UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTARIAN NATIONAL COMMITTEE, INC.,	Civ. No. 11-562 (RLW-MG-RBW)
Plaintiff,	THREE-JUDGE COURT
v.	
FEDERAL ELECTION COMMISSION,	REPLY MEMORANDUM
Defendant.	

DEFENDANT FEDERAL ELECTION COMMISSION'S
REPLY MEMORANDUM IN SUPPORT OF ITS
MOTION FOR A MORE DEFINITE STATEMENT

In its memorandum in opposition, plaintiff Libertarian National Committee, Inc. ("LNC") has clarified that it is not challenging the contribution limits of the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431-57, found in section 441a of Title 2. LNC incorrectly asserts, however, that its lawsuit can nevertheless indirectly invalidate section 441a because that provision would purportedly be rendered unenforceable by a favorable ruling on LNC's claim against section 441i, the non-federal (soft) money ban imposed on national party committees like LNC by the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 82. LNC has chosen not to clarify its Complaint's ambiguity about whether it claims a right to receive unlimited contributions through bequests for the purpose of influencing *federal* elections. If LNC is making that claim, its position resembles a game of bait and switch: On the surface LNC challenges only section 441i to enjoy the special review features of BCRA section 403, but the underlying substance of LNC's claim is a challenge to section 441a, the pre-existing provision of FECA, for which no three-judge court is available.

LNC cannot have it both ways. To be sure, LNC is the master of its complaint and can choose to challenge only section 441i for strategic reasons. But if LNC seeks federal funds, it must live with the *full* consequences of its choice not to challenge section 441a. A ruling striking down only section 441i would leave intact section 441a, along with its limits on the receipt of federal funds. As a result, LNC would lack standing because a three-judge court could not redress LNC's claimed injury. But it would be premature for the Commission to bring a motion to dismiss on that basis before at least seeking clarification as to whether LNC wants federal funds. If LNC seeks only non-federal funds, there would be no basis for such a motion, because a ruling striking down section 441i would grant LNC full relief. Rather than clarify this point, LNC suggests that the FEC bring a potentially needless motion to dismiss. The Commission's Rule 12(e) motion should be granted, because when a "'defendant is unclear about the meaning of a particular allegation in the complaint, the proper course of action is not to move to dismiss but to move for a more definite statement.'" *Potts v. Howard Univ.*, 269 F.R.D. 40, 42 (D.D.C. 2010) (quoting *Am. Nurses' Ass'n v. Illinois*, 783 F.2d 716, 725 (7th Cir. 1986)).

ARGUMENT

I. LNC Has Clarified That It Is Not Challenging Section 441a, Yet the Complaint Remains Ambiguous About Whether LNC Seeks Unlimited Federal Funds

In its opening memorandum, the Commission identified two critical ambiguities in LNC's Complaint: (1) whether LNC is challenging the constitutionality of the contribution limits in 2 U.S.C. § 441a, and (2) whether LNC claims a right to accept unlimited contributions of money to be used to influence federal elections, as opposed to funds to be used for non-federal purposes. (FEC's Memorandum in Support of Motion for a More Definite Statement ("Def.'s Mem.") (Docket No. 9) at 5-7.) LNC has now clarified that it does not challenge the

constitutionality of section 441a. (*See* Plaintiff's Opposition to Motion for More Definite Statement ("Pl.'s Opp'n Mem.") (Docket No. 10) at 2-3.) But despite the Commission's motion, LNC has not clarified whether it is claiming a right to receive unlimited contributions of federal funds, and as a result, the Complaint remains ambiguous on this critical point. (*See* Def.'s Mem at 5-6 (citing Complaint ("Compl.") (Docket No. 1) ¶¶ 4, 14, 24-25).) This ambiguity prevents the FEC from ascertaining the nature of LNC's claim and reasonably addressing whether LNC has standing and whether the three-judge Court has jurisdiction to hear this case. *See Dorsey v. Am. Express Co.*, 499 F. Supp. 2d 1, 3 (D.D.C. 2007) ("[T]he complaint must be detailed enough to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests[.]" (alteration in original; internal quotation marks omitted); Def.'s Mem. at 4-8.

II. LNC May Decline to Challenge Section 441a, But if That Is Its Choice, LNC Cannot Obtain Relief from Section 441a's Limits in This Case or a Future Case

A plaintiff is the master of its complaint and is free to assert only some of the claims available to it for jurisdictional reasons, such as in the situation in which a plaintiff with possible state and federal law claims brings only the state law claims in order to prevent the defendant from removing the case to federal court. *See, e.g., Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) ("[T]he plaintiff [is] the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law."); *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 367 (5th Cir. 1995) ("[I]f a plaintiff indeed has a viable state law claim, he may depend on it alone and thereby defeat attempts at removal."). While sections 441a and 441i *both* bar LNC from accepting unlimited contributions of federal funds, LNC is free to attack the constitutionality of only section 441i, as it has, to secure the jurisdiction of the three-judge Court. But LNC's choice must be clear, and LNC must live by *all* consequences of that choice, which means that LNC cannot obtain relief from section 441a's limits through its current Complaint.

LNC asserts that if it were "to prevail in this action, and obtain its requested declaratory relief . . . the Commission could not enforce *some other law* to bar the same conduct . . . ." (Pl.'s Opp'n Mem. at 8 (emphasis added).) Assuming that by "some other law" LNC is referring to section 441a, LNC is incorrect because (1) LNC cannot receive relief it has not requested, and it has not requested relief from section 441a; (2) the three-judge Court has no jurisdiction to grant relief as to section 441a; and (3) section 441a is distinct from section 441i, which would not fall by implication if section 441i were struck down.

First, a plaintiff cannot receive relief for a claim that it has specifically chosen not to assert, even if the facts pled would have supported that claim. For example, in *Warthman v. Genoa Twp. Bd. of Trs.*, 549 F.3d 1055 (6th Cir. 2008), the court rejected the defendant's argument that removal was appropriate merely because the plaintiff had pled facts that would have supported a federal due process claim, because the plaintiff chose not to assert that claim. *Id.* at 1062. The Court noted that the plaintiff "took great care to assert only state-law claims in her complaint, a choice that she was fully entitled to make even if it meant foregoing an available federal cause of action." *Id.* at 1063. *See Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 625 (1996) (explaining that if the Court were to strike down as unconstitutional FECA's Party Expenditure Provision's limits on a political party's coordinated expenditures, a separate FECA limit on a party's contributions — which plaintiff decided not to challenge as a matter of litigation strategy — would continue to limit its coordinated expenditures, which are treated as contributions under the Act).

In this case, LNC has pled facts that may support a claim against section 441a. LNC has nevertheless taken great care to request *only* "[a]n order permanently enjoining" the FEC "from enforcing 2 U.S.C. § 441i" and "[d]eclaratory relief consistent with the injunction." (Compl.

Prayer for Relief at 8.) Thus, LNC has chosen to forgo a possible section 441a claim, "and when [a plaintiff] says that it is not bringing a . . . claim, we should take it at its word." *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 458 (6th Cir. 2007) (refusing to imply a claim that the plaintiff expressly disavowed in its briefing).[1]

Second, even if LNC could receive relief on a section 441a claim it has declined to assert, a three-judge court lacks jurisdiction to grant such relief under BCRA section 403(a). *See McConnell v. FEC*, 540 U.S. 93, 229 (2003). Like LNC, certain plaintiffs in *McConnell* brought a claim against only a provision of BCRA, but "[t]he relief the . . . plaintiffs s[ought wa]s for th[e] Court to strike down the [FECA] contribution limits" of section 441a. *Id.* Thus, as LNC notes, "[t]he challenge was, in reality, to the pre-existing law" (Pl.'s Opp'n Mem. at 10), which the Court had "no power to adjudicate," *McConnell*, 540 U.S. at 229.[2]

Contrary to plaintiff's argument (Pl.'s Opp'n Mem. at 10-11), *Bluman v. FEC*, No. 10-1766, 2011 WL 52561 (D.D.C. Jan 7, 2011), shows why this Court cannot grant LNC relief from section 441a's limits. *Bluman* held that a three-judge court was appropriate in that case because if the BCRA provision challenged there were struck down, "*no other law* . . . would prohibit the plaintiffs from engaging in their desired conduct." *Id.* at *3 (emphasis added). Unlike the

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[1] Additionally, LNC would be barred from obtaining relief from section 441a's limits in a *future* case by the doctrine of *res judicata*, which "precludes the parties or their privies from relitigating issues that were or could have been raised in that action" so long as a final judgment on the merits was issued. *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981); *see also Carpenter*, 44 F.3d at 367 ("[P]laintiff with a choice between federal- and state-law claims may elect to proceed in state court on the exclusive basis of state law, thus defeating the defendant's opportunity to remove, *but taking the risk that his federal claims will one day be precluded*." (emphasis added)).

[2] LNC mischaracterizes *McConnell* when it states that the case involved "an attempt to bring a *direct challenge* to FECA's Section 441a contribution limits." (Pl.'s Opp'n Mem. at 10 (emphasis added).) These *McConnell* plaintiffs directly challenged only BCRA *while asking for FECA relief*, which the Court could not grant in a BCRA section 403(a) case. *See McConnell*, 540 U.S. at 229.

situation in *McConnell*, the BCRA provision challenged in *Bluman* had "entirely replaced" a FECA provision that was "no longer in effect." *Id.* Here, section 441i did not replace section 441a, and section 441a is still in effect. Although section 441i's broad language partially *overlaps* section 441a's coverage to the extent they both prohibit national party committees like LNC from accepting unlimited federal funds, they are still separate and distinct provisions, and if section 441i were struck down, section 441a would continue to restrict LNC's receipt of federal funds.

Third, a ruling striking down section 441i would not cause section 441a to fall by implication simply because section 441i references FECA's contribution limits, as LNC claims. (*See* Pl.'s Opp'n Mem. at 8.) LNC asserts that section 441i merely "impose[s]" section 441a's contribution limits (*id.* at 2) and that "inherently, every BCRA case is intertwined with FECA" (*id.* at 8; *see also id.* at 3, 9 (further suggesting that every BCRA case implicates FECA)). However, before BCRA, section 441a(f) already "imposed" FECA's federal money contribution limits on national party committees. BCRA reinforced that provision and added something new — the soft money ban of section 441i, which prevents parties from circumventing the federal money contribution limits by accepting unlimited donations of money to be used for non-federal purposes. *See McConnell*, 540 U.S. at 133, 142. Indeed, section 441i is entitled, "*Soft money* of political parties." (emphasis added). Thus, it is easy to "conceive of a BCRA challenge that would not involve FECA" (Pl.'s Opp'n Mem. at 9) and which would be appropriate for a three-judge court: a case in which the plaintiff seeks only soft money.[3]

[3] For example, last year, a three-judge district court heard a challenge to section 441i in *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150 (D.D.C.), *aff'd*, 130 S. Ct. 3544 (2010). In that case, the plaintiff argued unsuccessfully that the "First Amendment entitles it to raise and spend soft money for . . . activities [that] lack sufficient connection to a *federal* election." *Id.* at 155. *See also McConnell*, 540 U.S. at 142-61 (addressing a facial attack on section 441i, in

By contrast, LNC's Complaint is ambiguous about whether it claims a right to solicit and receive federal or non-federal money above the contribution limits in section 441a. Assuming LNC does seek federal funds, section 441a and 441i both bar LNC's desired conduct. But this overlap does not invest this three-judge Court with the statutory authority to grant LNC relief from the prohibitions of section 441a. Analogously, the three-judge district court in *Bluman* held that although it could review the plaintiffs' challenge to BCRA section 303, it could not review a challenge to the regulation implementing BCRA section 303 since that regulation was not part of BCRA. *See* 2011 WL 52561, at *3. The court so concluded despite the plaintiffs' argument that the implementing regulation would "necessarily fall along with the" challenged BCRA provision if the plaintiffs were to win the suit. *See id.*

Thus, LNC cannot obtain relief from section 441a's limits by challenging only the restrictions in section 441i as stated in its current Complaint.

III. LNC Should Clarify Whether It Seeks Federal Funds; If It Does, LNC Lacks Standing Before This Three-Judge Court

Because LNC cannot obtain relief from section 441a's limits before this three-judge Court, the Commission's motion for a more definite statement should be granted in order to clarify whether LNC claims a right to receive federal or non-federal funds. If LNC claims a right to only non-federal funds, a ruling by this Court striking down section 441i would fully redress the LNC's alleged injury from its inability to accept limitless non-federal funds, and thus LNC would have standing. But if LNC claims a right to federal funds, this three-judge Court cannot redress LNC's alleged injury because it cannot reach section 441a, and so LNC would lack standing. *See McConnell*, 540 U.S. at 229 (holding that certain plaintiffs lacked standing

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which the question presented was "whether large *soft-money* contributions to national party committees have a corrupting influence"). The Commission did not challenge the three-judge court's jurisdiction in that case.

because "[a]lthough [it] ha[d] jurisdiction to hear a challenge to [BCRA] § 307, if the Court were to strike down the increases and indexes established by BCRA § 307, it would not remedy the . . . plaintiffs' alleged injury because . . . the limitations imposed by FECA . . . would remain unchanged"); *Schonberg v. FEC*, No. 1:10-cv-02040, slip op. at 8 (D.D.C. May 12, 2011) (holding that a plaintiff lacked standing before a three-judge court because "[a]s in *McConnell*, were this court to hold that BCRA § 301 is unconstitutional, the limitations imposed by FECA would remain in force"). Thus, this Court should order LNC to provide a more definite statement, which would permit the Commission to identify the nature of LNC's claim and to determine how to respond in a way that promotes judicial efficiency.

CONCLUSION

For the foregoing reasons, the Commission's motion for a more definite statement pursuant to Rule 12(e) should be granted.[4]

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[4] Contrary to the text of LNC's proposed order (Docket No. 11), if the Court were to deny this motion, the Commission would have 14 days after notice of the Court's action to file a responsive pleading, unless the Court were to set a different time. *See* Fed. R. Civ. P. 12(a)(4)(A).

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