

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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COMBAT VETERANS FOR CONGRESS	)	)
POLITICAL ACTION COMMITTEE and	)	)
DAVID H. WIGGS, TREASURER	)	)
264 South La Cienega Boulevard	)	)
Suite 186	)	)
Beverly Hills, CA 90211	)	)
	)	)
	Plaintiffs,	)
	)	)
v.	)	Civil Case No. 1:11-cv-02168-CK
	)	)
FEDERAL ELECTION COMMISSION	)	)
999 E Street, NW	)	)
Washington, DC 20463,	)	)
	)	)
	Defendant.	)
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**AMENDED PETITION FOR REVIEW OF FEDERAL ELECTION COMMISSION  
DETERMINATION AND COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

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Plaintiffs Combat Veterans For Congress Political Action Committee (CVFC PAC) and Treasurer David H. Wiggs in his official capacity as Treasurer, by their undersigned attorney, hereby file this amended petition for review of a determination by defendant Federal Election Commission and complaint for declaratory and injunctive relief, and allege as follows:

## INTRODUCTION

1. This is a civil action in which plaintiffs seek to modify or set aside the November 4, 2011 Final Determination by the Federal Election Commission (“FEC” or “Commission”) which improperly imposed fines aggregating \$8,690 upon plaintiffs for alleged violations of the Federal Election Campaign Act (“FECA” or “the Act”), and declaratory and injunctive relief declaring the Commission’s actions to be procedurally and substantively unlawful, including for failing to obtain the requisite minimum four affirmative votes to initiate enforcement proceedings, and enjoining the assessment of a civil money penalty against plaintiffs.
2. The fines imposed relate to the knowing, willful, and/or reckless conduct of a malfeasant former Treasurer who violated the Act by failing to timely file certain reports and should be solely liable for such misconduct in his personal capacity.
3. 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 the Commission’s regulations and *Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings*, 70 Fed. Reg. 1 (Jan. 3, 2005).
4. The Commission’s actions in finding liability and assessing the fine in this matter against the plaintiffs instead of the former treasurer, or at least mitigating the fine against the plaintiffs, is arbitrary, capricious, an abuse of discretion or a failure to exercise discretion and otherwise not in accordance with law; violates the procedural and due process rights of plaintiffs; and violates the plaintiffs’ First Amendment rights.

### **JURISDICTION and VENUE**

5. This action arises under the Federal Election Campaign Act (“FECA” or “the Act”), 2 U.S.C. §§ 431, et seq., the Declaratory Judgment Act, 28 U.S.C. §2201, and the Administrative Procedure Act, 5 U.S.C. 701-706. This Court has jurisdiction under 2 U.S.C. §437g(a)(4)(C)(iii) and 28 U.S.C. §1331. The original petition and complaint was filed with this Court within 30 days of plaintiffs’ receipt of the notice of adverse determination as required by 2 U.S.C. §437g(a)(4)(C)(iii).
6. This district has venue under 2 U.S.C. §437g(a)(4)(C)(iii) and 28 U.S.C. §§1391(b) and (e). Combat Veterans For Congress PAC transacts business in this District.

### **PARTIES**

7. Plaintiff Combat Veterans For Congress PAC (“CVFC PAC”) is a non-partisan, non-connected political action committee registered with the Federal Election Commission and is located in Beverly Hills, California, with legal and operational offices in Washington, D.C.
8. David H. Wiggs is the current Treasurer of CVFC PAC, and is a party to this action in his official capacity as the substitute Treasurer.
9. Defendant Federal Election Commission (“FEC”) is an independent administrative agency of the United States, created pursuant to 2 U.S.C. §437(c). It is responsible for enforcing the FECA, and is required to investigate alleged violations of the FECA.

### **STATEMENT OF FACTS**

10. 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 CFR

§102.1(d). CVFC PAC's Statement of Organization named Michael Curry, an attorney, as both Treasurer and Custodian of Records. (Exhibit 1)

11. Subsequent to its registration with the FEC, the Treasurer would have and is presumed to have received the standard "welcome" package of information and resources from the FEC mailed to all new registrants at that time, including separate copies of "Federal Election Campaign Laws" as compiled by the Commission and including all of FECA, Title 11 (Federal Election) of the Code of Federal Regulations, the Federal Election Commission Campaign Guide for Non-Connected Committees ("The Guide"), and various supplemental material for the benefit of the Treasurer in complying with his legal obligations as a Treasurer under FECA.
12. On January 29, 2010, Mr. Curry filed CVFC PAC's 2009 Year-End Report with the FEC pursuant to 2 U.S.C. §434. (Exhibit 2)
13. On March 12, 2010, the FEC sent Mr. Curry a Request for Additional Information (RFAI) in order to clarify errors in the 2009 Year End Statement. (Exhibit 3)
14. On April 5, 2010, Mr. Curry filed the amended 2009 Year End Report. (Exhibit 4)
15. On April 15, 2010, Mr. Curry filed the April 2010 Quarterly Report. (Exhibit 5)
16. On June 16, 2010, the FEC sent an RFAI in order to clarify errors in the April 2010 Quarterly Report. (Exhibit 6)
17. On July 14, 2011, Mr. Curry filed an amended April 2010 Quarterly Report. (Exhibit 7)
18. On July 15, 2010, Mr. Curry filed the July 2010 Quarterly Report. (Exhibit 8)
19. On August 4, 2010, the FEC sent an RFAI in order to clarify errors in the Amended April 2010 Quarterly Report. Mr. Curry did not submit a response to the August 4 RFAI. (Exhibit 9)

20. On October 12, 2010, three days before the October 2010 Quarterly Report was due and nine days before the FEC Pre-Election Report was due, Mr. Curry verbally communicated to CVFC PAC's Chairman Capt. Joe John [USN Ret.'d] that he intended to resign as Treasurer, but that he would complete the necessary upcoming filings before doing so. (Exhibit 10)
21. On October 14, 2010, legal counsel for CVFC PAC sent Mr. Curry an e-mail informing him of the steps to take in order to formally resign as Treasurer. (Exhibit 10)
22. On October 14, 2010, Capt. John forwarded an to Mr. Curry describing the potential consequences of failing to timely respond to an RFAI and included a reminder of the deadlines for the upcoming reports. (Exhibit 32)
23. On October 15, 2010, legal counsel for CVFC PAC sent Mr. Curry an e-mail reminding him that the 2010 October Quarterly Report was due that day, and reminding Mr. Curry of the due dates and coverage dates for the pre- and post-election reports. (Exhibit 11)
24. On October 15, 2010, the 2010 October Quarterly Report became due, and Mr. Curry did not timely file. Before the report became due, Mr. Curry took no steps to resign as Treasurer. Mr. Curry knowing and willfully or recklessly failed to file this report.
25. On October 18, 2010, Mr. Curry sent to an e-mail to other members of CVFC PAC stating that he would complete the reports with the assistance of CVFC PAC accountant Ken Margala. (Exhibit 12)
26. 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." (Exhibit 13)

27. On October 21, 2010, the 12-Day Pre-General Election Report became due, and Mr. Curry did not timely file. Before the report became due, Mr. Curry took no steps to resign as Treasurer. Mr. Curry knowing and willfully or recklessly failed to file this report.
28. 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." (Exhibit 13)
29. 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." (Exhibit 14)
30. On November 7, 2010, CVFC PAC received for the first time from Mr. Curry the password for electronic filing that had not been previously shared. However, CVFC PAC still had not been provided access to or copies of the financial and banking records in the exclusive possession of Mr. Curry. (Exhibit 34)
31. 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." (Exhibit 13)
32. 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. (Exhibit 15)

33. On November 19, 2010, Mr. Curry received an e-mail from counsel to CVFC PAC again informing Mr. Curry of the liability of the Treasurer to timely file reports, as well as reminding him that the Post General Election Report would be due December 2, 2010. (Exhibit 16)
34. On November 21, 2010, Mr. Curry electronically filed the 2010 October Quarterly Report, thirty seven (37) days after it became due. (Exhibit 17)
35. On November 30, 2010, Mr. Backer e-mailed Mr. Curry and reminded him that the August 4 RFAI had yet to be responded to, that the Pre-General Election Report was overdue and that the Post-General Election Report was due on December 2, 2010. (Exhibit 18)
36. On December 2, 2010, the 30-Day Post-General Election Report became due, and Mr. Curry did not timely file. Before the report became due, Mr. Curry took no steps to resign as Treasurer. Mr. Curry knowingly and willfully or recklessly failed to file this report.
37. On December 2, 2010, Mr. Curry called Mr. McAllister “to get clarification for the coverage dates for the [Post-General Election Report]. (Exhibit 13)
38. On December 2, 2010, Mr. Curry e-mailed Capt. John to say that “[he] spoke to [his] FEC contact [...] who said a post-election report is all that is needed. [The FEC RAD analyst] said the pre-election one was already due and a post-election report as a result would be sufficient.” (Exhibit 19)
39. On December 8, 2010, Mr. Curry sent an e-mail to Capt. John and others at CVFC stating: “As you know I am no longer the Treasurer. My last conversation with the FEC they were reluctant to give me any information because I am no longer the Treasurer. My obligations were fulfilled with the 3rd Qtr. report which has been filed.” (Exhibit 20)

40. On December 8, 2010, Capt. John sent an e-mail to Mr. Curry reminding Mr. Curry to make use of the bookkeeper that the PAC retained in October to assist with filings, continuing to demonstrate his ongoing performance as Treasurer. (Exhibit 42)
41. On December 9, 2010, Mr. Curry replied to Capt. John's e-mail by indicating that it could be useful to have the bookkeeper's assistance, continuing to demonstrate his ongoing performance as Treasurer. (Exhibit 42)
42. On December 10, 2010, Mr. Curry received an e-mail from Mr. Backer with detailed instructions on how to resign as treasurer. (Exhibit 43)
43. On December 12, 2010, Mr. Curry sent Capt. John an e-mail stating, "When you speak to the FEC tomorrow find out how I need to resign." (Exhibit 44)
44. On December 13, 2010, Capt. John, 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 a [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.” (Exhibit 13)

45. On December 13, 2010, Capt. John circulated an e-mail containing an overview of his conversation with the RAD analyst. This e-mail provided yet another outline of the necessary steps to resign as treasurer, as well as a thorough inventory of the reporting requirements that the PAC needed to satisfy. (Exhibit 44)
46. 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. ...” (Exhibit 13)
47. On December 15, 2010, the FEC purported to find by a vote of 6-0 Reason to Believe (“RTB”) that CVFC PAC violated 2 U.S.C. §434(a) by failing to timely file the October Quarterly Report by October 15, 2010. AF#2199 (Exhibit 21), However, the actual votes cast were 3-0 and the Commissioners so voting did not find RTB but merely did not object to a staff recommendation to find RTB. (Exhibit 48). Both 2 U.S.C. 437g(a)(2) and 11 C.F.R. 111.32 require at least “four affirmative votes” to find RTB.
48. On December 18, 2010, Capt. John sent an e-mail to Mr. Backer and others outlining the many steps that the PAC’s bookkeeper had taken in order to obtain accurate and sufficient records of the PACs funds. (Exhibit 44)
49. On December 18, 2010, Mr. Curry forwarded the August 4 RFAI to other members of the PAC for the first time. (Exhibit 45)

50. On December 20, 2010 the FEC sent a Notice of Failure to File regarding the Post-General Election Report. (Exhibit 22)
51. On December 22, 2010, the FEC sent an RFAI regarding the October 2010 Quarterly Report. (Exhibit 23)
52. On December 30, 2010, Mr. Curry forwarded the RTB regarding the October Quarterly Report to other PAC members via e-mail and merely stating “this related to the October report which you have already filed so it may be moot.” (Exhibit 46)
53. 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....” (Exhibit 13)
54. On January 11, 2011, CVFC PAC filed the delinquent Pre-Election Report and Post-Election Reports, which were due on October 25, 2010 and December 2, 2010, respectively. (Exhibits 24 & 25)
55. On January 12, 2011, an amended F1 Statement of Organization was filed that replaced Mr. Curry as Treasurer with David Wiggs. (Exhibit 26)
56. 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, the October 2010 Quarterly Report, the Pre-Election Report and the Post-Election Report. (Exhibit 27, 28, 29, 30 & 31)
57. 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....”

(Exhibit 13)

58. On February 4, 2011, Mr. Backer returned a voice message left by Sari Pickerall, an FEC employee, regarding the [RTB] issued by the FEC that Mr. Backer was not previously aware of. “[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” (Exhibit 13)
59. 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...” (Exhibit 13)
60. 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. (Exhibit 13)

61. On March 11, 2011, the FEC purported to find reason to believe by a vote of 6-0 that CVFC PAC's Pre-General Election Report was filed after the deadline of October 21, 2010. (Exhibit 32). However, the actual votes cast were 2-0 and the Commissioners so voting did not find RTB, but merely did not object to a staff recommendation to find RTB. (Exhibit 49). Both 2 U.S.C. 437g(a)(2) and 11 C.F.R. require at least "four affirmative votes" to find RTB.
62. 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. (Exhibit 10)
63. 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. (Exhibit 33)
64. On March 25, 2011, the FEC purported to find reason to believe that CVFC PAC's 30 Day Post-General Election Report was filed after the deadline of December 2, 2010. (Exhibit 34). However, the actual votes cast were 3-0 and the Commissioners so voting did not find RTB but merely did not object to a staff recommendation to find RTB. (Exhibit 50). Both 2 U.S.C. 437g(a)(2) and 11 C.F.R. 111.32 require at least "four affirmative votes" to find RTB.

65. On March 31, 2011, Capt. John sent a letter to the FEC to challenge the RTB finding with respect to the Post 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. (Exhibit 35)
66. On June 16, 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 the October 2010 Quarterly Report. (Exhibit 36)
67. On June 20, 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. (Exhibit 37)
68. 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. (Exhibit 38)
69. 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. (Exhibit 47). Notably, the OGC in Part III heading of its memorandum concluded that CVFC PAC's allegations "**MIGHT JUSTIFY PURSUING [THE FORMER] TREASURER PERSONALLY.**" (p.3) and that the "Commission could conclude that [Mr. Curry's] actions constituted a reckless failure to fulfill his duties as treasurer." (p. 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.

70. 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 USC 434(a) and to assess respective penalties of \$4,400, \$3,300, and \$990 against them for an aggregate of \$8690. (Exhibit 39). Notably, Ms. Brown requested that "the Commission consider the issue of the [former] Treasurer's personal responsibility in these matters." Id. at 3.
71. On October 27, 2011, 125 days since CVC PAC's response of June 24, the Commission by a notational vote of 6-0 without meeting and without providing plaintiffs with an opportunity to be heard, summarily adopted the Reviewing Officer's recommendation and purported to make a final determination that the CVFC PAC and Mr. Wiggs in his official capacity as the current treasurer 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, and assessing 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, for an aggregate amount of \$8690. (Exhibit 39). However, the Commission failed to address the request by its Chief Compliance Officer to 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. (Exhibit 51). The Commissioners did not make a final determination of liability but per their notation ballots cast, "approved" the staff recommendation to make a final determination. (Exhibit 52). The Commission also

did not give CVFC PAC an opportunity to be heard before the full Commission before purporting to make its final determination.

72. On November 4, 2011, notice of the final determination was sent to CVFC PAC. (Exhibit 40) by certified mail.. Notice was received by mail on November 10, 2011.
73. On November 23, 2011, CVFC PAC 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 USC 437g(a)(C)(ii). 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. (Exhibit 41). The FEC responded by letter on December 9, 2011 rejecting the request for reconsideration. (Exhibit 53).

## COUNT I

### **THE COMMISSION'S PURPORTED ADVERSE DETERMINATIONS FOR ALL THREE FILINGS ARE NULL AND VOID AND OTHERWISE INVALID BECAUSE THEY ARE PROCEDURALLY DEFECTIVE**

74. Plaintiffs re-allege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.
75. Pursuant to 2 U.S.C. 437g(a)(2) and 11 C.F.R. 111.32, the Commission may not initiate an enforcement action unless it first “determines by an affirmative vote of 4 of its members, that it has reason to believe” that a violation has occurred. As evidenced by the votes actually cast by notation ballots, the “no objection votes” cast were 3-0 for AF#2199, 2-0

for AF#2312, and 3-0 for AF#2355 and thus none of those votes were legally sufficient in number to initiate any of the enforcement actions in this case. See Exhibits 48, 49, and 50.

76. The ballots cast were “Do Not Object” votes and thus did not constitute “affirmative votes” to find “reason to believe” as required by law, but merely did not object to the staff report recommending that the Commission find reason to believe.
77. In addition, the purported final determination on October 27, 2011 was invalid since the ballot votes merely noted the Commissioner’s approval of the staff recommendation but did not constitute a final determination of liability as required by law.

## COUNT II

### **THE COMMISSION’S FINAL ADVERSE DETERMINATION IS INVALID BECAUSE THE COMMISSION FAILED TO PROVIDE PLAINTIFFS WITH A HEARING**

78. Plaintiffs re-allege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.
79. Pursuant to 2 USC 437g(a)(C)(ii), “the Commission may not make any determination adverse to a person under clause (i) until the person has been given...an opportunity to be heard before the Commission.”
80. On October 27, 2011, the Commission purported to make a final determination regarding liability and assessment of penalties against the plaintiffs without giving them an opportunity to be heard before the Commission.
81. Congress was specific in other parts of 2 USC 437g affording respondents at earlier stages of the enforcement process with the opportunity to file written statements and briefs, e.g..2 USC 437g(a)(1) (respondent “shall have the opportunity to demonstrate in writing...that no action should be taken against such person”); 2 USC 437g(a)(4)(A)(i) (respondent “may

submit a brief” before Commission finds “probable cause” to believe a violation occurred). However, before a final determination is made, the respondents are required to be “heard before the Commission”, i.e., an in-person hearing before the Commission.

82. Plaintiffs were not given an opportunity for a hearing, did not waive their right to a hearing, and specifically reminded the Commission of its non-discretionary duty to provide plaintiffs with a hearing in their November 23, 2011 letter to the FEC.
83. Accordingly, the final determination by the Commission on October 27, 2011 was not issued in accordance with law and is therefore premature, null and void, of no legal effect, and should be set aside. The failure to provide plaintiffs with a hearing also violated their right to Due Process.

### COUNT III

#### **THE FORMER TREASURER OF CVFC PAC IS SOLELY LIABLE IN HIS PERSONAL CAPACITY FOR FAILING TO FILE THE REPORTS IN QUESTION**

##### **A. TREASURERS’ PERSONAL LIABILITY UNDER FECA**

84. Plaintiffs re-allege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.
85. The Act clearly intends to impose any liability on the Treasurer as the only statutory officer required of political committees. “Treasurer of a political committee shall file reports of receipts and disbursements in accordance with the provisions of this subsection. The Treasurer shall sign each such report.” 2 USC 434(a)(1).
86. 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 CFR part 104.” **The regulations do not impose any duty on the political committee to file a report.** Further, under 11 C.F.R.

104.14(d), “Each treasurer of a political committee... *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.” (Emphasis added). *See also FEC v. Toledano*, 317 F3d 939, 947 (9<sup>th</sup> Cir. 2002) (“Treasurers may be held personally liable for failing to fulfill their responsibilities under the Act and the Commission’s regulations.”).

87. The Act imposes legal obligations on Treasurers of political action committees, “the violation of *which makes them personally liable.*” 70 Fed. Reg. 1 at 5 (Jan., 3, 2005) (emphasis added), noting the absence of permissive language, such as “may”; *See e.g.* 2 U.S.C. 432(c); 2 U.S.C. 432(d);
88. 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.
89. Despite the Commission’s own regulations unequivocally and unconditionally mandating that a treasurer “shall be personally liable” for failing to file the required reports in all cases, the Commission has articulated a discretionary 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).

90. Knowledge of a legal obligation can be found where the treasurer is expressly made aware of his responsibility by others in writing, and/or by the Commission staff, to timely file reports as required by 2 U.S.C. §434(a), and the deadlines and coverage dates therein.
91. 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. FEC*, 628 F.2d 97, 110 (D.C. Cir. 1980). Willful conduct may be found where the Treasurer, having been made aware of his legal duties, chooses not to comply with them.
92. Recklessness can be found where a Treasurer 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 (Bryan A. Garner et al. eds., West Publishing 8<sup>th</sup> ed. 2007).

**B. MR. CURRY’S KNOWING, WILLFUL, AND/OR RECKLESS FAILURE TO COMPLY WITH THE ACT.**

93. Plaintiffs re-allege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.
94. Mr. Curry’s conduct meets the standard of “knowing”, in that he received repeated written and oral communications, including materials provided to him by the FEC, expressly informing him of his responsibility as Treasurer.

95. Pursuant to Paragraphs 15 and 18, Mr. Curry filed the April and June Quarterly Reports on or before the deadline of the 15<sup>th</sup> day of the month, demonstrating that he had knowledge of the deadline for filing quarterly reports.
96. Pursuant to Paragraph 23, on October 15, 2010, legal counsel for CVFC PAC sent Mr. Curry an e-mail reminding him that the 2010 October Quarterly Report was due that day, and reminding Mr. Curry of the due dates and coverage dates for the Pre- and Post-General Election Reports.
97. Mr. Curry's conduct was willful in that he was clearly aware of, but made a decision not to fulfill, his legal obligation as Treasurer.
98. Pursuant to Paragraph 28, Mr. Curry telephoned the FEC's Mr. McAllister November 3, 2010 to apologize for not submitting the 2010 October Quarterly Report on time, stating "that he was very busy and would try to get it in by the end of the week."
99. Pursuant to Paragraph 33 and 35, Mr. Curry understood his responsibility to complete the Pre and Post General Election Reports, yet declined assistance from the Assistant Treasurer and others in carrying out this obligation.
100. Pursuant to Paragraph 29, 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."
101. Mr. Curry's conduct was reckless in that he failed to meet his obligations and refused assistance despite the fact that he had full knowledge of the potential consequences of failing to timely file, and maintained sole possession of the electronic filing password and financial records, preventing CVFC PAC from otherwise filing.

102. Pursuant to Paragraph 19, Mr. Curry failed to timely respond to the FEC's August 4, 2010, RFAI, even though he the RFAI explicitly states the serious consequences that could result from failure to respond. Further, Mr. Curry failed to timely file the October Quarterly Report despite clear notice that substantial penalties could result from failure to submit on time.
103. Pursuant to Paragraph 25, Mr. Curry expressed his intention to complete the Pre- and Post-General Election Reports on time and discouraged the PAC from obtaining assistance in completing those reports
104. Mr. Curry was particularly reckless in first indicating an interest in resigning as Treasurer, but then committing to complete the work of the Treasurer. Mr. Curry did not resign, despite repeated inquiries and having received information from CVFC PAC legal counsel (Paragraph 21) and the FEC (Paragraph 46) as to how to resign if he desired, and continuing to occupy the role and perform as Treasurer.
105. Mr. Curry's failure to timely file the required reports was a knowing, willful, and/or reckless violation of the reporting requirements and he is therefore personally liable for any fines imposed for the late reporting. The Commission failure to find that Mr. Curry was personally liable for the fines imposed for his misconduct was arbitrary, capricious, an abuse of discretion, and contrary to law.
106. The Commission failure to consider the request by its 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 law.

107. The Commission and its staff had “reason to believe” that Mr .Curry violated the law by failing to timely file reports based upon information that it ascertained in the normal course of carrying out its supervisory responsibilities but arbitrarily and capriciously failed to take any enforcement action against him for such violations under 2 USC 437g.

#### COUNT IV

**CVFC PAC AND ITS CURRENT TREASURER ARE NOT LIABLE FOR THE MALFEASANCE OF THE FORMER TREASURER, PARTICULARLY WHEN CVFC PAC USED ITS BEST EFFORTS TO CORRECT THE MISCONDUCT BY FILING THE REQUIRED REPORTS AS SOON AS WAS PRACTICABLE UNDER THE CIRCUMSTANCES**

108. Plaintiffs re-allege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.
109. The FEC’s Reason To Believe finding did not identify 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 CVFC PAC or its current Treasurer in his official capacity to be liable.
110. The 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.
111. The FEC defines “best efforts” under 11 CFR 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.”

112. 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.

113. 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 remission or reduction in the fines assessed were arbitrary, capricious, an abuse of discretion, contrary to law and a violation of Due Process.

114. 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 CFR 111.35, plaintiffs submit that regulation is arbitrary, capricious, unreasonably narrow, contrary to law and a violation of Due Process.

115. 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.

## **COUNT V**

### **THE COMMISSION UNLAWFULLY FAILED TO MITIGATE THE FINES IMPOSED ON CVFC PAC AND ITS CURRENT TREASURER**

116. Plaintiffs re-allege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

117. Both the Office of General Counsel in their August 18, 2011 memo (Para. 69) and the Reviewing Officer in her October 11, 2011 Final Determination Recommendation to the Commission (Para. 70) indicated that the personal liability of the former treasurer could serve to mitigate the fine against the PAC and its current treasurer.
118. Assuming, *arguendo*, that the plaintiffs are liable for the former treasurer's failure to file timely reports, the Commission failed to exercise its discretion or abused its discretion in failing to mitigate or reduce the fine in whole or in part due to the misconduct and personal liability of the former treasurer.
119. The fines imposed on plaintiffs aggregating \$8,690.00 for filing its reports late are unreasonable and are greater than fines that the FEC has imposed on other political and candidate committees who are found to violate more serious substantive provisions of the law, such as receiving and failing to cure excessive contributions, or receiving prohibited contributions from corporations or foreign nationals.

## COUNT VI

### **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**

120. Plaintiffs re-allege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.
121. The Commission's final determination that the 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.
122. The unlawful finding of liability and imposition of fines totaling \$8,690 on the plaintiffs is a significant sum that would have a negative impact on the exercise of CVPC PAC's

political speech under the First Amendment. The mere finding that the plaintiffs are guilty of violating federal election laws stigmatizes the PAC and its current treasurer as a lawbreaker and would likely discourage donors from making contributions to the PAC or otherwise volunteering or associating with the PAC, its 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.

123. Currently, the CVPC PAC has less than \$2,000 cash on hand. Its financial situation has worsened due to the expenditure of human and monetary resources to defend itself in this unreasonable enforcement action. Furthermore, the uncertainty during the inordinate delay by the Commission to decide whether the PAC would be held liable and subject to heavy fines hampered its fundraising efforts and thus further infringed on the PAC's First Amendment rights and violated due process. 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 effectively bankrupt the PAC and force it to disband.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs pray this Court issue:

124. A declaratory judgment that the Commission's purported "reason to believe" findings are null and void and otherwise without legal effect because they did not constitute the four affirmative votes necessary to initiate any of the three enforcement actions as required by 2 U.S.C. 437g(a)(2) and 11 C.F.R. 111.32, nor do they constitute "affirmative votes" and

should be enjoined and set aside because those proceedings were not in accordance with procedures required by law. 5 U.S.C. 706(2)(D).

125. A declaratory judgment that the Commission's purported Final Determination of October 27, 2011 is null and void because the Commissioners notation ballot votes did not make a final determination of liability and assessed any fines but merely "approved" a staff recommendation that the Commission should make a final determination, and should be enjoined and set aside as not in accordance with procedures required by law. 5 U.S.C. 706(2)(D).
126. A declaratory judgment that the Commission's purported Final Determination of November 4, 2011 is null and void because the plaintiffs were not given an opportunity to be heard which was a statutory prerequisite to a final determination and violated due process and enjoin its enforcement.
127. A declaratory judgment that the Commission's Final Determination is arbitrary, capricious, an abuse of discretion, a failure to exercise discretion, a violation of Due Process and the First Amendment and otherwise not in accordance with law and enjoin its enforcement.
128. A declaratory judgment that CVFC PAC and its current Treasurer are not liable for the reporting violations as determined by the Commission and are not subject to any civil penalties under FECA or FEC regulations, or alternatively, that the Commission's failure to consider plaintiffs' best efforts as opposed to that of the former Treasurer and mitigation of the fine due to the malfeasance of the former Treasurer was arbitrary, capricious, an abuse of discretion, a failure to exercise discretion and otherwise contrary to law, and/or that the "best efforts" regulation, 11 CFR 111.35.

