UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RALPH NADER, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 10-989 (BAH)

DEFENDANT FEDERAL ELECTION COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Phillip Christopher Hughey
Acting General Counsel

David Kolker (D.C. Bar No. 394558)
Associate General Counsel

Kevin Deeley
Assistant General Counsel

Seth Nesin
Attorney

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
Telephone: (202) 694-1650
Fax: (202) 219-0260

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On May 30, 2008, plaintiff Ralph Nader filed an administrative complaint with the Federal Election Commission ("FEC" or "Commission") alleging a massive conspiracy against his 2004 Presidential campaign. The administrative complaint accused over 150 individuals and entities of having engaged in wrongdoing almost four years earlier, including the Democratic National Committee ("DNC"), Senator John Kerry's campaign committee[1] ("Kerry Committee"), several non-profit groups, a number of state Democratic parties, dozens of law firms and individual lawyers, a union, and various other individuals and entities. The Commission used its discretion to identify the appropriate respondents, dismissed the allegations against some respondents as a matter of prosecutorial discretion, and found no reason to believe that the remaining respondents had violated the law.

Nader now brings this lawsuit pursuant to 2 U.S.C. § 437g(a)(8) alleging that the FEC acted contrary to law in its handling of his administrative complaint. Nader's claims should fail as a matter of law. The Commission acted reasonably and lawfully, particularly given the difficulties in investigating a complex administrative complaint involving scores of individuals and entities — some of which had since become defunct — that had allegedly broken the law several years earlier. Because the Commission acted reasonably, and because this Court affords considerable deference to the FEC's investigatory decisions and interpretation of the statute it administers, summary judgment should be granted in favor of the Commission.

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[1] The administrative complaint mentions both Kerry for President 2004, Inc. and Kerry-Edwards 2004, Inc., but seems to only allege wrongdoing by the latter. AR00856, AR00876. The Commission found no reason to believe that either entity violated FECA, and for purposes of this brief they are identified collectively as the "Kerry Committee."

I. STATEMENT OF FACTS[2]

A. The Parties

The FEC is the United States agency with exclusive civil jurisdiction over administration of the Federal Election Campaign Act, 2 U.S.C. §§ 431-457 ("FECA"). Any person who believes that FECA has been violated may file with the Commission an administrative complaint regarding that violation. 2 U.S.C. § 437g(a)(1). The Commission then notifies the appropriate respondents, who have the opportunity "to demonstrate, in writing, to the Commission . . . that no action should be taken against such person." *Id.* Afterwards, the Commission determines whether the administrative complaint provides "reason to believe" that FECA has been violated. 2 U.S.C. § 437g(a)(2). The Commission may not conduct such a vote, other than a vote to dismiss, without giving respondents 15 days to respond. 2 U.S.C. § 437g(a)(1). If at least four commissioners vote to find reason to believe that FECA has been violated, the Commission investigates the alleged violation; if there are not four such votes, the Commission either dismisses the administrative complaint or makes a determination that there is "no reason to believe" a violation has occurred. 2 U.S.C. § 437g(a); *see also* Statement of Policy Regarding

[2] Because this case involves review of an administrative record, the Commission includes this statement of facts rather than a separate statement of material facts and genuine issues. *See* LCvR 7(h)(2). In addition to his improperly-filed statement of material facts, plaintiff also filed affidavits of counsel Oliver B. Hall and plaintiff Ralph Nader. As a general matter, review of an agency action is limited to materials "'compiled' by the agency, that were 'before the agency at the time the decision was made.'" *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996) (internal citations omitted). The Court therefore should consider Mr. Nader's affidavit solely for the limited purpose of establishing standing, not for the merits. Mr. Hall's affidavit, which is intended to show that the FEC did not treat all of the individuals and entities in the administrative complaint as respondents, should not be considered by the Court. That fact is in the administrative record (Docket Nos. 13-14), AR01730.06, and, in any event, the Commission does not dispute it. Compl. ¶ 2 (Docket No. 1); Answer ¶ 2 (Docket No. 7).

Comm'n Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545-46 (Mar. 16, 2007) (describing the initial stage of the FEC enforcement process).

When the Commission dismisses a complaint, the complainant may file suit in the United States District Court for the District of Columbia seeking a declaration that the Commission's dismissal was "contrary to law." 2 U.S.C. § 437g(a)(8). If the district court determines that the Commission's dismissal was contrary to law, the court can "direct the Commission to conform with such declaration within 30 days." 2 U.S.C. § 437g(a)(8)(C).

Plaintiff Ralph Nader was a candidate for President of the United States in both 2000 and 2004. AR00020, AR00043. In 2004, Nader ran for President as an independent with Vice Presidential candidate Peter Miguel Camejo. AR00043.

B. The Administrative Complaint and Notification of Respondents

On May 30, 2008, Nader filed an administrative complaint with the FEC, alleging a wide range of illegal conduct by the DNC, the Kerry Committee, five Section 527 organizations,[3] and many other individuals and entities during the 2004 campaign. AR00001-00576. In all, the administrative complaint's 100 pages of allegations and 475 pages of exhibits listed over 150 individuals and entities that Nader believed had broken the law during the 2004 campaign. AR01833-34. The case was designated Matter Under Review ("MUR") 6021. *Id.*

On June 5, 2008, the Commission sent notice of the administrative complaint to the DNC and Kerry Committee. AR000577-83. Although there were over 150 individuals and entities accused of illegal activities in the administrative complaint, "[o]riginally, it appeared that the complaint might be duplicative of previous MURs dismissing similar allegations, and, in order to reserve resources, as well as to comply with the practice of avoiding over-notification, [the FEC]

[3] A "Section 527" organization is a non-profit, tax-exempt political organization named after section 527 of the Internal Revenue Code. *See* 26 U.S.C. § 527.

initially notified only the DNC and the Kerry Committee of the complaint." AR01730.06. After further consideration, Commission staff "later determined that the 527 organizations, which the complaint alleges were unregistered political committees, should also be notified." *Id.* As a result, on September 26, 2008, the Commission sent notices to America Coming Together ("ACT"), Uniting People For Victory, United Progressives for Victory, National Progress Fund, Americans For Jobs, and The Ballot Project, Inc. (collectively "the 527 Groups"). AR00729-40.[4] The Commission determined that the remaining individuals and entities identified in the complaint should not be treated as respondents and therefore did not need to receive notification. AR01730.05 n.2; *see infra* Part II.B.3.a (explaining Commission's discretionary authority to designate appropriate respondents).

Nader filed two supplements to the administrative complaint, dated on September 24, 2008, and January 7, 2010 (erroneously dated January 7, 2009), accusing another 17 individuals and entities of wrongdoing. AR00609-728, AR01732-90. Nader had improperly filed the administrative complaint and first supplement with his attorney's signature instead of his own; he therefore refiled them with appropriate signatures on October 14 and 15, 2008, at the suggestion of the Commission. AR00741-1421. The Kerry Committee, DNC, ACT, and The Ballot Project, Inc., all submitted responses to the administrative complaint, the last of which was dated February 17, 2009. AR00591-98, AR00599-608, AR01475-1609, AR01612-39. ACT also submitted a short response to the second supplement dated February 12, 2010. AR01809. The other 527 Group respondents did not respond.

[4] The notifications to the 527 Groups stated that "[t]he complaint was not sent to you earlier due to an administrative oversight." *See, e.g.*, AR00729.

C. Disposition of the MUR

On April 13, 2010, the Commission voted unanimously in favor of the General Counsel's recommendation that MUR 6021 should be closed. AR01810-11. With respect to each respondent, the Commission adopted a Factual and Legal Analysis articulating the reason for its determination. AR01812-57. The Commission found no reason to believe that the DNC, Kerry Committee, their treasurers, or Senator John Kerry personally violated FECA. AR01810-11, AR01831-57. With respect to ACT, the Commission found no reason to believe that it had made undisclosed excessive in-kind contributions or that it had failed to register as a political committee under 2 U.S.C. § 433. AR01810-11, AR01824-30. The Commission dismissed the complaint as to ACT with respect to the allegation that it illegally failed to report ballot expenditures. *Id.* The Commission also dismissed the complaint as to the remaining 527 Groups. AR01810-11, AR01812-23. Consistent with the general practice of the Commission, it made no recommendation as to the non-respondents and closed the MUR. *Id.*; AR01730.05 n.2.

II. ARGUMENT

A. Standard of Review

A court reviewing the Commission's dismissal of an administrative complaint "may set aside the FEC's dismissal of a complaint only if its action was 'contrary to law.'" *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005) (citing 2 U.S.C. § 437g(a)(8)); *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986) (same). The Commission's dismissal of an administrative complaint cannot be disturbed unless it is based on "an impermissible interpretation of [FECA]" or is "arbitrary or capricious, or an abuse of discretion." *Orloski*, 795 F.2d at 161; *see also FEC v. Democratic Senatorial Campaign Comm.* ("*DSCC*"), 454 U.S. 27, 31 (1981). "The FEC has broad discretionary power in determining whether to investigate a claim. . . ." *Akins v. FEC*, 736

F. Supp. 2d 9, 21 (D.D.C. 2010). To affirm the agency's action, "it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *DSCC*, 454 U.S. at 39. Instead, the court engages in "the narrower inquiry into whether the Commission's construction [is] sufficiently reasonable to be accepted by a reviewing court." *Id*. (citations and internal quotation marks omitted).

The Commission is entitled to deference from the Court in both its legal reasoning and its conduct. The court's inquiry should be "highly deferential" to the Commission's interpretation of the statutes it administers. *Democratic Senatorial Campaign Comm. v. FEC*, 918 F. Supp. 1 (D.D.C. 1994). The court also "review[s] the Commission's interpretation of its own regulations pursuant to an exceedingly deferential standard . . . [and that] interpretation will prevail unless it is plainly erroneous or inconsistent with the plain terms of the disputed regulation." *FEC v. Nat'l Rifle Ass'n of Am.*, 254 F.3d 173, 182 (D.C. Cir. 2001) (quotation marks and citations omitted). Lastly, the Commission is entitled to great deference as to the manner in which it conducts investigations and its decisions to dismiss complaints, provided it supplies reasonable grounds. *See Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1134 (D.C. Cir. 1987); *Common Cause v. FEC*, 655 F. Supp. 619, 623 (D.D.C. 1986), *rev'd on other grounds*, 842 F.2d 436 (D.C.Cir.1988). In the absence of evidence of an abuse of discretion, the court should not "second-guess the Commission's exercise of its discretion." *FEC v. Rose*, 806 F.2d 1081, 1091 (D.C. Cir. 1986). [5]

[5] The "contrary to law" standard is established in 2 U.S.C. § 437g(a)(8), which governs review of dismissals of administrative complaints by the FEC. Plaintiff's brief incorrectly cites the Administrative Procedure Act's standard of review and several cases applying that standard, most of which involved reviews of agency rulemaking. *See* Plaintiff's Mem. of Points And Auth'ies in Support of Mot. For Summ. J. ("Nader Mem.") at 3-5 (Docket 16-1) (citing *Shays v.*

B. The Commission's Disposition of the Administrative Complaint Was Lawful

In considering plaintiff's administrative complaint, the Commission reasonably exercised its broad discretion in disposing of the MUR. The Commission's finding that there was "no reason to believe" that any respondents made illegal contributions to the Kerry Committee was justified by the speculative nature of the allegations, most notably the absence of any evidence that the Kerry Committee had "played a role in this activity, rather than just being the indirect beneficiary." AR01856. The Commission's dismissal of the allegations against the remaining respondents as a matter of prosecutorial discretion was justified by the fact that each of the entities had long since stopped operating by the time Mr. Nader filed this administrative complaint. And the Commission's determination to treat many of the individuals and entities accused of wrongdoing as non-respondents was justified by both the speculative nature of the claims against them and the burdens it could have placed on these potential respondents and the agency. For all of these reasons, the Commission did not act "contrary to law."

1. It Was Lawful for the Commission to Find "No Reason to Believe" that the DNC, Kerry Committee, Their Treasurers, and John Kerry Had Violated the Law Because of The Speculative Nature of the Allegations

Count 1 of the administrative complaint alleges that the DNC, the Kerry Committee, and over 150 other individuals and entities made or received illegal in-kind contributions as part of an attempt to help John Kerry win the Presidential election in 2004. AR00857-63. According to the administrative complaint, the law firms and attorneys that worked on the numerous

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FEC, 337 F. Supp. 2d 28 (D.D.C. 2004); *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005); *Republican Nat'l Comm. v. FEC*, 76 F.3d 400 (D.C. Cir. 1996); and *AFL-CIO v. FEC*, 177 F. Supp. 2d 48 (D.D.C. 2001)). While APA review of rulemaking has a similar touchstone (arbitrary, capricious, or an abuse of discretion), the test is otherwise not applicable and the Court should instead rely on the analysis in section 437g(a)(8) cases, which accord the discretion appropriate to the context of a Commission dismissal.

challenges to Nader-Camejo's nomination papers did so for free, and complainant asserted that doing so constituted illegal in-kind contributions to the DNC and/or the Kerry Committee. AR00858-59, AR00863.

The allegations in Count 1 were speculative, however, because they assumed without any evidence that the legal challenges were coordinated with the DNC and/or the Kerry Committee. In order for the Kerry Committee or the DNC to have violated the law, there must be some connection between the legal challenges and the DNC or Kerry Committee such that the legal work would constitute a contribution. *See* 2 U.S.C. § 441a(a)(7)(B) (expenditures coordinated with a candidate "shall be considered to be a contribution to such candidate"). Expenditures made independently of a campaign, even if they are intended to benefit that campaign, do not constitute contributions under 2 U.S.C. § 431(8)(A).

The allegations were also speculative because they assumed, without any supporting information, that attorneys were paid by their law firms for working on the ballot challenges. AR00860-61. The definition of "contribution" under FECA does not include "the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee." 2 U.S.C. § 431(8)(B)(i) (the "Volunteer Exception"). The complaint alleged that the in-kind contributions were impermissible for a variety of reasons, primarily because they were not disclosed as contributions, they exceeded contribution limits, and because incorporated entities such as law firms are prohibited from making contributions. AR 00860-61. But if the legal work was performed pursuant to the Volunteer Exception, it would not constitute a contribution at all.

The Commission's General Counsel agreed that the claim was based on a "viable theory, namely that spending by corporate law firms to remove a candidate from the ballot may

constitute prohibited contributions." AR 01730.10. But the General Counsel also believed that the available facts did not support the allegations. *Id.* As explained below, the Commission agreed and found no reason to believe there was a violation committed by the DNC, the Kerry Committee, their respective treasurers or John Kerry. AR01810-11.

a. There is no Evidence that the Ballot Challenge Proceedings Were Coordinated With The Kerry Committee and the DNC

The administrative complaint stated that free legal services were provided "to benefit the Kerry-Edwards campaign." AR00858-59. But merely intending to benefit the Kerry Committee does not make the legal work a contribution if it was done independently from the Committee. As the Commission concluded, "[e]ven if there were corporate law firms that provided free services to ballot challengers while compensating their attorneys, the complaint does not present facts sufficient to support that those services constituted undisclosed in-kind contributions accepted or received by the Kerry Committee." AR01852.

The complaint generally did not specify "which firms allegedly provided free services or to whom." AR01837. Without this information, it was impossible to conclude that the DNC, Kerry Committee, their treasurers, or John Kerry committed any unlawful conduct. The administrative complaint, which merely assumed that the legal challenges were coordinated with the DNC and Kerry Committee, was therefore too speculative to warrant an investigation. "[U]nwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true" and "[s]uch purely speculative charges, especially when accompanied by a direct refutation, do not form an adequate basis to find reason to believe that a violation of the FECA has occurred." AR01841 (quoting Statement of Reasons, MUR 4960 (Hillary Rodham Clinton for Senate Exploratory Committee), Dec. 21, 2000, at 3,

http://eqs.nictusa.com/eqsdocsMUR/0000263B.pdf ("Clinton MUR Statement of Reasons") (citations omitted)).[6]

The Commission noted that all the available evidence in response to Nader's allegation indicated that the DNC and Kerry Committee did not coordinate the ballot challenges. AR01856 ("[W]ithout specific facts suggesting that . . . the Kerry Committee played a role in this activity, rather than just being the indirect beneficiary, there is nothing left but speculative charges that have been directly refuted . . . ."); AR01841 ("[W]ithout specific facts suggesting that . . . the DNC played a role in this activity, there is nothing left but speculative charges that have been directly refuted . . . ."). The DNC's response stated unequivocally that it "did not receive and fail to report any in-kind legal services from law firms representing ballot access petition challengers." AR01838 (quoting AR00606). The Kerry Committee similarly denied accepting contributions in the form of legal services and stated that its "limited involvement in ballot access litigation and its awareness of the litigation engaged in by others — both on a volunteer and paid basis — simply does not constitute a violation of the act." AR01854 (quoting AR00598). The record before the Commission also included four separate affidavits from the Ballot Project, the group that coordinated the ballot challenge efforts, which specifically refuted the allegation by stating "[t]he Ballot Project did not undertake any of its activities at the direction, request, or suggestion of, or in conjunction or concert with" the Kerry Committee, the DNC, or any state or local entities, and it "acted independently" of all those entities. AR01641,

[6] The Commission noted one exception in which the administrative complaint made a specific allegation, namely that the Reed Smith law firm worked on the Pennsylvania ballot challenge and billed the work to "charity, without charging any client." AR01837-38 (quoting AR00939). But this does not establish a connection with the Kerry Committee, and as noted *infra*, Part II.B.1.b, individual attorneys working without sponsorship from their employer may fall within an exception to the contribution limits for volunteer work. In fact, the newspaper article complainant relies upon to make the allegation indicates that the hours Reed Smith attorneys spent on the ballot challenge were "nonbillable." AR01392.

AR01644, AR01647, and AR01650. The Commission is entitled to give credence to sworn evidence that is submitted under penalty of perjury by a respondent, particularly in a case where the allegations are based on speculation. *See* Clinton MUR Statement of Reasons at 2 ("[W]hile credibility will not be weighed in favor of the complainant or the respondent, a complaint may be dismissed if it consists of factual allegations that are refuted with sufficiently compelling evidence provided in the response to the complaint . . . ."). Furthermore, neither the DNC nor the Kerry Committee was a party to any of the ballot challenges the administrative complaint points to as illegal in-kind contributions.

The administrative complaint bases its allegations of a connection between the Kerry Committee, DNC, and the various ballot challenges on some overlapping connections between these various entities. For example, the administrative complaint states that some of the same lawyers that represented the ballot challenges also were contacts for "Lawyers For Kerry," a group that monitored polling stations for the Kerry campaign, AR00889; or represented the DNC on other matters, AR00938-939; or that an individual plaintiff in the Maine ballot challenge was also the "Maine Democratic Party Chair and DNC official." AR00915. But it is unsurprising that some of the same people might have connections to these various entities, because they shared many of the same goals. Mere affiliations are insufficient to raise a non-speculative claim of illegality. The administrative complaint presented no evidence that the DNC or Kerry Committee played any actual role in the ballot challenges, rather than just being "indirect beneficiar[ies]." AR01856. It was entirely reasonable for the Commission to decline an investigation where all the complainant could do was point at a set of circumstances that provided no reason to believe it was illegal.

b. The Administrative Complaint Contained No Evidence That Ballot Challenge Attorneys Were Compensated For Their Work

The allegation that the DNC and/or the Kerry Committee received illegal in-kind contributions in the form of free legal services was also speculative in assuming that the Volunteer Exception did not apply and therefore that the legal work constituted "contributions" under the Act. AR00860-61. But, as the Commission noted, "any free attorney services may have been provided by volunteers without any sponsorship from their employer." AR01864. The complaint presented no evidence about "which of those firms are incorporated, and of those, which firms compensated their attorneys who worked on the ballot challenges." AR01837. Plaintiff relies on FEC Advisory Opinion 2006-22 for the proposition that a law firm providing free legal services to a political committee constitutes a contribution. But that AO specifically asked whether "the Firm's" preparation of a brief would constitute a contribution. FEC Advisory Op. 2006-22 at 4, http://saos.nictusa.com/aodocs/2006-22.pdf. That advisory opinion, however, did not address whether *individual attorneys* at a firm can provide legal work to a campaign within the Volunteer Exception.

It also remains unclear what the legal theory is in which the individual attorneys accused in the administrative complaint could have made illegal campaign contributions. If the individual lawyers were working on their own behalf without compensation, it would fall within the Volunteer Exception. On the other hand, if the law firm was compensating them for working on the ballot challenges, then it would be the law firms, not the individual lawyers, that were making the illegal contributions. In any event, the allegation that the law firms that worked on ballot challenges were providing illegal in-kind contributions is also entirely speculative because it, too, rests on the unsupported assumption that the lawyers' work did not fall within the

Volunteer Exception.[7] The complainant presented no evidence to bolster its speculation, and it was within the Commission's discretion not to devote the substantial resources that would be required to obtain information about conduct that did not appear to constitute a violation. The Commission is not required to assume the worst and find reason to believe the law has been violated merely because an attorney has worked on a case.

Plaintiff suggests that any ambiguity as to whether attorneys were compensated for their work on ballot challenges could have been resolved because "the FEC easily could have obtained the relevant information by serving the administrative complaint upon the law firm Respondents," or failing that, "could have subpoenaed the necessary documents." Nader Mem. at 14. But plaintiff seems overly optimistic about the ease with which such information would be obtained. While the Commission possesses the power to subpoena documents and might ultimately have been successful in obtaining law firms' internal documents, it could have required an enormous and resource-draining undertaking to litigate subpoena enforcement actions against 54 different law firms in jurisdictions spread throughout the country. Furthermore, as discussed *infra*, Part II.B.2.b, the almost four-year delay between the alleged illegal activity and the filing of the administrative complaint meant that there was limited time before FECA's five-year statute of limitations elapsed. There was thus no guarantee that the documents could even be obtained in sufficient time.

[7] Plaintiff argues that even if the individual attorneys qualified under the Volunteer Exception, it would still constitute an illegal contribution by the law firms if those attorneys were using "corporate law firm resources, including office space, office equipment, office supplies and support staff services." Nader Mem. at 15. The complaint provided no evidence regarding which law firms provided what resources to any volunteer attorneys, and the Commission was well within its discretion not to investigate four-year-old allegations of illegal contributions of office supplies.

2. It Was Lawful for the Commission to Exercise its Prosecutorial Discretion to Dismiss the Complaint Against the 527 Groups

The administrative complaint alleged that The Ballot Project, National Progress Fund, Americans for Jobs, and Uniting People for Victory illegally failed to register and report as political committees in the 2004 election cycle.[8] The Commission ultimately exercised its prosecutorial discretion and dismissed the allegation. Plaintiff accuses the Commission of a "clear abuse of discretion" for the dismissal, calling it "wrongful" and "arbitrary and capricious." Nader Mem. at 20.

The FEC has considerable discretion to decide where to devote its resources and how best to enforce FECA. *See supra* Part II.A. This is especially true when the Commission decides not to bring an enforcement action. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("[A]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion. . . . [A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise."); *FEC v. Akins*, 524 U.S. 11, 25 (1998) ("[I]t is possible that even had the FEC agreed with respondents' view of the law, it would still have decided in the exercise of its discretion not to require AIPAC to produce the information."); *Citizens for Responsibility and Ethics in Wash. v. FEC*, 475 F.3d 337, 340 (D.C. Cir. 2007) ("No one contends that the Commission must bring actions in court on every administrative complaint. The Supreme Court in *Akins* recognized that the Commission, like other Executive agencies, retains prosecutorial discretion.").

[8] There was some confusion as to whether the administrative complaint (at AR00950) intended to allege that America Coming Together had failed to register and report as a political committee, but plaintiff has now clarified that he did not make that allegation against it. Nader Mem. at 19 n.5.

a. The Commission Reasonably Considered the Defunct Status of the Organizations

In this case, the Commission exercised its prosecutorial discretion and dismissed the claims against the 527 Groups because they were all "defunct" organizations and the age of the alleged wrongful activity would render an investigation exceedingly difficult. AR01813, AR01816, AR01819, AR01823. The administrative complaint was filed well after the 527 Groups had ceased operations. AR01823 (Ballot Project dissolved on September 12, 2005); AR01813, AR01816, AR01819 (National Progress Fund, Uniting People for Victory, and Americans for Jobs filed their final IRS reports in March 2006, January 2006, and July 2004).

And even if the Commission could complete a successful investigation and find probable cause to believe that a violation had been committed within the five-year period, it would be difficult to recover civil penalties from defunct organizations. Given that there are competing demands on the Commission's resources, it is not contrary to law for the Commission to focus its law enforcement resources on claims that are more current and can be fully vindicated. *Akins*, 736 F. Supp. 2d at 22 ("Absent evidence that the Commission's investigation was so inadequate as to constitute an abuse of discretion, it is not this Court's place to direct the Commission how to expend its resources, and it is certainly not the plaintiffs'."). In light of the age of the allegations and the number of individuals and entities accused of wrongdoing, the Commission's decision to exercise its prosecutorial discretion to dismiss the claims against the 527 groups was entirely reasonable.[9]

[9] In addition to the dismissal of certain claims against ACT on the basis of prosecutorial discretion, the Commission also found that there was no reason to believe that it had made undisclosed excessive in-kind contributions in violation of 2 U.S.C. §§ 441b and 441a(f) by conspiring with the Service Employees International Union ("SEIU") to attack a Nader-Camejo petition drive in Oregon. AR01828. The Commission noted that the administrative complaint "does not allege, and the available information does not suggest, that ACT's activities in Oregon

b. The Commission Reasonably Took Into Account The Staleness of Evidence and the Approaching Statute of Limitations

Plaintiff directs considerable criticism at the Commission for its alleged "inaction and mishandling of this matter." Nader Mem. at 3. Yet plaintiff never acknowledges that his own inaction was at least partially responsible for the Commission's decision not to investigate the claims made against the 527 Groups. The entire alleged conspiracy took place during the presidential campaign of 2004. The vast majority of actions described in the administrative complaint, AR00856-1422, were not only knowable in 2004, but were *actually* known to Nader and his campaign because they involved litigation to keep him off the ballot. The newspaper articles that Nader attached to his administrative complaint and on which he bases most of his allegations were contemporaneous with the 2004 campaign. AR00956-59 (34 of the 36 news articles attached as exhibits to administrative complaint were published in 2004).

Despite the fact that Nader knew all this information in 2004, he did not file his administrative complaint until May 30, 2008, nearly four years after most of the alleged wrongdoing had taken place. The administrative complaint had to be refiled in October 2008, along with a supplement that had been filed the month before, because both were signed by Nader's attorney despite the statute's requirement that a complaint shall be "signed and sworn to by the person filing such complaint." 2 U.S.C. § 437g(a)(1). Plaintiff even submitted a second supplement in January 2010, more than five years after the alleged wrongdoing.

Nader's failure to bring a timely administrative complaint created "problems of proof" that might have otherwise been avoided. AR01813, AR01816, AR01819, AR01823, AR01830.

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were coordinated with the Kerry Committee, the DNC, or any other entity" so it "does not indicate that the activities in question resulted in the making of an in-kind excessive contribution to either the Kerry Committee or the DNC." *Id.* The Commission therefore reasonably concluded that the complaint contained insufficient supporting facts to warrant an investigation.

As discussed above, all of the 527 Groups accused of wrongdoing were dissolved or otherwise non-operational well before the complaint was even brought. Congress long ago recognized the need for statutes of limitations because of "[t]he concern that after the passage of time 'evidence has been lost, memories have faded, and witnesses have disappeared.'" *3M Co. v. Browner*, 17 F.3d 1453, 1457 (D.C. Cir. 1994) (quoting *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944)). It was entirely reasonable for the Commission to consider these problems when deciding how to exercise its prosecutorial discretion.

It was equally reasonable for the Commission to consider the statute of limitations when determining how to allocate its resources. The Act provides for both injunctive relief and civil penalties, 2 U.S.C. § 437g(a)(6)(A), but there is a general five-year statute of limitations regarding civil penalties, 28 U.S.C. § 2462. The Commission reviewed the evidence and determined that the age of the alleged violations "raise[d] obstacles under the five-year statute of limitations." AR01813, AR01816, AR01819, AR01823, AR01830. Taking into account the difficulty of obtaining civil penalties in this case — with numerous more recent complaints pending before the Commission — the decision to dismiss this complaint is not arbitrary or capricious agency decisionmaking, and this Court should not second-guess the Commission's decisions. As the D.C. Circuit has explained:

> [W]e have no basis for reordering agency priorities. The agency is in a unique — and authoritative — position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way. Such budget flexibility as Congress has allowed the agency is not for us to hijack.

In re Barr Labs., Inc., 930 F.2d 72, 76 (D.C. Cir. 1991); *Rose*, 806 F.2d at 1091 ("It is not for the judiciary to ride roughshod over agency procedures or sit as a board of superintendance directing where limited agency resources will be devoted."). In fiscal year 2010, the Commission completed processing 135 enforcement cases and 45 cases through its alternative dispute

resolution program. FEC Performance and Accountability Report Fiscal Year 2010, at 24, http://www.fec.gov/pages/budget/fy2010/par_2010.pdf. Plaintiff has failed to demonstrate that it was contrary to law for the Commission to exercise its prosecutorial discretion to decline to devote its limited resources to the allegations in MUR 6021 at the expense of the many matters before it that involve more current activities and elections.

3. The Commission Acted Reasonably In Identifying the Appropriate Respondents To The Administrative Complaint

Plaintiff argues at length that the Commission acted contrary to law by not notifying all of the individuals and entities that the administrative complaint identified as "respondents."[10] Nader Mem. at 6-11. But the FECA enforcement process is not a civil lawsuit between the complainant and respondents. The entire process — which potentially includes an investigation, attempted conciliation, and the filing of a lawsuit — is performed by the Commission without direction by the complainant.[11] Although many matters are initiated by outside complaints, it is ultimately the role of the Commission, with assistance from its staff, to determine who are the appropriate respondents and how to direct Commission resources.

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[10] Plaintiff does not have statutory standing to bring a lawsuit based on a failure to provide notice to someone else. *See* 2 U.S.C. § 437g(a)(8)(A) (creating cause of action solely for parties aggrieved that their complaint has been dismissed). Nonetheless, the decision to treat those individuals and entities as non-respondents ultimately led to the determination to make no recommendation as to them. AR01730.05 n.2. As a practical matter, therefore, the Commission's decision to close the file functioned as a dismissal of the allegations that such persons referenced in the complaint had violated the Act.

[11] Indeed, plaintiff is well aware that an administrative complaint is different from a lawsuit, having brought four separate unsuccessful civil lawsuits making many of the same factual allegations as this administrative complaint. *See Nader v. DNC*, 567 F.3d 692 (D.C. Cir. 2009); *Nader v. McAuliffe*, 593 F. Supp. 2d 95 (D.D.C. 2009); *Nader v. DNC*, 590 F. Supp 2d 164 (D.D.C. 2008); *Nader v. McAuliffe*, 549 F. Supp. 2d 760 (E.D. Va. 2008).

a. The Commission Regularly Exercises its Discretion In Identifying the Appropriate Respondents To An Administrative Complaint

Plaintiff argues that the statute and Commission's regulations require that all individuals and entities accused in an administrative complaint must be treated as respondents and therefore receive notification and an opportunity to respond. But this misstates the statute and regulations in two respects. As an initial matter, both the statute and regulations make clear that the Commission need not provide an opportunity to respond in a situation where the Commission votes to dismiss the complaint. *See* 2 U.S.C. § 437g(a) ("Before the Commission conducts any vote on the complaint, *other than a vote to dismiss*, any person so notified shall have the opportunity to demonstrate . . . that no action should be taken . . . ." (emphasis added)); 11 C.F.R. § 111.6(b) (The Commission "shall not take any action, or make any finding, against a respondent *other than action dismissing the complaint*, unless it has considered such response or unless no such response has been served upon the Commission . . . ." (emphasis added)). The statute and regulations therefore contemplate the possibility that the Commission might choose to dismiss a complaint, without even obtaining a response, or notifying potential respondents — a course of action that Commission has chosen in the past. *See, e.g.*, Cert., MUR 6158 (Harpo Inc., et al.), Mar. 4, 2009, http://eqs.nictusa.com/eqsdocsMUR/29044231149.pdf (Commission voting 5-1 to dismiss); General Counsel's Rep., MUR 6158 (Harpo Inc., et al.), Jan. 16, 2009, at 1 n.1, http://eqs.nictusa.com/eqsdocsMUR/29044231144.pdf ("The potential respondents in this matter have not been notified in order that the Commission be afforded the opportunity to quickly dismiss the case. See 2 U.S.C. § 437g(a)."). The opportunity to respond is for the benefit of the respondent, not for the benefit of the complainant or as a means of discovery. *See* Guidebook for Complainants and Respondents on the FEC Enforcement Process, at 10, http://www.fec.gov/em/respondent_guide.pdf ("The notification letters . . . are merely a vehicle

for (1) informing the respondent that the Commission has received allegations as to possible violations of the federal campaign laws by the respondent, (2) providing a copy of the complaint or referral document, or in limited circumstances, a summary thereof, and (3) giving the respondent an opportunity to respond in writing in a timely manner.").

Second, plaintiff misunderstands the regulations by assuming that the identity of the "respondents" is determined by the complainant and not by the Commission. The purpose of the enforcement process is, *inter alia*, to sanction and deter violations of FECA, but allowing complainants to determine who will be respondents would create the danger of both under-enforcement (if complainants fail to identify all of the appropriate respondents) and over-enforcement (if complainants name incorrect entities and individuals as respondents). Political opponents could harass each other by filing frivolous administrative complaints, and the FEC would be forced "to direct its limited resources toward conducting a full-scale, detailed inquiry into almost every complaint, even those involving the most mundane allegations. . . . [because] "[r]arely could the FEC dismiss a complaint without soliciting a response . . . ." *Orloski*, 795 F.2d at 165. The Commission is particularly cautious in exercising its enforcement authority because courts look at FEC investigations with "extra-careful scrutiny." *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387-88 (D.C. Cir. 1981). "[I]t can hardly be doubted that the constitutional guarantee (of the First Amendment) has its fullest and most urgent application precisely to the conduct of campaigns for political office . . . ." *Id.* (citing *Monitor Detroit Co. v. Roy*, 401 U.S. 265, 272 (1971)).

For all these reasons, the Commission has carefully considered how to exercise its discretion in identifying respondents. In 2003, the Commission held a public hearing specifically about enforcement process procedures. Enforcement Procedures, 68 Fed. Reg.

23,311 (May 1, 2003). The Commission solicited comments about a variety of subjects, and the very first was who was appropriate to designate as a respondent in a complaint. *Id.* at 23,312. The Commission noted that it was requesting input from the regulated community because it had "been criticized for designating too many additional respondents who may only have tangential interaction with the allegations in the complaint." *Id.*

The problems resulting from over-designating of respondents was discussed at great length in both the public comments submitted and at the subsequent Commission hearing. Despite disagreement on a variety of subjects, no commenter argued that the Commission lacked the authority to determine who were the appropriate respondents in a MUR. *See, e.g.*, Comment of California Political Attorneys Association, at 2, http://www.fec.gov/agenda/agendas2003/notice2003-09/epdf/cpaa.pdf ("The CPAA believes the Commission has sufficient latitude within its statutory and regulatory enforcement powers to designate respondents that the Commission believes may have committed a violation of the FECA."); Comments of FEC Watch and the Center for Responsive Politics, at 1, http://www.fec.gov/agenda/agendas2003/notice2003-09/epdf/fec_watch.pdf ("CRP Comment") (The decision about whom to treat as a respondent "is not an exact science and will require judgment and prosecutorial discretion on the part of the agency."). All of the disagreement amongst commenters concerned how inclusive the Commission should be in designating respondents. *Compare* Comment of Republican National Committee, at 2, http://www.fec.gov/agenda/agendas2003/notice2003-09/rnc.pdf ("RNC Comment") ("If in doubt, Commission staff should err on the side of limiting the number of initial respondents named, and then naming additional respondents only if necessary based upon timely information

gleaned during the investigation.") *with* CRP Comment, at 1 (Commission should "err on the side of giving notice").

Many commenters, spanning a wide variety of ideological positions, explained the negative effects that follow from being named as a respondent in an FEC administrative complaint. *See, e.g.*, Comment of Free Speech Coalition, Inc., and Conservative Legal Defense and Education Fund, at 2, http://www.fec.gov/agenda/agendas2003/notice2003-09/epdf/free.pdf ("Becoming a respondent is a significant event for an individual or entity, and often requires the expenditure of legal fees in self-defense."); Comment of Perkins Coie, at 3-4, http://www.fec.gov/agenda/agendas2003/notice2003-09/perkins.pdf ("[N]aming a person as a respondent may seem an insignificant act. To a respondent it is often of major consequence. It may require hiring an attorney. It can create paralyzing fear that something that they did or might do may expose them to significant civil and potentially criminal liability."); *id.* at 16 ("One can hardly overstate how emotionally and even financially disruptive it can be for an innocent individual to be named as a respondent in a matter in which he or she had absolutely no involvement."); RNC Comment at 2 (The Commission's overdesignation of respondents "has caused needless cost and anxiety for organizations and individuals named that must then hire attorneys and file a response."); Prepared Statement of Jan Witold Baran, Wiley, Rein & Fielding LLP, at 3, http://www.fec.gov/agenda/agendas2003/notice2003-09/baran_statement.pdf (naming of too many respondents "add[s] an enormous amount of pressure and anxiety to persons and entities merely included in the complaint for factual context."). The same issue was also noted at the public hearing. *See, e.g.*, FEC Transcript of Public Hearing on Enforcement Procedures (2003) ("Hearing Tr."), at 230, http://www.fec.gov/agenda/agendas2003/notice2003-09/enforce_trans.pdf ("[Respondents] are put in the position of having to go back and reconstruct

what happened, to retain counsel, to have counsel prepare filings. There is a lot of cost involved in that, pain, anguish . . . ." (statement of William J. Olson, Free Speech Coalition and Conservative Defense and Education Fund)).

Plaintiff argues that the Commission should merely rubber stamp the complainant's designation of "respondents" identified in administrative complaints. But this approach was dismissed by most commenters in 2003 both because it creates incentives for complainants to over-designate and leads to over-designation when complainants are mistaken about the law. If complainants were the sole arbiter of who was a respondent it would "encourage complainants to name everybody under the sun as respondents." Hearing Tr. at 38 (Robert F. Bauer, Perkins Coie); *see also* General Counsel's Rep., MUR 5333 (Swallow for Congress, Inc.), June 21, 2004, at 5-7 http://eqs.nictusa.com/eqsdocsMUR/0000602A.pdf (twenty-one different individuals who had made legal contributions were treated as respondents because complainant misunderstood the law). Similarly, the Commission must "screen out frivolous complaints at the reason to believe stage" in order to reduce the incentive for "political opponents to file charges against their competitors to . . . chill[] the expressive efforts of their competitor." *See AFL-CIO v. FEC*, 333 F.3d 168, 178 (D.C. Cir. 2003) (internal quotation marks omitted) (discussing policy concerns in the context of the Commission's disclosure policies).

In light of the comments received in 2003, the Commission has been especially conscious of the potential "over-notification" problem in the exercise of its discretion and has addressed two of the primary issues that commenters believed were causing it. The Commission no longer treats as respondents all parties mentioned in a complaint that merely could be inferred to have violated a provision of FECA. Agency Procedures, 73 Fed. Reg. 74,494, 74,498 (Dec. 8, 2008). And the Commission has clarified the instances in which treasurers of political committees are

named as respondents, either in an official or personal capacity (or both). Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 3 (Jan. 3, 2005). "In any scenario, the Commission will, of course, remain free to exercise its prosecutorial discretion not to pursue a respondent." *Id.* at 3 n.2.

The possibility of under-notification is largely alleviated by the fact that the Commission has the ability to add additional respondents to a MUR in the event circumstances warrant it. Such additional respondents can be added prior to a Commission investigation, as several were in this case, or after the Commission has already found reason to believe that one or more of the original respondents have violated the law. *See, e.g.*, Letter of Notification, MUR 5333 (Swallow for Congress, Inc.), Dec. 16, 2005, http://eqs.nictusa.com/eqsdocsMUR/0000605A.pdf (explaining Commission's decision to add additional respondent after investigation). The flexibility to add additional respondents in later stages of the enforcement process allows the Commission to avoid problems of over-notification while still retaining the ability to enforce the law against individuals and entities whose inclusion in the case is warranted by subsequent developments.

b. The Commission Acted Reasonably In Identifying the Appropriate Respondents To Nader's Administrative Complaint

Plaintiff argues that the failure to notify all entities and individuals accused in his complaint of wrongdoing represents a "radical departure from the Agency's established practice . . . ." Nader Mem. at 10-11. As discussed above, the Commission regularly exercises its discretion to determine the appropriate respondents to an administrative complaint, so its actions in this case are not a "radical departure." But to the extent the Commission's actions represent any sort of departure from the way it handles ordinary administrative complaints, such treatment is entirely justified because this was not an ordinary complaint. The typical FEC administrative

complaint involves approximately three or four respondents; the administrative complaint in this case alleged wrongdoing by more than 150 individuals and entities, with an additional 17 added in the supplement. The other persons plaintiff believed should have been required to prepare responses to the complaint included, *inter alia*, 54 law firms, 98 individuals employed by law firms, 18 state Democratic parties, certain "John and Jane Doe Democratic Party employees," and 13 individual officers, employees and agents of the 527 Group respondents. Furthermore, as discussed in *supra* Part II.B.1.a, the allegations against all of these individuals and entities hinged largely upon the involvement of the DNC and/or Kerry Committee in the alleged misconduct; therefore, resolving that critical issue by noticing a handful of entities could potentially resolve the case as to the remainder of the potential respondents.

In addition, the fact that this administrative complaint was filed so long after the alleged illegal activities meant that, unlike cases that are filed in a more timely fashion, evidence was likely to be stale and a statute of limitations deadline was near. While the Commission is certainly capable of handling large administrative complaints, or ones alleging wrongdoing from years earlier, these factors are considerations in whether the Commission believes that expending resources on a particular matter is justified in context of the overall enforcement objectives of the agency. *See generally* Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg 12,545, 12,546 (Mar. 16, 2007) (Commission will dismiss an administrative complaint "when the matter does not merit further use of Commission resources" due to, *inter alia*, "likely difficulties with an investigation").[12]

[12] Plaintiff points to *AFL-CIO v. FEC* as evidence that the FEC is capable of an investigation of "more than 150" respondents and third-party witnesses. 177 F. Supp. 2d 48, 53 & n.7 (D.D.C. 2001), *aff'd on other grounds*, 333 F.3d 168 (D.C. Cir. 2003). But the administrative complaints in that case were not speculative and were filed shortly after the alleged illegal activity. *See* 177 F. Supp. 2d at 52 ("Between December of 1995 and November

i. Notification of all Individuals and Entities Identified In The Administrative Complaint Would Have Created Unnecessary Burdens for Respondents

As discussed above, both courts and the regulated community have indicated that naming individuals and entities as respondents to a MUR can be a serious burden. In this matter, the Commission drew the line between respondents and non-respondents in a way that attempted to properly balance the enforcement priorities of the Commission with the objective of minimizing the burdens on potentially innocent respondents. The Commission treated the DNC and Kerry Committee as respondents (as well as their treasurers and John Kerry personally) because the illegal in-kind contributions alleged in Count 1 of the complaint were allegedly directed by and for the benefit of those entities. *See* AR00857-58 ("Respondents initiated these legal proceedings with the knowledge and consent of [the DNC chairman] and John Kerry, and coordinated their efforts with the DNC, the Kerry-Edwards Campaign and at least 18 state or local Democratic Parties."); AR00861 ("[T]he total value of the legal services that their law firms unlawfully contributed to the Kerry-Edwards Campaign greatly exceeds $2 million."); AR00863 ("In summary, this Complaint proves that Respondents conspired on behalf of the Democratic Party and the Kerry-Edwards Campaign . . . ."). As a result, it made sense to proceed against those parties both because of their alleged culpability and their central role in the alleged conspiracy.

By contrast, the non-respondents were more peripheral to the allegations in Count 1, allegations that rested largely on speculation. Although the administrative complaint was more

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of 1996, the FEC received eleven complaints alleging that Plaintiffs' activities in connection with the 1996 election year violated FECA."). Furthermore, many individuals were "added to the case as respondents and as third-party witnesses during the course of the investigation," *id.* at 53 n.7, a practice that would seem to be foreclosed by Nader's suggestion that only the complainant determines the respondents.

than 100 pages long and provided detail regarding the alleged conduct of non-respondents, it was still speculative regarding the critical question of *illegal* conduct, namely, the involvement of the DNC and Kerry Committee. If the ballot challenges were conducted independently of the DNC and Kerry campaign, then the legal work painstakingly described in the administrative complaint did not constitute a contribution to either of those committees. Because the 18 state Democratic parties, 53 law firms, and 95 individual lawyers would have committed no violation if the DNC and Kerry Committee had not been involved, it made sense for the Commission to designate as respondents the entities likely to have information directly bearing on that issue. The Commission always retained the authority to designate additional respondents later if further developments had suggested merit to the allegations against some or all of the non-respondents. *See supra* Part II.B.3.a.

Similarly, the Commission was entirely justified in treating SEIU as a non-respondent, because the administrative complaint was speculative as to the same critical issue of whether the DNC or Kerry Committee was involved in the alleged conspiracy to disrupt the Nader-Camejo petition drive in Oregon. Plaintiff attempts to get around this problem by alleging that SEIU violated the law by making independent expenditures rather than contributions. *See* Nader Mem. at 17-18. But this argument appears foreclosed by the Supreme Court's holding in *Citizens United v. FEC* that corporations (and by extension, labor unions) have a constitutional right to make unlimited independent expenditures. 130 S. Ct. 876, 913 (2010). The Commission cannot bring an enforcement action against SEIU for violating a provision of FECA that was subsequently invalidated by the Supreme Court. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97-98 (1993) (Supreme Court holdings on federal law have retroactive application).

In contrast to the speculative nature of the first two counts of the administrative complaint, the allegation in Count 3, that the 527 Groups had failed to appropriately register as political committees, on its face was supported by more than mere speculation. The Commission therefore treated those 527 Groups as respondents.[13]

The speculative nature of the allegations was a sufficient reason for the Commission to be concerned about imposing a burden upon so many potentially innocent respondents. In addition, the passage of time since the alleged illegality had the potential to make an investigation additionally burdensome. Reconstructing events that took place four years earlier can prove to be a challenge for even the most dutiful respondent. The Commission is entitled to consider that fact when designating respondents.

ii. Notification of all Individuals and Entities Identified in the Administrative Complaint Would Have Caused Significant Delay

As discussed above, the original administrative complaint was filed more than three and a half years after the underlying allegedly illegal conduct occurred, and the statute of limitations to obtain civil penalties is five years. *See* 28 U.S.C. § 2462. But the Commission's enforcement process has a number of built-in steps that are designed to provide respondents with an ample opportunity to participate in the process. All respondents to a complaint are afforded fifteen days

[13] Although he references it in his judicial complaint (¶ 46), plaintiff appears to have abandoned his challenge to the Commission's dismissal of Count 4, which involved a ballot challenge to a 2006 Pennsylvania Senate campaign in which Nader was not a candidate. Given his complete lack of Article III standing to bring such a claim, that abandonment makes sense. *See Summers v. Earth Island Inst.* 129 S. Ct. 1142, 1148 (2009) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992)). Nader contends that money judgments obtained by law firms against Green Party 2006 Senate candidate Carl Romanelli helped to "effectively fr[ee]ze[] minor party and independent candidates out of Pennsylvania's electoral process," thereby harming Nader's ability to engage in advocacy "for the rights of minor party and independent candidates and voters." Nader Aff. ¶ 17. That allegation falls woefully short of establishing a concrete and particularized injury *to him* that was both caused by the Commission's dismissal of Count 4 and redressable by this Court in a favorable decision. *See Lujan*, 504 U.S. at 559-60.

to respond from the time of actual receipt of notification. 11 C.F.R. § 111.6(a). Respondents often receive extensions of time to respond, as several of the respondents in this case did. *See* AR00588 (granting 30 day extension to DNC); AR00589 (granting 30 day extension to Kerry Committee); AR01451 (granting 38 day extension to The Ballot Project in exchange for tolling agreement); AR01611 (granting an additional 17 day extension to The Ballot Project in exchange for a tolling agreement); AR01453 (requesting additional time for ACT response).

After the responses have been received or the time to receive them has elapsed, the FEC then reviews the complaint and any responses filed thereto to determine whether there is "reason to believe" that a violation of FECA has occurred or is about to occur. 2 U.S.C. § 437g(a)(2); 11 C.F.R. § 111.7. If four or more Commissioners vote that there is reason to believe a violation has or will occur, the Commission undertakes an investigation of the alleged violation, which may include the subpoena of documents, depositions, written questions, and other methods of information gathering. 2 U.S.C. § 437g(a)(2); 11 C.F.R. § 111.9-12. After completion of an investigation, the Commission votes yet again on whether there is "probable cause" to believe FECA has been violated. 2 U.S.C. § 437g(a)(3). If at least four Commissioners find that there is probable cause a violation occurred, the respondent receives another notification. 11 C.F.R. § 111.17. The statute then requires a conciliation period of at least thirty days after probable cause is found (or a shorter period immediately before an election). 2 U.S.C. § 437g(a)(4)(a); *see also* 11 C.F.R. § 111.18. At the conclusion of the conciliation period, if no agreement has been reached between the Commission and a respondent, the Commission must vote again by affirmative vote of four Commissioners before it may seek enforcement of FECA in federal district court. 2 U.S.C. § 437g(a)(6)(A); 11 C.F.R. § 111.19.

Congress chose these procedures so that the Commission can make an informed decision about whether a violation probably occurred and merits redress, and so that respondents have a meaningful opportunity to participate in the process. *See Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996) (noting that FEC enforcement procedures are "purposely designed to ensure fairness not only to complainants but also to respondents" and that "a court is not free to disregard that congressional judgment."). But because the process is time consuming, the Commission urges complainants to file as soon as possible. *See* Guidebook for Complainants and Respondents on the FEC Enforcement Process, at 6, http://www.fec.gov/em/respondent_guide.pdf ("Complaints should be filed as soon as possible after the alleged violation becomes known to the complainant in order to preserve evidence and the Commission's ability to seek civil penalties in federal district court within the five-year statutes of limitations period (measured from the time of the violation) . . . .").

In this case, having to investigate 150 additional respondents would have greatly slowed the progress of the MUR, which would have been problematic both for reasons of staleness and the approaching statute of limitations.[14] Any difficulties in dealing with some respondents — either before a "reason to believe" finding or during an investigation — could have delayed the case against all respondents sufficiently to threaten the Commission's ability to complete its work during the short window between the delayed filing of Nader's administrative complaint and the end of the statute of limitations period.

[14] Although unrelated to the Commission's initial determination about the appropriate respondents, the Commission notes that plaintiff filed two supplements to the administrative complaint, approximately four months and twenty months after the initial filing, respectively, as well as a corrected administrative complaint to fix a signature issue. Each of these filings was also provided to respondents, and they were given an opportunity to respond. Had the Commission been dealing with over 150 respondents, each of these supplemental and corrected filings could have threatened to further delay the consideration of the MUR.

The Commission's determination to limit the number of respondents was intended to enable an efficient resolution. The agency made the reasonable determination to restrict the number of respondents, thereby streamlining the process and making it far more likely that an investigation, if necessary, could be completed before the statute of limitations period elapsed. The Commission retained the authority to designate additional respondents had it obtained any information from the DNC, the Kerry Committee, or any of the 527 Groups, that, for example, the Kerry Committee was coordinating and supervising a particular law firm litigating ballot challenges against Nader-Camejo. *See supra* Part II.B.3.a. In that event, the Commission could have named additional respondents and expanded its investigation to include other parties.

iii. Notification of all Individuals and Entities Identified In The Administrative Complaint Would Have Required Disproportionate Commission Resources

As stated above, the Commission has great discretion regarding how to allocate its limited resources. *See supra* Part II.A. That consideration was of particular importance for an investigation as large as the one contemplated by this administrative complaint. Had the Commission decided to treat as respondents all of the individuals and entities that were named in the administrative complaint, the Commission would have had to devote substantially more resources to this matter. As discussed above, an FEC investigation may include document subpoenas, depositions, written questions, and other methods of information-gathering. In this case, the relevant documents and witnesses were spread throughout the country. The Commission faced the prospect of serving subpoenas all over the country and dealing with over 150 respondents in a case that was several years old and based on speculative accusations.

The resources that would have been expended on this MUR would necessarily have been diverted from other priorities at the agency. The Commission reasonably concluded that the investment of time and energy in treating all persons referenced by plaintiff as respondents,

given all of these considerations, was unjustified by the facts presented in the administrative complaint.

c. It Was Reasonable To Make No Recommendations As To Non-Respondents

The Commission's general practice when analyzing the potential liability of non-respondents is to make no recommendation as to them. AR001730.05 n.2 (citing MUR 5237 (Friedman, et al.)). Both the statute and regulations make clear that the Commission cannot proceed with an investigation against an entity that has not been given notice and an opportunity to respond. *See* 2 U.S.C. § 437g(a); 11 C.F.R. § 111.6(b). In this case, for the reasons stated above, the Commission disposed of all the allegations against the respondents, either through dismissal or a finding that there was no reason to believe a violation occurred. All of the allegations against the non-respondents were inextricably linked with the allegations against the respondents. For example, the Commission's determination that there was no reason to believe that the Kerry Committee had accepted illegal contributions (in the form of coordinated expenditures) necessarily meant that neither the law firms and lawyers, nor SEIU, had given the Kerry Committee illegal contributions. Similarly, the allegation that the 18 state and local Democratic parties helped to coordinate these illegal contributions to the Kerry Committee was precluded by the Commission's finding of "no reason to believe" as to the Kerry Committee. It was therefore reasonable for the Commission to continue to treat the remaining individuals and entities as non-respondents and to close the MUR without making a recommendation as to them.

III. CONCLUSION

Plaintiff has moved for summary judgment in his favor arguing that the Commission acted "contrary to law" in the handling of his administrative complaint. For the reasons stated above, however, the Commission's resolution of Nader's administrative complaint was

reasonable. The Court should therefore grant summary judgment in favor of the FEC and deny the plaintiff's motion for summary judgment.

Respectfully submitted,

Phillip Christopher Hughey
Acting General Counsel

David Kolker (D.C. Bar No. 394558)
Associate General Counsel

Kevin Deeley
Assistant General Counsel

/s/ Seth Nesin
Seth Nesin
Attorney

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
Telephone: (202) 694-1650
Fax: (202) 219-0260

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