UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

FEDERAL ELECTION COMMISSION, Plaintiff, v. LATPAC, and CHALIN M. ASKEW, in his official capacity as treasurer of LATPAC, Defendants.	Civ. No. 21-6095 REPLY IN SUPPORT OF MOTION FOR DEFAULT JUDGMENT

FEDERAL ELECTION COMMISSION'S REPLY
IN SUPPORT OF ITS MOTION FOR DEFAULT JUDGMENT

Pursuant to the Court's February 28, 2022 Order (Docket No. 36), the Federal Election Commission ("FEC" or "Commission") hereby submits this reply in support of its motion for default judgment. In its prior submissions, the Commission established that relief including a $56,400 civil penalty for defendants' repeated and ongoing violations of the Federal Election Campaign Act ("FECA") — an amount far short of the $328,448 statutory maximum — was reasonable and warranted to punish defendants, vindicate important public interests, and deter future violations. (FEC's Memo. in Supp. of Its Mot. for Default J. ("Mot.") (Docket No. 27).) Defendant LatPAC, a political committee, has not responded to the FEC's motion for default judgment. LatPAC's treasurer, defendant Chalin Askew — after failing to participate in this case for months in violation of court orders — did file a very short opposition making

unsubstantiated factual assertions as to the appropriate remedy in this matter.[1] (Def.'s Opp'n to Mot. for Default J. ("Opp.") (Docket No. 35).) In his filing, defendant Askew conceded liability for the violations at issue; agreed to the injunctive report-filing relief the Commission has sought, except as to the deadline for compliance; and agreed that a civil penalty "may be proper" here, but objected to the requested amount. (*Id*. at 1-2) Askew did not contest the Commission's requested declaratory relief, nor the requested injunctive relief barring future violations of FECA.

Even Askew's limited objections to the requested relief are completely unsupported by competent evidence, however, and they should not even be considered. *See House v. Kent Worldwide Mach. Works, Inc.*, 359 F. App'x 206, 207 (2d Cir. 2010) (findings as to damages require evidence). In any case, Askew has not disputed the important interests that the requested monetary penalty serves, nor has he contested the accuracy of the ample evidence the FEC has provided to support its requested relief. Askew's minimal, unsupported assertions as to LatPAC's current account balances (Opp. at 1), even if considered, would fall woefully short of showing why defendants should face a lesser penalty. And his vague claims about being unable to find "proper staff" (*id*.) would likewise fail to justify a lower penalty or a more lenient deadline to file the required FEC reports, the first of which was due in 2016. Accordingly, the Court should impose a $56,400 civil penalty and the other relief requested.

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[1] This Court has already held that Askew cannot represent LatPAC in this case. (Nov. 12, 2021 Order at 1 (Docket No. 21).) Therefore, to the extent that Askew makes representations regarding matters beyond the scope of his statutory duties as treasurer of LatPAC, 52 U.S.C. §§ 30102, 30104, those allegations must be disregarded and should be stricken for violating this Court's order.

1. Defendant Fails to Challenge the Commission's Showing That Nearly All of the Relevant Factors Weigh Heavily in Favor of a $56,400 Penalty Here

As explained in the Commission's opening brief (Mot. at 10), when determining the appropriate civil penalty in FECA cases, courts generally consider: "(1) the good or bad faith of the defendants; (2) the injury to the public; (3) the defendant's ability to pay; and (4) the necessity of vindicating the authority of the responsible federal agency." *FEC v. Odzer*, No. 05 CV 3101 NG RML, 2006 WL 898049, at *4 (E.D.N.Y. Apr. 3, 2006) (adopting R&R). Setting aside ability to pay, which is addressed separately below (*infra* pp. 5-8), the FEC has demonstrated that all of the remaining factors weigh *heavily* in favor of imposing the requested civil penalty. (Mot. at 10-14.)

Askew's perfunctory opposition fails to counter the Commission's showing in this regard, as a comparison with *FEC v. Furgatch*, 869 F.2d 1256 (9th Cir. 1989), illustrates. There, the defendant had refused to comply with the FEC's request to file a statutorily-required disclosure report until the district court ordered him to do so "over a year" after the appellate court had "rejected his defenses to the FEC's action against him." *Id.* at 1258-59. The Ninth Circuit agreed this demonstrated "the absence of good faith efforts by [defendant] to undo or cure his violations" and thus "the need for a large penalty to deter future wrongdoing." *Id.* at 1259. It also found that the "[defendant]'s failure to comply with the FEC's demand for [a] [disclosure] report" demonstrated "the need to vindicate the agency's authority." *Id.* And it held that, since "the violations were clearly serious," "serious public harm should . . . be presumed." *Id.* The Ninth Circuit thus affirmed a civil penalty of $25,000 — $57,996 adjusted for inflation[2] — for the defendant's failure to file a *single* disclosure report and failure to include the

[2] *See* CPI Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm (last visited Mar. 28, 2022).

statutorily-required disclaimer on *one* advertisement, which was "essentially *the statutory maximum*." *Id.* at 1258, 1264 (emphasis added).

These factors weigh even more heavily in favor of a substantial penalty here:

- While *Furgatch* involved a single, discrete instance of the failure to file a disclosure report, defendants here failed to file *sixteen* statutorily-required disclosure reports over numerous years preceding the filing of this lawsuit and an additional three reports since (Decl. of Kristin D. Roser ("Roser Decl.") ¶¶ 5-8 (Docket No. 29));

- In contrast to the sixteen-month delay between the conclusion of his defense on the merits and the defendant's filing of the requisite report in *Furgatch*, defendants here admitted *two-and-a-half years ago* that they had violated FECA (Decl. of Dominique Dillenseger ("Dillenseger Decl.") (Docket No. 28), Exh. A at 3 (Docket No. 28-1)), and they still have not filed any of the (now) nineteen statutorily-required reports (Roser Decl. ¶¶ 5-8);

- Unlike the *Furgatch* defendant, who contested the merits all the way through proceedings in the court of appeals, defendants here admitted that they had violated FECA during the FEC's *administrative enforcement process* (Dillenseger Decl., Exh. A at 3), yet did not engage in the statutory conciliation process (Dillenseger Decl. ¶¶ 5-13), thereby requiring the Commission to file and litigate this case for over eight months (*see* FEC's Compl. (Docket No. 1)) — during which defendants have also not contested liability (Defs.' Answer at 2 (Docket No. 18) (stating only that defendants need additional time to file the required reports); Opp. at 1 (stating that it is "undisputed that the defendant violated [FECA]")), but have similarly failed to meaningfully participate in the proceeding (Jan. 7, 2022 Op. & Order at 2-5 (Docket No. 23)).

Yet the $56,400 civil penalty that the FEC requests here is comparatively much lower. Far from the maximum statutory penalty upheld in *Furgatch*, the requested amount is at the low

end of the range authorized by Congress. It is less than 18% of the maximum penalty FECA authorizes the Court to impose against LatPAC and Askew for their sixteen disclosure violations ($328,448), which violations Askew admits. (Mot. at 9; Opp. at 1.). And it is only 30% of the total amount that the Commission has established is, at minimum, involved in those violations ($188,000), which amount Askew fails to dispute. (Mot. at 9-10; Dillenseger Decl. ¶¶ 14-15.)

The requested penalty therefore is reasonable and warranted.

2. Defendant's Claims of a Lack of Funds to Comply with the Requested Relief Are Unsupported and Fail to Meet His Burden to Show an Inability to Pay

Askew appears to object to both the requested civil penalty amount and the requested deadline to file overdue reports on the grounds that LatPAC's "available [account] balance" is $6,162 and "monthly average balance" is $5,052, stating further that "it is because of the lack of funding that the defendant has been unable to hire the proper staff to complete the reports at the required deadlines" and "defendant has only recently obtained volunteers to assist in completing the backlog." (Opp. at 1.) However, as an initial matter, Askew's claims regarding LatPAC's finances are wholly unsubstantiated by evidence and should be disregarded for this failure alone, since the Court must have an evidentiary basis for damages-related findings. *See Kent Worldwide*, 359 F. App'x at 207; *see also infra* p. 6.

Under FECA it is Askew, as LatPAC's treasurer, who is personally responsible for keeping and preserving records of LatPAC's finances, completing the statutorily-required disclosure reports regarding those finances, and timely filing those reports with the Commission. 52 U.S.C. §§ 30102(a)-(d), 30104(a)(1); 11 C.F.R. §§ 102.7(a), 102.9, 104.1(a), 104.14(d); Mot. at 2 & n.2; *cf.* Dillenseger Decl., Exh. B at 3 (LatPAC's bylaws likewise impose such obligations on its treasurer). And if Askew was unable to serve as treasurer, LatPAC was forbidden from accepting contributions or making expenditures during that time. 52 U.S.C. § 30102(a).

Whether LatPAC had other staff or volunteers is, therefore, irrelevant. *See FEC v. Toledano*, 317 F.3d 939, 945 (9th Cir. 2002) (finding that a committee's staffing challenges made "not an iota of difference under FECA" since the statute "contain[ed] no exception for 'internal breakdown'").

The Commission's evidence established — and Askew does not contest — that: (a) the Commission notified defendants in October 2016 that their failure to timely file the required disclosure reports violated FECA; (b) the agency reiterated this admonishment for six years; (c) in November 2019, defendants admitted their legal violations, promised to timely file all future-due reports, and promised to file all past-due reports by January 1, 2020; and (d) defendants have nonetheless not filed a single statutorily-required report — timely or otherwise — since July 20, 2016. (Roser ¶¶ 5-8 & Exhs. A-B; Dillenseger Decl., Exh. A at 3.)

In addition, with its opening brief (*see* Mot. at 12), the Commission submitted uncontested evidence indicating defendants' ability to pay a substantial civil penalty: (a) at least as of July 2018, LatPAC had received more than $92,000 in deposits (Dillenseger Decl. ¶ 14); (b) more than one year later, in a November 2019 submission to the Commission during the administrative proceedings, defendants admitted that they had at least sufficient assets to pay $35,388 in contribution refunds and outstanding debts (*id.* at Exh. A at 3); and (c) LatPAC has continued to seek contributions (Decl. of Haven G. Ward ¶¶ 9-11 & Exhs. C-G) (Docket Nos. 30, 30-3–30-6).

While Askew seeks a lower penalty still (Opp. at 1-2), the FEC's requested amount of $56,400 is already at the low end of the range of the civil penalties authorized by Congress (*supra* p. 5). Askew has not submitted *any* evidence to substantiate his asserted inability to pay this relatively modest penalty. While a court may consider a defendant's ability to pay when

fashioning the amount of a civil penalty for a FECA violation, "[i]t is settled that the [defendant] has the burden to produce evidence of inability to pay." *Toledano*, 317 F.3d at 948 (internal quotation marks omitted); *see also United States v. Ahuja*, 736 F. App'x 20, 22 (2d Cir. 2018) (holding that defendant has "the burden of showing that he could not pay the fine"). Where, as here, defendants "have offered no financial records to substantiate their alleged inability to pay," courts refuse to limit the civil penalty imposed on this basis. *SEC v. Cole*, No. 12-CV-8167 RJS, 2014 WL 4723306, at *6 (S.D.N.Y. Sept. 22, 2014), *aff'd*, 661 F. App'x 52 (2d Cir. 2016); *see also, e.g.*, *SEC v. Shkreli*, No. 15-CV-7175 (KAM) (JRC), 2022 WL 541792, at *12 (E.D.N.Y. Feb. 23, 2022) ("The Court cannot find, based on [defendant's] unsubstantiated arguments, that his financial circumstances . . . warrant a reduction of [the] civil monetary penalty."); *SEC v. Invest Better 2001*, No. 01-CIV-11427 (BSJ), 2005 WL 2385452, at *5 (S.D.N.Y. May 4, 2005).

Accordingly, because Askew's claim of a purported inability to pay a $56,400 penalty (Opp. at 1) is similarly unsubstantiated, it should likewise be rejected — *particularly because his failure to disclose LatPAC's finances is at the very heart of this case.* To paraphrase this Court: It would not serve the purposes of FECA if political committees and treasurers can fail to disclose the committee's finances for many years in violation of FECA and then simply claim poverty based on those (still) undisclosed finances to escape financial liability. *See SEC v. Inorganic Recycling Corp.*, No. 99 CIV. 10159 (GEL), 2002 WL 1968341, at *4 (S.D.N.Y. Aug. 23, 2002). The unsworn account balance figures that defendant now provides, from some unspecified accounts and dates, are of no weight in determining the proper civil penalty here.

Finally, even if defendants, "knowing that [they] faced the very real possibility of civil financial penalties, chose to spend down [their] assets, or failed to adjust [their expenditures], that is [their] problem, not the Commission's or this court's." *SEC v. Metcalf*,

No. 11 Civ. 493 (CM), 2012 WL 5519358, at *8 (S.D.N.Y. Nov. 13, 2012); *see also FEC v. O'Donnell*, C.A. No. 15-17-LPS, 2017 WL 1404387, at *3 (D. Del. Apr. 19, 2017) (refusing to reduce civil penalty despite political committee's current low funds where it transferred funds "after the administrative complaint in this case was filed—hence, after Defendants were on notice of their potential liability"). Here, defendants were aware of their FECA reporting failures in 2016.

* * *

In light of the defendants' failure to present any concrete and substantial evidence rebutting the Commission's extensive evidentiary showing, and for the reasons set forth above and in the Commission's opening brief, the Court should impose a civil penalty on defendants of $56,400 and order the remaining declaratory and injunctive relief requested.

Respectfully submitted,

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