

Allen Dickerson (*pro hac vice*)  
Tyler Martinez (*pro hac vice*)  
Owen Yeates (Utah Bar No. 13901)  
INSTITUTE FOR FREE SPEECH  
124 S. West Street, Suite 201  
Alexandria, Virginia 22314  
Telephone: 703.894.6800  
Facsimile: 703.894.6811  
adickerson@ifs.org  
tmartinez@ifs.org  
oyeates@ifs.org

Scott C. Williams (Utah Bar. No. 6687)  
SCOTT C. WILLIAMS, LLC  
43 East 400 South  
Salt Lake City, Utah 84111  
Telephone: 801.220.0700  
Facsimile: 801.364.3232  
scwlegal@gmail.com

Scott E. Thomas  
BLANK ROME, LLP  
1825 Eye Street N.W.  
Washington, D.C. 20006  
Telephone: 202.420.2601  
Facsimile: 202.420.2201  
sthomas@blankrome.com

*Counsel for Defendant John Swallow*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

<p>FEDERAL ELECTION COMMISSION,  <i>Plaintiff,</i>  v.  JEREMY JOHNSON and  JOHN SWALLOW,  <i>Defendants.</i></p>	<p>Case No. 2:15-cv-00439-DB  <b>DEFENDANT JOHN SWALLOW'S MOTION FOR CLARIFICATION</b>  District Judge Dee Benson</p>
---	---

Defendant John Swallow, by and through undersigned counsel, respectfully requests this Court's clarification concerning its Stay Order issued September 20, 2017. Joint. Stip. and Order to Stay Proceedings at 1-2, ¶1 (Sept. 20, 2017), ECF No. 91 ("Stay Order").

Mr. Swallow has today filed a timely reply brief in support of his Motion to Dismiss, Motion for Judgement on the Pleadings, and Memorandum in Support (Oct. 23, 2017), ECF No. 98 (“Swallow Mot.”). That brief complies with this Court’s deadlines and page limitations for a reply brief, rather than the substantially more relaxed limitations applicable to a brief in opposition to a cross motion. DUCivR 7-1(b)(2)(A) (twenty-five-page limit) and DUCivR 7-1(b)(3)(A) (twenty-eight-day time period to file the response).

Briefing on Mr. Swallow’s Motion is governed by this Court’s Stay Order, which provides in relevant part that:

Swallow may file, by October 23, 2017, a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) based on purely legal arguments, and then briefing and potentially argument on any such motion would proceed in the normal course under DUCivR 7-1. By its deadline to respond to defendant Swallow’s Rule 12(c) motion, plaintiff Commission may cross-move under Rule 12(c) on any issues raised by defendant Swallow’s Rule 12(c) motion.

Stay Order at 1-2, ¶ 1. Consequently, the Federal Election Commission was entitled to file a cross-motion contemporaneously with its opposition to Mr. Swallow’s motion. However, the Court’s Stay Order did not anticipate an additional round of briefing on that cross-motion. *Id.* (stating only “briefing and potentially argument on [Swallow’s] motion would proceed in the normal course under DUCivR 7-1”).

Moreover, the FEC’s brief lacks any indication of the arguments the Commission intends as support for its cross-motion. In fact, its Memorandum in Opposition<sup>1</sup> fails to materially argue the Commission’s cross-motion at all. From a review of that brief, some references to the existence

---

<sup>1</sup> Pl. FEC’s Mem. In Opp’n To Def. John Swallow’s Mots. to Dismiss and for J. on the Pleadings and in Supp. of Cross-Mot. for Partial J. on the Pleadings (Nov. 20, 2017), ECF No. 103 (“FEC Mem.”).

of the cross-motion can possibly be found at pages xv, 1, 2, 23, and 30. But none are adequate to argue a cross-motion or constitute independent grounds for this Court's action. Instead, the FEC's Cross-Motion simply objects to the defense raised in Mr. Swallow's Motion. *See, e.g.*, Swallow Mot. at vi ("This Motion addresses Mr. Swallow's Third Defense"); FEC Mem. at 1 ("Swallow's third defense should be dismissed under Rule 12(c) as a result."); FEC Cross-Mot. for Partial J. on the Pleadings at 2 ("The Commission now cross-moves under Rule 12(c) against the third affirmative defense.")<sup>2</sup> The FEC's cross-motion provides no independent basis for relief. Granting the FEC's Cross-Motion is to deny Mr. Swallow's Motion, and vice versa.

Mr. Swallow cannot be expected to respond to the Commission's scattershot approach to briefing, which would appear to seek circumvention of this Court's page limitations. That is precisely the sort of harm DUCivR 7-1(b)(1)(A) appears intended to avoid.

In Mr. Swallow's view, then, Plaintiff Federal Election Commission has failed to file a stand-alone cross-motion. Instead, it has simply filed a brief in opposition to Mr. Swallow's motion. Because there is no true cross-motion to which he can respond, he has abstained from filing an excessive or late brief treating the FEC's opposition as an opening brief for an independent motion.

Nevertheless, in telephonic conversations, counsel for the Commission has suggested that it intends to file an additional reply brief in support of its phantom cross-motion. That approach

---

<sup>2</sup> The FEC's Cross-Motion also incorporated separate briefing against another party. Pl. FEC's Cross-Mot. for Partial J. on the Pleadings at 2 (Nov. 20, 2017), ECF No. 102 ("This Court has previously entered judgment on the pleadings in this case against defendant Jeremy Johnson's legally insufficient affirmative defenses."); *but see* Advisory Comm. Note on DUCivR 7-1(a)(4) (allowing incorporation by reference of another party assuming it's the same relief sought). But Mr. Johnson did not raise the arguments asserted in Mr. Swallow's motion, nor does the FEC explain which arguments in its earlier brief are relied upon here.

would prejudice Mr. Swallow, who has abided by this Court’s rules and limited his own briefing. Moreover, because “the Government merely responds to the matters raised by [Mr. Swallow] in [his] opening brief,” *Carlwood Dev. Inc. v. United States*, No. 2:10-cv-01773-RLH-PAL, 2011 U.S. Dist. LEXIS 4194, at \*3 (D. Nev. Jan. 10, 2011) (unpublished), “[t]he Government’s purported cross-motion is . . . nothing more than a[n] attempt to get the last word,” *id.* at \*4. And even if the Commission were permitted such a reply, “that reply may address only the party’s own cross-motion, and not the opponent’s original motion; otherwise, the ‘reply’ would, in part, constitute a surreply.” *Planck v. Schenectady Cty.*, No. 1:12-CV-0336(GTS/DRH), 2012 U.S. Dist. LEXIS 76241, at \*4-5 (N.D.N.Y. June 1, 2012) (unpublished).

Accordingly, Mr. Swallow asks this Court for clarification. In particular, he asks that this Court clarify that Mr. Swallow’s brief, filed today, concludes the briefing for both his motion and the FEC’s cross-motion. In the alternative, he asks that this Court clarify that his reply is subject to the rules for an opposition brief to a cross motion, meaning that he may file an enlarged, twenty-five-page version of his reply brief by December 18, 2017.<sup>3</sup>

Respectfully submitted,

Scott C. Williams (Utah Bar. No. 6687)  
 SCOTT C. WILLIAMS, LLC  
 43 East 400 South  
 Salt Lake City, Utah 84111  
 Telephone: 801.220.0700  
 Facsimile: 801.364.3232  
 scwlegal@gmail.com

/s/ Allen Dickerson  
 Allen Dickerson (*pro hac vice*)  
 Tyler Martinez (*pro hac vice*)  
 Owen Yeates (Utah Bar No. 13901)  
 INSTITUTE FOR FREE SPEECH  
 124 S. West Street, Suite 201  
 Alexandria, Virginia 22314  
 Telephone: 703.894.6800

---

<sup>3</sup> If this Court chooses the latter course, counsel for the FEC has contacted the undersigned attorneys to seek an extension for its reply brief, which would be due January 2, 2018. Mr. Swallow does not oppose an extension allowing the FEC’s counsel to avoid a filing just after the holidays. Consequently, while he does not believe the FEC is entitled to a reply brief, if one is ordered, he agrees that it should be due January 12, 2018.

Scott E. Thomas  
BLANK ROME, LLP  
1825 Eye Street N.W.  
Washington, D.C. 20006  
Telephone: 202.420.2601  
Facsimile: 202.420.2201  
sthomas@blankrome.com

Facsimile: 703.894.6811  
adickerson@ifs.org  
tmartinez@ifs.org  
oyeates@ifs.org

*Counsel for Defendant John Swallow*

Dated: December 4, 2017