IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTARIAN NATIONAL COMMITTEE, INC., Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Case No. 11-CV-562-RLW-MG-RBW

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO
MOTION FOR MORE DEFINITE STATEMENT

Comes now the Plaintiff Libertarian National Committee ("LNC"), by and through undersigned counsel, and submits its Memorandum of Points and Authorities in Opposition to the Motion for More Definite Statement.

Dated: May 17, 2011

Respectfully submitted,
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PRELIMINARY STATEMENT

The Commission makes no secret of its strategy: it demands that Plaintiff add allegations to its Complaint that could then be used to advance a motion to dissolve this three-judge court. That is hardly an appropriate use of Rule 12(e),[1] a disfavored tool designed to add clarity to unintelligible complaints—not, as the Commission might prefer, a tool to demand the inclusion of allegations omitted by the Plaintiff that would aid an attack on the Court's jurisdiction.

Quite simply, it is not Plaintiff's obligation to draft a complaint in the manner that the Commission believes would best comport with *its* theories. There is absolutely no question that the Commission understands Plaintiff's Complaint. It may not like the Complaint, it might prefer the Complaint addressed different or other issues, but it understands the Complaint not only well enough to answer it, but well enough to see that it lacks allegations that would make it easier to attack. The motion for more definite statement must be denied.

Plaintiff is constrained, however, to note that even if the Complaint were amended to include the allegations sought by the Commission—allegations that the Plaintiff simply will not assert absent some good reason to do so—the Commission's jurisdictional theory would fail.

[1]All citations to rules are to the Federal Rules of Civil Procedure.

STATEMENT OF FACTS

There is no need to recite in detail the Complaint's plain allegations. The Libertarian Party has received a very large bequest that it would like to access, immediately and in full, but it cannot do so because 2 U.S.C. § 441i[2] forbids such access to the money. Additionally, Section 441i forbids the Libertarian Party from soliciting bequests that exceed federal contribution limits. The Libertarian Party claims that Section 441i, as applied to testamentary bequests, violates its First Amendment rights. It seeks declaratory and injunctive relief to vindicate its claims.

The contribution limits imposed by Section 441i are those listed in Section 441a, but the Complaint does not challenge Section 441a because (1) the Plaintiff does not believe it is necessary for it to challenge Section 441a, and (2) the Plaintiff is not interested in fomenting the very dispute that the Commission's motion seeks to trigger, regarding what sort of Court should be convened to hear this challenge.

SUMMARY OF ARGUMENT

The instant motion suffers from two major flaws. First—and this the only directly relevant consideration on a motion for more definite statement—the Complaint is crystal-clear in full compliance with the notice pleading requirements of Rule 8. It lays out a plain statement of the facts, a short, coherent legal theory, and an unambiguous prayer for relief. There is no mystery about the dispute.

Motions for more definite statements are disfavored under modern notice pleading standards. Addressed to complaints that are truly unintelligible, such motions are not a vehicle for conducting discovery or forcing plaintiffs to alter their theories of the case.

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[2]All statutory citations are to Title 2 of the United States Code.

The Commission only strains to see a challenge to Section 441a because the Complaint contains no such challenge. Opposing counsel has referenced our conversations meeting and conferring regarding this motion, but only this part is relevant: Plaintiff's counsel has made very clear to the Commission that the Complaint is what it is, and the lack of a Section 441a challenge speaks for itself.

If the Commission believes that a challenge to Section 441a is mandatory under the circumstances, its avenue for relief is not under Rule 12(e), but under Rule 12(b)(6). At that point, were the Court to agree with the Commission that Plaintiff must challenge Section 441a, an amendment to that effect would ordinarily be sought.

Of course, the very fact of this Rule 12(e) motion suggests the Commission understands full-well that a Rule 12(b)(6) motion would not succeed, and that its ultimate goal of dissolving this Court is unavailable because the plain and unambiguous command of the Bi-Partisan Campaign Reform Act of 2002 ("BCRA") provides that Plaintiff may unilaterally elect to have its case heard by a three-judge court. Were a three-judge court unavailable in every BCRA challenge that implicated the Federal Election Campaign Act ("FECA"), BCRA's three-judge panel provision would be utterly illusory. Nothing in the Act, or in any precedent, requires a "FECA exception" to swallow wholesale BCRA's jurisdictional provisions.

In any event, Rule 12(e) cannot be invoked to force Plaintiff to include allegations it has opted not to include. As there is no ambiguity in the Complaint, the motion must be denied, and the consequences of Plaintiff's plainly well-pleaded Complaint will unfold per the merits of the parties' various arguments.

ARGUMENT

I. THE COMPLAINT IS INTELLIGIBLE.

"Given the liberal nature of the federal pleading standards, Rule 12(e) motions are typically disfavored by courts." *Rahman* v. *Johanns*, 501 F. Supp. 2d 8, 19 (D.D.C. 2007) (citation omitted); *United States ex rel. Brown* v. *Aramark Corp.*, 591 F. Supp. 2d 68, 76 n.5 (D.D.C. 2008). Indeed, "Rule 12(e) motions are . . . rarely granted in light of the notice-pleading framework of the federal rules." *Towers Tenant Ass'n* v. *Towers Ltd. Partnership*, 563 F. Supp. 566, 569 (D.D.C. 1983) (citations omitted). Rule 12(e) motions are also "disfavored for their dilatory effect on the progress of litigation." *Potts* v. *Howard Univ.*, 269 F.R.D. 40, 44 (D.D.C. 2010).

"Rule 12(e) provides defendants with a remedy for inadequate complaints that fail to meet the minimum pleading standard set forth in Rule 8(a) . . . " *Hilska* v. *Jones*, 217 F.R.D. 16, 21 (D.D.C. 2003) (citations omitted). But "[a] complaint need only contain a short, plain statement of the claim, indicating that plaintiff is entitled to relief, and giving defendant fair notice of the nature of plaintiff's grievance." *Towers*, 563 F. Supp. at 569 (citations omitted). Accordingly, under Rule 12(e), "[a] party may move for a more definite statement of a pleading . . . which is so vague or ambiguous that the party cannot reasonably prepare a response." Rule 12(e). But Rule 12(e) motions are denied where "a review of the defendants' submissions establishes that the defendants understand the crux of" a complaint. *Potts*, 269 F.R.D. at 43. "A motion for a more definite statement should not be used to test an opponent's case by requiring him to allege certain facts or retreat from his allegations." *Juneau Square Corp.* v. *First Wisconsin Nat'l Bank*, 60 F.R.D. 46, 48 (E.D.Wis. 1973).

"[A] complaint satisfies th[e] criterion [of Rules 8(a) and 12(e)] if it is not 'so vague or ambiguous that a party cannot reasonably be expected to frame a responsive pleading.'" *Wilson* v. *Gov't of the Dist. of Columbia*, 269 F.R.D. 8, 12 (D.D.C. 2010) (citation omitted). "Normally, of course, the basis for requiring a more definite statement is unintelligibility, not mere lack of detail." *Rahman*, 501 F. Supp. 2d at 19 (citations omitted); *Brown*, 591 F. Supp. 2d at 76 n.5; *Towers*, 563 F. Supp. at 569.

> [W]hen the complaint conforms to Rule 8(a) and it is neither so vague nor so ambiguous that the defendant cannot reasonably be required to answer, the district court should deny a motion for a more definite statement and require the defendant to bring the case to issue by filing a response within the time provided by the rules.

Potts, 269 F.R.D. at 42 (citation omitted); *Hilska*, 217 F.R.D. at 21. "[A]s long as the defendant is able to respond, even if only with simple denial, in good faith, without prejudice, the complaint is deemed sufficient." *SEC* v. *Digital Lightwave*, 196 F.R.D. 698, 700 (M.D.Fla. 2000) (citation omitted).

Under these standards, it is plain that the Commission's motion borders on the frivolous. Indeed, the Commission opens by declaring:

> LNC claims that it is challenging only a provision of the Bipartisan Campaign Reform Act ("BCRA"), 2 U.S.C. § 441i, that bars national political parties like LNC from soliciting or receiving "soft money" (funds to be used for non-federal purposes) — and LNC based its request to convene this three-judge Court on that limited claim.

Def. Mem. at 1.

That should end the matter. Clearly, the Commission understands the Complaint. If the Commission believes that this allegation is unsustainable for some reason, it can file an appropriate motion to that effect. But Plaintiff has nothing to add here. Indeed, the great bulk of the motion is devoted to the Commission's jurisdictional theories. Yet the Commission also

recognizes that it cannot even argue for its real goal—the dissolution of this three-judge court—unless the Plaintiff were to add a Section 441a claim. Since the Commission understands perfectly well that there is no Section 441a claim in this case, the motion for more definite statement is pointless. Instead of wasting time angling for an attack on the formation of a three-judge court—to which Plaintiff is unambiguously entitled under BCRA—the Commission should try to address the merits of the Complaint, the meaning of which it clearly comprehends.

II. THERE IS NO CONFUSION REGARDING THE APPLICATION OF FEDERAL ELECTION LAW TO TESTAMENTARY ESTATES.

The Commission's claimed confusion is nonsensical. It claims that "LNC's recitation of the fact that the Commission has interpreted the term 'person' in FECA to include testamentary estates also suggests that LNC is challenging section 441a." Def. Mem. at 6. The theory is that while Section 441a bars donations by "persons," Section 441i impacts all donations, regardless of source. Accordingly, the meaning of Section 441a "is irrelevant to a challenge to BCRA's prohibition in section 441i." *Id.*

There are two significant flaws with this thinking.

A. The Limits of Section 441a Are Incorporated Into Section 441i.

The literal text of Section 441i(a)(1) should dispel any confusion:

> A national committee of a political party (including a national congressional campaign committee of a political party) may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to *the limitations, prohibitions, and reporting requirements of this Act*.

(emphasis added). Section 441a is entitled, "Limitations on Contributions and Expenditures," and it contains, unsurprisingly, limitations on contributions and expenditures. "[T]he limitations,

prohibitions, and reporting requirements of this Act" referenced in Section 441i *include, primarily, Section 441a*. Of course the meaning of Section 441a is relevant to what Section 441i allows and does not allow. It is actually referred to as the operative distinction in the text of Section 441i.

B. All Contributions Referred To By Section 441i Are By "Persons."

The notion that there is some sort of distinction between donations from "persons" and other sources is simply false:

> The term "person" includes an individual, partnership, committee, association, corporation, labor organization, *or any other organization or group of persons*, but such term does not include the Federal Government or any authority of the Federal Government.

Section 431(11) (emphasis added).

In other words, under federal election law, the world is divided into two parts: "persons," and the federal government. That is all. There is simply no such thing as a donation made under the auspices of Section 441i that is not made by a "person." This much is confirmed in the earlier FEC opinions that apply the word "person" to testamentary estates. *See* FEC Advisory Opinions 1978-7, 1983-13.

In sum, most challenges to Section 441i would involve its application of Section 441a, and *all* challenges to Section 441i would necessarily relate to "persons," but these facts do not convert every, or indeed, any, BCRA case into a FECA case.

III. THE GOVERNMENT'S PREMATURE SUBSTANTIVE CHALLENGES TO THIS COURT'S AUTHORITY WOULD BE UNTENABLE.

A motion for a more definite statement is not the proper vehicle by which to lay out theories attacking the Court's jurisdiction. Were the Commission confident in its assertions that Plaintiff's Complaint is defective for not seeking complete relief, it would have filed a Rule 12(b)(6) motion. And if the Commission were to prevail on such a motion, the Plaintiff would be entitled to amend its complaint to add an allegation under Section 441a—after all, there is no time bar issue, and such a decision would not be on the merits.

But while the Commission's substantive attack on the Court's composition is premature, Plaintiff is constrained to note, in an abundance of caution, that the Commission's theory lacks merit. Were Plaintiff to prevail in this action, and obtain its requested declaratory relief to the effect that the First Amendment protects the solicitation and acceptance of unlimited bequests from decedents' testamentary estates, the Commission could not enforce some other law to bar the same conduct any more than could the Congress enact a new provision containing the same prohibition. This is especially the case considering Section 441i incorporates all other prohibitory federal election laws, including Section 441a, into its text. Indeed, the Commission's argument that a challenge to Section 441i unavoidably raises the specter of a challenge to Section 441a answers its own argument about the alleged lack of complete relief.

But perhaps more to the point, under the Commission's theory, a three-judge court could never be convened in any challenge to Section 441i, notwithstanding that this provision is the very heart of BCRA. This is because inherently, every BCRA case is intertwined with FECA,

and, according to the Commission, any case dealing with FECA must be brought exclusively in accordance with FECA provisions.

The extremity of the Commission's position is reflected in its claim that even though Plaintiff challenges the solicitation ban of Section 441i, which the Commission concedes "has no overlapping counterpart in FECA," Def. Mem. at 8 n.4, "[n]evertheless, it appears that this aspect of LNC's claim would also not provide LNC standing if LNC does not challenge section 441a." *Id.* The Commission simply cannot conceive of a BCRA challenge that would not involve FECA, and, consequently, defeat the formation of a three-judge court.

The illogic of the Commission's position can be seen in the following hypothetical. Supposing a plaintiff brought the same case, but targeting only Section 441a, under FECA procedures. Had the Commission seen some special advantage in utilizing BCRA procedures, it could invoke the same reasoning to demand "clarification" that the plaintiff also challenges Section 441i, and then follow up with an attack on the FECA court in favor of its preferred BCRA procedural rules. Of course, the answer here is that BCRA supplies the Plaintiff, not the Commission, to invoke the BCRA provisions where BCRA applies. Plaintiff is fully entitled to exercise its right.

But there is, of course, nothing in BCRA's special procedural provisions that includes an exemption for cases allegedly tainted by FECA, an exception that would swallow the entire rule. "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992) (citations and internal quotation marks omitted).

Nonetheless, the Commission seeks support for its theory in that portion of *McConnell* v. *FEC*, 540 U.S. 93 (2003), which rejected an attempt to bring a direct challenge to FECA's Section 441a contribution limits under BCRA procedures. A judge of this Court recently rejected this exact argument in an attempt to defeat a three-judge BCRA panel. *See Bluman* v. *FEC*, 2011 U.S. Dist. LEXIS 1649 (D.D.C. Jan. 7, 2011). For the same reason, the Commission's theory should again be rejected.

In *McConnell*, plaintiffs unhappy with FECA's contribution limitation utilized the occasion of BCRA having raised those limits to join the comprehensive attack on BCRA. With respect to this aspect of *McConnell*, "[t]he Court determined that although § 307 of the BCRA 'increased and indexed for inflation certain FECA contribution limits,' it was the FECA provisions that actually imposed the contested contribution limits." *Bluman*, 2011 U.S. Dist. LEXIS 1649 at *6 (citing *McConnell*, 540 U.S. at 229). Accordingly, it was pointless to attack only the BCRA provisions which adjusted pre-existing contribution limits, where no new provision of BCRA, qua BCRA, was at issue. The challenge was, in reality, to the pre-existing law and needed to utilize the pre-existing procedures.

In *Bluman*, however, the earlier FECA prohibition at issue was "entirely replaced" by a new BCRA provision. *Bluman*, 2011 U.S. Dist. LEXIS 1649 at *8. Accordingly, the fact that the same conduct had earlier been prohibited by FECA was irrelevant—the challenge was to a BCRA provision and BCRA rules applied.

This case is much closer to *Bluman* than to *McConnell*. Plaintiff challenges Section 441i—an entirely new BCRA provision, at least one of whose (challenged) provisions the Commission concedes "has no overlapping counterpart in FECA." Def Br. at 8 n.4. And even if

Plaintiff were forced to amend its complaint to challenge Section 441a, it would still challenge this unique BCRA provision—and the BCRA procedures apply to BCRA challenges. As *Bluman* held:

> Nor does the fact that the plaintiffs' proposed activities were banned before the BCRA's enactment impact the plaintiffs' entitlement to a three-judge court. See BCRA § 403 (stating that."any action . . . brought for declaratory or injunctive relief to challenge the constitutionality of any provision of [the BCRA] . . . shall be heard by a [three]-judge court"). Because the plaintiffs' requested relief would remedy their alleged injury in fact, they have the requisite standing and are entitled to a three-judge court to review their constitutional challenge . . .

Bluman, at *8.

In *McConnell*, by contrast, the only operative statutory provisions at issue were FECA provisions. BCRA created no new statutory prohibitions related to that portion of the opinion.

This case is a BCRA challenge, and will remain a BCRA challenge even if it also becomes a FECA challenge, which, at the present time, it is not.

CONCLUSION

There is nothing confusing about the present Complaint. If the Complaint is ruled deficient on a proper motion, Plaintiff will address such deficiency—which would still not alter Plaintiff's entitlement to a three-judge court.

The Commission's difficulty in framing a response to the Complaint does not emanate from any unintelligibility in the Complaint. Rather, it emanates from the fact that the Commission's position is indefensible. Plaintiff's obligation is not to draft a complaint that is easy to defeat, but to draft—as it has done—a complaint that is easy to understand.

The motion for more definite statement lacks any merit and must be denied.

Dated: May 17, 2011

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