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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Jon Marcus,

Plaintiff,

v.

United States Attorney General
Alberto R. Gonzales;
Federal Election Commission Chairman
Michael E. Toner;
In their official capacities,

Defendants.

CV07-00398-PCT EHC

MOTION TO DISMISS AND COMBINED BRIEF IN SUPPORT OF THAT MOTION AND IN OPPOSITION TO MOTION FOR DECLARATORY JUDGMENT

DEFENDANT FEDERAL ELECTION COMMISSION'S MOTION TO DISMISS AND ITS COMBINED BRIEF IN SUPPORT OF THAT MOTION AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR A DECLARATORY JUDGMENT

The Defendant Federal Election Commission ("Commission" or "FEC") hereby moves to dismiss Plaintiff's Complaint for Declaratory Relief for failure to state a claim pursuant to Fed. R. Civ. P 12(b)(6) and submits this combined brief in support of that motion

and in opposition to plaintiff's motion for declaratory judgment.

On February 21, 2007, Plaintiff Jon Marcus filed a Complaint in this Court alleging that he is a target of an ongoing grand jury investigation involving illegal contributions the Plaintiff allegedly made during the 2004 presidential election to a presidential candidate. Complaint ¶¶ 1, 12, 13. Plaintiff's basic claim is that the grand jury investigation is illegal because the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431-455 (the "Act" or "FECA") purportedly provides the Commission with the exclusive authority to perform an investigation in the first instance, and the Department of Justice ("DOJ") is precluded from proceeding unless and until it receives a referral from the FEC. Id. at ¶¶ 19-21. He seeks declaratory relief against the Commission and the Attorney General on this basis, and has filed a motion asking the Court to enter such an order. Plaintiffs's Motion for Declaratory Judgment ("Mot.")(Docket #6).[1]

As we show below, Plaintiff's claim is premised upon a fundamental misunderstanding of the Act, which contains no requirement that DOJ await a referral from the Commission before beginning its own criminal investigations. Plaintiff's Complaint and motion are thus nothing more than a misguided attempt to collaterally attack an alleged ongoing criminal investigation being conducted by a grand jury. Because his argument is premised on a mistaken legal conclusion that is directly contrary to binding Ninth Circuit precedent and because the Complaint contains no factual allegations concerning the Commission, the plaintiff has failed to state a claim, his motion should be denied and the Complaint should be dismissed as to the Commission.

[1] In his Complaint and motion, Plaintiff erroneously cite to the "Federal Campaign Finance Act" rather than the Federal Election Campaign Act. See Complaint at ¶¶ 7, 16, 18, and at 4 (prayer for relief); Mot. at ¶¶ 1, 6, 8, 9 and at 4 (payer for relief). See also Plaintiff's Brief in Support of Motion for Declaratory Judgment ("Br.") 1, 3, 6, 11, 14, 23. Moreover. Plaintiff has improperly named the Chairman of the Commission as a defendant. If plaintiff had any cause of action, it would be against the Commission itself, which alone has the powers and duties at issue in this case. See, e.g., 2 U.S.C. 437c(b), 437d(a), 437g(a).

BACKGROUND

1. Federal Election Commission

The Federal Election Commission is the independent agency of the United States government empowered to administer, interpret and enforce three federal statutes — the FECA,[2] the Presidential Election Campaign Fund Act, 26 U.S.C. 9001-9013,[3] and the Presidential Primary Matching Payment Account Act, 26 U.S.C. 9031-9042.[4] See generally 2 U.S.C. 437c(b)(1), 437d(a) and 437g.

Pursuant to the Act, the Commission has "exclusive jurisdiction with respect to the civil enforcement" of the Act and the two presidential public funding statutes. 2 U.S.C. 437c(b)(1). The Commission is authorized to institute investigations of possible violations of the Act, 2 U.S.C. 437g(a)(1) and (2), pursuant to detailed administrative procedures prescribed by Congress in the Act. 2 U.S.C. 437g(a). The Act provides that the Commission may initiate an administrative enforcement proceeding based upon a complaint that is "in writing, signed and sworn to," made by "any person who believes a violation" of the Act "has occurred," 2 U.S.C. 437g(a)(1), or upon "the basis of information ascertained in the normal course of carrying out its supervisory duties," 2 U.S.C. 437g(a)(2). If a complaint is filed, the Commission must notify the respondent and provide him with an opportunity to respond. If the Commission finds reason to believe that there has been a violation of the Act,

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[2] The Act imposes extensive requirements for comprehensive public disclosure of all contributions and expenditures in connection with federal election campaigns. 2 U.S.C. 432-434. The Act places dollar limitations on contributions by individuals and multi-candidate political committees to candidates for federal office, 2 U.S.C. 441a(a), and prohibits campaign contributions by corporations and unions from their treasury funds. 2 U.S.C. 441b(a). The Act also prohibits contributions made in the name of another. 2 U.S.C. 441f. Contributing money to a candidate in one's own name using funds provided by someone else is an example of activity that would violate of 2 U.S.C. 441f. 11 C.F.R. 110.4(b)(2)(i).

[3] The Presidential Election Campaign Fund Act, 26 U.S.C. 9001-9013 ("Fund Act"), provides for a voluntary program of public financing of the general election campaigns of eligible major and minor party nominees for the offices of President and Vice President of the United States.

[4] The Presidential Primary Matching Payment Act 26 U.S.C. 9031-9042 ("Matching Payment Act"), provides partial federal financing for the campaigns of presidential primary candidates who choose to participate and satisfy certain eligibility requirements.

the Commission "shall make an investigation of [the] alleged violation, which may include a field investigation or audit, in accordance with the provisions of [section 437g(a)]." 2 U.S.C. 437g(a)(2). The Act permits the Commission to issue subpoenas and orders in aid of its investigation and provides it with the power to seek judicial enforcement of such orders in federal district court. 2 U.S.C. 437d(a)(3),(4); 2 U.S.C. 437d(b).[5]

At the conclusion of an administrative investigation, the statute authorizes the Commission's General Counsel to recommend that the Commission vote on whether there is probable cause to believe that the Act has been violated. 2 U.S.C. 437g(a)(3). If she recommends that the Commission find probable cause to believe respondents have violated the Act, the statute requires the General Counsel to notify the respondents, provide them with a brief stating her position on the issues, and give the respondents the opportunity to submit a response brief. Id. The General Counsel then prepares a report to the Commission, recommending what action the Commission should take. 11 C.F.R. 111.16. Upon consideration of the briefs and report, the Commission determines whether there is "probable cause to believe" a violation has occurred. 2 U.S.C. 437g(a)(4)(A)(i).

If the Commission finds probable cause to believe a violation that is not knowing and willful has occurred, it attempts to resolve the matter by "informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement" with the respondent. The Act requires any such conciliation effort to continue for at least 30 days — or 15 days if the probable cause finding was made within 45 days of an election — and authorizes the Commission to continue such negotiations for up to 90 days. 2 U.S.C. 437g(a)(4)(A)(i). If the Commission is unable to negotiate an acceptable conciliation agreement, the Act permits the Commission to file a civil law enforcement suit in federal district court.[6] The Commission's decision whether to file a civil enforcement suit is discretionary, and the litigation in district court is de novo. See 2 U.S.C. 437g(a)(6)(A).

[5] At any time during the administrative enforcement process, the Commission may determine that no violation has occurred, decide to take no further action, or dismiss the administrative complaint for some other reason.

[6] The Commission has no authority to require respondents to enter into a conciliation agreements; such agreements are totally voluntarily.

If the Commission finds probable cause to believe that a knowing and willful violation of the Act has occurred, it may take all the same actions that it may take with regard to non-willful violations described above, including conciliating the matter, and filing a de novo lawsuit in federal district court. In addition, however, the statute permits the Commission to refer apparent knowing and willful violations to the Attorney General for criminal prosecution, pursuant to 2 U.S.C. 437g(d), without having to engage in conciliation first:[7]

> If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d) of this section, or a knowing and willful violation of chapter 95 or chapter 96 of title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations [requiring conciliation] set forth in paragraph (4)(A).

2 U.S.C. 437g(a)(5)(C). When the Commission refers a knowing and willful violation of the Act to the Attorney General, the Act requires the Department of Justice to report periodically to the Commission concerning the matter. 2 U.S.C. 437g(c). If there is a conciliation agreement with the Commission, it may be introduced by the defendant in a subsequent criminal prosecution for the same "act or failure to act constituting such violation," to "evidence their lack of knowledge or intent to commit the violation," 2 U.S.C. 437g(d)(2), and as a mitigating factor in sentencing. 2 U.S.C. 437g(d)(3).

2. Department of Justice

28 U.S.C. 516 provides that the Attorney General has exclusive authority and plenary power to control the conduct of litigation in which the United States in involved. Pursuant to this provision, the Attorney General has jurisdiction to prosecute criminal violations of the FECA, as well as criminal violations of the provisions of the Fund Act and the Matching

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[7] The Act also provides that the Commission can seek higher civil penalties for violations that are "knowing and willful" versus those that are non-willful. The amount the Commission may seek for most knowing and willful violations (currently $11,000 or 200% of the contribution or expenditure involved in the transaction) is double the amount it may seek if the violation is non-willful. 2 U.S.C. 437g(a)(5)(A), (B). Knowing and willful violations of 2 U.S.C. 441f (contributions in the name of another) can result in penalties of "not less than 300 percent of the amount in violation and is not more than the greater of $50,000 or 1,000 percent of the amount involved in the violation." 2 U.S.C. 437g(a)(5)(B).

Payment Act. 2 U.S.C. 437g(d) sets out the criminal sanctions for violations of the Act, which vary according to the provision and the amount of money involved in the violation, and include fines and imprisonment. A five-year statute of limitations applies to criminal violations of the Act. 2 U.S.C. 455.[8]

For 30 years, the Commission and the Department of Justice have construed the Act to permit the Attorney General to pursue criminal violations of the Act and presidential public funding statutes that the Department of Justice uncovers on its own, as well as in response to referrals the Commission makes pursuant to 2 U.S.C. 437g(a)(5)(C). In 1977, one year after the Act was amended to give the Commission exclusive civil enforcement authority, the Commission and the Department of Justice entered into a Memorandum of Understanding ("MOU") (App. 99) in which the agencies jointly outlined their respective roles in pursuing election law violations. 43 Fed. Reg. 5441 (1978).[9] That joint memorandum describes the circumstances under which the Commission is to refer apparent criminal violations of the Act to the Attorney General and specifically addresses criminal violations of the FECA that come to the attention of the Department of Justice independent of the Commission. In such an instance, the MOU provides that DOJ will "apprise the Commission of such information at the earliest opportunity" and "continue its investigation

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[8] In 2002, Congress increased the criminal statute of limitations from three years to five years.

[9] When Congress first created the Commission in 1974, it did not give the Commission exclusive jurisdiction over civil enforcement of the Act, but instead "primary jurisdiction with respect to the civil enforcement" of the Act and the contribution and expenditure limitations that were then contained in Title 18. Under the 1974 Amendments to the Act, the Commission could refer to the Department of Justice civil violations of the Title 18 provisions over which the Commission had jurisdiction, but it had no authority whatever to file civil actions in federal district court regarding those provisions. All such civil and criminal court actions were at the Attorney General's discretion, after referral from the Commission. 2 U.S.C. 437g(a)(7) (1974) (App. 97). See also Buckley v. Valeo, 519 F.2d 821, 893 n.191 (D.C. Cir. 1975) (concluding that the Attorney General has discretion whether to file civil enforcement proceedings referred by the Commission), aff'd in part, rev'd in part, 424 U.S. 1 (1976). In 1976, when Congress amended the Act in response to the Supreme Court's decision in Buckley v. Valeo, 424 U.S. 1 (1976), it recodified the Act, transferred to Title 2 the contribution limitations and prohibitions previously codified in Title 18, and gave the Commission, rather than the Attorney General, the power to file civil actions to enforce those provisions. 2 U.S.C. 437g(a)(5)(B) (1976).

to prosecution when appropriate and necessary to its prosecutorial duties and functions." While the Department is to "endeavor" to share information with the Commission "subject to existing law," the MOU specifically provides that "information obtained during the course of [a] grand jury proceeding will not be disclosed to the Commission." In the years since the MOU issued, the Department of Justice has prosecuted numerous such criminal cases without any referral from the Commission. Among these are United States v. Kanchanalak, 192 F.3d 1037 (D.C. Cir. 1999); United States v. Gabriel, 125 F.3d 89 (2d Cir. 1996); United States v. Curran, 20 F.3d 560 (3d Cir. 1994); United States v. Hopkins, 916 F.2d 207 (5th Cir. 1990); Goland v. United States, 903 F.2d 1247 (9th Cir. 1990); United State v. Hsia, 87 F. Supp. 2d 10 (D.D.C. 2000); United States v. Mariani, 7. F. Supp. 2d 556 (M.D. Pa. 1998); United States v. Crop Growers Corp. 954 F.Supp. 335 (D.D.C. 1997).

ARGUMENT

1. The Court Should Deny Plaintiff's Motion for Declaratory Relief and Dismiss the Complaint

Plaintiff's motion for declaratory relief and Complaint are premised entirely upon the argument that the Act precludes the grand jury and the Department of Justice from investigating possible criminal violations of federal campaign finance law unless and until the Commission finds probable cause to believe that a knowing and willful violation of the Act has occurred and refers the matter to the Attorney General pursuant to 2 U.S.C. 437g(a)(5)(C). Binding Ninth Circuit precedent rejects this argument:

> [N]either the language nor the legislative history of the Act provides the kind of "clear and unambiguous expression of legislative will" necessary to support a holding that Congress sought to alter the traditionally broad scope of the Attorney General's prosecutorial discretion by requiring initial administrative screening of alleged violations of the Act. On the contrary, the language and legislative history indicates that while centralizing and strengthening the authority of the FEC to enforce the Act administratively and by civil proceedings, Congress intended to leave undisturbed the Justice Department's authority to prosecute criminally a narrow range of aggravated offenses.

United States v. International Operating Engineers, Local 701, ("Operating Engineers"), 638

F.2d 1161, 1168 (9th Cir. 1979). Thus, the Ninth Circuit has examined plaintiff's argument and has firmly rejected it. This authority is dispositive on the central legal issue in plaintiff's motion and complaint and there is no reason this Court should reach any different result here. On this basis alone plaintiff's motion should be denied and the Complaint dismissed.[10]

2. By Statute the Attorney General Has Plenary Authority Over Violations of Federal Criminal Law

As noted above, 28 U.S.C. 516 provides: "[e]xcept as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefore, is reserved to officers of the Department of Justice, under the direction of the Attorney General." "Congress has given very broad authority to the Attorney General to institute and conduct litigation in order to establish and safeguard government." United States v. California, 332 U.S. 19, 26-27 n.3 (1947). While Congress has the authority to restrict this authority, it has long been settled that the statutory authority of the Attorney General to control litigation is not diminished without a "clear and unambiguous" directive from Congress. United States v. Morgan, 222 U.S. 274, 282 (1911); Executive Business Media, Inc. v. United States Dep't of Defense, 3 F.3d 759, 762 (4th Cir. 1993); United States v. Walcott, 972 F.2d 323, 326 (11th Cir. 1992); United States v. Hercules Inc., 961 F.2d 796, 798 (8th Cir. 1992); accord United States v. Libby, 429 F.Supp.2d 27, 32 (D.D.C. 2006).[11]

There is no language in the Act that evidences a "clear and unambiguous" intent of Congress to prohibit the Attorney General from investigating or charging a criminal violation

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[10] Numerous other courts have reached this same result (infra at 11-12) and the 1980 amendments to the FECA have no affect on the vitality of this authority (infra at 12-13).

[11] Plaintiff attempts (Mem. 4 n.1) to distinguish Morgan by arguing that the statute at issue there "expressly recognized the Attorney General's ability to prosecute without a referral." Plaintiff has it backwards — Morgan and its progeny stand for the proposition that there is a presumption against interpreting federal laws to limit the powers of the Attorney General to prosecute criminal violations in the absence of clear statutory language, not that a statute must affirmatively state that the Attorney General's overall plenary powers are preserved in order for his power not to be limited. Operating Engineers, Local 701, 638 F.2d at 1163.

of federal election law unless and until he receives a referral from the Commission. The referral provision on which plaintiff relies, Section 437g(a)(5)(C), provides only that:

> If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d) of this section, or a knowing and willful violation of chapter 95 or chapter 96 of title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth on paragraph (4)(A).

This provision affirmatively authorizes the Commission to refer a case to the Attorney General, after a finding of probable cause, if the violation is knowing and willful.[12] This provision only addresses the Commission's authority; nothing in it (or in any other provision of the Act) even addresses, much less purports to restrict, the usual plenary authority of the Department of Justice and the grand jury to investigate activities that might be criminal.

As we have already explained, supra pp. 5 - 7, both the Commission and the Department of Justice have long interpreted the Act to permit the Attorney General to investigate and prosecute criminal violations of the Act without a referral from the Commission. The Commission and the Department of Justice are both charged with enforcing the Act, and the Commission has the explicit statutory authority to interpret, and make policy respecting, its provisions, 2 U.S.C. 437c(b)(1). When two agencies agree on the meaning of the statutory division of authority between them, deference should be afforded. See AFL-CIO, Local 3306 v. FLRB, 2 F.3d 6, 10 (2d Cir. 1993); CF Industries, Inc. v. FERC, 925 F.2d 476, 478 (D.C. Cir. 1991). "[T]he Commission is precisely the type of agency to which deference should presumptively be afforded." FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 37 (1981). See also FEC v. National Rifle Ass'n of America, 254 F.3d 173, 185 (D.C. Cir. 2001).

3. The Legislative History Only Confirms the Attorney General's Authority

While the absence of "clear and unambiguous" statutory language is conclusive under

[12] Contrary to plaintiff's assumption, this is not the only circumstance in which the Act authorizes the Commission to report unlawful activity it uncovers to other law enforcement officials. The Commission is also given more general authority in 2 U.S.C. 437d(a)(9) "to report apparent violations to the appropriate law enforcement authorities."

the Morgan line of cases, the legislative history of the Act also supports the view of the Commission and the Department of Justice that Congress did not intend to limit the then-existing authority of the Attorney General to investigate possible criminal violations of the Act without a referral from the Commission. Committee reports are especially relevant sources of legislative intent, Bates v. United Parcel Service Inc., 465 F.3d 1069, 1082 (9th Cir. 2006), and the 1976 committee report that accompanied the House bill when the Commission was given exclusive civil enforcement authority explicitly states an intent not to limit the traditional criminal authority of the Attorney General.

> H.R. 12406, following the pattern set in the 1974 Amendments, channels to the Federal Election Commission complaints alleging on any theory, that a person is entitled to relief, because of conduct regulated by this Act, other than complaints directed to the Attorney General and seeking the institution of a criminal proceeding.

H.R. Rep. No. 94-917 at 4 (1976), 94th Cong., 2d Sess., reprinted in Legislative History of Federal Election Campaign Act Amendments of 1976 ("1976 Legislative History") at 804 (emphasis added) (App. 24). Senator Cannon, Chairman of the Senate Rules and Administration Committee and sponsor of S. 3065, gave a similar explanation of the bill:

> Under existing law, every violation of the Federal election campaign laws is a criminal act and the Federal Election Commission has extremely limited civil enforcement powers at the present time. S. 3065 would provide criminal penalties for willful and knowing violations of the law of a substantive nature, and civil penalties and immediate disclosure of violations for less substantial infractions of the campaign finance laws. S. 3065 would give the Commission expanded civil enforcement powers including the power to ask the court for imposition of civil fines for such violations as, for example, the negligent failure to file a particular report, as well as more substantial civil fines for willful and knowing violations of the act. The bill would grant the exclusive civil enforcement of the act to the Commission to avoid confusion and overlapping with the Department of Justice, but at the same time, retain the jurisdiction of the Department of Justice for the criminal prosecution of any violations of this act.

94 Cong. Rec. S3860-61 (daily ed. March 22, 1976) (statement of Sen. Cannon); 1976 Legislative History at 470-71 (emphasis added) (App. 21-22). See also 94 Cong. Rec. H3778 (daily ed. May 3, 1976) (remarks of House Committee Chairman Hayes) (the bill

"centralize[s] the authority to deal with complaints alleging on any theory that a person is entitled to relief because of conduct regulated by this act, other than complaints directed to the Attorney General and seeking the institution of a criminal proceeding", reprinted in 1976 Legislative History at 1078) (App. 28). Thus, far from supporting plaintiff's strained interpretation of the Act, the legislative history of the 1976 FECA Amendments reinforces the long-standing conclusion of the Commission and the Department of Justice that the Act was not intended to limit or displace the Attorney General's independent authority to pursue criminal violations of the Act.[13]

In addition to Operating Engineers, 638 F.2d at 1168, every other federal court that has ever addressed the issue has rejected the argument plaintiff makes here.

In United States v. Jackson, 433 F. Supp. 239, 241 (W.D.N.Y. 1977), the court similarly concluded that "[a] finding of probable cause by the Commission and its subsequent referral to the Attorney General is not a condition precedent to the jurisdiction of the Attorney General to investigate and prosecute alleged criminal violations." United States v. Tonry, 433 F. Supp. 620, 623 (E.D. La. 1977) came to the same conclusion: "[a]t no place in the statute is specific provision made prohibiting the Attorney General from going forward with criminal investigation without a referral by the Commission. In the absence of such a specific provision the general authority of the Attorney General to proceed cannot be limited." Thus, two decades ago it was already "settled that criminal enforcement of FECA provisions may originate either with the FEC, see 2 U.S.C. 437g(a)(5)(C) (1982), or the

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[13] The only support plaintiff is able to find in the Act's entire 33-year legislative history for his view is a single paragraph in a 1976 floor statement by Senator Brock. However, Senator Brock was a vociferous opponent of the bill, which he condemned as "a deceit, a sham, and a fraud on the American public." 94 Cong. Rec. S6479 (daily ed., May 4, 1976) (Sen. Brock); 1976 Legislative History at 1109 (App. 37). The Supreme Court has:

> often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach. The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt.

NLRB v. Fruit and Vegetable Packers Warehouseman, 377 U.S. 58, 66 (1964) (quotation and citations omitted).

Department of Justice." United States v. Galliano, 836 F.2d 1362, 1368, n. 6 (D.C. Cir. 1988). See also United States v. Hsia, 24 F. Supp. 2d 33, 43 (D.D.C. 1998), rev'd on other grounds, 176 F.3d 517 (D.C. Cir. 1999).

Plaintiff cites no cases at all that have ever questioned this settled law. Instead, even though Galliano was decided in 1988, plaintiff argues that Operating Engineers is no longer good law because Congress overturned it in the 1979 Amendments to the Act. There is no evidence however, to support plaintiff's argument (Mem. 8-9) that in 1979 Congress added the phrase "by an affirmative vote of 4 of its members" to the referral provision found at 2 U.S.C. 437g(a)(5)(C)[14] "in direct response to the Ninth Circuit's decision" in Operating Engineers. Plaintiff cites no discussion of that decision in the legislative history, which actually contains no evidence that Congress was even aware of that decision when it adopted the 1979 amendments. Indeed, the 4-vote requirement was contained in the bill reported by the House Committee on Administration on September 7, 1979, three weeks before the Ninth Circuit decided Operating Engineers on October 1, 1979. See H.R. 5010 96th Cong. (1st Sess. 1979), reprinted in Legislative History of Federal Election Campaign Act Amendments

[14] Section 313(a)(5)(D) of the 1976 Act provided that:

> If the Commission determines that there is probable cause to believe that a knowing and willful violation subject to and as defined in section 329, or a knowing or willful violation of a provision of chapter 95 or 96 of the Internal Revenue Code of 1954 has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in subparagraph (A) [the thirty day conciliation period].

90 Stat. 484 (1976) (App. 32). That provision was amended in 1980 to state:

> If the Commission *by an affirmative vote of 4 of its members* determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to [subsection (d),] or a knowing or willful violation of a provision of chapter 95 or 96 of the Internal Revenue Code of 1954 has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in subparagraph (4)(A) [the thirty day conciliation period].

93 Stat 1339, 1360 (1980) (emphasis added) (App. 85).

of 1979 ("1979 Legislative History") at 283 (dated September 7, 1979) (App. 47). The 4-vote requirement could not, therefore, have been written in response to the Operating Engineers decision.

Moreover, the 4-vote requirement added in 1979 states a limitation only on the Commission's authority, not the Attorney General's. Under the 1976 Act, a vote of at least four of the six Commissioners was already required for the Commission to initiate investigations and civil actions. At that time, referrals to the Department of Justice, like almost all other enforcement actions, had to "be made by a majority vote of the members of the Commission." 2 U.S.C. 437c(c) (1976) (App. 108). Thus, in most circumstances, a "majority vote" of six Commissioners to refer a case to the Department of Justice already required four or more Commissioners, even prior to the 1979 Amendments.[15] The effect of the 4-vote requirement was only to ensure that no fewer votes would be required even if one Commission seat was vacant or a Commissioner recused. The House Committee report plainly indicates that Congress did not intend this minor procedural change to alter the substance of section 437g(a)(5)(C), since it explained that the bill merely "incorporates the language in section 305(D) of the current Act regarding referral of knowing and willful violations to the Attorney General." H.R. Rep. No. 96 – 422, at 22 (1979) (Section-by-Section Explanation of the Bill), 1979 Legislative History at 206 (App. 119). Accordingly, even if the new language had been drafted after the Operating Engineers decision, Congress clearly did not intend it to overrule that decision or to fundamentally alter the Attorney General's existing authority over criminal enforcement of the Act. See Chisom v. Roman, 501 U.S. 380, 396 n.23 (1991) ("Congress's silence in this regard can be likened to the dog that did not bark. See A. Doyle, Silver Blaze"); Common Cause v. FEC, 842 F.2d 436, 444 (D.C. Cir. 1987) (addressing legislative history of the 1979 Amendments and quoting Finegan v. Leu, 456 U.S. 431, 441 n.12 (1982)); id. at 447 (citing Sherlock Holmes).

[15] The 1979 Amendments recodified section 437g which, as we have described supra pp. 2 - 5, governs the Commission's administrative enforcement procedures, and the 4-vote requirement was added to a number of its provisions. Sections 309(a)(2); 309(a)(4)(A)(i); 309(a)(6)(A) (App. 83-85).

Plaintiff makes a number of arguments for drawing inferences about Congressional intent from various and sundry provisions of the Act, but none of these provisions contain any language addressing, much less purporting to limit, the usual authority of the Department of Justice and the grand jury to investigate activity that might be a criminal violation of law. Plaintiff asserts (Mem. 10 – 14, 17), for example, that respondents are entitled to the opportunity to negotiate with the Commission for the Commission's agreement in a conciliation agreement not to refer their cases to the Attorney General, and that section 437g(d)(3), which permits a conciliation agreement to be used in criminal proceedings, requires that a defendant have an opportunity to conciliate before any criminal investigation is begun. As we have already described, however, section 437g(a)(5)(C) itself plainly provides that the Commission is not required to engage in the conciliation procedures set forth in section 437g(a)(4)(A) before referring a matter to the Attorney General, so plaintiff's argument is contrary to the language of the statute.[16]

Plaintiff argues (Mem. 19 – 21) that an independent grand jury investigation would be contrary to Congress' decision to give the Commission "exclusive" and "primary" jurisdiction over the Act. As we explained supra p. 2, however, Congress carefully limited the Commission's exclusive jurisdiction to "civil" enforcement, 2 U.S.C. 437c(b)(1), 437d(e). See also 2 U.S.C. 437d(a)(6) (describing the Commission power to initiate, defend and appeal "civil actions") and 437g(a)(6) (providing that the Commission may file a "civil action" to enforce the Act).[17] Plaintiff carefully avoids any discussion of this explicit statutory limitation on the Commission's exclusive jurisdiction, which plainly demonstrates

[16] Plaintiff speculates (Mem. 10) that the Commission might issue an advisory opinion "diametrically opposed" to an ongoing criminal prosecution, even though he does not identify a single instance of this happening in the Commission's 32 years of existence. In fact, the Commission will only issue an advisory opinion regarding "a specific transaction or activity that the requesting person plans to undertake or is presently undertaking," 11 C.F.R. 112.1(b). Thus, past activities already subject to criminal prosecution would not qualify for an advisory opinion.

[17] The modifier "primary" on which plaintiff relies (Mem. 6) in claiming that the Commission has "primary exclusive jurisdiction" over violations of the Act was removed from Section 437c(b) in 1979. Federal Election Campaign Act of 1979, Amendments, section 306(b)(1), 93 Stat. 1355, 2 U.S.C. 437(c)(b)(1) (1980) (App. 80).

that Congress did not intend it to interfere with the Attorney General's plenary authority over criminal prosecution.

Since the Attorney General having plenary power to initiate criminal prosecutions of the Act is not inconsistent with the Commission having "exclusive" civil jurisdiction over that same statute, there is no merit to Plaintiff's claim that this impliedly limits the Attorney General's powers.

> The civil and regulatory laws of the United States frequently overlap with the criminal laws, creating the possibility of parallel civil and criminal proceedings, either successive or simultaneous. In the absence of substantial prejudice to the rights of the parties involved, such parallel proceedings are unobjectionable under our jurisprudence.

SEC v. Dresser Industries, Inc., 628 F.2d 1368, 1374 (D.C. Cir. 1980) (citation omitted). Plaintiff argues (Mem. 14 –16) that the Commission's "exclusive" jurisdiction would be "thwarted" if it did not foreclose concurrent criminal investigation because no respondent would "rationally" cooperate with a Commission civil investigation while facing criminal charges for the same conduct, but would invariably invoke the Fifth Amendment. As a matter of fact, contrary to plaintiff's theory, the Commission has successfully investigated thousands of cases during the 30 years that the Department of Justice has been exercising concurrent criminal authority in accord with the MOU and the Operating Engineers decision.[18] Moreover, plaintiff offers no reason to believe that a respondent's invocation of the Fifth Amendment would be any less likely merely because a prospective criminal prosecution would be delayed until after a referral by the FEC.

4. Plaintiff Has Alleged No Facts that Would Entitle Him to Relief and His Complaint Should be Dismissed Pursuant to Fed. R. Civ. P. 12(b)(6)

Plaintiff's complaint should be dismissed with prejudice pursuant to Fed. R. Civ. P. 12(b)(6) because it fails to state a claim upon which relief can be granted. It is well-settled that such a motion should be granted if "it appears beyond doubt that plaintiff can prove no

[18] An adverse inference may be drawn from a respondent's invocation of the Fifth Amendment in determining whether there has been a civil violation of the Act. See SEC v. Gemstar-TV Guide Inc., 401 F.3d 1031, 1046 (9th Cir. 2005). Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 286 (1998).

set of facts in support of his claim which would entitle him to relief." Van Busirk v. Cable News Network Inc., 284 F.3d 977, 980 (9th Cir. 2002). Only "well-pleaded facts, as distinguished from conclusory allegations, must be taken as true." Holden v. Hagopian, 978 F.2d 1115, 1121 (9th Cir. 1992). Mere "conclusory allegations" in a complaint do not constitute well-pleaded factual allegations. Id. In particular, "general allegations" or "[c]onclusory allegations [of fraud or conspiracy] without any stated factual basis are insufficient as a matter of law." Swartz v. KPMG LLP, 476 F.3d 756, 765 (9th Cir. 2006).

In this case, plaintiff alleges he received a subpoena in an alleged grand jury investigation that he says is being conducted by the Department of Justice, but he does not allege any facts that establish any contact, interaction or relationship between him and the Commission. He does not allege that he is the subject of any complaint filed with the Commission, or a participant in any investigation the Commission is conducting into alleged violations of the Act. Plaintiff does not allege that he has been subpoenaed by the Commission, questioned by the Commission, or even contacted by the agency. He does not allege that he is under any threat of being investigated, subpoenaed, or has been subjected to possible civil penalty or faces the threat of any future penalty.

Plaintiff's only allegation with respect to the Commission is that it "is tacitly cooperating and conspiring" with the Department of Justice. Complaint ¶ 18. This allegation is woefully inadequate for Rule 12(b)(6) purposes because it is nothing more than a conclusory assertion.[19] Plaintiff does not state any specific facts regarding any agreement or concerted action between the Commission and the Department of Justice. By failing to

[19] Civil enforcement of the Act is part of the Commission's statutory mission, and the Commission is entitled to the normal presumption that it seeks to perform that function in good faith. See U.S. Dep't of State v. Ray, 502 U.S. 164, 179 (1991) ("We generally accord Government records and official conduct a presumption of legitimacy."). "'[I]n the absence of clear evidence to the contrary, courts presume that [government prosecutors] have properly discharged their official duties.'" Branch Ministries v. Rossotti, 211 F.3d 137, 144 (D.C. Cir. 2000) (second brackets in original) (quoting United States v. Armstrong, 517 U.S. 456, 464 (1996)). Plaintiff's conclusory allegation of "tacit cooperation" with the Attorney General's grand jury proceeding is unsupported by the required specific factual allegations. See, e.g., Spannaus v. FEC, 641 F. Supp. 1520, 1534-36 (S.D.N.Y. 1986) (finding plaintiffs have failed to meet their burden and are not entitled to discovery based on "allegations of bad faith and improper purpose [which] must be buttressed with specific facts").

allege any specific facts about anything the Commission might have done to cooperate or conspire with the Department of Justice, or any action the Commission has ever taken regarding Mr. Marcus, the Complaint fails to state a claim against the Commission, even if there were some legal support for plaintiff's claim against the Attorney General. For this reason alone, the Complaint should be summarily dismissed as to the Commission.

CONCLUSION

For the reasons stated, the Federal Election Commission respectfully requests that this Court deny plaintiff's motion and dismiss the Complaint.

Respectfully submitted,

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