IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

HERRON FOR CONGRESS
P.O. Box 5
Dresden TN 38225,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington. DC 20463,

Defendant.

Case: 1:11-cv-01466
Assigned To : Huvelle, Ellen S.
Assign. Date : 8/12/2011
Description: Admn Agency Review

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELEIF

1. This is an action for declaratory and injunctive relief under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, and the Federal Election Campaign Act of 1971 as amended, ("FECA"), 2 U.S.C. § 437g(a)(8), challenging as arbitrary, capricious, an abuse of discretion, and contrary to law the dismissal by the Federal Election Commission ("FEC" or "Commission") of an administrative complaint filed by Herron For Congress for violations of the FECA.

2. This is also an action for declaratory and injunctive relief under the APA, 5 U.S.C. § 706, and the FECA, 2 U.S.C. § 437g(a), challenging as arbitrary, capricious, and contrary to law the failure of the FEC to provide a complete statement of reasons for the dismissal of the administrative complaint filed by Herron For Congress.

JURISDICTION AND VENUE

3. This action arises under the FECA, 2 U.S.C. §§ 431 *et seq.*, as amended by the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155; the APA, 5 U.S.C. §§ 551-706;

and the Declaratory Judgment Act, 2 U.S.C. § 2201. The Court has both subject matter and personal jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1336; 5 U.S.C. §§ 701, 702, and 706; and 2 U.S.C. § 437g(a)(8)(A). The APA, 5 U.S.C. § 702, gives private parties the right to seek injunctive relief when adversely affected or aggrieved by arbitrary or capricious agency action or inaction, as well as action or inaction that is contrary to law. The APA also empowers courts to compel agency action unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706. FECA specifically gives a party who filed an administrative complaint that was dismissed by the FEC the right to file an action with the United States District Court for the District of Columbia. 2 U.S.C. § 437g(a)(8)(A). The Court may declare that such dismissal of the complaint was contrary to law and may direct the FEC to conform with its declaration within 30 days. 2 U.S.C. § 437g(a)(8)(C).

4. Venue in this district is proper pursuant to 28 U.S.C. § 1391(e), 5 U.S.C. § 703 and 2 U.S.C. § 437g(a)(8)(A).

THE PARTIES

5. Plaintiff Herron For Congress is the authorized committee of Roy Herron, the Democratic nominee in 2010 for U.S. House of Representatives for the 8th Congressional District of Tennessee for the November 2010 general election. The address of Herron for Congress is P.O. Box 5, Dresden, TN 38225.

6. As an authorized committee, the Herron For Congress committee was designated and authorized by Roy Herron to receive campaign contributions and make expenditures on behalf of his campaign, *see* 2 U.S.C. § 431 (5)and (6).

7. Herron For Congress (the "Herron Campaign") filed an administrative complaint with the FEC against Steve Fincher for Congress (the "Fincher Campaign"), the authorized

committee of Stephen Fincher, the Republican nominee for U.S. House of Representative for the 8th Congressional District of Tennessee, for the November 2010 general election. Mr. Fincher won the election and is the incumbent Member of Congress representing that district.

8. Herron For Congress and Roy Herron were harmed by the violations of FECA described in the administrative complaint and the FEC's failure to take timely action, which decreased Mr. Herron's voter support and increased Mr. Fincher's voter support. The Herron Campaign will be harmed in the future by the FEC's dismissal of the administrative complaint if Roy Herron runs for office against Steve Fincher in the future because there will be no deterrent for Mr. Fincher to engage in similar violations of FECA, which may increase his opportunity to win elections. The dismissal of the administrative complaint also impacts Mr. Herron's decision whether to run against Mr. Fincher in the future. The FEC's failure to require Mr. Fincher to obey the law will encourage dishonest candidates to break the law and discourage honest and law abiding people from running for federal office.

9. Defendant Federal Election Commission is an agency within the meaning of 5 U.S.C. § 552(f) and was established by Congress to oversee the administration and civil enforcement of the FECA. *See* 2 U.S.C. § 437c. The FEC has exclusive jurisdiction with respect to the civil enforcement of the FECA, 2 U.S.C. § 437c(b)(1), except for the limited provision described herein if the FEC fails to comply with this Court's order, 2 U.S.C. § 437g(a)(8)(C).

STATUTORY AND REGULATORY FRAMEWORK

10. The FEC consists of six members of which no more than three may be affiliated with the same political party. 2 U.S.C. § 437c(a). The FEC is required to administer and obtain compliance with FECA. 2 U.S.C. § 437c(b)(1). The FEC has exclusive jurisdiction for civil

enforcement of FECA. *Id.* All decisions of the FEC with respect to its responsibility to obtain compliance with FECA require a vote of at least four members. 2 U.S.C. § 437c(c).

11. Under the FECA, any person who believes there has been a violation of the FECA can file a sworn complaint with the FEC. 2 U.S.C. § 437g(a)(1). Upon receipt of a complaint, the FEC has five days in which to notify the person or persons alleged in the complaint to have violated the Act. *Id.* The respondent then has 15 days to demonstrate to the FEC that no action should be taken based on the complaint. *Id.*

12. Based on the complaint, the response, and any recommendation of the FEC Office of General Counsel, the FEC may then vote on whether there is "reason to believe" a violation of the FECA has occurred. 2 U.S.C. § 437g(a)(2). If at least four commissioners find there is "reason to believe" a violation of the FECA has occurred, the FEC must notify the respondents of that finding, and either must "make an investigation of such alleged violation," *id.*, or negotiate a conciliation agreement to correct or prevent such a violation, 2 U.S.C. § 437g(a)(4)(A)(i).

13. After the investigation, the FEC's general counsel may recommend that the FEC vote on whether there is "probable cause" to believe the FECA has been violated. 2 U.S.C. § 437g(a)(3). The general counsel must notify the respondents of any such recommendation and provide the respondents with a brief stating the position of the general counsel on the legal and factual issues presented. *Id.* Within 15 days of receiving the brief, respondents may submit their own brief on the legal and factual issues presented in the case and replying to the brief of the general counsel. *Id.*

14. Upon consideration of these briefs, the FEC may then determine whether there is "probable cause" to believe a violation of the FECA has occurred. 2 U.S.C. § 437g(a)(4)(A)(I).

If at least four commissioners find probable cause to believe a violation of the FECA has occurred, the FEC must attempt for at least 30 days, but not more than 90 days, to resolve the matter "by informal methods of conference, conciliation and persuasion." *Id.*

15. If the FEC is unable to settle the matter through informal methods, it may institute a civil action for legal and equitable relief in the United States District Court. 2 U.S.C. § 434g(a)(6)(A). In any action instituted by the FEC, the District Court may grant injunctive relief as well as impose monetary penalties. 2 U.S.C. §§ 437g(a)(6)(B)-(C).

16. If, at any stage of the proceedings, at least four commissioners vote to dismiss a complaint, any "party aggrieved" may seek judicial review of that dismissal in the United States District Court for the District of Columbia. 2 U.S.C. § 437g(a)(8)(A). All petitions from the dismissal of a complaint by the FEC "shall be filed . . . within 60 days after the date of the dismissal." 2 U.S.C. § 437g(a)(8)(B).

17. The FECA, by vesting in the FEC exclusive jurisdiction to civilly enforce the Act's provisions and setting forth a detailed time schedule within which the FEC must act on complaints, allows the development of a record before the matter reaches the district court pursuant to 2 U.S.C. § 437g(a)(8)(A). *In re Carter-Mondale Reelection Committee, Inc.*, 642 F.2d 538, 542-43 (D.C. Cir. 1980). It also avoids unnecessary judicial review, as "[i]nvestigations of complaints may result in a vindication of the alleged conduct to the complete satisfaction of all." *Id.* at 543.

18. The District Court reviewing either the FEC's dismissal or its failure to act by at least four commissioners may declare the FEC's actions (or inactions) "contrary to law." 2 U.S.C. § 437g(a)(8). The court may also order the FEC "to conform with such declaration within 30 days." *Id.*

19. If the FEC fails to abide by the court's order, the FECA provides the complainant with a private right of action, brought in its own name, "to remedy the violation involved in the original complaint." *Id.*

20. FEC regulations governing public disclosure of an FEC action require the FEC to make public the fact that it made a finding of no reason to believe, no probable cause to believe, or otherwise terminated a proceeding and the basis for such action "no later than thirty (30) days from the date on which the required notifications are sent to complainant and respondent." 11 C.F.R. § 111.20(a). In addition, 11 C.F.R. § 5.4(a)(4) requires the FEC to place Commissioner opinions in enforcement cases, General Counsel's reports, and non-exempt investigatory materials on the public record within 30 days from the date on which respondents are notified the FEC has voted to close an enforcement file.

21. Following the dismissal of a complaint, the Secretary of the FEC also issues a certification attesting to the action taken by the FEC with respect to a particular complaint, including how each commissioner voted on each enumerated motion. The certification is placed on the public record.

22. When the FEC follows the recommendation of its general counsel and dismisses an administrative complaint, the General Counsel's Report to the FEC provides the basis for district court review. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 38 and n. 19 (1981).

23. When the FEC rejects the General Counsel's recommendation to pursue a possible violation of the FECA, the reasoning of the Commissioners who voted to dismiss the complaint – generally set forth in a Statement of Reasons – provides the basis for judicial review. *FEC v. Nat'l Republican Senatorial Comm.*, 842 F.2d 436, 449 (D.C. Cir. 1988).

VIOLATIONS OF FECA DESCRIBED IN THE ADMINSTRATIVE COMPLAINT

24. On September 29, 2010, the plaintiff filed an administrative complaint with the FEC against Steve Fincher For Congress and its treasurer. On October 14, 2010, the plaintiff filed a supplement to its complaint. The complaint and supplement filed by Herron for Congress described the following facts:

25. "On July 23, 2010, the Fincher Campaign filed with the FEC the Campaign's pre-primary election report, covering the period July 1, 2010 through July 16, 2010. That report disclosed a loan of $250,000 made to the Campaign on July 8, 2010. The loan was reported on Line 13(a) as having been made or guaranteed personally by the candidate. On Schedule C to this report, the Campaign reported the loan source as being "Personal Funds," with no due date and no interest rate."

26. "Mr. Fincher has filed two personal financial disclosure reports with the Clerk of the U.S. House, pursuant to the Ethics in Government Act of 1978. The first report was filed on October 29, 2009, covering calendar year 2009 up to September 29, 2009; and the second report was filed on May 17, 2010, covering January 1, 2009 through May 15, 2010. These reports showed *no* personal financial assets of Mr. Fincher, *at all—no* bank accounts, no stocks, no bonds, no certificates of deposit. The only asset of any kind disclosed was Mr. Fincher's farm." A copy of the disclosure report was attached to the administrative complaint.

27. "Clearly, it seems impossible that Mr. Fincher had $250,000 in cash available to loan to his campaign on July 8, 2010 yet had *no* personal funds at all, of any kind, at any time in 2010 through at least May 15. An Associated Press article on August 27, 2010 ... reported that 'Warren Nunn, chairman of the Gates Banking and Trust Co., said his bank was the source of the loan to Fincher, a longtime customer. "*We did advance Stephen a loan,*" Nunn said. . . . Nunn,

who has given the Fincher campaign $4,800, declined to say what kind of collateral Fincher put up for the loan' (emphasis added)."

28. "The Fincher Campaign ... filed with the FEC its quarterly report for the third quarter of 2010. Remarkably, Schedule C on that report continues to indicate that the source of the $250,000 loan made to the Fincher Campaign in July was Stephen Fincher's personal funds. That is exactly what the Fincher Campaign reported in its pre-primary report filed on July 23, 2010."

29. "Since that pre-primary report was filed, however, the chairman of Gates Banking &, Trust Co. of Tennessee told the Associated Press, on August 27, that Gates Bank was actually the source of the loan to the Fincher Campaign, as set forth in the Herron Campaign's original complaint. That bank chairman also refused to say whether Mr. Fincher had put up any collateral to secure the loan—and the Herron Campaign has been unable to find any UCC security statement on file with the Tennessee Secretary of State indicating that the Gates Bank took any security interest in any collateral in respect of this loan. Further, the filing of the complaint with the FEC has also been publicized."

30. "In short, Mr. Fincher and his campaign have been on notice for many weeks now that the failure to disclose the campaign's loan from the Gates Bank, and to report the terms on Schedule C, is unlawful. Yet Mr. Fincher and his campaign have continued flagrantly to ignore and refuse to comply with the clear requirements of the law and now have done so again even after being put on notice."

FACTS DESCRIBED IN REPLIES TO THE ADMINISTRATIVE COMPLAINT

31. After a two requests for extensions, which were granted, Steve Fincher For Congress (the "Fincher Campaign") and its treasurer filed a reply to the administrative complaint on November 26, 2010 and filed a supplement on December 6, 2010 consisting solely of copies of amended reports. After requesting and receiving an extension from the FEC, on November

17, 2010, the Gates Banking & Trust Company (the "Bank") filed a reply to the administrative complaint. Certain attachments to the replies were not placed on the public record and are not available to the plaintiff. The replies submitted the following facts and unsupported assertions:

32. The Fincher Campaign reply admitted that the Campaign had violated the FECA's reporting provisions: "a review of how the loan was reported to the FEC revealed inadvertent reporting errors and omissions that require the need for amended reports to be filed with the FEC."

33. Both the Campaign's reply and the Bank's reply admitted that on July 7, 2010, Stephen Fincher obtained a $250,000 bank loan for campaign-related purposes from the Bank with a rate of interest of 6.500% per year until paid in full. The maturity date was November 30, 2010. The replies attached a "Multipurpose Note and Security Agreement" but other attachments were not made public for the plaintiff's review. The replies asserted that the payee on a cashier's check was Stephen Fincher for Congress, but a copy was not provided.

34. The Fincher Campaign admitted that: "The loan was reported to the FEC on July 23, 2010 as an itemized receipt on Schedule A and as a loan on Schedule C. The purpose of the loan was listed on the loan document as 'business expense.'" The Steve Fincher for Congress committee's FEC disclosure report reported the interest rate as 0% instead of 6.5%.

35. Both the Fincher Campaign reply and the Bank reply assert that the 6.5% interest rate was 3.25% over the New York prime rate but did not provide any supporting information.

36. The Fincher Campaign reply stated that the "collateral for this note was a 2010 crop production note, on file with the Tennessee Secretary of State, and the deed of trust on the Fincher home held by Gates Banking and Trust serves as evidenced of the perfected security interest established by the Bank in the collateral." "In addition the bank cross collateralized the

loan with a deposit account held by the Finchers jointly, on which the bank possessed a right of offset." The Bank reply described the same collateral for the loan.

37. The Bank asserted that 6.5% "represented the usual and customary interest rate at the time of the loan for this category of loan at this lending institution," but provided no documentation to support the assertion.

38. The Bank did not file a separate UCC Financing Statement for the campaign loan, but argued that it had previously perfected a security interest in the Finchers' 2010 crops and proceeds and his personal residence.

39. Both replies asserted that the value of the collateral was greater than the amount of the loan. Although the Bank asserted it had performed a loan analysis that evaluated the collateral (but did not say whether the evaluation was performed when the original loan was made or when the $250,000 loan was made), no documentation of the value of the collateral was provided. Indeed, neither reply even asserted a value for the collateral.

40. Neither the Fincher Campaign's submission nor the Bank's submission provided any information about the original loan secured by the same collateral that allegedly secured the campaign loan, *e.g.* the amount of the loan, the date of the loan, the balance owed on the loan, the assessed value of the collateral, the date of the assessment and the procedure for assessing the value of the collateral, whether another party had a prior security interest in any of the so-called collateral, whether any parties in addition to Stephen Fincher and his wife were parties to the original loan, whether any parties in addition to Stephen Fincher and his wife had an interest in the 2010 crops, and whether the Bank had prohibited the Finchers from withdrawing any funds from their account that supposedly could be used as an off-set. Instead, both submissions merely made the assertion that the value of the collateral was greater than the $250,000 campaign loan.

41. The Bank asserted that it has a security interest in the crops, residence and deposit accounts.

a. To create a security interest the debtor must grant one. Neither submission asserted that such grant was made, and none of the attached documents available to the plaintiff made such a grant.

b. To perfect a security interest, one must make a proper filing. No filing was made.

c. The Deed of Trust indicates that the real estate is held by the entirety. Thus, Stephen Fincher and his wife must both sign any note that can legally be secured by their residence -- *i.e.*, because Stephen Fincher was the sole signer on the note for the campaign loan, the Bank does not have a collateralized interest in the residence.

d. The Bank asserted that the collateral for the $250,000 campaign loan was also the collateral for a previous loan for which there were previous security agreements and deeds of trust (mortgages) that cover future advances. However, documents available to the plaintiff do not support that assertion. Even if the residence could collateralize the campaign loan, the duration of the future advances clause in the deed of trust is blank and, therefore does not permit future advances. Further, future advances cannot exceed the amount of the original mortgage absent an amendment and additional taxes being paid.

e. Further, there is a prior filing in favor of Helena Chemical Company for a loan collateralized by the Finchers' 2010 crops. Thus , the available documents do not

support the assertion that the Bank had a secured debt and do not perfect the claimed security interest.

42. The usual and normal practice and regulatory requirements for Tennessee banks making similar loans require the bank to maintain a file that contains an appraisal or, at the very least, an evaluation and inspection report of the offered collateral, a UCC and real estate title search and certification, a signed financial statement (balance sheet) on the debtors and three years' federal income tax returns. The loan would be memorialized by promissory note, a security agreement granting security in described collateral, a UCC 1 filing to perfect the security interest and a deed of trust on the real estate. When relying on collateral for a previous loan, the bank would have a document that authorizes the use of the collateral for "future advances." There should also be documentation that there are no other security filings on the collateral or, as in this case where Helena Chemical Company has a security filing on the crops, there should be a subordination agreement from Helena giving the bank's security interest in the crops priority over Helena's which is now prior. There should be a document showing the ownership of the collateral, which in this case would show that there were others who had an ownership interest in the 2010 crops. None of these documents were supplied to the FEC to the best of the plaintiff's knowledge.

THE FEC'S PROCEEDING DISMISSING THE ADMINISTRATIVE COMPLAINT

43. The FEC assigned the administrative complaint MUR 6386 for administrative purposes.

44. On March 9, 2011, the FEC staff submitted the First General Counsel's Report to the FEC, which described the relevant law, the facts and their analysis supporting their recommendation that the FEC: find reason to believe Steve Fincher for Congress and its treasurer

violated 2 U.S.C. § 434(b)(3)(E) and 11 CFR § 104.3(d)(4); find no reason to believe that the campaign and the bank violated 2 U.S.C. § 441b(a), and enter into conciliation with Steve Fincher For Congress and its treasurer. In other words, as more fully described below, the staff recommended that the FEC not conduct an investigation, but settle the matter solely with respect to the admitted filing violation.

FECA'S REPORTING REQUIREMENTS FOR A CAMPAIGN LOAN

45. The staff described the law applicable to the reporting requirements for the loan as follow: "The Act provides that each report shall identify the person who makes a loan to the reporting committee during the reporting period, together with the identification of any endorser or guarantor of such loan, and date and amount or value of such loan. 2 U.S.C. § 434(b)(3)(E). When a candidate obtains a bank loan in connection with the candidate's campaign, the candidate's principal campaign committee shall disclose on Schedule C-1 to the report covering the period when the loan was obtained, the date, amount, and interest rate of the loan, the name and address of the lending institution, and the types and value of collateral or other sources of repayment that secure the loan, advance, or line of credit, if any. 11 C.F.R. § 104.3(d)(4)."

STAFF RECOMMENDATION TO FIND A REPORTING VIOLATION

46. The staff recommended finding reason to believe a violation of U.S.C. § 434(b)(3)(E) occurred and to negotiate a settlement of that violation because "[t]he committee acknowlege[d] that it failed to properly report the loan on its original 2010 Pre-Primary Report" as described in the administrative complaint." But the staff did not recommend a finding of a knowing and willful violation because "[w]hile the public would have been better served by more timely amendments, [the staff] have no information suggesting that the Committee intentionally delayed submitting them."

FECA PROHIBITS CORPORATE CONTRIBUTIONS

47. The staff described the law applicable to the legality of the loan. "The Act prohibits corporations such as Gates Bank from making, and the Committee from knowingly accepting, a contribution in connection with any federal Campaign. 2 U.S.C. § 441b(a). [footnote omitted] The FEC's regulations provide that a loan of money to a political committee or a candidate is not a contribution by the lending institution if such loan is made in accordance with applicable banking laws and regulations and is made in the ordinary course of business. 11 C.F.R. § 100.82(a). A loan will be deemed in the ordinary course of business if it (1) bears the usual and customary interest rate of the lending institution for the category of loan involved; (2) is made on a basis that assures repayment; (3) is evidenced by a written instrument; and (4) is subject to a due date or amortization schedule. *Id.*"

STAFF RECOMMENDATION NOT TO FIND A CORPORATE CONTRIBUTION

48. The staff accepted the Gates Bank &Trust Company's unsupported assertion that 6.5% was the usual and customary interest rate because "[w]e have no information to the contrary."

49. The staff recited the committee's and the bank's argument and evidence that the loan was made on a basis that assured repayment; *i.e.* the loan was cross collateralized with other bank debt and personal accounts, the bank had perfected a security interest on Mr. Fincher's personal residence and 2010 crop production; and the value of the collateral was greater than the loan amount.

50. The staff also noted that: there was no separate perfected security interest for the campaign loan; "the bank did not provide information as to the value of Fincher's farm, the 2010 crops, and his personal residence or the amount of funds in Fincher's non-interest bearing deposit account, or whether the collateral was adequate to satisfy Fincher's total indebtedness.

In a footnote, the staff noted that the bank's security interest was filed on January 5, 2010 for a $600,000 debt. Although not noted in the First General Counsel's Report, the staff was well aware that only the candidate's interest in the value of collateral co-owned by a candidate and his wife and others to secure a campaign loan may be used to determine whether there is a basis for assuring repayment of the loan. 11 C.F.R. § 100.82(a), 11 CFR § 100.52(b)(4). But, the replies do not disclose Mr. Fincher's interest in any of the so-called collateral, and whether the committee and the Bank made that calculation when they asserted that the value of the collateral was greater than the amount of the campaign loan. Nevertheless, the staff stated "we have no information suggesting that the $250,000 loan to the Fincher Committee was under collateralized. As noted, the loan was repaid in full before the maturity date."

THE COMMISSIONERS' DECISION

51. On June 14, 2011, in executive session, the FEC considered the First General Counsel's Report and the General Counsel's recommendation to: (1) find reason to believe that Steve Fincher For Congress and its treasurer violated 2 U.S.C. § 434(b)((3)(E) and 11 CFR §104.3(d)(4), (2) find no reason to believe that Steve Fincher For Congress, its treasurer and Gates Banking & Trust Company violated 2 U.S.C. § 441(b)(a), and (3) enter into conciliation with the committee and its treasurer regarding a Conciliation Agreement , which includes a civil money penalty. Votes on motions to approve those recommendations and modifications thereto failed. Finally, the FEC voted 5-1 to close the file in MUR 6386 without making any findings of a reason to believe a violation occurred.

COMMISSIONERS' STATEMENTS OF REASONS

52. On July 21, 2010, FEC Commissioners Bauerly, Walther and Weintraub issued a Statement of Reasons explaining their votes in MUR 6386. "All six Commissioners voted to

find reason to believe that the Fincher Campaign violated 2 U.S.C. § 434(b)(3)(E) and 11 CFR § 104.3(d)(4)," and to find no reason to believe that the Fincher Campaign or Gates Banking & Trust Company violated 2 U.S.C. § 441b(a), as recommended in the First General Counsel's Report. However, the FEC divided 3-3 on whether to seek a civil money penalty in a Conciliation Agreement from the Fincher Campaign, and then divided 3-3 on whether to send a letter of caution to the committee.

53. After all of the motions to find a reason to believe that a violation occurred failed because the FEC could not agree on the appropriate sanction, the FEC voted to close the file without making any findings or imposing any sanctions.

54. Commissioners Hunter, McGahn and Petersen have not filed a Statement of Reasons for their votes on the public record as of August 11, 2011.

FIRST CLAIM

55. Plaintiff re-alleges and incorporates by reference all preceding paragraphs as if fully set forth herein.

56. According to the Statement of Reasons, all six Commissioners agreed that there was reason to believe Fincher for Congress and its treasurer violated the FECA's reporting requirements and should be sanctioned by a conciliation agreement or a letter of caution, but dismissed the administrative complaint without finding reason to believe they had violated FECA because four or more commissioners could not agree on a sanction.

57. The FEC's failure to provide a reasoned explanation of its failure to find that Steve Fincher for Congress and its treasurer violated 2 U.S.C. § 434(b)(3)(E) and 11 CFR § 104.3(d)(4) is arbitrary, capricious, an abuse of discretion, and contrary to law in violation of 2 U.S.C. § 437g(a)(8)(A).

58. The FEC's dismissal of the complaint in MUR 6386 without finding reason to believe that Steve Fincher for Congress and its treasurer violated 2 U.S.C. § 434(b)(3)(E) and 11 CFR § 104.3(d)(4) and to seek a sanction, when all six commissioners agreed that there was reason to believe that they had violated the law and were willing to impose some sanction, is arbitrary, capricious, an abuse of discretion, and contrary to law in violation of 2 U.S.C. § 437g(a)(8)(A).

59. The failure of three Commissioners to provide a Statement of Reasons indicating why they disagreed with the General Counsel's recommendation to find reason to believe Fincher for Congress and its treasurer violated FECA and to attempt to resolve the matter with a conciliation agreement is arbitrary, capricious, an abuse of discretion, and contrary to law in violation of 2 U.S.C. § 437g(a)(8)(A).

60. Plaintiff is, therefore, entitled to relief in the form of a declaratory order that defendant FEC's failure to find reason to believe that Steve Fincher for Congress and its treasurer violated 2 U.S.C. § 434(b)(3)(E) and 11 CFR § 104.3(d)(4) is arbitrary, capricious, an abuse of discretion, and contrary to law in violation of 2 U.S.C. § 437g(a)(8).

SECOND CLAIM

61. Plaintiff re-alleges and incorporates by reference all preceding paragraphs as if fully set forth herein.

62. The staff did not recommend a finding of a knowing and willful violation 2 U.S.C. § 434(b)(3)(E) and 11 CFR § 104.3(d)(4) because "[w]hile the public would have been better served by more timely amendments, [the staff] have no information suggesting that the Committee intentionally delayed submitting them."

63. However, the staff had information suggesting there was reason to believe the committee and its treasurer willfully violated 2 U.S.C. § 434(b)(3)(E) and 11 CFR § 104.3(d)(4). The phrase "knowing and willful" indicates that "actions [were] taken with full knowledge of all of the facts and a recognition that the action is prohibited by law." 122 Cong. Rec. H 2778 (daily ed. May 3 1976); *see also Federal Election FEC v. John A. Dramesi for Cong. Comm.*, 640 F. Supp. 985, 987 (D.N.J. 1986) (distinguishing between "knowing" and "knowing and willful"); *United States v. Hopkins*, 916 F. 2d 207, 214 (5th Cir. 1990) (a violation may be established "by proof that the defendant acted deliberately and with knowledge," but need not show that the defendant "had specific knowledge of the regulations" or "conclusively demonstrate a defendant's "state of mind"). For example, Steve Fincher for Congress and its treasurer were aware of their responsibility to accurately and timely describe the Fincher campaign loan in their FEC reports, and failed to do so. Indeed, the treasurer certified that the reports were complete and accurate to the best of her knowledge. They admitted that merely reviewing their filing revealed the error. Moreover, the administrative complaint put them on notice that there was an error. Yet, they failed to amend the report in a timely manner. Knowing there was an error and knowing that they had a responsibility to correct that error, but did not, is knowing and willful, or at least, is reason to believe that the admitted violation was knowing and willful. Thus, the staff's assertion that there was no suggestion that the committee intentionally delayed is inconsistent with the administrative record.

64. The FEC's failure to provide a reasoned explanation for not finding that Steve Fincher for Congress and its treasurer knowingly and willfully violated 2 U.S.C. § 434(b)(3)(E) and 11 CFR § 104.3(d)(4) is arbitrary, capricious, an abuse of discretion, and contrary to law in violation of 2 U.S.C. § 437g(a)(8)(A).

65. The FEC's dismissal of the complaint in MUR 6386 without finding that Steve Fincher for Congress and its treasurer knowingly and willfully violated 2 U.S.C. § 434(b)(3)(E) and 11 CFR § 104.3(d)(4) is arbitrary, capricious, an abuse of discretion, and contrary to law in violation of 2 U.S.C. § 437g(a)(8)(A).

66. Plaintiff is, therefore, entitled to relief in the form of a declaratory order that defendant FEC's failure to find reason to believe that Steve Fincher for Congress and its treasurer knowingly and willfully violated 2 U.S.C. § 434(b)(3)(E) and 11 CFR § 104.3(d)(4) is arbitrary, capricious, an abuse of discretion, and contrary to law in violation of 2 U.S.C. § 437g(a)(8).

THIRD CLAIM

67. Plaintiff re-alleges and incorporates by reference all preceding paragraphs as if fully set forth herein.

68. The FEC staff incorrectly accepted the Bank's assertion that the documentation it provided demonstrated that the loan was secured by the so-called collateral and the Bank had a perfected security interest in the collateral. In fact, the documents provided by the Bank and the adverse inference arising from the Bank's failure to provide additional documents that would exist if it had a perfected security interest in the so-called collateral provide reason to believe the collateral was not secured.

69. The Bank asserted, and the FEC staff repeated the assertion, that the collateral for the $250,000 campaign loan was also the collateral for a previous loan for which there were previous security agreements and deeds of trust (mortgages) that cover future advances. However, the documents provided by the Bank available to the plaintiff do not support that assertion. For example, the staff failed to recognize and discuss that to create a security interest

the debtor must grant one. The duration of the future advances clause in the deed of trust is blank and, therefore, there was no grant to use the so-called collateral to secure future advances. None of the submissions or attachments thereto claim or evidence a grant of a security interest to secure the campaign loan. Furthermore, to perfect a security interest, one must make a proper filing. The UCC document submitted by the Bank as evidence of a perfected security interest, on its face, does not describe any collateral, and therefore, no security interest was created in the so-called collateral. Even if there was a security interest, neither reply even claimed to have a priority interest in any of the collateral. Thus, the available documents do not support the assertion that the Bank had a secured debt and had perfected the claimed security interest.

70. The FEC's failure to provide a reasoned explanation to support its finding that the collateral for Fincher's campaign loan was secured and the Bank had perfected a priority security interest is arbitrary, capricious, an abuse of discretion, and contrary to law in violation of 2 U.S.C. § 437g(a)(8)(A).

71. The Steve Fincher's campaign loan was not supported by a perfected security interest in the collateral to provide a basis for assurance of repayment in accordance with the requirements of 11 C.F.R. § 100.82(a). Thus, the FEC's dismissal of the complaint in MUR 6386 without finding reason to believe that Steve Fincher For Congress and its treasurer knowingly and willfully violated 2 U.S.C. § 441b(a) is arbitrary, capricious, an abuse of discretion, and contrary to law in violation of 2 U.S.C. § 437g(a)(8)(A).

72. Plaintiff is, therefore, entitled to relief in the form of a declaratory order that defendant FEC's failure to find reason to believe that Steve Fincher for Congress and its treasurer violated 2 U.S.C. § 441b(a) is arbitrary, capricious, an abuse of discretion, and contrary to law in violation of 2 U.S.C. § 437g(a)(8).

FOURTH CLAIM

73. Plaintiff re-alleges and incorporates by reference all preceding paragraphs as if fully set forth herein.

74. The FEC staff incorrectly accepted the Bank's assertion that the documentation it provided demonstrated that there was sufficient collateral to assure re-payment of the $250,000 campaign loan pursuant to 11 C.F.R. § 100.82(a). In fact, the documents provided by the Bank and the adverse inference arising from the Bank's failure to provide additional documents showing the valuation of the so-called collateral provide reason to believe there was insufficient collateral to find reason to believe that the Bank was assured re-payment of the $250,000 campaign loan.

75. In fact, there was evidence that there was reason to believe the campaign loan was not sufficiently collateralized to assure re-payment of the loan even if the Bank had a security interest in the so-called collateral. For example, the staff itself noted that: (1) there was no separate perfected security interest for the campaign loan; and (2) the bank did not provide information as to the value of Fincher's farm, the 2010 crops, and his personal residence or the amount of funds in Fincher's non-interest bearing deposit account, or whether the collateral was adequate to satisfy Fincher's total indebtedness. Furthermore, because the Bank filed a security interest on January 5, 2010 for a $600,000 debt, the Deed of Trust was for $200,000, and Stephen Fincher could use no more than half of the so-called collateral to secure his $250,000 campaign loan, the value of the so- collateral would have to have been more than one million dollars. In fact, there is reason to believe that there was no so-called collateral available to secure the campaign loan. Neither the Steve Fincher for Congress' nor the Bank's submission provided any information about the original loan secured by the 2010 crops and the deposit

account that also allegedly secured the campaign loan, e.g. the amount of the loan, the date of the loan, the assessed value of the collateral, the date of the assessment and the procedure for assessing the value of the collateral, and whether the Bank held a primary security interest in the crops. Instead, both submissions merely made the assertion that the value of the collateral was greater than the $250,000 campaign loan. The usual and normal practice and regulatory requirements for Tennessee banks making similar loans requires the bank to maintain a file that contains an appraisal (or, at the very least, an evaluation and inspection report of the offered collateral), a UCC and real estate title search and certification, a signed financial statement (balance sheet) on the debtors and three years' federal income tax returns. The loan would be memorialized by promissory note, a security agreement granting security in described collateral, a UCC1 for filing to perfect the security interest and a deed of trust on the real estate. When relying on collateral for a previous loan, the bank would have a document granting a security interest in that collateral and that authorizes the use of the collateral for future advances. There should also be documentation that there are no other security filings on the collateral. None of these documents were provided to the FEC and placed on the public record to the best of the plaintiff's knowledge.

a. With respect to the assertion that the campaign loan was collateralized by 2010 crops, the Gates Banking and Trust Company did not make a filing perfecting a security interest. But even if it had, the value that could be used under 11 C.F.R. § 100.82 to support Mr. Fincher's loan would be his interest in the collateral. Although no information was provided about the value of the collateral it would have to be decreased by any prior loan and Mr. Fincher's interest would have to be determined based on the number

of other owners of the collateral. The staff failed to take notice of the absence of this information. Indeed, according to public records, the Helena Chemical Company has a $1.5 million perfected security interest in the 2010 crops, and the crops are owned by Mr. Fincher and his wife, and many other members of the extended Fincher family and their wives. Therefore, there is evidence, or at least an adverse inference, that the crops did not provide collateral for the campaign loan.

b. With respect to the assertion that the campaign loan was collateralized by the residence of Mr. Fincher and his wife, the Deed of Trust indicates that the real estate is held by the entirety. Therefore, each spouse owns only an expectancy, that is, the debtor spouse's interest cannot be executed upon or foreclosed until one of them dies because each owns the whole through the marital unity. Thus, the residence cannot provide collateral for a loan unless both Mr. Fincher and his wife sign for the loan. *i.e.* the Bank does not have a collateralized interest in the campaign loan signed solely by Mr. Fincher. Even if the residence could be used for collateral, the value of the collateral would be *de minimus*. The maximum amount of a new advance is the original $200,000 loan amount. Thus, the most the residence could collateralize would be any principal previously re-paid. Therefore, there is evidence, or at least an adverse inference, that the residence did not provide collateral for the campaign loan.

c. With respect to the possibility of any offset against deposits at the Bank, they are specious. Any deposits could be withdrawn at any time.

> Moreover, Mr. Fincher's personal financial disclosure statement filed pursuant to the Ethics in Government Act, a copy of which was attached to the plaintiff's administrative complaint, did not disclose any money at all held in any depository accounts. Therefore, there is evidence, or at least an adverse inference, that the deposits available for offset did not provide collateral for the campaign loan.

Given the evidence provided and under the adverse inference rule for the documents not provided there was reason to believe that the loan was under collateralized.

76. The FEC's failure to provide a reasoned explanation to support its finding that Fincher's campaign loan was supported by sufficient collateral to provide a basis to assure repayment in accordance with 11 C.F.R. § 100.82(a) is arbitrary, capricious, an abuse of discretion, and contrary to law in violation of 2 U.S.C. § 437g(a)(8)(A).

77. The FEC's dismissal of the complaint in MUR 6386 without finding that there was reason to believe that Steve Fincher For Congress and its treasurer violated 2 U.S.C. § 441b(a) is arbitrary, capricious, an abuse of discretion, and contrary to law in violation of 2 U.S.C. § 437g(a)(8)(A).

78. Plaintiff is, therefore, entitled to relief in the form of a declaratory order that defendant FEC's failure to find reason to believe that Steve Fincher for Congress and its treasurer violated 2 U.S.C. § 441b(a) is arbitrary, capricious, an abuse of discretion, and contrary to law in violation of 2 U.S.C. § 437g(a)(8).

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully requests that this Court:

A. Declare that the Federal Election Commission's dismissal of plaintiff's administrative complaint against Steve Fincher For Congress and its treasurer, MUR 6386, is arbitrary, capricious, an abuse of discretion, and contrary to law;

B. Remand MUR 6386 to the Federal Election Commission with an Order to conform to this Court's declaration and to inform this Court and the plaintiff within 30 days whether the Federal Election Commission intends to conform to this Court's Order;

C. Award plaintiff its costs, expenses, and reasonable attorney's fees in this action, and

D. Grant such other and further relief as this Court may deem just and proper.

Respectfully submitted,

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