In addition to the express personal liability of Treasurers, the rules and regulations of the Commission impose affirmative legal duties upon Treasurers of political action committees, "the violation of *which makes them personally liable*." See Federal Election Commission Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 1, 5 (Jan., 3, 2005) (emphasis added). The law consistently tasks Treasurers in non-permissive explicit language with affirmative legal obligations and duties, the violation of which subjects Treasurers, and only Treasurers, to personal liability.

The legal obligations of political committee Treasurers are plain on the face of the Act. Moreover, the Commission's own regulations and publications further unequivocally and unconditionally mandate that Treasurers shall be personally liable for failing to file the required reports in all cases. "Indeed, if FECA were construed to impose liability on treasurers only in their official capacities, it would effectively mean that only committees are liable for violations under the statute--which would have been easy enough for Congress to accomplish *by writing the Act to impose reporting, recordkeeping, and other duties on 'committees' rather than 'treasurers.'*" Federal Election Commission Proposed Statement of Policy Regarding Naming of

Treasurers in Enforcement Matters, 69 Fed. Reg. 4092,4093 n. 6 (Jan. 28, 2004) (emphasis added).

Even in a scenario where political committee records were not under the control of the Treasurer, a former chairman of the FEC has recognized that personal liability would still lie with the Treasurer. "The Act and Commission regulations impose . . . duties and obligations upon every political committee, and the committee's treasurer has the primary and personal duty to perform them . . . This personal liability will not be abated or avoided in circumstances where a violation may result entirely or partially from the fact that the required committee records were not held by or under the control of the treasurer." Letter from Danny L. McDonald, Chairman, Federal Election Commission, to Margaret Person, Currin Law Firm (April 28, 1995) (accessible via the FEC's website at http://saos.nictusa.com/aodocs/1995-10.pdf).

In addition to the rules and regulations of the Commission, federal courts have recognized the personal liability of political committee Treasurers. *See FEC v. Gus Savage for Congress '82 Committee and Thomas J. Savage, Treasurer*, 606 F. Supp. 541, 547 (N.D. Ill. 1985) ("Liability . . . filters through the candidate to his amorphous campaign committee, or, more precisely, to the committee's treasurer, who is legally responsible for any violation of the Act. It is the treasurer, and not the candidate, who becomes the named defendant in federal court, and subjected to the imposition of penalties ranging from substantial fines to imprisonment."); *see also FEC v. Dramesi for Congress Comm.*, No. 85-4039 (MHC) (D.N.J. Sept. 5, 1990) (unpublished opinion) ("[A]n individual will also stand responsible for his indiscretions as a treasurer. It is because of the ephemeral nature of such political committees that Congress chose to place this burden upon treasurers.").

The regulations promulgated by the Commission lay the legal duty of reporting upon the Treasurer and not the political committee. 11 C.F.R. § 104.1(a) provides as follows: "*Who must report*. Each treasurer of a political committee…shall report in accordance with 11 C.F.R. § 104." The Federal Election Commission Campaign Guide for Non-connected Committees (May, 2008), Chapter 2, Section 2, (Treasurer's Duties) states: "The Treasurer is responsible for filing complete and accurate reports and statements on time." Id. at 3. The Guide further states that "a committee's Treasurer is personally responsible for carrying out the duties listed above and should understand these responsibilities (as well as his or her personal liability for fulfilling them) before taking them on . . . Also, the treasurer can be named and found liable in his or her personal capacity if he or she knowingly and willfully violates the Act." *Id.* at 4.

Mr. Curry was the Treasurer of CVFC PAC when the political committee reports mandated under the Act were not timely filed with the Commission. As Treasurer, he was under a legal duty to timely file these reports with the Commission. Because black letter law holds political committee Treasurers like Mr. Curry personally liable for such failures, he and not CVFC PAC -- and certainly not its current Treasurer who had nothing to do with the late filings -- is solely responsible for his own reckless conduct as Treasurer.

B. ***Failure By the Commission to Take Enforcement Action Against Mr. Curry Personally Was Arbitrary, Capricious, and Otherwise Contrary to Law Because The Commission Had Notice Of Failure By Mr. Curry to Comply With the Act***

The Commission has stated that "when information indicates that a treasurer has knowingly and willfully violated a provision of the Act or regulations, or has recklessly failed to fulfill duties specifically imposed on treasurers by the Act, or has intentionally deprived himself or herself of the operative facts giving rise to the violation, the Commission will consider the

treasurer to have acted in a personal capacity and make findings (and pursue conciliation) accordingly." 70 Fed. Reg. 1, 3-4 (Jan. 2005). The administrative record clearly establishes that the former Treasurer was informed by the Commission and its staff of his responsibility to timely file reports as required by 2 U.S.C. § 434(a), and the deadlines and coverage dates therein. See Commission communications log at AF2312-AR066; see also declaration by the Commission's Compliance Branch Acting Chief stating prior notice regarding the late filings was sent the former Treasurer (AF2355-AR035).

Willful conduct "must necessarily connote 'defiance or such reckless disregard of the consequences as to be equivalent to a knowing, conscious, and deliberate flaunting of the Act." *AFL-CIO v. Federal Election Commission*, 628 F.2d 97, 110 (D.C. Cir. 1980). Willful conduct may be found where an actor, the Treasurer, has been made aware of his legal duties and chooses not to comply with them.

Recklessness is found where an actor, the Treasurer in the instant matter, has knowledge of the duties imposed by law and negligently fails to fulfill them or intentionally remains ignorant of the facts necessary to prevent a violation of the law. Behaving in a reckless manner is, "more than mere negligence: it is a gross deviation from what a reasonable person would do." Black's Law Dictionary 1298 (8th ed. 2007).

The conduct of Mr. Curry meets the standard of "knowing," in that he received written and oral communications from the FEC expressly informing him of his legal responsibilities as Treasurer. Mr. Curry timely filed the April and June Quarterly Reports on or before the applicable deadlines, demonstrating his knowledge of the deadlines and rules for filing quarterly reports.

Mr. Curry telephoned Mr. McAllister, a Commission staff member, on October 19 and November 3, 2010 to apologize for not submitting the 2010 October Quarterly Report on time, stating he was "swamped" and "that he was very busy and would try to get it in by the end of the week." AF2312-AR078. Mr. Curry's admission and apology demonstrates that his conduct was willful in that he was clearly aware of, but made a decision not to fulfill, his legal obligations as Treasurer.

The conduct of Mr. Curry was reckless in that he failed to meet his legal obligations and further failed to timely avail himself of assistance from the Commission or elsewhere despite the fact that he had been advised by the FEC of the potential consequences of failing to timely file. As the FEC Communications Log indicates, Mr. Curry understood his responsibility to complete the Pre- and Post- General Election Reports, yet failed to solicit assistance from the Commission in advance of the deadline in carrying out his obligations. AF2312-AR078-79. The Commission was in receipt of substantial additional documentation from Plaintiffs of this failure to seek assistance, and without addressing the substance of such information, the Commission failed to consider it when the Commission ignored the black letter law regarding personal liability of malfeasant Treasurers and instead imposed fines totaling $8,690 upon CVFC PAC and its current Treasurer in his official capacity.

On November 4, 2010, the FEC sent Mr. Curry a Notice of Failure to File regarding the October 2010 Quarterly Report. The notice states, "The failure to timely file this report may result in civil money penalties, an audit or legal enforcement action." AF2199-AR035. Despite this clear warning that penalties could result from his reckless failure to fulfill his legal duties as Treasurer, Mr. Curry failed to timely file the October Quarterly Report. In his December 15th phone call to the Commission, Mr. Curry was particularly reckless in indicating his interest to

abdicate his office and resign as Treasurer. AF2199-AR022. In that phone call, the Commission advised him how to resign if he so desired, yet Mr. Curry did not resign after the call and continued to occupy the office of Treasurer and perform his statutory duties in a reckless manner.

The failure of Mr. Curry to timely file the required reports was a knowing, willful, and/or reckless violation of the legal reporting requirements and he is therefore personally liable for any fines imposed for the late reporting. Failure by the Commission to find or even consider that Mr. Curry was personally liable for the fines imposed because of misconduct by Mr. Curry was arbitrary, capricious, an abuse of discretion, and contrary to law.

The Commission was in receipt of significant additional information from CVFC PAC relating to Mr. Curry's knowing, willful, and/or reckless abrogation of his statutory duties as Treasurer. The Commission had a duty to consider such information in its deliberative process with respect to the appeal of the $8,690 in fines it imposed upon CVFC PAC and its current Treasurer in his official capacity. Yet, the Commissioners either did not exercise their discretion to consider the personal liability of the treasurer or arbitrarily and capriciously exercised that discretion by choosing to turn a blind eye to the significant, documented malfeasance of Mr. Curry contained in its own records and those provided by CVFC PAC. There is simply nothing in the record that explains the Commission's reasons for not carrying out the mandates of the Act and its own regulations and guidance as even suggested by its Chief Compliance Officer. AF2199-AR102-104.

Whatever prosecutorial discretion the Commission may have with respect to pursuing or not pursuing Mr. Curry for his personal liability cannot be used to justify finding innocent parties such as the Plaintiffs liable and imposing significant monetary sanctions without any abatement or remission. Willful failure by the Commission to consider the request by its own Reviewing

Officer that Mr. Curry may have personal liability and failure to consider the relevant facts was arbitrary, capricious, an abuse of discretion, a failure to exercise its discretion, and otherwise contrary to or not in accordance with law.

The Commission and its staff had more than sufficient information to find "Reason To Believe" that Mr. Curry knowingly, willfully, and/or recklessly violated the Act by failing to timely file reports based upon information that it ascertained "in the normal course of carrying out its supervisory responsibilities." See 2 U.S.C. § 437g(a)(2); 11 C.F.R. § 111.8(a). However, the Commission arbitrarily and capriciously failed to take any enforcement action against him for such violations, leaving the Plaintiffs and the public guessing as to why.

III. HOLDING PLAINTIFFS LIABLE FOR THE MALFEASANCE OF ANOTHER IS CONTRARY TO COMMISSION POLICY AND THE PUBLIC INTEREST

Neither the FEC's purported Reason To Believe finding nor its Final Determination identified any conduct on the part of CVFC PAC as an entity or its current Treasurer that, absent the specific misconduct of the former Treasurer for which he is personally liable, would cause or justify imposing liability on CVFC PAC or its current Treasurer in his official capacity. Simply put, the PAC and its current treasurer did nothing wrong.

The Commission has articulated an enforcement policy that it will impose personal liability on a Treasurer for a knowing, willful, or reckless failure to timely file reports: "The Commission *intends to* consider a Treasurer the subject of an enforcement proceeding in his or her personal capacity only when available information (or inferences fairly derived therefrom) indicates that the Treasurer had knowledge that his or her conduct violated a duty imposed by law; or where the Treasurer recklessly failed to fulfill his or her duties under the Act and regulations; or intentionally deprived himself or herself of facts giving rise to the violations." 70

Fed. Reg. 1 at 5 (emphasis added) Notably, the FEC did not say that they "may" consider Treasurers personally subject to an enforcement action, but employed stronger "intends to" language that suggests that the Commission *will* consider treasurer liability. Indeed, the Commission recently expressed that very intention when it advised treasurers of their reporting and other statutory duties. "[W]hen information indicates that a treasurer has knowingly and willfully violated the Act, recklessly failed to fulfill duties specifically imposed by the Act, or intentionally deprived himself or herself of facts giving rise to the violation, the Commission *will consider* the treasurer subject to action in a personal capacity and make findings accordingly." *Treasurer's Liability: Compliance with FEC Law*, Committee Treasurers Brochure (FEC, Washington, D.C.), Jan. 2011 at 3. Further, the Commission's newsletter stated, "Committee treasurers must comply with all applicable filing deadlines established by law, and the lack of prior notice does not constitute an excuse for failing to comply with any filing deadline." *Reports: April Reporting Reminder*, Record (FEC, Washington, D.C.), April 2011 Vol. 37, No. 4 at 3.

Despite clear law and regulation placing the personal liability for filing on political committee Treasurers as previously discussed (see section C, *supra)* and the absence of any law altering that rule, the Commission has ignored or unlawfully deviated from the law's requirements and standards. "As the two decisions [Dramesi and Savage] above indicate, there is legal support for the position that a committee treasurer may be held personally liable for violations of the Act. It is important to remember, however, that the issue of personal liability of a committee treasurer does not arise frequently during the enforcement process. *As a practical matter, the issue of treasurer liability generally does not arise in the enforcement process where the committee is solvent and willing to pay the civil penalty.*" *Treasurer Policy*, Enforcement

Manual (FEC, Washington, D.C.), 1997, Addendum N at 6 (emphasis added). The Commission further noted in its own publication: "In *rare instances* . . . the Commission has made findings against a treasurer in his or her personal capacity." *Notification of Reason to Believe Findings*, Guidebook for Complainants and Respondents on the FEC Enforcement Process, (FEC, Washington, D.C.), May 2012 at 13 (emphasis added). *See also* 70 Fed. Reg. 1, 3-4 (Jan. 2005) "Although the Commission may be entitled to take action as to a treasurer in both an official and individual capacity, *in the typical enforcement matter the Commission expects that it will proceed against treasurers only in their official capacities*." (emphasis added). Accordingly, in recognition that committees will often just pay the fines, the Commission does not believe Treasurers will generally be legally pursued in a personal capacity.

Nonetheless, in each and every edition of the various guides published by the Commission, and as recently as May 2012, the FEC reiterated the standards for holding treasurers personally liable. "For example, the Commission may make a determination that the treasurer acted in a personal capacity when information indicates that the treasurer knowingly and willfully violated the Act, recklessly failed to fulfill duties specifically imposed by the Act or intentionally deprived himself or herself of facts giving rise to the violation." Guidebook for Complainants and Respondents on the FEC Enforcement Process at 13 (May 2012).

However, neither industry practice nor administrative convenience vitiate the clear statutory language promulgated by Congress, which requires that Treasurers be found personally liable where the Treasurer "had knowledge that his or her conduct violated a duty imposed by law; or where the Treasurer recklessly failed to fulfill his or her duties under the Act and regulations; or intentionally deprived himself or herself of facts giving rise to the violations." 70 Fed. Reg. 1 at 5 (Jan. 2005). The statute and accompanying regulations are clear on their face

that the legal duty, and resulting liability, for timely reporting is imposed on the Treasurer personally, and not on the Committee.

Moreover, holding CVFC PAC and its current Treasurer in his official capacity responsible rather than properly holding the malfeasant former Treasurer responsible in his personal capacity is against the public interest and sound public policy. It punishes the wrong person and does not deter and may invite abuse of the campaign finance regulatory regime inasmuch as malefactors could act with impunity and without any sanctions.

If the determination by the Commission in this case is left undisturbed and the innocent plaintiffs are liable and that the significant fines cannot be reduced or remitted, Treasurers could be intentionally derelict and negligent in carrying out their statutory duties, abruptly resign from their position with their political committees, and not face any consequences for their reckless and perhaps even criminal conduct. The failure of the Commission to impose liability on the treasurer personally would encourage current treasurers to be negligent, reckless or worse, resign when the FEC starts investigating, and then discourage the hiring of competent replacement treasurers whose name will be automatically substituted for the malefactor in official FEC enforcement actions that the Commission publicizes and makes publicly available on the Internet for all to see. It is little solace to the new treasurer that in the fine print, he is being found to be guilty of violating campaign finance laws only "in his official capacity." Furthermore, the Committee itself will be stigmatized as a law breaker in the media and by its opponents, thereby tending to cause contributors to withhold contributions to such "law breakers."

Whatever prosecutorial discretion the Commission may possess, nothing in the Act, regulations, or elsewhere empowers the Commission to arbitrarily substitute one party, the political committee, in the place of another who should be properly charged, namely, the

malfeasant Treasurer who is expressly tasked with reporting and other duties by Congress. The customary willingness of most committees to pay fines to the Commission does not abrogate the clear statutory duties of the Treasurer, nor empower the Commission to substitute parties in contradiction to the Act.

Accordingly, for the foregoing reasons, CVFC PAC and its current Treasurer should not be substituted as parties for Mr. Curry, the malfeasant former Treasurer who failed to comply with his legal obligations, in the enforcement action in question by the Commission. At a minimum, the fine should be abated or remitted or the Commission should consider that issue and provide reasons if they decide not to abate or remit the fine.

IV. THE COMMISSION UNLAWFULLY FAILED TO MITIGATE THE FINES IMPOSED ON CVFC PAC AND ITS CURRENT TREASURER OR AT LEAST TO CONSIDER MITIGATING THE FINE

Both the Office of General Counsel's August 18, 2011 memo [”In the enforcement context [the Commission] could consider Mr. Curry's actions as possible mitigating factors in determining the civil penalty." AF2355-AR097] and the Reviewing Officer in her October 12, 2011 Final Determination Recommendation to the Commission ["Mr. Curry's actions could be considered as possible mitigating factors in determining the civil penalty for the Committee's violations." AF2355-AR100] make it clear that the personal liability of the former treasurer could serve to mitigate the fine against the PAC and its current Treasurer, presumably in whole or in part.

Assuming, *arguendo*, that the plaintiffs can be found by the FEC to be legally liable for the former treasurer's willful or reckless failure to file timely reports, the Commission either failed to exercise its discretion or abused its discretion in refusing to mitigate or reduce the fine

in whole or in part due to the misconduct and personal liability of the former treasurer and for other equitable considerations

The fines imposed on plaintiffs aggregating $8,690.00 for filing its reports late are unreasonable and are substantially greater -- in some cases by eightfold -- than fines that the FEC has imposed on other political and candidate committees which are found to violate far more serious, substantive provisions of FECA, such as receiving and failing to cure excessive contributions, or receiving prohibited contributions from corporations or foreign nationals.[1] After all, while three reports of this small committee may have been filed late, it must be remembered that the overarching purpose of disclosure is to inform the *voter* the source of the *candidate's* funds. Here, CVFC PAC is an unaffiliated PAC unauthorized by any candidate. Any contributions made by CVFC PAC to a candidate are reported on the candidate's disclosure reports for voters to see what "special interest" funds are being contributed to the candidate. Because the recipient candidates filed their reports, the public interest in disclosure was not as paramount for a timely filing of the reports for CVFC PAC. Yet, for purposes of both liability and the level of the fine, the Commission arbitrarily treats the two committees effectively exactly the same.

Moreover, the arbitrariness of the fines imposed in this case is further underscored regarding the late filing of the October 2010 Quarterly Report that was originally due on October 15, 2010 but was filed late on November 21, 2010. AF# 2199. Since that report was filed over

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[1] See, e.g., Liffrig For Senate fined $1,000 for corporate contributions, excessive contributions, contributions in the name of another, and reporting violations (MUR #5678, closed 2/14/07); Committee to Elect Lindsay Graham fined $1,000 for excessive contributions (ADR #103, closed 06/13/03); Eva Clayton Committee For Congress fined $1,500 for excessive contributions (MUR #5049, closed 09/28/2000); Committee to Elect Clinton B. Lesueur for Congress fined $500 for corporation contributions, personal use, and excessive contributions (ADR #112, closed 9/5/03); Craig Schelske for Congress fined $500 for corporate contributions (ADR #083, closed 3/4/03). These and other similar cases are accessible through the FEC's Enforcement Query System accessible at http://eqs.nictusa.com.

30 days late, the FEC treats the report as having never been filed at all in terms of assessing the level of fine which was $4,400. 11 C.F.R. § 111.43(e)(1). This puts a new twist on the old maxim, "better late than never"; according to the FEC's arbitrary fine schedule, it's "better never than late." Treating a 31-day late report the same as one never filed at all is on its face arbitrary and capricious. In addition, the FEC would allow a committee to timely file a wholly deficient disclosure report without any late fines being assessed, and then allow the committee to "amend" its report later with the information that was required to be disclosed in the first place. Indeed, in this very case after the reckless treasurer resigned and best efforts were expended to file the delinquent reports, CVFC PAC undertook on its own initiative to amend earlier April and July Quarterly Reports 2010 that were timely filed but grossly deficient. See Statement of Facts, *supra*, at 8. The FEC appears to promote an arbitrary message: File your reports on time and worry later about whether they were complete and accurate.

CVFC PAC, its current Treasurer, Assistant Treasurer, and Chairman and other personnel used their best efforts to file the required reports as soon as practicable following the malfeasance of its former treasurer. The malfeasance of the treasurer was not reasonably foreseeable and was beyond the control of the plaintiffs and, therefore, liability should not have been imposed on the plaintiffs and/or the fines should have been remitted in whole or in part.

The FEC defines "best efforts" under 11 C.F.R. § 111.35(c) to "include, but are not limited to" certain computer breakdowns and severe weather as being reasonably unforeseen and beyond the control of the respondent, but does not include "negligence" or "illness, inexperience, or unavailability of the treasurer or other staff."

In the first place, this regulation is arbitrary and capricious because it is both under-inclusive and over-inclusive. If the treasurer can show there was "severe weather" that somehow

prevent the exercise of his or her duties, that excuse *does* constitute "best efforts." 11 C.F.R. § 111.35(c)(3). On the other hand, the FEC says that it is foreseeable (and therefore is *not* a "best efforts" defense) if the committee's computers were suddenly attacked by a virus, if the treasurer were suddenly attacked by a virus or fall ill from ptomaine poisoning the night before the report is due, or even fall dead from a heart attack or accident (and thus is "unavailable" under the regulation) . 11 C.F.R. § 111.35(d)(3). In such cases, the FEC will *not* accept these reasons as "best efforts" to comply with the filing deadline. This regulation is clearly arbitrary and capricious and unreasonable on its face and arbitrarily excludes the opportunity for CVFC PAC and its current treasurer to raise both legal and equitable reasons before the Commission to explain the late filings.

Secondly, CVFC PAC provided clear evidence that the failure to file was not due to simple negligence of the former treasurer, but was knowing and willful or reckless.

The Commission's failure to consider these best efforts by plaintiffs to remedy the malfeasance of the former treasurer and the Commission's failure to find that they serve as grounds for finding no liability on their part and/or a to remit or reduce the fines assessed were arbitrary, capricious, an abuse of discretion, contrary to law and a violation of Due Process.

To the extent that plaintiffs' best efforts to remedy the malfeasance of its former treasurer are *not* deemed to satisfy the "best efforts" described in 11 C.F.R. § 111.35, plaintiffs submit that such regulation is arbitrary, capricious, unreasonably narrow, contrary to law, and a violation of Due Process. See *U.S. Chamber of Commerce v. Securities and Exchange Commission,* 412 F.3d 133 (D.C. Cir. 2005); *Public Citizen v. Federal Motor Carrier Safety Administration*, 374 F.3d 1209 (D,C. Cir. 2004); 5 U.S.C. § 706(2)(A), (2)(D).

To hold CVFC PAC and its current treasurer solely liable for the malfeasance of its former treasurer violates Due Process and would allow treasurers to violate and evade their statutory responsibilities, resign from the committee, and unfairly leave the innocent PAC and substitute treasurer with liability and civil penalties. This unreasonable practice would undermine compliance with the law and against public policy

V. THE COMMISSION'S FINDING OF LIABILITY AND IMPOSITION OF SUBSTANTIAL FINES ON PLAINTIFFS RATHER THAN ON ITS CULPABLE FORMER TREASURER VIOLATES DUE PROCESS AND THE FIRST AMENDMENT

As the foregoing discussion demonstrates, the Commission's Final Determination that CVFC PAC and its current treasurer are liable for the malfeasance of its former treasurer and subject to substantial fines violates their right to Due Process.

The unlawful finding of liability and imposition upon the plaintiffs of fines totaling $8,690 for conduct they did not commit and for which the underlying law does not hold them responsible violates Due Process and would have a chilling effect on the exercise of CVFC PAC's political speech and associational rights under the First Amendment. The mere finding that the plaintiffs are guilty of violating federal election laws stigmatizes CVFC PAC and its current Treasurer as lawbreakers and would likely discourage donors from making contributions to CVFC PAC or otherwise volunteering or associating with CVFC PAC, its current treasurer, and employees. Furthermore, the imposition of the unlawful and excessive fines would substantially reduce the amount of funds otherwise available to the PAC to make campaign contributions and expenditures in the exercise of its First Amendment rights.

CVFC PAC has only $3,050 cash on hand as of its most recent FEC report and cannot afford to pay a fine over $8,000. See *United States v. Bajakian,* 524 U.S. 321 (1998). Its

financial situation has worsened due to the expenditure of human and monetary resources to defend itself in this unreasonable and unlawful enforcement action. The imposition of these fines would, in effect, operate to deny Plaintiffs the ability to further speak and associate with respect to this and likely any future election, thereby permanently depriving them of fundamental rights recognized in protected in a long line of cases from *Buckley v. Valeo*, 424 U.S. 1 (1976), to *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010). Accordingly, the civil penalties in this case are excessive and unreasonable in comparison to the PAC's ability to pay, a factor which the Commission should have but failed to consider, and which penalties would in effect bankrupt CVFC PAC and force it to disband.

VI. THE COMMISSION'S FINAL ADVERSE DETERMINATION IS INVALID BECAUSE THE COMMISSION FAILED TO PROVIDE PLAINTIFFS WITH AN OPPORTUNITY TO BE HEARD BEFORE THE COMMISSION THEREBY DEPRIVING THEM OF A STATUTORY RIGHT AND DUE PROCESS PROTECTION

Pursuant to 2 U.S.C. § 437g(a)(4)(C)(ii), "[T]he Commission may not make any determination adverse to a person under clause (i) until the person has been given written notice and an opportunity to be heard before the Commission." While the Plaintiffs concede that they were given a "written notice" of a possible adverse determination by the Commission on October 27, 2011, the Commission purported to make a Final Determination finding liability and assessing civil money penalties against plaintiffs without giving them an opportunity to be heard before the Commission. AF2312-AR118-119. Since that adverse determination was made without affording Plaintiffs the requisite opportunity to be heard, the Final Determination is null and void and without legal effect. At issue is whether "an opportunity to be heard before the Commission" means an opportunity to be heard in person (or telephonically) or whether, as the

FEC contends, written presentations constitute an "opportunity to be heard" by the Commission. The related Constitutional issue is whether such a hearing is required by Due Process.

Congress was very specific in other parts of 2 U.S.C. § 437g, making distinctions between written presentations and hearings, affording respondents at earlier stages of the enforcement process with the opportunity to file *written* statements and briefs. See, e.g., 2 U.S.C. § 437g(a)(1) (respondent "shall have the opportunity to demonstrate, in writing, …that no action should be taken against such person"); 2 U.S.C. § 437g(a)(3) (respondent "may submit a brief" before Commission finds "probable cause" to believe a violation occurred). The Commission's enforcement regulations also make this distinction. See, e.g., 11 C.F.R. 111.35 ("[t]o challenge a Reason To Believe finding or proposed civil money penalty, the respondent must submit a written response to the Commission…"). However, before a Final Determination is made, the respondents are required to be given "an opportunity [to be heard before the Commission", i.e., an in-person hearing of some kind before the Commission, in addition to the written submissions they are allowed to submit. Admittedly, respondents can decline to attend such a hearing and many would likely do so in the usual run-of-the-mill case. But Plaintiffs were not given that opportunity for a hearing nor did they waive their right to one. Indeed, they specifically reminded the Commission of its non-discretionary duty to provide plaintiffs with a hearing in their November 23, 2011 letter to the FEC requesting a hearing. That request was unlawfully rejected by the Commission in a letter dated December 9, 2011. AF2312-AR139.

There is no dispute that the Plaintiffs were not afforded a hearing and there is no dispute that the Commission has the power to hold such hearings. See, e.g., 2 U.S.C. § 437d(a)(9) (the Commission has the power "to conduct investigations and hearings expeditiously"). In denying the Plaintiffs' request to appear before the Commission at a hearing, the FEC Staff Memorandum

of December 2, 2011 stated that written submissions legally satisfy the "opportunity to be heard" requirement. AF2312-AR131-133. We disagree.

The phrase "opportunity to be heard" is often used and understood to mean the same thing as an oral hearing. As the pre-eminent expert in administrative law observed long ago:

> I believe that when either judges or legislatures use the term "opportunity to be heard" they have in mind one of two ideas: (1) a chance to present argument at a public meeting, or (2) opportunity for a trial resembling that of the courtroom. The term as commonly used does not mean talking informally to the man who decides, or submitting written evidence or argument without an oral process, or participating in a conference out of which a decision grows, or answering one of the questionnaires which provide the entire factual basis for the decision, or receiving a tentative draft of proposed rules with an invitation to submit written comments, or sending a representative to collaborate with the agency's staff in drafting regulations, or participating in the selection of an advisory group which may make recommendations to the agency, or answering oral questions asked by the agency's interviewers.

Kenneth Culp Davis, *The Requirement Of Opportunity To Be Heard In The Administrative Process*, 51 Yale L.J. 1093 (1942) (footnotes omitted). While Professor Davis's views on the necessity of an oral hearing was in the context of rulemaking that affects the regulated community across the board, the rationale is the same in the context of the imposition of sanctions on individuals where Congress also specified in the agency's organic statute that there be an "opportunity to be heard."

The term "opportunity to be heard" arises often in the context of Due Process protections:

> The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an *opportunity to speak up* in his own defense, and when the State *must listen to what he has to say*, substantively unfair and simply mistaken deprivations of property interests can be prevented.

Fuentes v. Shevin, 407 U.S. 67, 81 (1972).(emphasis added).

The FEC counters by stating in its December 9, 2011 reply, and recounting its earlier justification for disallowing hearings in civil money penalty cases (Explanation and Justification, Administrative Fines, 65 Fed. Reg. 31787 at 31791 (May 19, 2000)) that even where a statute provides for a hearing, that the Supreme Court has held that the statute "cannot impute to Congress the design requiring, nor does Due Process demand, a hearing when it appears conclusively from the applicant's `pleadings' that the applicant cannot succeed." (citing *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 621 (1973). AF2199-AR127-130. In the first place, the Court in *Weinberger* affirmed the Court of Appeals holding that Hynson *was* entitled to a hearing before the FDA to show that it had met certain threshold standards for drug approval. 412 U.S. at 623. More importantly, the FEC cites the Court's opinion that it would not require a hearing "where it appears *conclusively*…that the applicant cannot succeed." 65 Fed. Reg. at 31791. (emphasis added). A fair reading of the Plaintiffs' voluminous legal and factual submissions to the Commission regarding the personal liability of its former Treasurer and CVFC PAC's best efforts to file the required reports can hardly be characterized as a conclusive losing argument on its face. Indeed, the FEC staff thought it had enough merit that it recommended to the Commissioners that they ought to consider it in the staff's earlier recommendation before the Final Determination was allegedly made.

It is perhaps disingenuous of FEC staff to assert in their December 2, 2011 memorandum to the Commission that, with respect to the Plaintiffs' earlier argument that there was more than sufficient information regarding the former Treasurer's violation for the Commission to exercise its authority to bring a separate enforcement action against him, the "Commission did not decide to do that." AF2199-AR130. As far as the record shows, the Commission did not decide *not* to do that either. The Commissioners made no affirmative decision one way or the other about

referring this matter to the Office of the General Counsel to initiate action against the former treasurer and in that regard failed to even exercise their discretion.

The FEC readily admits that it allows for the opportunity for a hearing in other enforcement proceedings not involving filing violations and for audit reviews where two Commissioners grant the request. 72 Fed. Reg. 64919 (Nov. 19, 2007). It is arbitrary and capricious to deny plaintiffs from at least having that same opportunity to convince two Commissioners that a hearing is warranted in this case.

The FEC tries to justify this categorical denial of a hearing to every late and non-filer by stating that reporting violations are "elementary and readily ascertainable by review of written submissions . . . a hearing will not significantly increase accuracy and fairness but will drain the Commission's resources and hinder its efficiency" and further citing Congressman William Thomas views that a truncated enforcement process for administrative fines would free up FEC resources for other enforcement matters and that judicial review is available. AF2199-AR129 But there is already a truncated enforcement process for administrative fines: the Congress has eliminated an entire "probable cause" stage to the fine proceedings that are otherwise available to persons accuse of violating other provisions of FECA. 2 U.S.C. § 437g(a)(3).

There can be no doubt that the facts and circumstances in the instant case are far from elementary and if anything, the written submissions show that the FEC failed to follow its own procedures regarding the personal liability of treasurers. Moreover, "there exists no general administrative power to create exemptions to statutory requirements based upon the agency's perception of costs and benefits." *Public Citizen v. FTC*, 869 F.2d 1541,1556 (D.C. Cir. 1989), quoting *Alabama Power Co. v. Costle*, 636 F.2d 323, 357 (D.C. Cir. 1979). While Congress did provide a right of judicial review, an unreasonably expensive and burdensome process that very

few political committees can afford (not to mention the costs and burdens on the agency and the courts), an informal hearing before the agency will allow committees which have serious issues to raise and resolve them relatively quickly and efficiently at the agency level. The FEC often compares the process of imposing significant fines for late filings to parking tickets issued for strict liability offenses. But even here in the District of Columbia, a person is afforded Due Process and can challenge a $25 ticket issued for parking at an expired meter at a live hearing and have the fine remitted or reduced for valid reasons, such as a broken meter or where the car was blocked or pinned in by adjacent cars. See D.C. Code Ann. 50-2601, et seq.

Unless Congress specifically prohibited a hearing before the agency, this Court should interpret the "opportunity to be heard" before the FEC as providing an oral hearing as a matter of law and public policy, particularly where the agency here already provides an opportunity to be heard in other enforcement contexts. After surveying numerous federal agencies that impose civil money penalties and studying this issue in depth, the Administrative Conference of the United States (ACUS) concluded that as a matter of fairness: "The Conference is therefore recommending that, in all cases involving administratively imposed civil money penalties, the opportunity for a formal adjudication pursuant to the APA's provisions, 5 U.S.C. § 554, 556-558, be available to parties." ACUS, Recommendation 93-1 *Use of APA Formal Procedures In Civil Money Penalty Procedures* (Adopted June 10, 1993). In this case, Plaintiffs are not asking for a formal hearing, but merely an opportunity to appear before the Commission to explain its unique circumstances and to plead for an abatement or remission of the excessive fine.

Accordingly, the Plaintiffs submit that the Final Determination made by the Commission against the Plaintiffs was null and void and "without observance of procedure required by law"

and must be set aside inasmuch as the Plaintiffs were not given an opportunity to appear before the Commission at a hearing. 5 U.S.C. § 706(2)(D).

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment should be granted.

Respectfully submitted,

Dated June 7, 2012

/s/

Dan Backer (D.C. Bar No. 996641)
DB Capitol Strategies PLLC
209 Pennsylvania Avenue SE
Suite 2109
Washington, DC 20003
(202) 210-5431
dbacker@dbcapitolstrategies.com

Attorney for Plaintiffs

Of Counsel:
Paul D. Kamenar (D.C. Bar No. 914200)
3523 Woodbine Street
Chevy Chase, MD 20815
(202) 603-5397
paul.kamenar@gmail.com