UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RALPH NADER,	:	
Plaintiff,	:	
v.	:	Civil No. 10-989-RCL
FEDERAL ELECTION COMMISSION,	:	
Defendant.	:	

PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT

Pursuant to Fed. R. Civ. P. 59(e), Plaintiff Ralph Nader submits this Motion to Alter or Amend the Court's Memorandum Opinion and Order entered on November 9, 2011, which denied the Candidate's Motion for Summary Judgment and granted the Motion for Summary Judgment filed by Defendant Federal Election Commission ("FEC"). In support of this Motion, the Mr. Nader submits the attached Memorandum of Points and Authorities.

Dated: December 7, 2011

Respectfully submitted,

/s/ Oliver B. Hall

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT

If the dolorous day ever comes when the American people find it necessary to survey the past in hopes of determining how their great nation's experiment in self-government failed, they will find the Court's November 9, 2011 Opinion ("Opinion" or "Op.") an illuminating artifact. Not only is the Opinion wrong, in that it relies on basic legal errors and multiple factual mistakes, but it also demonstrates, perhaps more than any other in recent memory, the extent to which the federal courts have turned a blind eye to deliberate and unlawful efforts to suppress and destroy the grassroots political activity of ordinary citizens who seek to provide their fellow Americans with a free choice of candidates in federal elections. In this case, the Federal Election Commission ("FEC") was presented with compelling evidence – and, in many instances, actual proof itemized by transaction – that the respondent parties ("Respondents") named in the Administrative Complaint made millions of dollars in contributions and expenditures, in violation of the Federal Election Campaign Act of 1971, as amended ("FECA" or the "Act"), in an effort to deny Americans the choice of voting for consumer advocate Ralph Nader (the "Candidate"). As the Court recognized, the FEC directly violated the Act and its own regulations

by failing to serve the Administrative Complaint on the majority of Respondents responsible for the alleged violations, Op. at 21, and by failing to commence the mandatory investigatory process against them. Compounding its error, the FEC then relied on its supposed lack of information regarding those Respondents to find "no reason to believe" the few Respondents it did serve violated the Act.

The Court now approves the FEC's unlawful dismissal of this action as "reasonable" – albeit with reservations as to the agency's lack of "clarity" and the "drift" between its inaction and the Act's mandatory requirements – by concluding that the FEC's failure to serve a majority of the Respondents was "harmless error." Op. at 21-23. The cases cited by the Court do not support this conclusion. On the contrary, the Court's Opinion sets a dangerous precedent, by establishing that the FEC can willfully refuse to enforce the Act in any future case, simply by committing the "harmless error" of not serving the respondent parties. Accordingly, the Candidate respectfully requests that the Court correct the errors in its Opinion, as set forth below.

ARGUMENT

This case was wrongly decided because the Court committed two basic legal errors. First, the Court incorrectly concluded that the FEC's failure to serve the Administrative Complaint as required by law was "harmless error." Second, the Court imposed an improper evidentiary burden, by demanding that the Administrative Complaint include actual proof that Respondents violated the Act, rather than facts and evidence providing "reason to believe" that they may have violated the Act. In connection with these errors, the Court repeatedly misconstrued the factual record to support its conclusion that the FEC's dismissal of the Administrative Complaint was "not contrary to law."

I. The Court Erred By Concluding That the FEC's Failure to Serve the Administrative Complaint as Required By Law Was Harmless Error.

Despite acknowledging that the FEC "clearly violated" the Act by failing to serve the Administrative Complaint on the majority of Respondents in this matter, the Court concluded that this "clear defect" in the agency's action was "harmless error." Op. at 21. That is incorrect. An FEC enforcement action cannot proceed, regardless of its merits, if the agency never serves the administrative complaint on the respondent parties. The harm resulting from the FEC's error, therefore, is that the agency terminated this enforcement action at its inception, without taking the statutorily mandated steps necessary to determine whether the Respondents violated the Act.

As the D.C. Circuit has made clear, when the FEC receives an administrative complaint, "it must first notify the alleged violator and give it an opportunity to respond to the accusation." *American Fed. of Labor v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003) (citing 2 U.S.C. § 437g(a)(1) (emphasis added)). Thereafter, upon review of "the complaint and any responses filed thereto," the agency makes a finding as to whether it has "reason to believe" that a respondent violated the Act. *American Fed. of Labor v. FEC*, 177 F. Supp. 2D 48, 52 (D.D.C. 2001) (citing 2 U.S.C. § 437g(a)(2) (emphasis added)). In this case, by contrast, the FEC deliberately failed to serve a majority of the Respondents, and purported to make no finding whatsoever as to their alleged violations. AR01730.06-07. Such inaction amounts to agency nullification of the Act's mandatory procedures for investigation and enforcement of potential violations – a manifest error that is especially harmful in this case, where the FEC's own general counsel concluded that the claims rely on a "viable theory." AR01730.10.

The Court's conclusion that the FEC's error is "harmless" is based entirely on its finding that there is "no reason to believe" the agency "would have reached a different decision" if it had

actually served the Administrative Complaint on the Respondents. Op. at 22 (citing *City of Portland, Oregon v. EPA*, 507 F.3d 706, 716 (D.C. Cir. 2007)). But the Court's finding is unwarranted. A primary basis for setting aside the FEC's dismissal of an enforcement action is that "the agency's decision is not supported by substantial evidence" in the administrative record. *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005). The Court cannot properly make that determination in this case, because the agency failed to develop the administrative record by – at a minimum – serving the Respondents and reviewing their responses. *See American Fed. of Labor*, 333 F.3d at 170; 2 U.S.C. § 437g.

City of Portland provides no support for the Court's conclusion that the FEC's complete failure to serve an administrative complaint alleging claims based on a "viable theory" can be considered harmless error. In that case, a rule adopted by the Environmental Protection Agency was challenged on the ground that the available evidence permitted adoption of a lesser requirement. *City of Portland*, 507 F.3d at 716. Even if that were true, the Court found, the EPA's error "was harmless," because the relevant statute required adoption of "the most stringent feasible" requirement. *Id.* Here, by contrast, the FEC undermined the entire enforcement process established by the Act, by failing to follow its mandatory procedures.

The only other case cited by the Court involves an error so minor it underscores the FEC's gross dereliction of its statutory duty here. Op. at 22 (citing *FEC v. Club for Growth, Inc.*, 432 F. Supp. 2d 87, 90 (D.D.C. 2006)). In sharp contrast with the FEC's deliberate failure to serve the Administrative Complaint on the majority of Respondents in this case, in *Club for Growth* the FEC timely served the corporate respondent, but misidentified the individual served by his title as officer of an affiliated organization with an almost identical name. *See Club for*

Growth, Inc., 432 F. Supp. 2d at 90. Because the agency corrected its nominal error within two weeks, and because the individual "surely had coterminous notice," regardless of the misnomer, the Court found the agency's action to be "harmless error." *Id. Club for Growth* thus involved a minor clerical defect that the FEC promptly corrected, not a complete failure to commence the Act's mandatory enforcement process against Respondents who are alleged, based on a "viable theory," to have made millions of dollars in unlawful and unreported contributions and expenditures.

In sum, there is no precedent to support the Court's conclusion regarding the FEC's "harmless error" in this case. On the contrary, the Court's Opinion announces a new rule, which will set a dangerous precedent if it is not corrected. The Court asserts, without citing any authority, that the mandatory procedures established by Section 437g of the Act are "for the benefit of" respondents to a complaint only, and "not for [a complainant's] benefit." Op. at 23. The Court further asserts, again without citing any authority, that Respondents are "the only persons and entities who could have been prejudiced" by the FEC's failure to abide by those mandatory procedures. Op. at 23. Under the rule announced in this case, therefore, the FEC can refuse to enforce the Act in future cases simply by declining to serve the respondent parties; only they will be "prejudiced," and they surely will not complain. Because such a rule would eviscerate the Act's mandatory enforcement procedures, the Court's conclusion regarding the FEC's "harmless error" is incorrect.

II. The Court Misidentified the Issue to Be Decided and Imposed an Improper Evidentiary Burden By Demanding That the Administrative Complaint Provide Proof That Respondents Violated the Act.

The reason the Court incorrectly concluded that it was "harmless error" for the FEC not

to serve the Administrative Complaint on the majority of Respondents is that it fundamentally misapprehended the issue to be decided in this case. The question is not whether the Administrative Complaint contains sufficient factual support to establish that Respondents actually violated the Act, as the Court assumed, but only whether it contains sufficient factual support to provide "reason to believe" they may have violated the Act. 2 U.S.C. § 437g(a)(2). As the FEC itself has clarified, "a 'reason to believe' finding indicates only that the Commission found sufficient legal justification to open an investigation." *See* Press Release, *FEC Approves Barack Obama Advisory Opinion, Clarifies Enforcement Terms* (March 1, 2007) available at http://www.fec.gov/press/press2007/20070301meeting.html (emphasis added). Thus, the Act does not even permit the FEC to determine that a respondent has in fact committed a violation, by making a "probable cause" finding, until after it completes such an investigation. 2 U.S.C. § 437g(a)(3).

In evaluating the sufficiency of the allegations in the Administrative Complaint, the Court does not dispute that, if true, they provide "reason to believe" Respondents may have violated the Act, as set forth in each count. 2 U.S.C. § 437g(a)(2). That should end the inquiry at this stage of the proceedings, because the only question to be decided is whether the FEC erred by failing to serve the Administrative Complaint and conduct an investigation. *See id.* ("The Commission shall make an investigation of such alleged violation") (emphasis added). Instead, however, the Court affirmed dismissal on the ground that such allegations do not establish that Respondents in fact violated the Act. But that is a question that cannot be determined until the FEC conducts an investigation and makes a "probable cause" finding. 2 U.S.C. § 437g(a)(3). The Court thus imposed an improper evidentiary burden, by demanding that the Administrative

Complaint satisfy the "probable cause" standard, even though the FEC never conducted an investigation pursuant to Section 437g(a)(2).

A. The Court Improperly Dismissed Count I.

Count I of the Administrative Complaint alleges that at least 53 named law firm Respondents made "millions of dollars in illegal and unreported contributions and expenditures to benefit the Kerry-Edwards Campaign." AR at 91. The Court affirmed dismissal of the claims in Count I primarily on the ground that the FEC "reasonably determined" that the "supporting facts were insufficient" to establish "coordination" between these Respondents and the DNC and Kerry-Edwards 2004. Op. at 10. As a threshold matter, however, much of the Court's analysis is improper, because the FEC conspicuously failed to address the most relevant supporting facts and evidence. *See* Pl. Opp. to Def. FEC's Mot. for S.J. at 2-4 (listing evidence, which FEC failed to address, supporting claim that "both Kerry-Edwards 2004 and the DNC not only 'coordinated,' but also directed and actively participated in Respondent law firms' legal challenges). Given the FEC's complete failure to address such evidence, the Court erred by doing so itself. *See Common Cause v. FEC*, 906 F.2d 705, 706 (1990) (courts must determine propriety of FEC's dismissal "solely by the grounds invoked by the agency") (citation omitted).

In its Opinion demonstrates that the Court imposed an improper evidentiary burden, by demanding facts amounting to actual proof that Respondents violated the Act. In particular, the Court found that the Administrative Complaint fails to "establish coordination" between Respondent Reed Smith and the DNC and Kerry-Edwards 2004. Op. at 11. But the issue is only whether the facts alleged provide "reason to believe" these Respondents may have coordinated with one another. 2 U.S.C. § 437g(a)(2). And they do. For example, like the FEC, the Court

completely ignores the fact that the DNC retained Reed Smith during the 2004 presidential election. AR83. Further, the Court misconstrues the factual record by asserting that Respondent John Kerry "may have retained that firm's services in the past," Op. at 11, when in fact, the record discloses that "John Kerry himself is an important client of Reed Smith," who retained the firm in at least one other matter arising out of the 2004 presidential election. AR49-50 & n.91, AR84 (emphasis added). These facts alone establish a prima facie basis for a finding of coordination among these parties. Contrary to the Court's conclusion, Op. at 11, therefore, it was manifestly unreasonable for the FEC to conclude otherwise – without bothering to serve Reed Smith – because it is the purpose of an investigation to resolve such factual questions. 2 U.S.C. § 437g(a)(2).

The Court similarly disregards or misconstrues evidence relating to the Grand Jury investigation of Respondents' Pennsylvania challenge. For example, the Court finds it "reasonable" for the FEC to conclude that the Grand Jury made "no findings as to the Kerry Committee or Reed Smith," Op. at 13, but disregards the Grand Jury's finding that the Pennsylvania challenge was expressly intended to benefit "Democratic Presidential Candidate John Kerry." AR812. The Court further disregards the testimony identifying Reed Smith by name, AR1748-49, AR1756-58, and in particular the testimony that Reed Smith partner Efrem Grail "was coordinating the effort" by state employees to prepare Respondents' Pennsylvania challenge at taxpayer expense. AR1748. Again, such evidence establishes a prima facie basis for concluding that Reed Smith may have made unlawful and unreported contributions and expenditures for the benefit of Kerry-Edwards 2004, but the Court, like the FEC, failed to consider it.

More generally, the Court asserts that there is a "yawning gap" between the allegations in the Administrative Complaint and the conclusion that the Respondent law firms – who were never asked to respond to the allegations – "were making unreported expenditures, coordinated with the DNC or the Kerry-Edwards Campaign." Op. at 11. At most, the Court reasons, the Administrative Complaint alleges "parallel conduct and shared goals, not coordination." Op. at 11. That is not even an accurate statement of the record. It disregards, for example, the fact that the DNC retained several other law firm Respondents, in addition to Reed Smith, who filed challenges in states other than Pennsylvania. AR48. Stronger evidence of coordination between the DNC and the Respondent law firms is hard to imagine.

To the extent that the Court addresses such evidence, it confuses the issue by asserting that the DNC's payment of the Respondent law firms undermines the claim that the firms made unreported contributions. Op. at 13. But the relevance of the payments is that they establish a prima facie basis for concluding that Respondents coordinated with one another – not that the payments themselves were necessarily illegal. The Court concedes as much in its discussion of Dorothy Melanson's sworn testimony, in which she admits that the DNC directed her to file Respondents' Maine challenge and retained her attorneys, but suggests that Melanson also "gives testimony" to the opposite effect. Op. at 13. Once again, the FEC was obligated to resolve this factual dispute by serving the relevant Respondents and conducting an investigation. 2 U.S.C. § 437g(a)(2). Had it done so, it would have discovered that its own records, which are included in the factual record in this very case, resolve the conflict in favor of a finding of coordination, by proving that the DNC did in fact retain Melanson's attorneys. AR61.

Yet another example of the improper evidentiary burden the Court imposed comes in its

discussion of the email from Kerry-Edwards 2004 official Judy Reardon to the attorneys who filed Respondents' New Hampshire challenge. Op. at 12. Attached to Reardon's email is a draft version of the complaint that the law firm Respondent Orr & Reno filed, which Reardon authored. The Court does not dispute that this email demonstrates coordination between Kerry-Edwards 2004 and Orr & Reno, but faults the allegations for failing to specify whether the attorneys were "compensated for this specific work or even how much work they performed." Op. at 12. Naturally, no private complainant has access to the billing records of a law firm; instead, that is precisely the sort of information the FEC could obtain by conducting the investigation required by that Act. 2 U.S.C. § 437g(a)(2).

Here, then, is the crux of the Court's error with respect to Count I. The Court contends that the law firm Respondents would not "necessarily" produce their billing records if the FEC had served them as it was required by law to do, and "even if they did...there is no reason to think that these responses would contain information favorable to [the Candidate]." Op. at 22. A complainant need not include evidence "necessarily" establishing that an investigation will lead to a conclusion that the respondent parties violated the Act, however. Instead, the Act expressly contemplates that enforcement actions might be dismissed, following an investigation, because the FEC finds no "probable cause" for concluding the respondent parties violated the Act. 2 U.S.C. § 437g(a)(3). The Court's demand that the Candidate submit evidence strong enough to preclude the possibility of such a finding, in the absence of any investigation whatsoever, was error.

B. The Court Improperly Dismissed Count II.

The Court's errors in affirming dismissal of Count II mirror its errors in affirming

dismissal of Count I. Count II alleges that Respondents Service Employees International Union ("SEIU") and America Coming Together ("ACT") made unlawful and unreported contributions to the DNC in connection with Respondents' Oregon challenge. Without serving the Administrative Complaint on SEIU, the FEC concluded that "the available information" does not support a finding that these Respondents coordinated their efforts with the DNC and Kerry-Edwards 2004, and the Court found that determination to be "entitled to deference." Op. at 15.

As an initial matter, the FEC's failure to serve SEIU, in violation of the plain language of the Act and its own regulations, is precisely the sort of agency action that is not entitled to deference. *See American Fed. of Labor v. FEC*, 177 F. Supp. 2D at 55. But even if it were, the Court once again defers to the FEC's resolution of factual questions, which the FEC made without conducting an investigation. The FEC concluded, for example, that there is no basis for inferring coordination between SEIU and the DNC, even though Anna Burger is an official in both organizations, and the Court found that determination to be "not clearly erroneous." Op. at 15-16. That determination was clearly erroneous, however – Ms. Burger very well might have acted as the liaison between her two organizations, which is a factual predicate sufficient to establish that SEIU and the DNC may have coordinated their Oregon efforts – and the FEC's resolution of that factual question without conducting an investigation or even serving SEIU was improper.

Similarly, the Court erred by accepting the FEC's conclusion that evidence in the record did not "necessarily mean" that SEIU made an unlawful contribution or contributions to the DNC. Op. at 16. The standard is not whether the allegations in the Administrative Complaint "necessarily" establish that Respondents violated the Act, but only whether there is "reason to

believe" they might have violated the Act. 2 U.S.C. § 437g(a)(2).

C. The Court Improperly Dismissed Count III.

The Court upholds the FEC's dismissal of Count III, which alleges that several political organizations violated the Act by failing to register as political committees and comply with the Act's prohibitions and limitations, on the ground that "the FEC is in a better position than [the Candidate]" to determine its enforcement priorities. Op. at 18. As the Court acknowledges, however, that determination is subject to judicial review. Op. at 18. Here, the agency failed to pursue violations that were itemized by transaction, and which were further supported by reference to the relevant Internal Revenue Service filings. AR14-20. With respect to Count III, in other words, the Administrative Complaint included evidence practically amounting to actual proof, the Court's deference to the FEC's dismissal of these claims was unwarranted.

CONCLUSION

For the foregoing reasons, the Motion to Alter or Amend Judgment should be granted.

Dated: December 7, 2011

Respectfully submitted,

/s/ Oliver B. Hall

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CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2011, I served the foregoing Motion to Alter or Amend Judgment on behalf of the Plaintiff, by means of the Court's CM-ECF system, upon the following parties:

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[PROPOSED] ORDER

Having considered the Motion to Alter or Amend Judgment pursuant to Fed. R. Civ. P. 59(e) filed by Plaintiff Ralph Nader on December 7, 2011, it is hereby Ordered that the Motion is granted.

Dated: _____

Honorable Royce C. Lamberth
Chief Judge