IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GARCIA FOR CONGRESS AND SWATI PATEL, Plaintiffs,	§	
Vs.	§	CIVIL ACTION NUMBER 3:13-CV-02401-K
FEDERAL ELECTION COMMISSION, Defendant.	§	

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE ED KINKEADE, UNITED STATES DISTRICT JUDGE:

COME NOW Plaintiffs GARCIA FOR CONGRESS and SWATI PATEL, who file this their Response to Defendant FEDERAL ELECTION COMMISSION's Motion to for Summary Judgment and respectfully show this Honorable Court as follows:

I. LEGAL AND FACTUAL GROUNDS IN OPPOSITION TO DEFENDANT'S MOTION

1. There are clear questions of material fact as to whether Plaintiffs violated 2 U.S.C. § 434(a) or (g) and whether Defendant should have assessed a civil penalty of $15,220.00 against Plaintiffs and whether this Court should conduct a judicial review under 5 U.S.C. § 706, set aside that final determination, and modify that final determination or remand the case for a new determination by Defendant.

2. Because a genuine and material fact question exists regarding whether reliable and substantial evidence with rational probative force support's Defendant's analysis and final determination, whether Defendant has articulated a satisfactory explanation and a rational connection between the facts found and the choice(s) made, whether Defendant's findings and fine assessed against Plaintiffs was arbitrary or capricious, and whether Defendant abused its discretion with regard to Plaintiffs,

this Court should deny Defendant's motion and find that there was a factual or legal error in Defendant's finding and/or a miscalculation of the fine assessed by Defendant against Plaintiffs.

II. SEE BRIEF IN SUPPORT OF
PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION

3. Plaintiffs' Brief in Support of Their Response to Defendant's motion contains their argument and authorities, upon which Plaintiffs rely to demonstrate that Defendant's Motion for Summary Judgment should be denied. Plaintiffs' Appendix to Their Brief in Support of Their Response to Defendant's Motion for Summary Judgment contains the evidence to which Plaintiffs cite in their brief.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that this Court deny Defendant's Motion for Summary Judgment.

Signed on December 9, 2013.

Respectfully submitted,

LAW OFFICES OF DOMINGO A. GARCIA, P.C.

By: /s/ Domingo A. Garcia
Domingo A. Garcia
State Bar No. 07631950

400 S. Zang Blvd., Suite 600
Dallas, Texas 75208
Telephone: (214) 941-8300
Facsimile: (214) 943-7536

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

A true and correct photocopy of this document was served upon all counsel of record in this case on December 9, 2013 in accordance with FED. R. CIV. PROC. 5 via the ECF email address(es) provided.

/s/ Domingo A. Garcia
Domingo A. Garcia

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GARCIA FOR CONGRESS AND SWATI PATEL, Plaintiffs,	§	
Vs.	§	CIVIL ACTION NUMBER 3:13-CV-02401-K
FEDERAL ELECTION COMMISSION, Defendant.	§	

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR RESPONSE
TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE ED KINKEADE, UNITED STATES DISTRICT JUDGE:

COME NOW Plaintiffs GARCIA FOR CONGRESS and SWATI PATEL, who file this their Brief in Support of Their Response to Defendant FEDERAL ELECTION COMMISSION's Motion to for Summary Judgment and respectfully show this Honorable Court as follows:

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases — Page

Rules and Statutes

ARGUMENT

Summary Judgment Standard

1. In an 2011 Opinion, U. S. District Judge Terry Means of Fort Worth found, "When the record establishes 'that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law,' summary judgment is appropriate." *Freeman v. City of Fort Worth*, 2011 U.S. Dist. LEXIS 72963, 20 (N.D. Tex.), *quoting* FED. R. CIV. PROC. 56(a). Judge Means also found, "To demonstrate that a particular fact is, or cannot be, genuinely in dispute, a party must either:

> (1) cite to particular parts of materials in the record (e.g., affidavits),
> (2) show that the materials cited by the adverse party do not establish the presence or absence of a genuine dispute, or
> (3) show that the adverse party cannot produce admissible evidence to support the fact.

Freeman v. City of Fort Worth, 2011 U.S. Dist. LEXIS 72963 at 20, *citing* FED. R. CIV. PROC. 56(c)(1).

2. The United States Court of Appeals for the Fifth Circuit holds, "The moving party bears the burden of showing the district court that there is an absence of evidence to support the nonmoving party's case." *Littlefield v. Forney I.S.D.*, 268 F.3d 275, 282 (5th Cir. 2001), *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986), *quoting* FED. R. CIV. PROC. 56(c). Stated another way, "[t]o win summary judgment, the movant must show that the evidence in the record would not permit the nonmovant to carry its burden of proof at trial." *Gutierrez v. City of San Antonio*, 139 F.3d 441, 444 (5th Cir. 1998), *citing Celotex Corp. v. Catrett*, 477 U.S. at 327. The Fifth Circuit also holds, "'If the moving party fails to meet this initial burden, the motion must be denied, regardless of the nonmovant's response. If the movant does, however, meet this burden, the nonmovant must . . .

designate specific facts showing that there is a genuine issue for trial.'" *Littlefield v. Forney I.S.D.*, 268 F.3d at 282, *citing Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995). The Fifth Circuit additionally holds that, **if** "[t]he moving party" demonstrates "by competent evidence that no issue of material fact exists, . . . [t]he non-moving party" only "then has the burden of showing the existence of a specific factual issue which is disputed." *Scott v. Moore*, 85 F.3d 230, 232 (5th Cir. 1996), *citing Isquith v. Middle S. Utils., Inc.*, 847 F.2d 186, 198-99 (5th Cir.), *cert. denied*, 488 U.S. 926 (1988) and *Celotex Corp. v. Catrett*, 477 U.S. at 321-23.

3. In *Freeman*, Judge Means affirmed, "In evaluating whether summary judgment is appropriate, the Court 'views the evidence in the light most favorable to the nonmovant, drawing all reasonable inferences in the nonmovant's favor.'" *Freeman v. City of Fort Worth*, 2011 U.S. Dist. LEXIS 72963 at 20-21, *quoting Sanders-Burns v. City of Plano*, 594 F.3d 366, 380 (5th Cir. 2010)(citation omitted). The Fifth Circuit holds, "Factual controversies," such as "'when both parties have submitted evidence of contradictory facts,' . . . are resolved in favor of the nonmoving party, . . ." *Massay v. Fed. Correctional Institution-Texarkana*, 243 Fed. Appx. 871, 873 (5th Cir. 2007)(*per curiam*)(unpublished), *citing Guillory v. Domtar Indus., Inc.*, 95 F.3d 1320, 1325 (5th Cir. 1996). Chief United States District Judge Sidney A. Fitzwater of the Northern District of Texas holds, "Evidence from a party opposing summary judgment may be considered despite its failure to meet the 'technical requirements' of Rule 56(e) 'so long as the record, taken as a whole, demonstrates that the . . . testimony meets the requirements of rule 56;'" therefore, "'papers of a party opposing summary judgment are usually held to a less exacting standard,' . . ." *Brady v. Blue Cross and Blue Shield of Tex., Inc.*, 767 F. Supp. 131, 135-36 (N.D. Tex. 1991), *quoting Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc.*, 831 F.2d 77, 80 (5th Cir. 1987). United States District

Judge Richard A. Schell of Sherman noted in a 1998 Memorandum Opinion "the low threshold of evidence necessary to defeat summary judgment." *Doe v. Beaumont I.S.D.*, 8 F. Supp. 2d 596, 612 (E.D. Tex., memo. opin.).

4. In evaluating whether a "motion," for "summary judgment," should be granted or denied, the Fifth Circuit holds that this "Court may make no credibility determinations or weigh any evidence, and must disregard all evidence favorable to the moving party that the jury is not required to believe." *Chambers v. Sears Roebuck and Co.*, 2011 U.S. App. LEXIS 12150, 15 and 18 (5th Cir.)(*per curiam*)(unpublished), *citing Chaney v. Dreyfus Serv. Corp.*, 595 F.3d 219, 229 (5th Cir. 2010), *citing Reaves Brokerage Co. v. Sunbelt Fruit & Vegetable Co.*, 336 F.3d 410, 412-13 (5th Cir. 2003). The Fifth Circuit explains "that credibility determinations are to be determined by the trier of fact, not by the court on a summary judgment motion." *Gutierrez v. City of San Antonio*, 139 F.3d at 447 *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). In a 2002 Opinion, Judge Means held that this Cout's "function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Riggs v. City of Fort Worth*, 229 F. Supp. 2d 572, 576 (N.D. Tex. 2002), *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 249. Judge Means adds that, only "'if no reasonable juror could find for the nonmovant,' summary judgment should be granted." *Freeman v. City of Fort Worth*, 2011 U.S. Dist. LEXIS 72963 at 21, *quoting Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 424 (5th Cir. 2000), *citing Celotex Corp. v. Catrett*, 477 U.S. at 322.

Point I: Plaintiff used their best efforts to file in a timely manner, but they were prevented from doing so by reasonably unforeseen circumstances which were beyond their control.

5. In the last complete sentence on page 6 and in the sentence completed at the top of page 7

of Defendant's Memorandum of Law in support of its motion, Defendant alleges that it sent a courtesy copy of the Primary Election Report to Garcia for Congress, which included the disclosure report deadlines. That Primary Election Report Notice is contained in pages AR015-20 of the Administrative Record Defendant filed in support of its motion. App. at pp. 2-3. Page AR014 of Defendant's Administrative Record states that that Primary Election Report Notice was emailed to garciadtx@gmail.com. Plaintiff Swati Patel states in her December 9, 2013 affidavit that Domingo A. Garcia never uses a gmail.com account to communicate with her or anyone else and that she cannot find any evidence that such an email address existed for Garcia for Congress or anyone else in 2012, despite page AR023 of Defendant's Administrative Record stating that that email to that address was sent successfully. *Id.* at p. 3.

6. In a 2002 Memorandum Opinion, United States District Judge Sam A. Lindsay of Dallas found that both the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit have previously held, "When ruling on a motion for summary judgment, the court is required to view all inferences drawn from the factual record in the light most favorable to the nonmoving party." *Sefton v. Pathos*, 2002 U.S. Dist. LEXIS 3597, 6 (N.D. Tex, memo. opin.), *citing Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986) and *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998).

7. In her affidavit, Ms. Patel explains that Plaintiffs hired Brett Smiley of CFO Compliance, LLC to comply with all of Defendant's rules, regulations, and filing requirements. App. at pp. 1-4.

8. Ms. Patel also explains how her unexpected pregnancy with her second child in late March 2012 made it difficult, if not impossible, to work effectively in May 2012, when Garcia for Congress' disclosure notifications regarding Mr. Garcia's $100,000.00 and $50,000.00 loans to it

were due. *Id.* at pp. 2-4.

9. Since Ms. Patel did not deliver her daughter until November 25, 2012 and then went on maternity leave and did not return to work until mid-January 2013, this Court should find that the unforeseen circumstances which prevented Plaintiffs from timely filing the required disclosure notifications by May 20 and 26, 2012 did not end until mid-January 2013 and that Plaintiff's 48-hour notices filed on September 17, 2012 were thereby timely filed. *Id.* at pp. 3-4; 11 C.F.R. § 111.35(b)(3).

Point II: Defendant's finding and fine assessed against Plaintiffs were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

10. In the fifth sentence on page 2 of its motion, Defendant quotes from Section 434(a)(6)(A) to prove that a campaign committee is required to report in writing any contribution of $1,000.00 or more after the twentieth day, but more than forty-eight hours before, any election. Other than quoting from the *Cox for U.S. Senate Comm., Inc.* opinion from the Northern District of Illinois in footnote 3 on page 13 of its Memorandum of Law, Defendant never cites to any portion of the Federal Election Campaign Act, the Treasury and General Government Appropriations Act, or any other legal authority to prove that a candidate's loans to his campaign committee, which he expects to be repaid, are campaign contributions, for which 48-hour notices are required. Defendant even refers to those alleged contributions as "personal loans" by Mr. Garcia on pages 7-9 of its Memorandum of Law. Without such proof, this Court should find that it is irrelevant whether Plaintiffs properly challenged Defendant's reason-to-believe finding or the proposed penalty at the administrative stage because, unless Mr. Garcia's personal loans were "a campaign . . . contribution of $1,000.00 or more," none of the three possible grounds for an administrative challenge would

apply. 2 U.S.C. § 434(a)(6)(A); 11 C.F.R. § 111.35(b)(1)-(3).

11. This Court, accordingly, should find that Defendant failed to meet its burden "to . . . show that there is no genuine issue as to any material fact and that" it "is entitled to judgment **as a matter of law**." *Sefton v. Pathos*, 2002 U.S. Dist. LEXIS 3597 at 6(emphasis added), *citing* FED. R. CIV. PROC. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. at 323-25; and *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d at 458.

12. In a 2012 Memorandum Opinion, United States District Judge Rudolph Contreras of the District of Columbia found that, in "the judicial review of administrative decisions; . . . courts must not abdicate the judicial duty to carefully 'review the record to ascertain that the agency has made a reasoned decision based on reasonable extrapolations from some reliable evidence'" and articulated "a 'satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" *La Botz v. FEC*, 889 F. Supp. 2d 51, 59-60 (D.C. 2012), *quoting Motor Vehicle Mfrs. Assoc. of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) and *Nat. Resource Def. Council v. EPA*, 902 F.2d 962, 968 (D.C. Cir. 1990) and *citing Hagelin v. FEC*, 411 F.3d 237, 238 (D.C. Cir. 2005). Judge Contreras even quoted from a 1968 United States Supreme Court decision: "the 'deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia.'" *La Botz v. FEC*, 889 F. Supp. 2d at 63, *quoting Volkswagen Aktiengesellschaft v. FMC*, 390 U.S. 261, 272 (1968). From Judge Contreras' opinion, this Court should not reasonably "conclude that the FEC's determination . . . was supported by substantial evidence" when "[i]ts conclusion is . . . 'contrary to law.'" *La Botz v. FEC*, 889 F. Supp. 2d at 63, *quoting* 2 U.S.C. § 437g(a)(8).

13. When former United States Attorney General John Ashcroft ran for the United States Senate from Missouri in 2000, "Spirit of America PAC . . . gave a fundraising list of 100,000 donors to

Ashcroft 2000, and . . . neither Ashcroft's campaign nor his political action committee . . . reported the contribution to the Federal Election Commission." *Alliance for Democracy v. FEC*, 362 F. Supp. 2d 138, 139 (D.C. 2004, memo. opin.). However, "Ashcroft 2000" was permitted to enter into "A Conciliation Agreement" with Defendant. *Id.* at 145-46 n. 8. Defendant never offered Plaintiffs any opportunity to negotiate with it regarding the amount of the proposed penalty. *See* AR contained in Defendant's Administrative Record. The United States Supreme Court has found that "the consistency of an agency's position is a factor is assessing the weight that position is due" and that "'a consistently held agency view' . . . is 'entitled to considerably'" more "'deference' . . ." *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993), *quoting INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30 (1981). *See also FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 33 (1981), *citing Adamo Wrecking Co. v. U.S.*, 434 U.S. 275, 287 n. 5 (1978) and *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). This is another reason for this Court to find that Defendant's finding and the penalty assessed against Defendants should be set aside.

14. Consequently, this Court should infer "from" Defendant's motion and "the" attached "record in the light most favorable" to Plaintiffs that Defendant's finding and administrative fine against them was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and, accordingly, set aside both that finding and that penalty. 5 U.S.C. § 706(2)(A) & (C). Plaintiffs, accordingly, request that this Court find that Plaintiffs met their "burden of proving that the agency's determination was arbitrary or capricious." *Medina Cnty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010). As Judge Contreras did in *La Botz*, this Court should "remand this matter back to the FEC." *La Botz v. FEC*, 889 F. Supp. 2d at 64.

Conclusion

14. Since Defendant fails to comply with its burden "[t]o demonstrate that a particular fact . . . cannot be, genuinely in dispute," and "show that the materials cited by" Defendant" in its motion "do not establish the . . . absence of a genuine dispute," this Court must deny Defendant's motion. *Freeman v. City of Fort Worth*, 2011 U.S. Dist. LEXIS 72963 at 20, *citing* FED. R. CIV. PROC. 56(c)(1).

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that this Court deny Defendant's Motion for Summary Judgment.

Signed on December 9, 2013.

Respectfully submitted,

LAW OFFICES OF DOMINGO A. GARCIA, P.C.

By: /s/ Domingo A. Garcia
Domingo A. Garcia
State Bar No. 07631950

400 S. Zang Blvd., Suite 600
Dallas, Texas 75208
Telephone: (214) 941-8300
Facsimile: (214) 943-7536

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

A true and correct photocopy of this document was served upon all counsel of record in this case on December 9, 2013 in accordance with FED. R. CIV. PROC. 5 via the ECF email address(es) provided.

/s/ Domingo A. Garcia
Domingo A. Garcia