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8 **United States District Court**
9 **Central District of California**
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11 GARY E. JOHNSON; JAMES P. GRAY)
and GARY JOHNSON 2012, INC.,)
12 Plaintiff)
13 vs.)
14 FEDERAL ELECTION COMMISSION,)
15 Defendants.)
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Case No. 8:12-cv-1626-ODW(JCx)
PLAINTIFF’S RESPONSE TO ORDER
TO SHOW CAUSE RE JURISDICTION
THREE-JUDGE COURT

17
18 I.

19 PLAINTIFFS’ ACTION MUST BE HEARD BY A THREE-JUDGE PANEL

20 As explained more fully below, Plaintiffs have instituted this action under 26
21 U.S.C. §9011(b), which specifically proscribes that “Such proceedings shall be heard
22 and determined by a court of three judges in accordance with the provisions of
23 section 2284 of title 28 United States Code.” 26 U.S.C. §9011(b)(2). As of the
24 present date, the case has only been assigned to a singular courtroom and judge.
25 Thus, any determination regarding the matter, jurisdictional or otherwise, is
26 premature until the action has been assigned and reviewed by a three-judge panel.
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1 II.

2 THIS COURT HAS JURISDICTION UNDER 26 U.S.C. § 9011(b)(2)

3 The Court is correct in noting that 26 U.S.C. §9011(a) provides that a
4 certification, determination or other action by the Federal Election Committee under
5 the Presidential Campaign Funding Act is subject to review by the United States
6 Court of Appeals for the District of Columbia. However, Plaintiffs have not filed a
7 petition for review in this court, and instead have instituted a civil action to
8 implement a portion of the Presidential Campaign Funding Act, as authorized by 26
9 U.S.C. §9011(b).

10 26 U.S.C. §9011(b) states in its entirety that:

11 (1) The Commission, the national committee of any political party, and
12 individuals eligible to vote for President are authorized to institute such
13 actions, including actions for declaratory judgment or injunctive relief, as may
14 be appropriate to implement or contrue [sic] any provisions of this chapter.

15
16 (2) The district courts of the United States shall have jurisdiction of
17 proceedings instituted pursuant to this subsection and shall exercise the same
18 without regard to whether a person asserting rights under provisions of this
19 subsection shall have exhausted any administrative or other remedies that may
20 be provided at law. Such proceedings shall be heard and determined by a court
21 of three judges in accordance with the provisions of section 2284 of title 28
22 United States Code, and any appeal shall lie to the Supreme Court.

23 Thus, 26 U.S.C. §9011 offers two remedies for plaintiffs seeking redress under
24 the Presidential Campaign Funding Act: a petition for review of an FEC
25 determination asserted directly to the United States Court of Appeals for the District
26 of Columbia, per subsection (a), as well as a lawsuit filed in United States District
27 court, regardless of whether administrative or other remedies have already been
28 exhausted, under subsection (b). To assert that a petition for review in the D.C.

1 appellate court is Plaintiffs' only remedy in this instance would serve to completely
2 ignore the plain language, and in fact the very existence, of subsection (b).
3 Therefore, as asserted in Plaintiffs' complaint, this court has jurisdiction to hear this
4 matter under 26 U.S.C. §9011(b)(2).

5
6 III.

7 THE AUTHORITY CITED IS DISTINGUISHABLE FROM THE INSTANT
8 ACTION

9 The Court cites *Fed. Election Comm'n v. Reform Party of the U.S.*, 479 F.3d
10 1302 (11th Cir. 2007). As explained above, Plaintiffs do not seek judicial review of
11 the FEC's determination regarding election funding. Plaintiffs are instead asking the
12 court to interpret and, in turn, implement certain provisions of the Presidential
13 Campaign Funding Act.

14 While the cross-complaint in *FEC* was also instituted under 26 U.S.C.
15 §9011(b)(2), the similarities with the instant case end there. There, the Reform Party
16 of the United States had been ordered to re-pay election funding they already received
17 and spent, and had attempted to bring a petition for review of the FEC's order to
18 repay under 26 U.S.C. §9011(a). When this petition was dismissed as untimely, and
19 the FEC filed suit in district court to obtain repayment, the Reform Party sought to
20 counterclaim under 26 U.S.C. §9011(b), which the court flat out rejected as a thinly
21 veiled attempt to seek review of the FEC's earlier determination, as the counterclaim
22 argued only that the earlier determination was arbitrary and capricious.

23 Here, Plaintiffs' suit asks this court not to review the FEC's previous decision
24 regarding funding, but to interpret statutory language over which the parties disagree,
25 in order to construe, and thus implement, a certain provision of the Presidential
26 Campaign Funding Act, specifically 26 U.S.C. §9004 (a)(2)(A). Plaintiffs do not
27

1 allege that the FEC's denial of funding was unconstitutional, nor arbitrary and
2 capricious, the typical bases for challenging FEC determinations. In actuality, the
3 fact that the FEC issued a determination denying the Plaintiffs pre-election funding is
4 somewhat irrelevant, in that the disagreement over the interpretation of the language
5 of the pre-election funding statute is what prompted the filing of this suit, not the
6 denial of the funding itself. This comports with the 11th Circuit's opinion in FEC,
7 which states that "In order for the two subsections of section 9011 to have meaning,
8 those actions covered by subsection (b)...must be suits that do not concern review of
9 certifications, determinations, or other actions by the Commission." This suit seeks
10 declaratory and injunctive relief independent of any review of the Commission's final
11 determination, and no review is pending before the D.C. Circuit. If subsection (b) is
12 to have any meaning whatsoever, then it applies in this case. To hold otherwise
13 would be to write this statute out of existence. Thus, this court has subject matter
14 jurisdiction over this action under 26 U.S.C. §9011(b) as previously asserted.

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16 IV.

17 CONCLUSION

18 For the foregoing reasons, this court should refrain from issuing any
19 determination in this matter unless and until the matter has been reviewed by a three-
20 judge panel as ordered by statute. After such review, any remaining jurisdictional
21 issues should be deemed moot, in that this court has subject matter jurisdiction under
22 the plain language of 26 U.S.C. §9011(b)(2).

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October 11, 2012

Respectfully submitted,

JENSEN & ASSOCIATES, APC
Trial Lawyers



By: _____
PAUL ROLF JENSEN
Attorneys for Plaintiffs

PROOF OF SERVICE

1 I am employed in the County of Orange, State of California. I am over the age of 18 and not
2 a party to the within entitled action; my business address is 650 Town Center Drive, Twelfth Floor,
Costa Mesa, CA 92626.

3 On October 11, 2012, I served the foregoing document(s) described as PLAINTIFFS'
4 RESPONSE TO ORDER TO SHOW CAUSE RE JURISDICTION on the interested parties in this
action by placing a copy thereof enclosed in a sealed envelope addressed as follows:

5
6 Anthony Herman, Esq.
7 David Kolker, Esq.
8 Lisa J. Stevenson, Esq.
9 Harry J. Summers, Esq.
10 Seth Nesin, Esq.
11 FEDERAL ELECTION COMMISSION
12 999 E Street, N.W.
13 Washington, D.C. 20463

14
15 Roger E. West, Esq.
16 Assistant United States Attorney
17 First Assistant Chief, Civil Division
18 300 North Los Angeles Street, Suite 7516
19 Los Angeles, CA 90012

20 xx **BY MAIL.** I caused such envelope with postage thereon fully prepaid to be placed in the
21 U.S. Mail at Costa Mesa, California.

22 xx **BY ELECTRONIC SERVICE.** I hereby certify that I filed the foregoing with the Clerk of
23 the Court for the United States District Court, Central District of California by using the
24 CM/ECF system on October 11, 2012.

25 Executed on October 11, 2012, at Costa Mesa, California.

26 xx **(Federal)** I declare under penalty of perjury under the laws of the United States that
27 the foregoing is true and correct.

28


Paul Rolf Jensen