UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SPEECHNOW.ORG, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	Civ. No. 08-248 (JR)
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	
	)	
Defendant.	)	

FEDERAL ELECTION COMMISSION'S REPLY ARGUMENTS RELATED TO PLAINTIFFS' FIRST MOTION IN LIMINE

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FEC Facts	=	FEC's Proposed Findings of Fact, Oct. 28, 2008 (Dkt. # 45)
FEC Resp. Mem.	=	FEC's Memorandum in Support of Response to Plaintiffs' Proposed Findings of Fact, Nov. 24, 2008 (Dkt. # 57-2)
FEC Resp. to SN Facts	=	FEC's Response to Plaintiffs' Proposed Findings of Fact, Nov. 21, 2008 (Dkt # 55)
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INTRODUCTION

In the midst of the parties' briefing on proposed findings of fact, plaintiffs (collectively "SpeechNow") filed two purported "motions in limine" that seek to prevent the Court from considering most of the Federal Election Commission's ("FEC" or "Commission") evidence and proposed facts. As the Court stated in its Order of December 9, 2008 (Doc. 61), those motions "will be considered arguments" about the Court's consideration of the Commission's evidence and proposed facts, and the Commission "may respond to those arguments in the context of its general briefing . . ." For the convenience of the Court, in this reply the Commission responds to the arguments SpeechNow has raised in its "First Motion in Limine."

SpeechNow's broad attack on the Commission's evidence and proposed facts suffers from numerous flaws: It ignores the key difference between adjudicative and legislative facts, conflates the distinction between an expert *witness* and expert *testimony*, attempts to deprive the Commission of the benefit of the work product privilege, and disregards the limits of the hearsay rule. Moreover, to the extent that any technical violations of the discovery deadlines occurred, SpeechNow is unable to show that it has suffered any harm that would warrant the extreme remedy of disregarding any of the Commission's evidence. Indeed, in many instances the timing of SpeechNow's actions were no different from those about which plaintiffs complain, and the record demonstrates that SpeechNow declined to take advantage of opportunities for additional discovery that would have cured the alleged shortcomings it perceives. In sum, there is no basis for excluding or disregarding any of the Commission's evidence or proposed findings of fact.

Throughout their responses regarding the Commission's Proposed Findings of Facts, the plaintiffs make a number of exaggerated allegations, incorrectly accusing the Commission of violating various Federal Rules of Evidence and Civil Procedure. Plaintiffs seek to have nearly

all of the Commission's evidence individually excluded, culminating in a request for the Court to "disregard" the Commission's Proposed Findings of Fact submission "in its entirety." (*See* SN Resp. to FEC Facts at 40.) In fact, plaintiffs commit a number of Federal Rules violations themselves and made some of the same decisions about disclosure in this "legislative facts" case about which they complain. For example, plaintiffs submitted expert reports with their proposed findings of fact that had been revised from when they had been submitted at the expert report deadline several months earlier, including testimony by Jeffrey Milyo that was materially different from his report. (*See* FEC Resp. to SN Facts at 29-32.) Plaintiffs produced a previously undisclosed and materially different draft of Rodney Smith's expert report by email during Mr. Smith's deposition. (*Id.* at 24-26.) Plaintiffs failed to make many of the expert disclosures required by Rule 26(a)(2) when they disclosed Mr. Smith as an expert. (*Id.* at 23-24.) Plaintiffs did not produce a number of publications relied upon by their experts (s*ee, e.g.,* SN Rebuttal Facts ¶¶ 182, 183, 184, 186, 192), and introduced a number of newspaper articles and other sources that would be considered hearsay if not offered to support legislative facts. (*See e.g.*, SN to FEC Facts at 82 n.24; SN Facts ¶ 128.) The Commission has noted these issues where appropriate in order to help the Court evaluate the merit of the plaintiffs' proposed facts. If the Court intends on granting the plaintiffs' requests for more draconian remedies, the Commission asks that the parties be treated with parity.

I. The Court May Accept the Commission's Evidence and Proposed Findings of Fact Because They Support Legislative Facts

Virtually all of the Commission's proposed findings of fact challenged by SpeechNow are not "adjudicative facts" about plaintiffs that would be subject to the Federal Rules of Evidence, but "legislative facts" that help the courts decide questions of law and policy. *See* Advisory Committee Notes (1972) to Fed. R. Evid. 201(a). As we explain in detail in Section I

of our accompanying Memorandum in Support of Reply Regarding Proposed Findings of Fact ("FEC Reply Mem."), the legislative facts at issue here are relevant to the broad policy concerns raised by plaintiffs' constitutional challenge and may be considered by the courts regardless of the usual evidentiary requirements for adjudicative facts.

II. Commission Witnesses Rozen and Johnson Were Properly Designated Fact Witnesses and Rule 26(a) Poses No Bar to Testimony By Them or Witnesses Yowell and Bright

A substantial portion of plaintiffs' Motion consists of strained argument regarding whether several of the Commission's witnesses and declarations were disclosed in a "timely manner." The cornerstone of this argument is that three of the Commission's witnesses should have been disclosed by August 15, 2008,[1] the deadline for expert disclosures according to the parties' Joint Scheduling Report. Declaration of Robert Gall in Support of Plaintiffs' First Motion in Limine ("Gall Decl."), Exh. GG. Plaintiffs, however, wrongly construe the statements of Ross Johnson and Robert Rozen, two of the Commission's lay witnesses, as expert testimony. *See* 1st Mot. at 2-18. Because this characterization is incorrect, the expert disclosure deadline is irrelevant, and, for this reason alone, the portions of the plaintiffs' Motion regarding these witnesses should be denied.

Scattered throughout their argument about the expert disclosure deadline, and in reference to two of the Commission's other witnesses, plaintiffs also make various other complaints about the timing of the Commission's supplemental initial disclosures and production of witness declarations. These arguments should be rejected because (i) plaintiffs ignore the significance of the fact that the witnesses at issue testify regarding legislative facts; (ii) the

[1] Specifically, plaintiffs claim that Ross Johnson, Robert Rozen, and P. Michael Calogero should have been disclosed as expert witnesses. *See* SN 1st Mot. at 2-18. The admissibility and timeliness of Calogero's declaration is discussed *infra* pp. 23-27.

witnesses were disclosed, or plaintiffs were otherwise on notice of such witnesses, at the appropriate time; (iii) plaintiffs had the opportunity, and in *every instance*, did, in fact, propound written third-party discovery on the challenged witnesses; (iv) the plaintiffs had no right to declarations or draft declarations protected by the attorney work-product doctrine; and (v) any untimely disclosures were substantially justified. Plaintiffs' heated mischaracterizations of the discovery proceedings in this case do not justify excluding the Commission's evidence.

A. The Testimony of Ross Johnson and Robert Rozen is Proper Lay Testimony That Is Not Subject to the Expert Disclosure Deadline

Plaintiffs wrongly assert that the testimony of Ross Johnson and Robert Rozen should be excluded based on the expert disclosure requirements. However, plaintiffs fail to demonstrate that Johnson's and Rozen's statements are actually expert testimony and cite no legal authority on this point. *See* SN 1st Mot. at 2-20. In fact, their testimony is admissible pursuant to Rule 701 because it (a) is "rationally based" on their own perceptions, not those of others; (b) will aid the Court in determining the legislative facts at issue; and (c) is "not based on scientific, technical, or other specialized knowledge within the scope of the Rule 702." Fed. R. Civ. P. 701. Because plaintiffs' characterization of certain parts of the declarations as expert testimony is without merit, the expert disclosure requirements are irrelevant, and the relevant statements are admissible under Rule 701 as proper opinion testimony by lay witnesses.

Before addressing plaintiffs' specific allegations, it is important to note that the relevant inquiry is not whether the Commission's witnesses have expertise, but the character of their testimony itself. As the Advisory Committee on Evidence Rules' notes to Rule 701 explain, the 2000 amendment that added part (c) to Rule 701 "does not distinguish between expert and lay *witnesses*, but rather between expert and lay *testimony*" (emphasis in original). Moreover, "[t]he fact that the [witness] based his opinion on specialized knowledge and might have been able to

offer his opinion as an expert does not mean he was required to do so." *Williams Enterprises, Inc. v. Sherman R. Smoot Co.*, 938 F.2d 230, 234 (D.C. Cir. 1991).[2]

Both Rozen and Johnson testified about facts and opinions that are clearly within their personal knowledge. (*See* Declaration of Chairman Ross Johnson ("Johnson Decl."), FEC Exh. 2; Declaration of Robert Rozen ("Rozen Decl."), FEC Exh. 3.) This is appropriate lay testimony because "[a]s long as [a witness] ha[s] personal knowledge of the facts, he [i]s entitled to draw conclusions and inferences from those facts — regardless of whether he applied any specialized experience." *Williams Enterprises, Inc.*, 938 F.2d at 234. Rozen has worked for decades on Capitol Hill and as a lobbyist, and has personal knowledge about fundraising from multiple perspectives. (Rozen Decl. ¶¶ 2-4, FEC Exh. 3.) Johnson had been a state representative for 26 years before joining California's Fair Political Practices Commission and subsequently becoming its Chairman. (Johnson Decl. ¶¶ 2-3, FEC Exh. 2). Their testimony does not consist of any technical application of specialized skills, but rather describes various facts about fundraising and spending that they have witnessed and the opinions they draw from that experience. As the Advisory Committee notes explain, testimony based on that kind of experience was meant to be permitted under Rule 701 (emphasis added):

> Such opinion testimony is admitted not because of experience, training or specialized knowledge *within the realm of an expert*, but because of the particularized knowledge that the witness has by virtue of his or her position in the business. *The amendment does not purport to change this analysis.*

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[2] Although *Williams Enterprises* was decided before the 2000 amendments to Rule 701, the "Advisory Committee's position was that the amendment did not work a sea change to the rule." *United States v. Perkins*, 470 F.3d 150, 155 n.8 (4th Cir. 2006) (allowing lay testimony by police officers about whether reasonable force was used against a suspect when officers had personal knowledge of the events).

Rozen and Johnson testify about the "business" of politics as they have experienced it, without any application of theoretical constructs that might require the work of an expert in political science or statistics. As the Advisory Committee notes explain, quoting *State v. Brown*, 836 S.W.2d 530, 549 (1992) (emphasis added),

> the distinction between lay and expert witness testimony is that lay testimony "*results from a process of reasoning familiar in everyday life*," while expert testimony "results from a process of reasoning which can be mastered only by specialists in the field."

Johnson offers such common-sense testimony; for example, besides relating numerical information about campaign spending in California about which he has "personal knowledge" (*e.g.*, Johnson Decl. ¶ 5, FEC Exh. 2), he explains the difficulty policing coordinated expenditures based on his own efforts to do so (Johnson Decl. ¶ 10, FEC Exh. 2):

> Independent expenditures, by definition, are not supposed to be coordinated with the candidates they support. Of course, such coordination would be difficult, if not impossible, to prove; however, there is reason to believe that cooperation occurs in various ways. For example, while I was serving as the Republican leader in the Assembly, an Assembly candidate came to me for an endorsement. To demonstrate the legitimacy of the campaign, the candidate told me that a professional association had directly committed to making a $75,000 independent expenditure in support. Subsequently, that association did, in fact, make such an independent expenditure on the candidate's behalf.

Similarly, as Rozen's testimony makes clear, his reasoning applies common sense, not scholarly abstractions or models, to the behavior he has witnessed. For example, after explaining the different degrees of appreciation Members have shown for donations of varying sizes, he explains (Rozen Decl. ¶ 13, FEC Exh. 3):

> Ordinarily, people feel inclined to reciprocate favors. Do a bigger favor for someone — that is, write a larger check — and they feel even more compelled to reciprocate. In my experience overt words are rarely exchanged about contributions, but people do have understandings: the Member has received a favor and feels a natural obligation to be helpful in return. This is how human relationships work. The legislative arena is the same as other areas of commerce and life.

These kinds of opinions based on personal experience apply "a process of reasoning familiar in everyday life" (Advisory Committee notes), not the application of specialized knowledge.

This distinction was further explored in *Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co., Ltd.*, 320 F.3d 1213, 1222 (11th Cir. 2003), when the court explained that when Rule 701 was amended in 2000, the Advisory Committee "carefully considered" the Department of Justice's concerns that "a determination that anyone who testifies based on specialized knowledge they possess, whether through experience or professional learning, is subject to expert disclosure rules." The Committee thus

> determined that further revision was necessary in order to clarify that the amendment was not intended to "prohibit lay witness testimony on matters of common knowledge that traditionally ha[d] been the subject of lay opinions." In order to address the DOJ's concern, the Committee added a further modification of the words "specialized knowledge." As revised, the Rule now "provide[d] that testimony [could not] qualify under Rule 701 if … based on 'scientific, technical or other specialized knowledge *within the scope of Rule 702*.' " (emphasis in original).

320 F.3d at 1222-23 (citations to Advisory Committee memorandum omitted). The *Tampa Bay* decision thus upheld the admissibility under Rule 701 of testimony from witnesses with years of experience in the shipbuilding industry about the reasonableness of charges incurred for major repair expenses. *Id.* Simply stated, "opinion testimony based on … years of experience and personal observations a[re] permitted by Fed. R. Evid. 701." *Webster v. Fujitsu Consulting, Inc. (In re NETtel Corp.),* 369 B.R. 50, 65 (Bankr. D.D.C. 2007) (rejecting an attack on a lay witness based on the "lack of disclosure in discovery and the alleged expert opinion character of the declaration" because the declaration was based on "personal experiences").

The testimony of Johnson and Rozen will help the Court in finding the legislative facts at issue here, and SpeechNow does not assert otherwise. Johnson's testimony is especially

informative because, as a longtime state legislator and Chairman of the California Fair Political Practices, he has seen first hand the corrupting effects of unregulated contributions to groups that make independent expenditures. (*See* Johnson Decl. ¶¶ 2-4, FEC Exh. 2.) As noted by plaintiffs, Rozen offered similar testimony in *McConnell*, also as a lay witness, and the Court relied on his observations in finding relevant legislative facts. (1st Mot. at 11; *see e.g.*, *McConnell*, 251 F. Supp.2d at 472, 485, 489.) In sum, the usefulness of Johnson's and Rozen's testimony plainly fulfills the requirements of Rule 701. Johnson and Rozen are not expert witnesses in this case and, accordingly, the Commission was not required to make expert disclosures about them. As discussed below, plaintiffs were made aware of these lay witnesses at the proper time and propounded discovery on both individuals (including a deposition of Johnson). Plaintiffs' motion regarding these witnesses thus has no merit and should be denied.

B. None of the Commission's Witnesses Should be Excluded Due to the Disclosure Requirements of Rule 26(a)

1. Application of the Disclosure Procedures to Legislative Fact Witnesses Could Not Work in the Manner Plaintiffs Suggest

Plaintiffs claim that several witnesses' testimony should be excluded based on the initial disclosure requirements of Fed. R. Civ. P. 26(a) and the sanctions provided in Fed. R. Civ. P. 37(c)(1).[3] Plaintiffs' requests for exclusion should be denied primarily because plaintiffs knew about the witnesses at the appropriate time, took advantage of the opportunity to propound discovery on the relevant individuals, and had no right to the witnesses' declarations before they were filed. The disclosures were generally proper and the plaintiffs suffered no harm. Moreover, because these witnesses testified about legislative facts concerning issues such as

[3] Plaintiffs argue that the Declarations of Kevin Yowell and Michael Bright should be excluded on these grounds (*see* Motion at 30-31) and mention in a footnote that the Rozen and Johnson Declarations should be excluded for the same reasons if they are in fact found not to be expert witnesses (*see* Motion at 11-12 n.5).

independent expenditures and the potential for corruption, rather than adjudicative facts about the plaintiffs, the requirements for initial disclosures must be assessed with that distinction in mind.

On June 6, 2008, when the Commission made its initial disclosures, it listed every witness of which it was aware that might have information regarding SpeechNow and related adjudicative facts. (*See* Gall Decl., Exh. W.) Since June 6, the Commission has not disclosed or relied on any additional witnesses that had actual knowledge of SpeechNow, the plaintiffs, or their activities. What the Commission has done is identify individuals who have knowledge of the relevant legislative facts, including general information about large contributions and independent expenditures and their relation to undue influence, corruption, and the appearance thereof. (*See* Declaration of Graham M. Wilson in Support of Response to Plaintiffs' First Motion in Limine, FEC Exh. 167 ("Wilson Decl.") Exh. 1, Defendant FEC's Supplement to Its Initial Disclosures (August 14, 2008); Exh. 2, Defendant FEC's Supplement to Its Initial Disclosures (September 12, 2008); Exh. 3, Defendant FEC's Supplement to Its Initial Disclosures (September 17, 2008), Exh. 4, Defendant FEC's Fourth Supplement to Its Initial Disclosures (September 26, 2008), and Exh. 5, Defendant FEC's Fifth Supplement to Its Initial Disclosures (October 1, 2008).)

This case does not involve a discrete event like a traffic accident, where only a certain number of people actually saw what happened and who, once identified, must be immediately disclosed to the opposing side if a party "may" use the witness, Fed R. Civ. P. 26(a)(1)(A)(i); there are many thousands of individuals who have relevant knowledge regarding the legislative facts in this case. Under plaintiffs' theory of initial disclosures — requiring disclosure of anyone about whom the Commission was arguably on notice — the Commission would have been

required to list, *inter alia*, every group or individual that ever made an independent expenditure, every individual that ever contributed to a group that made an independent expenditure, every candidate or elected official that benefited from an independent expenditure, every lobbyist who had advised clients about achieving access to a candidate or officeholder through contributing to supportive interest groups, and numerous other types of political operatives, advertising agencies, fundraisers, and the like. However, it would obviously have been both impracticable and pointless to engage in such an exercise. For legislative facts, more investigation and contemplation of and by a potential witness is necessary; counsel must determine whether a potential witness has information that will actually aid the Court, and individuals need to decide whether they are willing to provide sensitive First Amendment testimony despite their status as non-parties who may jeopardize their careers by speaking out about actual or potential corruption and its appearance.

Throughout the discovery period, the Commission identified several events it found relevant to plaintiffs' claims: *e.g.*, the California FPPC's investigation of independent expenditures, independent expenditures allegedly made to influence a West Virginia Supreme Court Justice, independent expenditures allegedly used to buy favors from Wisconsin State Senator Charles Chvala, and the Wyandotte Tribe's alleged attempt to bribe Representative Vincent Snowbarger by offering to make an independent expenditure on his behalf. (*See* Initial Disclosures, Gall Decl., Exh. W; Supplemental Initial Disclosures (August 14, 2008), Wilson Decl. Exh. 1[4].) The Commission then promptly disclosed documents regarding these events,

[4] As part of its August 14, 2008 Supplement to Its Initial Disclosures, the FEC produced, in part, the following materials, listed here with their corresponding FEC Exhibit Number, where applicable:

- Steven Walters and Patrick Marley, *Chvala Reaches Plea Deal,* Milwaukee J. Sentinel, Oct. 24, 2005., FEC Exh. 91;

generally including the names of key individuals, to plaintiffs. *Id.* As discussed below, the disclosure of these documents generally satisfied all of the Commission's disclosure obligations. (*See infra* Section II.B.2.) Only after the Commission had contacted an individual who had information about these events and ascertained that he or she would indeed provide testimony, did the Commission take the further step of making an additional formal disclosure to plaintiffs. This approach to disclosure is reasonable for legislative fact witnesses and satisfies the requirements of Rule 26(a) and (e).

2. The Commission's Witnesses Were Disclosed or Made Known to the Plaintiffs at the Appropriate Time

When the Commission made its initial disclosures on June 6, 2008, it had not even spoken to any of the witnesses at issue regarding this case. (*See* Wilson Decl. ¶ 7.) Accordingly, the issue here is the duty to supplement. Rule 26(e) provides, in relevant part:

- State's Sentencing Memorandum, *Wisconsin v. Chvala*, No. 02CF2451, Cir. Ct. for the State of Wis., Dane County (Dec. 2005).
- Motion of Respondent Corporations for Disqualification of Justice Benjamin, *Caperton v. Massey Coal Company, Inc.*, No. 98-C-192, Supreme Court of Appeals of West Virginia (Oct. 19, 2005), FEC Exh. 104.
- Brian Ross and Maddy Sauer, *Another Legal Victory for Tough Coal Boss*, ABC NEWS, April 7, 2008.
- Rick Alm and Jim Sullinger, *Congressman Calls Lobbyist's Tactics Illegal*, KANSAS CITY STAR, Oct. 6, 1998 at B1, FEC Exh. 89.
- Tim Carpenter, *Kansas Lawmaker Alleges Bribery Try on Gaming Issues*, LAWRENCE KANSAS JOURNAL-WORLD, Oct. 8, 1998, FEC Exh. 89.
- California Fair Political Practices Commission, *Independent Expenditures: The Giant Gorilla in Campaign Finance*, June, 2008, http://www.fppc.ca.gov/ie/IEReport2.pdf, FEC Exh. 47.
- Chris Dickerson, Company Asks Benjamin to Recuse Himself Again, this Time with Poll Numbers, LEGALNEWSLINE.COM, Mar. 28,2008 *http://www.legalnewsline.com/news/209989-company-asks-benjamin-to-recuse-himself-again-this-time-with-poll-numbers*), FEC Exh. 94;
- Second Renewed Motion for Disqualification of Justice Benjamin, Massey Coal Company, Inc. v. Caperton, Appeal No. 33350, Supreme Court of Appeals of West Virginia (Mar. 28, 2008), FEC Exh. 95.

> (1) A party who has made a disclosure under Rule 26(a) . . . must supplement or correct its disclosure or response:
>
> > (A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, *and if the additional corrective information has not otherwise been made known to the party during the discovery process* or in writing.

Fed. R. Civ. P. 26(e) (emphasis added). While parties "have an obligation to seasonably supplement their Rule 26(a) disclosures and interrogatory responses, such amendments are required only in certain circumstances, such as when the additional information has not otherwise been made known to the other parties during the discovery process." *Gutierrez v. AT&T Broadband,* 382 F.3d 725, 732 (7th Cir. 2004) (upholding district court's decision not to exclude affidavit of undisclosed witness when witness had been mentioned during a deposition). If an undisclosed witness's identity comes to light outside formal disclosures, then there is no violation of Rule 26(e) and no reason to exclude the witness under Rule 37(c)(1). *See Brighton Collectibles, Inc. v. Marc Chantal USA, Inc.*, No. 06-CV-1584, 2008 WL 4001066, at *1 (S.D. Cal. Aug. 28, 2008) (rejecting argument that witnesses should be excluded because defendant "never disclosed [them] either in its initial disclosures under Rule 26(a)(1)(I) or in supplemental disclosures under Rule 26(e)(1)(A)" because the witnesses were identified in a deposition and "through documents produced"); *Rooney v. Sprague Energy Corp.* 519 F. Supp. 2d 110, 116 (D.Me. 2007) (failure to identify a witness separately in initial and five supplemental disclosures did not require excluding witness when he was identified "in passing during a deposition").

Here, the Commission had no obligation to make any formal supplemental disclosure regarding Chairman Ross Johnson or Kevin Yowell because their identities, as well as the subject area of any potential testimony, were made known to plaintiffs during the discovery process. Regarding Chairman Johnson, the Commission's initial disclosures identified a report

published by the California FPPC, *Independent Expenditures: The Giant Gorilla in Campaign Finance*, which identified Chairman Johnson. (*See* Gall Decl. Exh. W; FPPC, *Independent Expenditures: The Giant Gorilla in Campaign Finance*, May 2008, FEC Exh. 47.) This report was the basis for a substantial amount of Chairman Johnson's eventual testimony. (*See, e.g.*, Ross Johnson Deposition Transcript ("Johnson Dep.," FEC Exh. 10 at 31:18-23) ("Basically what I've said is in the report. Those are examples from the report. And it has been out and available, published by the commission, available not just to my fellow commissioners, but to the press and the public generally for months.")) Identifying Chairman Johnson through this report satisfies the requirements of Rule 26(a)(1)(A). *See McKesson Information Solutions, Inc. v. Bridge Medical, Inc.* 434 F. Supp. 2d 810, 813 (E.D. Cal. 2006) (denying a motion to exclude witnesses not included in Rule 26 disclosures because "the challenged witnesses were identified in documents produced . . . during discovery," and accordingly, there was no prejudice); *Wright v. Aargo Security Services*, No. 99 Civ. 9115, 2001 WL 1035139, at *3 (S.D.N.Y. 2001) (refusing to exclude witnesses pursuant to Rule 37(c)(1) when their identities had been made known through personnel forms produced in response to discovery requests). The Commission also produced on August 25, 2008, an audio transcript of an FPPC hearing regarding independent expenditures, beginning with substantive testimony from Chairman Johnson. (*See* Wilson Decl. Exh. 6 (Defendant FEC's Response to Plaintiffs' First Set of Discovery Requests, Response to Document Request No. 19.)) In addition, the Commission produced audio files from a February 14, 2008 hearing conducted by the California FPPC. (FEC Attachments DR19-01.MP3 through DR19-20MP3.)[5]

[5] Plaintiffs apparently claim that Johnson should have been formally disclosed earlier based on emails between counsel for the Commission and Roman Porter, then communications director at the FPPC, from April 2008. However, these communications did not concern

As to Kevin Yowell, the Commission produced on August 15, 2008, several news stories concerning the Wyandotte Tribe's alleged attempt to bribe Representative Vincent Snowbarger; they repeatedly mentioned that Yowell was Rep. Snowbarger's campaign manager at the time. (*See* Supplemental Initial Disclosures (August 14, 2008), Wilson Decl. Exh. 1, attaching Tim Carpenter, *Kansas Lawmaker Alleges Bribery Try on Gaming Issues*, LAWRENCE KANSAS JOURNAL-WORLD, Oct. 8, 1998, FEC Exh. 89.) While lobbyist Michael Bright was not identified by name, the Commission also produced materials regarding the subject matter of his testimony: *quid pro quo* arrangements based on independent expenditures in Wisconsin. (*See* Wilson Decl., Exh. 1). Accordingly, plaintiffs were on notice that this was a series of events on which the Commission might rely, and they were free to locate witnesses or further explore the details of Senator Chvala's crimes.

Likewise, the Commission disclosed to plaintiffs that it would be relying on the record in *McConnell*, where Rozen offered testimony very similar to that presented here. (*See* Wilson Decl. Exh. 6, Defendant FEC's Responses to Plaintiffs' First Set of Discovery Requests at 9, 15 ("The Commission also relies on the record in *McConnell v. FEC*, 540 U.S. 93 (2003) … The Commission also notes that publicly available documents include the record in the Commission's

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Chairman Johnson or any potential testimony; the purpose of the commuications was solely to obtain the audio recording of a public hearing that the FPPC conducted regarding independent expenditures. The Commission appropriately produced the audio files it received from the FPPC on August 25, 2008 with its Responses to Plaintiffs' First Set of Discovery Requests. (*See* Wilson Decl. Exh. 6). Roman Porter was solely an individual at the FPPC that passed along these files. While the Commission inadvertently failed to produce certain emails between it and Mr. Porter until September 30, 2008, this oversight was harmless as the emails solely concerned the audio files already in plaintiffs' possession, several short documents available online from the FPPC or otherwise incorporated into the FPPC independent expenditure report that the plaintiffs already had, and finally, because plaintiffs were able to use these documents in their Rule 30(b)(6) deposition of the FPPC. (*See* Gall Decl. Exh. X.)

2004 Political Committee Status rulemaking, and the public filings in *McConnell v. FEC*, 540 U.S. 93 (2003)."); *McConnell*, 251 F. Supp.2d at 472, 485, 489.)

In any event, the Commission took the additional step of formally disclosing the identities of the witnesses at issue as soon as it was sufficiently clear that the witnesses would actually be providing testimony. These disclosures were timely. Chairman Johnson and Michael Bright were formally disclosed to plaintiffs on September 26, 2008, at the end of the original discovery period. (*See* Wilson Decl. Exh. 4, Defendant FEC's Fourth Supplement to Its Initial Disclosures (September 26, 2008).)[6] While formal supplemental disclosures regarding Yowell and Rozen were not sent to plaintiffs until a few days later, October 1, 2008, these disclosures should also be considered timely because both parties were continuing to conduct discovery and take depositions. As noted in the joint Amendment to Joint Scheduling Report, the parties agreed to take depositions until October 3, 2008. (*See* Wilson Decl. Exh. 8.) For example, plaintiffs took the depositions of Chairman Johnson, in both his individual capacity and as a Rule 30(b)(6) witness for the FPPC, on October 1, 2008. (*See* Ross Johnson Deposition Transcript, FEC Exh. 10.) Even after the October 3, 2008 deadline, plaintiffs served subpoenas on Bright, Yowell, and Rozen on October 7 and 8, 2008, and the Commission did not object to the extent that the witnesses had relevant non-privileged documents. (Wilson Decl. Exh. 9.) Although unnecessary, all of the Commission's formal supplemental disclosures were timely because they occurred while discovery was ongoing; thus, these witnesses' testimony should not be excluded.

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[6] Plaintiffs apparently claim that these disclosures were late because they were made "after the close of business." Motion at 30. If this were the appropriate standard, however, then plaintiffs' Initial Disclosures, expert reports, Responses to Defendant's First Set of Discovery Requests, Second Set of Discovery Requests, and rebuttal expert report, should all be ignored or excluded because they, too, were served or produced to the Commission after the "close of business." (*See* Wilson Decl. ¶ 9, Exh. 7.)

3. If Any Commission Disclosure Was Untimely, the Error Was Harmless or Substantially Justified

Even if any of the Commission's disclosures were technically untimely, none of the witnesses' testimony should be excluded under Rule 37(c)(1) because any such failure was "harmless" or "substantially justified." While plaintiffs refer to sanctions under Rule 37(c)(1) as "automatic," the Court has broad discretion to decide whether to exclude witness testimony under this provision. *See Peterson v. Hantman*, 227 F.R.D. 13 (D.D.C. 2005) ("district courts are entrusted with broad discretion regarding whether to impose sanctions under Rule 37"; no sanction for alleged refusal to produce documents or respond to interrogatories); *Flynn v. Dick Corp.*, 481 F.3d 824, 835 (D.C. Cir. 2007) (remanding to "the district court to *exercise its discretion* in deciding the Rule 37(c)(1) matter") (emphasis added). The sanction is "automatic in the sense that there is no need for the opposing party to make a motion to compel disclosure," not in the sense that a Court should exclude evidence without careful consideration. Wright and Miller, 8A *Fed. Prac. and Proc. Civ. 2d* § 2289.1.

Discretion is also essential because excluding testimony is an extreme remedy. *See Morgenstern v. County of Nassau*, No. 04-CV-0058, 2008 WL 4449335, at *1 (E.D.N.Y. 2008) ("[I]t is well recognized that 'preclusion of evidence pursuant to Rule 37(c)(1) is a drastic remedy and should be exercised with discretion and caution.'") (quoting *Ebewo v. Martinez*, 309 F. Supp. 2d 600, 607 (S.D.N.Y. 2004)). Ultimately, in "exercising [their] broad discretion to determine whether a nondisclosure of evidence is substantially justified or harmless for purposes of a Rule 37(c)(1) exclusion analysis," district courts should consider a wide array of factors. *DAG Enterprises, Inc. v. ExxonMobil Corp.*, No. 00-CV-0182 2007 WL 4294317, at *1 (D.D.C. 2007) (citing *Southern States Rack and Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592 (4th Cir. 2003)). For example, courts often consider the importance of the testimony of the

challenged witness, the "surprise" associated with the evidence, the extent to which allowing the evidence would disrupt the case, the possibility of a continuance or other cure, and the non-disclosing party's explanation. *See, e.g., id.*; *Heartland Surgical Specialty Hospital LLC v. Midwest Division, Inc.* 527 F. Supp. 2d 1257, 1291 (D. Kan. 2007) (refusing to exclude the declaration of a witness who was disclosed one day before the filing of a dispositive motion because the other party had time to formulate its response and there was no bad faith); *Design Strategies, Inc. v. Davis,* 228 F.R.D. 210, 213 (S.D.N.Y. 2005) (witness not disclosed until defendant's pre-trial order, but was not excluded when plaintiffs were familiar with witness and thus suffered no harm or undue prejudice).

Here, the circumstances do not support excluding any of the Commission's witnesses. Plaintiffs had actual notice of the witnesses or the subject of their testimony early in the discovery process, took advantage of the opportunity to propound discovery to the witnesses, had no right to their declarations, failed to seek any additional discovery, and therefore, suffered no harm. Additionally, the timing of the Commission's disclosures was justified by our reasonable interpretation of the disclosure requirements, the expedited discovery schedule, and the continuing nature of discovery.

Moreover, plaintiffs' own actions and inactions belie their unsupported claim of harm. Plaintiffs served subpoenas on and received responses from nearly every challenged witness, deposed Chairman Johnson, and had one of their expert witnesses, Jeffrey Milyo, prepare testimony against the findings of the FPPC. (*See* Wilson Decl. Exh. 9; Johnson Dep., FEC Exh. 10.) Indeed, plaintiffs noticed the Rule 30(b)(6) deposition at which Johnson appeared and had their expert prepare a report on the subject matter of his testimony before the Commission formally supplemented its Rule 26(a) disclosures, thus illustrating that those disclosures were

superfluous. While plaintiffs chose not to do so, they were similarly able to take depositions, prepare expert testimony, or otherwise explore the circumstances regarding the Wyandotte's alleged efforts to bribe Representative Snowbarger and the conviction of Wisconsin Senator Chvala, the subjects of Kevin Yowell's and Michael Bright's testimony, respectively. (*See* Wilson Decl. Exh. 1.) The Commission also made clear that it had no objection to plaintiffs' taking the depositions of Yowell, Bright, and Rozen. (*See* Wilson Decl., Exhs. 10-11.) While plaintiffs served document subpoenas on these witnesses, it chose not to depose them.

Nor did plaintiffs seek more time to take additional depositions or serve additional discovery — a failure that undermines their claim of harm. In *Flynn v. Dick Corp.*, No. 03-1718, 2008 WL 2410406 (D.D.C. June 16, 2008), Dick Corporation had moved to exclude a witness declaration and related exhibits offered by plaintiffs on summary judgment because plaintiffs had "withheld them from Dick during discovery despite Dick expressly requesting them from plaintiffs." *Id.* at *2. The court refused to exclude the declaration. Ignoring the question of whether the declaration should have been produced, the court ruled that any error was "harmless" because "Dick Corporation could have moved for additional discovery pursuant to Federal Rule of Civil Procedure 56(f)" but failed to do so. *Id.* The court explained that "the Rules afforded Dick Corporation an adequate opportunity to take discovery on the subjects contained therein before filing their opposition," but the corporation simply did not take advantage of them. *Id.* The same is true of plaintiffs, who proposed delaying the briefing schedule to negotiate the protective orders in this case, but never sought more time for depositions or discovery. (*See* Wilson Decl. Exh. 10).[7]

[7] Plaintiffs cannot reasonably claim that seeking a short extension of time for depositions would have prejudiced them by delaying the entire case. They have just moved to stay their appeal regarding their request for a preliminary injunction, stating their goal is to be "able to

Moreover, plaintiffs cannot demonstrate harm from the timing of their receipt of witness declarations because they simply had no right to these declarations during the discovery process.

> The work-product privilege protects written materials lawyers prepare "in anticipation of litigation." Fed R. Civ. P. 26(b)(3). By ensuring that lawyers can prepare for litigation without fear that opponents may obtain their private notes, memoranda, correspondence, and other written materials, the privilege protects the adversary process.

In re: Sealed Case, 146 F.3d 881, 884 (D.C. Cir. 1998). Declarations and draft declarations like the ones at issue here fall within this privilege and are not subject to disclosure until they are filed with the court. As stated in *Tierno v. Rite Aid Corp.,* "verbatim witness statements are generally considered ordinary work product" and a witness "declaration drafted by an attorney is 'clearly work product right up until the moment it is filed.'" No 05-02520, 2008 WL 270589, at *4 (N.D. Cal. Jun. 8, 2008) (party had no duty to produce draft declaration and witness statements) (quoting *Intel Corp. v. VIA Technologies, Inc.*, 204 F.R.D. 450, 452 (N.D. Cal. 2001)); *see also In re JDS Uniphase Corp. Securities Litigation*, No 02-1486, 2007 WL 419504, at *3 (N.D. Cal. Jan. 31, 2007) ("Plaintiffs seeks to compel Defendants to produce declarations by confidential witnesses that are in their possession which have not yet been filed in support of any motion. These declarations were prepared by defense counsel and are protected work product unless and until they are filed."). In fact, in the seminal Supreme Court case on the work product doctrine, some of the documents at issue were "oral and written statements of witnesses." *Hickman v. Taylor,* 329 U.S. 495, 512 (1947).

Across jurisdictions, courts thus "consider draft affidavits and communications with counsel relating to affidavits as covered by the attorney work product doctrine." *Randleman v. Fidelity Nat'l Title Ins. Co.,* No 06-7049, 2008 WL 2944992, at *6 (N.D. Ohio, July 25, 2008)

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make and accept contributions above the limits in the 2010 election season." (*See* Wilson Decl. Exh. 12.)

(draft affidavits and counsel communications were opinion work product and thus protected from discovery). *See, e.g., Ideal Elec. Co. v. Flowswerve Corp.*, 230 F.R.D. 603, 608-09 (D.Nev. 2005) (draft affidavits protected by the work product doctrine); *Chalimoniuk v. Interstate Brands Corp.*, No 01-0788, 2002 WL 1048826, at *4 (S.D. Ind. 2002) (same); *Business Integration Services, Inc., v. AT&T Corp.*, No 06-1863, 2007 WL 254107, at *2 (S.D.N.Y. 2007) (same); *Tuttle v Tyco Electronics Installation Services, Inc.*, No. 06-cv-581, 2007 WL 4561530, at *2 (S.D. Ohio 2007) (creation of affidavit subject to attorney work product privilege).[8]

After interviewing the contested witnesses, counsel for the Commission, as is customary, drafted the initial version of their declarations. (*See* Wilson Decl. ¶ 15.) The declarations thus revealed counsel's thoughts, impressions, and litigation strategies. *See Tierno*, 2008 WL 2705089, at *4 (ruling that declarations drafted by attorneys "could easily reveal the same thought processes as a summary or memorandum of a statement."). Accordingly, the Commission withheld the documents pursuant to the work product rule and candidly informed plaintiffs of this position in a series of privilege logs. (*See* Wilson Decl. Exh. 13.) Plaintiffs then chose not to file a motion to compel that might have challenged this position. Plaintiffs' claim that they were harmed by not receiving Chairman Johnson's declaration in advance is especially incredible as they were admittedly able to discuss the substance of the declaration with Chairman Johnson at length during his deposition. (*See* Johnson Dep. at 20:3 – 30:16, 32:3-17, 34:18-23,

[8] Although some courts have required draft witness declarations to be produced in discovery, those cases involve circumstances different from those presented here or fact-specific applications of the work-product balancing test. *See, e.g., Judicial Watch, Inc. v. U.S. Dept. of Commerce*, 196 F. Supp. 2d 1, 6-7 (D.D.C. 2001) (assuming for the sake of argument that witness declarations fell within the work product privilege, but requiring them to be produced when a party had "demonstrated a sufficiently important need for the two documents and an inability to obtain the information contained therein"). Plaintiffs do not even attempt to argue that the legislative facts presented in the witness declarations are the kind of information critical to their case that could not be obtained elsewhere.

35:18 – 36:6; 1st Mot. at 10.) Finally, regarding witness declarations, plaintiffs are in the exact same position as the Commission, which had to respond to several new declarations it had never seen until they were filed by plaintiffs with their own proposed findings of fact. (*See* Declarations of Scott Burkhardt, Edward Crane, Brad Russo, David Keating, and Fred Young in Support of Plaintiffs' Proposed Findings of Fact, October 28, 2008.)

Even if plaintiffs could demonstrate that they suffered some small amount of harm, the challenged testimony should still not be excluded because any action by the Commission was "substantially justified" under Rule 37(c)(1). This case has an expedited schedule because certification of the constitutional questions and findings of fact are to be made swiftly under 2 U.S.C. § 437h. Mindful of this requirement, the parties negotiated a very compressed discovery and briefing schedule. After June 6, 2008, when the parties submitted their Joint Scheduling Order, the parties each served and responded to two rounds of requests for documents, requests for admissions, and interrogatories; briefed the constitutional questions to be certified to the *en banc* Court of Appeals; identified expert witnesses and produced expert reports; served third-party subpoenas; located witnesses with knowledge of independent expenditures and explored their testimony; prepared for and then conducted numerous depositions; briefed the contested issue of protective orders; otherwise compiled substantial amounts of documentary information; and, in the case of the Commission, researched and commissioned a poll.

Given this schedule and workload, it is surprising how little the original discovery and briefing deadlines have changed. Both parties served numerous third-party subpoenas in the final weeks of the original discovery period, and both sides prepared for and conducted more than ten depositions in the last two weeks of the original discovery period and the following

week. (*See* FEC Exhs. 7-19.) The Commission formally supplemented its initial disclosures throughout the discovery period, even in circumstances when it was not required, continuing into the final week that depositions were still being taken. (*See* Wilson Decl. Exhs. 4-5.) Even after all other discovery had concluded, plaintiffs sent subpoenas and received responses from the Commission's witnesses. (*See* Wilson Decl. Exh. 9.) The timing about which plaintiffs complain was a justified part of an unusual, fast-paced discovery process that presented challenges for both parties in this very important case.

Therefore, even if the Court were to find that any of the Commission's disclosures were untimely, the Commission's actions and interpretation of the law are "substantially justified," so exclusion of the Commission's evidence is unwarranted. "According to the Supreme Court, a party meets the 'substantially justified' standard when there is a 'genuine dispute' or if 'reasonable people could differ' as to the appropriateness of the motion. A party's actions are substantially justified if the issue presented is one that 'could engender a responsible difference of opinion among conscientious, diligent, but reasonable advocates.'" *Peterson v. Hantman*, 227 F.R.D. 13, 16 (D.D.C. 2005) (internal citations omitted). Finally, if the Court were to find that any remedy is appropriate, the Court should exercise its discretion to allow plaintiffs to conduct additional discovery. Giving additional time to depose an undisclosed witness, for example, is an appropriate remedy, especially where the testimony is part of an important case with broad ramifications and where no discovery violations were made in bad faith. *See Brighton Collectibles*, 2008 WL 4001066, at *3 (refusing to strike witnesses challenged for lack of formal disclosure but allowing additional depositions to take place).

III. Michael Calogero's Testimony Should Not Be Excluded

A. Mr. Calogero's Declaration Consists of Lay Testimony

Plaintiffs seek to exclude the declaration of P. Michael Calogero and the survey accompanying his declaration. Plaintiffs argue that surveys "must be presented through expert witnesses" and therefore the survey must be excluded because Calogero has not been designated as an expert in this case. 1st Mot. at 5. While survey evidence is frequently introduced through expert testimony, here there are several reasons why Calogero's lay testimony is adequate and the Court should consider the survey.

The survey in question is evidence of a legislative fact rather than an adjudicatory fact. As discussed (*see* FEC Reply Mem. Section I), courts have long relied on legislative facts in deciding the kind of legal questions at issue here, including the consideration of polls in other cases involving challenges to FECA. In *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2667 n.6 (2007), Chief Justice Roberts cited a national survey that was neither introduced through expert testimony nor even submitted to the lower court. *See also Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280, 297 n.15 (S.D.N.Y. 1980) (admitting objected-to poll that "measure[d] various forms of citizen participation in political campaigns since 1952"), *judgment aff'd*, 445 U.S. 955 (1980); *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 628 (1995) (responding to dissenters' criticism of lack of information about a survey, the Court stated that "we do not read our case law to require that empirical data come to us accompanied by a surfeit of background information"). In contrast, every one of the cases cited by plaintiffs regarding the admissibility of survey evidence dealt with adjudicatory facts, not legislative ones.

Like most cases involving surveys, the ones plaintiffs rely on are trademark cases. In such cases, the surveys are intended to determine the central adjudicative factfinding decision in

the litigation — whether customers would be confused — and thus play a critical, irreplaceable role. The surveys must be introduced through expert testimony because their design must be carefully prepared to best replicate market conditions. Ordinary polls in which calls are placed and questions are simply asked are in many circumstances inadequate to satisfy the specialized needs of a trademark survey. For example, in *Constellation Brands, Inc. v. Arbor Hill Assocs., Inc.*, cited by plaintiffs, a consumer survey was excluded because it "provides no indication of public reaction under actual market conditions." 535 F. Supp. 2d 347, 368-69 (W.D.N.Y. 2008) (quoting *Beneficial Corp. v. Beneficial Capital Corp.*, 529 F. Supp. 445, 451 (S.D.N.Y.1982)). The court was also troubled because the party offering the survey "did not submit an affidavit from the individual(s) who conducted the pilot survey." *Id.* at 368 n.18. The complexity and difficulty in conducting such surveys thus typically require the analysis and testimony of an expert. *But see Bic Corp. v. Far Eastern Source Corp.*, 23 Fed. Appx. 36, 39, 2001 WL 1230706, at * 3 (2d Cir. Oct. 12, 2001) (affirming district court's decision to allow a lay witness to testify about a consumer survey that she designed and interpreted).

In this case, the survey is accompanied by the Calogero declaration, which states clearly how the survey was conducted. The survey asked simple questions without any special need to replicate market conditions, as in a trademark case. Mr. Calogero certainly possesses expertise in administering surveys, but no special analysis is needed here to understand the results. Although his declaration could have included expert analysis and become expert testimony, his actual testimony is limited and more in the nature of an authentication declaration. (*See supra* Section II.A.: Fed. R. Evid. 701 distinguishes between expert and lay testimony, not expert and lay witnesses.) In contrast, in other cases pollsters have gone beyond introduction of their survey results to provide expert analysis of the results. *See, e.g., Wisconsin Right to Life*, 127 S Ct.

at 2688 (quoting expert testimony that in "'public opinion research it is uncommon to have 70 percent or more of the public see an issue the same way. When they do, it indicates an unusually strong agreement on that issue.'").

Furthermore, the parties all agree that "a trial will likely not be necessary in this case." Jt. Scheduling Rept. at 6 (Docket No. 27). As even the cases cited by plaintiffs acknowledge, the standard by which the Court should exclude evidence is significantly different when there is no jury that might be misled or confused. *See, e.g., Simon Prop. Group L.P. v. mySimon, Inc.*, 104 F. Supp. 2d 1033, 1039 n.3 (S.D. Ind. 2000) ("[for injunction hearings and bench trials,] the safest course for the trial judge is to admit the evidence and to treat the criticisms as going to the weight of the evidence …"); *Johnson v. Big Lots Stores, Inc.*, No. 04-3201, 2008 WL 1930681, at *2 (E.D. La. Apr. 29, 2008) (citing numerous cases for the proposition that the court's gatekeeping function is diminished when there is no concern about jury confusion). The Court should admit the survey evidence and give it the weight it deserves.

B. Mr. Calogero Was Timely Identified as a Witness

Because the Court can accept the survey results through lay testimony, the expert disclosure deadline is not determinative. As a lay witness, Calogero was disclosed at the appropriate time and his testimony should not be excluded pursuant to Rule 37(c)(1). The Commission informed plaintiffs that Calogero may testify in this case and produced his declaration and the survey through a supplement to its initial disclosures on September 17, 2008. (*See* Wilson Decl. Exh. 3.) Unlike with Johnson and Rozen (1st Mot. at 11-12, n.5), plaintiffs do not claim that Calogero's testimony should be excluded if he is considered a lay witness. Furthermore, there was no harm to plaintiffs as they had an opportunity to propound discovery regarding Calogero but simply chose not to do so. In fact, after Calogero was disclosed,

plaintiffs noted and conducted depositions of other witnesses and served several third-party subpoenas. (*See* Wilson Decl. Exh. 15.) The Commission informed plaintiffs that it would accommodate them if they needed more time for scheduling depositions, but they did not request any more time, either from the Commission or the Court. (*See* Wilson Decl. Exh. 13.) *See Flynn*, 2008 WL 2410406 at *2 (holding that lack of disclosure was harmless and refusing to exclude testimony when party "could have moved for additional discovery pursuant to Federal Rule of Civil Procedure 56(f)" but failed to do so). Finally, plaintiffs did not suffer any harm because their expert witness, Jeffrey Milyo, already prepared a report discussing, *inter alia*, public perception of contribution limits and the appearance of corruption. (*See* Declaration of Jeffrey Milyo ("Milyo Decl.") ¶ 61 (discussing a study Milyo had co-authored "examin[ing] the effects of campaign contribution limits on the appearance of corruption.").) In this sense, if Calogero's declaration and survey must be considered expert testimony, it could have served as rebuttal expert testimony disclosed within 48 hours of the rebuttal expert disclosure deadline, a non-prejudicial delay. For all of these reasons, the disclosure of Calogero's declaration and the survey was proper or did not harm plaintiffs, and accordingly, the evidence should be admitted.

Plaintiffs argue (1st Mot. at 7) that the Commission could have had the final poll results ready to produce to them on August 4, 2008, but their perspective is obviously from outside the Commission. While the Zogby firm sent the Commission an estimate and statement of its methodology and services on July 30, 2008, this was just the start of the process. (*See* Gall Decl. Exh. G.) As plaintiffs acknowledge (1st Mot. at 17), it takes time to choose the questions to be asked and have the calls placed. It was only upon receiving this information from Zogby that the Commission could begin officially selecting it as a contractor and obligating funds, a legally required step before a federal agency can enter into a contract for any services. (*See* Declaration

of Kevin Deeley in Support of Response to First Motion in Limine ("Deeley Decl."), Exh. 168 at ¶ 3.) The contract was not finalized by the Commission's procurement officer until August 11, 2008. (*Id*.) At the same time, the Commission was also selecting the questions that it wanted to ask the public. (*See* Deeley Decl. ¶ 5.) It was thus reasonable to give Zogby final approval to run the survey and receive the results by August 25, 2008. (*See* Gall Decl. Exh. I.)

Plaintiffs also fault the Commission for not turning over the poll results that day, but plaintiffs lack information regarding the Commission's contemporaneous intentions. The Commission had originally considered retaining an expert witness that would provide expert analysis of additional poll results, including possibly as a rebuttal witness, and had intended only to use Zogby International as a non-testifying consultant to assist in that effort. (Deeley Decl. ¶ 6.) Plaintiffs thus were not entitled to information regarding Zogby under Rule 26(b)(4)(B)(2), a point the Commission made clear in its discovery responses. (*Id.* ¶ 7.) Based on a continuing assessment of the needs and ongoing developments of the case, including the resources and effort involved in retaining another expert, the Commission ultimately did not pursue this route. (*Id.* ¶ 8.) Instead, the Commission chose to simply place into the record the survey results with a lay declaration from Calogero that authenticated the documents and explained how the survey was conducted. (*See id.* ¶ 9; Declaration of P. Michael Calogero, FEC Exh. 97.) This change in litigation strategy explains why the survey was properly disclosed on September 17, 2008, and as discussed above, should not be excluded by the Court.

IV. The Affidavits and Declarations from *McConnell v. FEC* and *Massey v. Caperton* Are Admissible

A. The Declarations are Admissible as Legislative Facts

The sworn declarations from prior cases are admissible in this case because they are offered to prove legislative facts. (*See* FEC Reply Mem. Section I.) Plaintiffs contend (*see*

1st Mot. at 21-30) that the testimony in these declarations should be excluded because they contain hearsay, but none of the prior declarations has been offered for the purpose of establishing any adjudicative facts. The declarations are not offered to prove anything regarding plaintiffs. Rather, they are offered for broad points regarding how the campaign finance system functions. The Court may therefore rely on this material "as it might read *anything* for purposes of ascertaining 'legislative' facts." *Mail Order Ass'n of America v. US Postal Service*, 2 F.3d 408, 434 (D.C. Cir. 1993) (citing Federal Rule of Evidence 201(a), Notes of Advisory Committee on 1972 Proposed Rules) (emphasis in original). Accordingly, with respect to the prior case declarations, plaintiffs' motion should be denied for this reason alone.

B. The Sworn Testimony from Other Cases Is Admissible Evidence

Even if these declarations had been submitted in support of adjudicative facts, they can be considered by the Court because they are sworn statements. "An interview given under penalty of perjury may, however, be treated as a declaration — and therefore may be considered in ruling on a summary judgment motion, Fed R. Civ. P. 56(e) — even though Rule 32(a) prevents its use as a formal deposition." *SEC v. Phan*, 500 F.3d 895, 913 (9th Cir. 2007) (citing *Hoover v. Switlik Parachute Co.*, 663 F.2d 964, 966 (9th Cir. 1981)); *SEC v. Am. Commodity Exch., Inc.*, 546 F.2d 1361, 1369 (10th Cir. 1976) (holding that transcripts from an SEC investigation may be considered in ruling on summary judgment as the equivalent of a declaration)). Since these statements were executed under oath and plaintiffs received ample notice that the Commission intended to rely on them, there is no reason to exclude them here. (*See* Wilson Decl. Exh. 6 (Defendant FEC's Response to Plaintiffs' First Set of Discovery Requests, Response to Document Request No. 19.)) Moreover, sworn statements from different cases are admissible in a statement of material facts in opposition to summary judgment motion.

See, e.g., Lloyd-El v. Meyer, No. 87-C-9349, 1989 WL 88371, at *1 n.1 (N.D. Ill. 1989) (denying motion to strike seeking to exclude deposition from unrelated action and allowing deposition in as a affidavit). "They were sworn statements, and could be used to impeach witnesses or a party opponent at trial. Accordingly, they could also be used on summary judgment." *Burbank v. Davis*, 227 F.Supp. 2d 176, 179 (D.Me. 2002); *Tobacco & Allied Stocks v. Transamerica Corp.*, 16 F.R.D. 545, 547 (D.Del. 1954) (deposition admitted from prior litigation involving different parties on related issues).

Plaintiffs' objections are particularly weak because the bulk of the proposed facts plaintiffs seek to strike were included in findings of fact in the *McConnell* litigation. In each instance in which the Supreme Court has already resolved the challenged fact, this Court does not need to revisit the issue and may simply adopt the finding already made. Once resolved by an appellate court, issues of legislative fact need not be relitigated in lower courts each time they arise. *See Carhart v. Gonzales*, 413 F.3d 791, 800-01 (8th Cir. 2005) (legislative fact addressed by the Supreme Court need not be relitigated); *A Woman's Choice v. Newman*, 305 F.3d 684, 689 (7th Cir. 2002) (same).[9]

[9] Plaintiffs' First Motion in Limine (at 28-29) seeks to exclude facts based on portions of the Wilcox report that rely upon declarations from the *McConnell* litigation of Senator John McCain and Gerald Greenwald, former chairman of United Airlines. These declarations are not exhibits in this case. Apparently plaintiffs are objecting to the parentheticals explaining that Professor Wilcox relied on these declarations in reaching the conclusions in his report. There is no basis to exclude Wilcox's testimony because his publicly-available sources are listed in parentheticals. Both sworn statements were relied upon by the Supreme Court for the very propositions from which the Wilcox report draws support. They thus have greater force because the Supreme Court has already noted them with approval. *McConnell*, 540 U.S. at 150 (testimony of Senator McCain regarding promises made by tobacco industry); *id.* at 147-48 n.46 (testimony of Greenwald regarding union donations providing access to members of Congress).

1. The Beckett Declaration

The Beckett Declaration supports the Commission's Proposed Finding of Fact ¶ 209 that "candidates often appreciate the help that these interest groups provide, such as running attack ads for which the candidate has no responsibility." (Beckett Decl., *McConnell*, ¶ 16, FEC. Exh. 35.) Plaintiffs' argument that such statement is without foundation (1st Mot. at 26) lacks merit. One of the judges in *McConnell* has previously relied on the Beckett Declaration in reaching this same factual finding. *McConnell*, 251 F. Supp. 2d at 555 (Kollar-Kotelly, J.) (citing ¶ 16). Indeed, the Supreme Court cited portions of the district court opinion referring to the Beckett Declaration on numerous occasions. *See, e.g.*, *McConnell*, 540 U.S. at 126 n.16, 193.

Even standing alone, the Beckett Declaration provides ample foundation for its testimony. It details Beckett's twenty-five years of work on political campaigns, including three presidential campaigns, three Congressional campaigns and numerous state and local campaigns. (Beckett Decl., *McConnell*, ¶¶ 2-6, FEC. Exh. 35.) Her background was also explained in *McConnell*, 251 F. Supp. 2d at 445 n.16 (Kollar-Kotelly, J.). Beckett explains why candidates appreciate advertising from independent groups — because it gets a message out in a manner in which the campaign cannot be held accountable. (Beckett Decl., *McConnell*, ¶ 16, FEC Exh. 35.) In any event, the factual statement in ¶ 209 is supported by both the Beckett Declaration and the Wilcox Report. The Wilcox Report provides independent foundational support for this fact. (Wilcox Rept. at 19, FEC Exh. 1.)

2. The Bumpers Declaration

The Bumpers Declaration supports the Commission's Proposed Finding of Fact ¶ 211 that "[c]andidates whose campaigns benefit from these ads greatly appreciate the help of these groups" and will be more favorably disposed to these groups when they later seek access to

discuss pending legislation. (Bumpers Decl., *McConnell*, ¶ 27, FEC Exh. 64.) Plaintiffs' argument that such statement is without foundation (1st Mot. at 26) lacks merit. Indeed, one judge in *McConnell* adopted the paragraph the Commission relies upon. Bumpers Declaration ¶ 26 (showing that candidates appreciate help provided by interest groups). *McConnell*, 251 F. Supp. 2d at 556, 876-77 (Leon, J.).

At any rate, the declaration itself provides ample foundation, including Senator Bumpers experience of nearly 30 years in elected office, first as Governor of Arkansas, then as a Senator for 23 years, and most recently as a lobbyist. (Bumpers Decl., *McConnell,* ¶¶ 2-3, FEC Exh. 35.) This foundational background was explicitly noted by Judge Leon in *McConnell,* 251 F. Supp. 2d at 821 n.155. Bumpers was deposed by the plaintiffs in *McConnell* who had a similar motive to examine the declarant's testimony regarding the influence of interest groups. *McConnell v. FEC*, 02-582 (D.D.C. 2002) (Dkt. # 199). Finally, the proposed finding of fact is also supported by both the Bumpers Declaration and the Wilcox Report, which provide additional support for the Commission's proposed finding of fact.

3. The Simpson Declaration

The Simpson Declaration supports the Commission's Proposed Finding of Fact ¶ 212 that "[t]hese ads are very effective in influencing the outcome of elections" and that members realize how effective these ads are and express that gratitude to the groups that run them. (Simpson Decl., *McConnell*, ¶ 13, FEC Exh. 65.) Plaintiffs' claim that Senator Simpson was just "guessing how others might feel" and offered opinion testimony without evidence is without merit. Senator Simpson explains his 19 years of experience in the Senate legislating, fundraising, and campaigning. (Simpson Decl., *McConnell,* ¶¶ 2-3, 8-9, 11-14, FEC Exh. 65.) He describes specific conversations with legislators regarding campaigning. *Id.* ¶¶ 10-11. He

then explains — based on his experience campaigning, interacting with the public and other members of Congress — his understanding that this advertising by interest groups is effective and can influence elections and that, in his experience, members realize how effective these ads are and may express gratitude. *Id.* ¶ 13. These statements do not constitute "guessing," but rather direct testimony by an individual who experienced and participated in the campaign finance system for a long time. Senator Simpson was cross-examined on his statements in this declaration in a deposition in the *McConnell* case. *McConnell v. FEC*, 02-582 (D.D.C. 2002) (Dkt. # 199).

Indeed, the Supreme Court in *McConnell* relied on the Simpson Declaration. 540 U.S. at 149 (citing 251 F. Supp. 2d at 481 (Kollar-Kotelly, J.) (quoting Simpson Decl. ¶ 10, App. 811); 251 F. Supp. 2d at 851 (Leon, J.) (same). The *McConnell* district court extensively relied upon the Simpson Declaration. *See, e.g.*, 251 F. Supp. 2d at 406-07, 471 n.45, 473 476, 481 (Kollar-Kotelly, J.).

4. The Pennington Declaration

The Pennington Declaration supports the Commission's Proposed Findings of Fact ¶¶ 213, 230, and 276, which show that interest group advertising is helpful in supporting candidate campaigns and used to help try to create a sense of appreciation or obligation from the candidate to the group. Plaintiffs claim (1st Mot. at 27) that Pennington does not provide any "basis for his conclusion" and that his statements are generalizations not supported by personal knowledge. In *McConnell*, however, one judge relied on the Pennington declaration and his experience in the 2000 Congressional Race in Florida's Eighth Congressional District to conclude that interest group advertising effected elections. 251 F. Supp. 2d at 518, 550, 558, 581 (Kollar-Kotelly J.). The Supreme Court relied upon portions of the district court opinion that

were supported by Pennington's testimony on numerous occasions. *See, e.g.*, 540 U.S. at 126 n.16, 127-28, 177 . Pennington's declaration describes in detail the personal knowledge upon which his statements are based. Pennington is a Republican general political consultant with more than twenty-five years of political experience. He described, *inter alia*, interest groups' use of videotaped interviews with candidates so that groups are able to remind candidates of the content of their statements after the election.

5. The Chapin Declaration

The Chapin Declaration supports the Commission's Proposed Findings of Fact ¶¶ 217 & 310 regarding how federal candidates appreciate interest group advertising and how interest groups attempt to influence candidate's positions on issues with offers of support. Plaintiffs acknowledge that Chapin had personal knowledge of her own appreciation of support from interest groups, but claim any generalization regarding other candidates is without support. One of the judges in the district court in *McConnell* found the same fact the Commission asks this Court to find in ¶ 217, 251 F. Supp. 2d at 556 (Kollar-Kotelly, J.). Because plaintiffs essentially concede that the Chapin declaration is admissible for the proposition it is cited, this Court should rely on it and make the finding urged by the Commission.

6. The Drake Affidavit

The Drake Affidavit supports the Commission's Proposed Finding of Fact ¶ 328 regarding how more than two-thirds of West Virginia voters doubted that a West Virginia Supreme Court Justice could be fair and impartial regarding a particular case in light of money spent on his behalf during his election campaign.[10] Plaintiffs claim that this declaration should

[10] This response assumes plaintiffs intended to cite (1st Mot. at 29) the Commission's Proposed Findings of Fact ¶ 328 and not ¶ 325. Paragraph 325 is not supported by the Drake Affidavit.

not be considered by the Court because it was submitted in another case and is being offered as substantive evidence from an undesignated expert. 1st Mot. at 29-30. However, such evidence can be offered to support legislative facts, and the Drake affidavit is also sworn testimony that the Court may consider independently. In addition, the existence of the declaration and its coverage in the media (FEC Exh. 94) is evidence of the appearance of corruption, which is separate and apart from the substantive accuracy of the polling.

V. The Documents Challenged by Plaintiffs Are Admissible to Demonstrate Legislative Facts, and Many Are Not Hearsay

Plaintiffs also challenge on evidentiary grounds other documents cited by the Commission, primarily that they allegedly contain inadmissible hearsay. (1st Mot. at 34-40.) Plaintiffs' arguments, however, are misplaced because these documents were not cited by the Commission to establish adjudicative facts regarding the particular plaintiffs in this litigation. As explained (*see* FEC Reply Mem. Section I), the documents were cited to establish legislative facts related to the important governmental interests that support the Act's contribution limits and disclosure provisions. The D.C. Circuit's ultimate decision in this case on the constitutionality of the Act's contribution limits and disclosure provisions will have an impact far beyond the specific interests of the named plaintiffs, and the Commission is entitled to rely on legislative facts that go beyond plaintiffs' carefully crafted test case. Because courts, including the Supreme Court, routinely rely on legislative facts in constitutional challenges, similar hearsay objections were recently dismissed by one court as "almost frivolous." *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 845 (S.D. Ind. 2006), *aff'd sub nom. Crawford v. Marion County Election Bd*, 472 F.3d 949 (7th Cir. 2007), *aff'd*, 128 S. Ct. 1610 (2008).

Even if the documents that plaintiffs object to on hearsay grounds are not considered legislative facts (and therefore are analyzed under the Federal Rules of Evidence applicable to

adjudicative facts), many of the documents are still admissible for matters other than "the truth of the matter asserted." Fed. R. Evid. 801(c). Many of the documents also help to demonstrate the widespread public appearance of corruption that arises from contributions in excess of the existing federal limits. It is well established that "[o]ut-of-court statements constitute hearsay only when offered in evidence to prove the truth of the matter asserted." *Anderson v. United States*, 417 U.S. 211, 219 (1974). In many instances, the fact that the challenged statements were made, reported, or published helps to demonstrate an appearance of corruption. For that purpose, those statements are not hearsay. *Anderson*, 417 U.S. at 220 n.8 ("Of course, evidence is not hearsay when it is used only to prove that a prior statement was made and not to prove the truth of the statement") (citations omitted)).

Mariani v. United States, 80 F. Supp. 2d 352, 363 (M.D. Pa. 1999), one of the cases relied upon by plaintiffs, explicitly overruled nearly identical objections to newspaper and magazine articles "to the extent that the articles have not been offered for the truth of the matter asserted, but instead to demonstrate the appearance of corruption created by soft money contributions."

> "The hearsay evidence rule does not bar . . . the admissibility of . . . authenticated news reports when used to show public perceptions of corruption, rather than corruption in fact."

Id. at 362 (quoting *Democratic Party v. National Conservative Political Action Comm.*, 578 F. Supp. 797, 829 (E.D.Pa. 1983), *aff'd in part, rev'd in part*, 470 U.S. 480 (1985) ("*NCPAC*")). Thus, the documents plaintiffs object to on hearsay grounds are admissible to show the appearance of corruption, *i.e.*, the fact that events were reported reflect such an appearance, regardless of the truth of the individual matters asserted in the documents.

In addition, a number of the statements to which plaintiffs object are admissible under various exceptions to the hearsay rule. The Commission notes, for example, that the press

releases issued by the Commission and the White House (*see* FEC Facts ¶¶ 247, 278-279, 281) are admissible under Fed. R. Evid. 803(8)(A) as public records and reports. *Mueller v. First Nat. Bank of Quad Cities*, 797 F. Supp. 656, 657 (C.D. Ill. 1992) (citing FEC and White House press releases). Similarly, documents cited by the Commission for the proposition that an author believed the facts, whether or not they were true, are admissible under Fed R. Evid. 803(3) as reflecting a witness's state of mind.

VI. Copies of Secondary Authorities Cited in Expert Reports Need Not Be Filed With The Court

Plaintiffs also claim that approximately three dozen proposed facts citing Professor Clyde Wilcox's expert report should be rejected because the Commission did not file copies of the sources Professor Wilcox cited in his report with the Court (1st Mot. at 35), but this argument is frivolous. The Commission is not required to submit copies of such authorities, and all are available as published sources should consultation be required. Plaintiffs' objections are all to instances where the Commission cited Professor Wilcox's expert report and the Commission's citation includes a parenthetical identifying the authorities Professor Wilcox relied upon,[11] or, in one instance, to a fact with the parenthetical "citations omitted" (1st Mot. at 35 (objecting to FEC Facts ¶ 218)). Thus, the documents that are the subject of plaintiffs' objections are only secondary authorities referenced in Professor Wilcox's report, which independently supports the Commission's facts. The Commission included these explanatory parentheticals for the Court's convenience.

Thus, the only issue is whether, when parties cite expert reports in proposed findings of fact and their citations include parentheticals identifying secondary authorities (or state "citations

[11] (*See* 1st Mot. at 35 (criticizing FEC Facts ¶¶ 80, 81, 92, 100, 117, 118, 119, 126, 127, 133, 134, 137, 143, 144, 218, 219, 227, 228, 251, 309, 315 and 365).)

omitted"), copies of all the referenced documents also must be provided for the court. Here again, plaintiffs provide no legal authority for their proposition which, if adopted, would dramatically increase the already large number and volume of exhibits in this case. Plaintiffs' criticism of the Commission's failure to include all exhibits cited by its expert is particularly surprising since plaintiffs themselves did not file with the Court all authorities cited by their experts, which were considerably fewer than Professor Wilcox's sources.

CONCLUSION

For the foregoing reasons, the Commission's evidence is admissible, and none of the arguments raised in plaintiffs' first motion in limine justify the exclusion of any of the Commission's evidence or the proposed findings of fact based on that evidence.

Respectfully submitted,

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