**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

| | | |
|---|---|---|
| HERRON FOR CONGRESS , Plaintiff, | : | |
| v. | : | |
| | : | Civil Action No. 11-1466 (EGS) |
| FEDERAL ELECTION COMMISSION, Defendant. | : | |

**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Plaintiff Herron For Congress respectfully moves this Court for summary judgment pursuant to Fed. R. Civ. 56, and:

1. Declare that the Federal Election Commission's dismissal of plaintiff's administrative complaint against Steve Fincher For Congress and its treasurer, MUR 6386, is arbitrary, capricious, an abuse of discretion, and contrary to law;
2. Remand MUR 6386 to the Federal Election Commission with an Order to conform to this Court's declaration, and to inform this Court and the plaintiff within 30 days whether the Federal Election Commission has conformed to this Court's Order;
3. Order the Commission to issue any Statement of Reasons within 30 days of its decision;
4. Award plaintiff its costs, expenses, and reasonable attorney's fees in this action;
5. Order the parties to confer and to reach agreement on fee and cost issues and set a post-judgment status conference regarding the appropriate fees and costs matter pursuant to LCvR 54.2(a), and

6. Grant such other and further relief as this Court may deem just and proper.

Respectfully submitted,

_____/s/_____
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April 6, 2012

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**PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

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**PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

## I. SUMMARY

This case is a review of the Federal Election Commission's ("FEC" or "Commission") dismissal of an administrative complaint filed by Herron for Congress ("HFC") without investigating the legality and the disclosure of a $250,000 signature loan to Stephen Fincher, a congressional candidate in 2010, who provided those funds to his campaign committee, Steve Fincher for Congress ("SFC").

The Federal Election Campaign Act of 1971 as amended, 2 U.S.C. § 431 *et seq.*, ("FECA" or the "Act") and the regulations promulgated thereunder consider bank loans as an illegal corporate contribution, 2 U.S.C. § 441b(a), unless the bank had adequate collateral with a perfected security interest, among other things not relevant here. Mr. Fincher's only income and assets were the farm and residence he owned with his wife. The only evidence in the administrative record of any income was $124,016 that the farm earned that year, and the only other asset was a residence with a $200,000 mortgage and an assessed value of $250,300 in 2012. SFC and the bank asserted, without providing any supporting documents that the signature loan was cross-collateralized by a note on the farm's crops and the deed of trust on the residence. The Commission had no evidence, however, that the crops and residence could provide collateral for the signature loan because there is no evidence that Mrs. Fincher had agreed to permit her interest in the farm and residence to serve as collateral for the signature loan. Even if she had, there was no evidence that Mr. Fincher's interest in the value of the crops or residence equaled or exceeded $250,000. Nevertheless, in a reversal of the adverse inference rule and without discussing the available information to the contrary, the Commission arbitrarily and capriciously

decided not to investigate because "we have no information suggesting that the $250,000 loan to Fincher's committee was under-collateralized."

This case is also about SFC's disclosure of the funds as a loan from the candidate instead of from the bank despite Commission regulations that require political committees to disclose the bank as the source of this type of loan. 2 U.S.C. § 434(b)(3)(E) and 11 CFR § 104.3(d)(4). All six of the FEC Commissioners agreed there was a violation, and all voted, but not simultaneously, to find that there was reason to believe a violation had occurred pursuant to 2 U.S.C. § 437g(a)(2). Nevertheless, the Commission arbitrarily and capriciously failed to make that finding for the unrelated reason that the Commissioners could not agree on the appropriate sanction.

Accordingly, the plaintiff respectfully requests that this Court find that the Commission's decisions and its explanation for those decisions were arbitrary, capricious and contrary to law, and remand this matter to the Commission pursuant to 2 U.S.C. § 437g(a)(8).

## II. BACKGROUND

### A. The Parties And Others Involved In The Administrative Complaint

Defendant Federal Election Commission is an agency within the meaning of 5 U.S.C. § 552(f) and was established by Congress to oversee the administration and civil enforcement of the FECA. 2 U.S.C. § 437c. The Commission has exclusive jurisdiction with respect to the civil enforcement of the FECA, 2 U.S.C. § 437c(b)(1), except for a limited provision, 2 U.S.C. § 437g(a)(8)(C), not relevant here.

Plaintiff Herron For Congress is the authorized political committee of Roy Herron, the Democratic nominee for U.S. House of Representatives for the 8th Congressional District of Tennessee in the November 2010 general election. As an authorized committee, the HFC was

designated and authorized by Roy Herron to receive campaign contributions and make expenditures on behalf of his campaign, *see* 2 U.S.C. § 431 (5)and (6). Answer ¶¶ 5 and 6.

Steve Fincher for Congress was the the authorized political committee of Stephen Fincher, the Republican nominee for U.S. House of Representative for the 8th Congressional District of Tennessee in the November 2010 general election. As an authorized committee, the SFC was designated and authorized by Stephen Fincher to receive campaign contributions and make expenditures on behalf of his campaign, *see* 2 U.S.C. § 431 (5)and (6). Stephen Fincher won the election and is the incumbent Member of Congress representing that District. Answer ¶7.

Gates Bank & Trust Company is a Tennessee bank that provided $250,000 to Stephen Fincher who then provided those funds to SFC. Administrative Record ("AR") at 691.

**B. FECA's Enforcement Authority**

FECA's statutory enforcement regime is well known in this District and, in particular, this Court. *See e.g*. *Alliance for Democracy v. Federal Election Commission*, 335 F. Supp. 2d 39, 41(D.D.C. 2004).[1]

[1] *Alliance for Democracy v. Federal Election Commission*, 335 F. Supp. 2d 39, 41 (D.D.C. 2004):

> The FEC is authorized to institute investigations of possible violations of the FECA. 2 U.S.C. §§ 427g(a)(1) and (2). The FECA permits any person to file a signed, sworn administrative complaint with the FEC alleging a violation of the Act. 2 U.S.C. § 437g(a)(1).
>
> When a complaint is filed, the FEC notifies the respondents named in the administrative complaint, who are then given an opportunity to respond. 2 U.S.C. § 437g(a)(1). After reviewing the complaint and responses, the FEC then prepares a recommendation, addressing whether there is a "reason to believe" a violation of the FECA has occurred. 2 U.S.C. § 437g(a)(2). If the Commission finds that a reason to believe exists, it can proceed to "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).

Some of FECA's enforcement procedures, 2 U.S.C. § 437g(a), are unusual. Congress did not provide a private right of action for a violation of FECA. 2 U.S.C. § 437d(e). However, anyone may file an administrative complaint, and all the complainant must do is swear to the veracity of the information therein. 2 USC 437g(a)(1). All subsequent investigations by the Commission are confidential until the investigation is closed. 2 U.S.C. § 347g(a)(12). Thus, once an administrative complaint is filed, the complainant has no rights during the investigation and does not know the status of the complaint. For example, the complainant does not see the response to the complaint, cannot respond to it or offer relevant information, and must rely on

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At the conclusion of the investigation, the statute authorizes the FEC'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. § 427g(a)(3). The General Counsel then prepares a report to the Commission recommending what action should be taken. 11 C.F.R. § 111.16. Upon consideration of the briefs and report, the Commission determines whether or not 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 that a violation has occurred, the Commission is required to attempt to resolve the matter by "informal method of conference, conciliation, and persuasion, and to enter into a conciliation agreement" with the respondents. 2 U.S.C. § 437g(a)(4)(A)(i). The Commission is required to attempt to reach a conciliation agreement for at least 30 days and not more than 90 days. 2 U.S.C. § 437g(a)(4)(A)(i).

If the Commission is unable to resolve the matter through voluntary conciliation, the Commission may vote to authorize the filing of a *de novo* civil suit in district court to enforce the Act. If the Commission determines that no violation occurred or dismisses the administrative complaint for some other reason, the complainant has an opportunity to seek judicial review of that determination. 2 U.S.C. § 437g(a)(8)(A). Section 437g(a)(8) also allows a party who has filed an administrative complaint with the Commission to seek judicial review in this Court should the Commission "fail to act" on a complaint within 120 days. 2 U.S.C. § 437g(a)(8)(A). If the Court finds that the Commission's dismissal or failure to act was 'contrary to law,' it may order the Commission to conform to the Court's decision, but must give the agency 30 days to do so.
2 U.S.C. § 437g(a)(8)(C).

the Commission's staff to conduct a reasonable inquiry in private. Because the Commission may be called upon to investigate areas outside of its electoral expertise, Congress specifically gave it the power to "avail itself of the assistance, including personnel and facilities of other agencies and departments of the United States." 2 U.S.C. § 437c(f)(3).

Congress did provide the complainant with one unusual power: the ability to seek judicial review of the dismissal of a complaint. 2 U.S.C. § 437g(a)(8). This alone sets the Commission's enforcement provisions apart from most other agencies whose decision not to enforce the law is a matter of discretion and unreviewable. *See e.g. Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("This Court has recognized on several occasions over many years that an 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.") (citations omitted); *Securities and Exchange Commission v. Chenery Corp*., 337 U.S. 194, 199-200 (1975) (same).

The provision authorizing the Commission to initiate an investigation or to dismiss a complaint without an investigation, 2 U.S.C. § 437g(a)(2), is unambiguous and is consistent with the provisions prohibiting a private right of action and authorizing a judicial review of a Commission decision not to enforce the FECA. 2 U.S.C. § 437g(a)(2) states:

> If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96 of title 26, the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

Id. (emphasis added). Thus, "if the Commission has reasonable cause to believe that a person has violated the Act . . . , the Commission is required to notify the person and to conduct an

investigation of the violation." H.R. Rep. No. 94-917, at 63 (1976) *reprinted in* The Legislative History of the Federal Election Campaign Act Amendments of 1976 at 863(emphasis added). The Conference Committee substitute followed the House Amendment of this provision in relevant part. H.R. Rep. No. 94-1057, at 43 *reprinted in* The Legislative History of the Federal Election Campaign Act Amendments of 1976 at 1043.

The reason to believe ("RTB") standard is not defined in the FECA, but the Commission has issued a policy statement describing its views. "The Commission will find 'reason to believe' in cases where the available evidence in the matter is at least sufficient to warrant conducting an investigation, and where the seriousness of the alleged violation warrants further investigation or immediate conciliation." 72 Fed. Reg. 12545 (2007).[2] "The Commission finds 'no reason to believe' when the complaint, any response filed by the respondent, and any publicly available information, when taken together, fail to give rise to a reasonable inference that a violation has occurred, or even if the allegations were true, would not constitute a violation of the law." *Id.* at 12,546.

Thus, the RTB standard is a low threshold during the initial phase of the Commission's enforcement proceeding pursuant to 2 USC § 437g(a)(2), which is less than the grounds necessary to file a civil complaint, Fed.R.Civ.P. 8(a)((2) ("a short and plain statement of the claim showing that the pleader is entitled to relief"). In comparison, the evidence necessary to file a civil complaint is described in the FECA as a finding of probable cause to believe a violation has occurred. 2 U.S.C. § 437g(a)(4)-(6). Congress designed this system so a complainant, such as HFC, who has no private right of action, is only required to submit a sworn

[2] "Immediate conciliation" in this context refers to situations where the Commission allows the respondent to negotiate a settlement without the need for an investigation and without following the procedures described in 2 U.S.C. §§ 427g(a)(3) – (5). A typical example is when a respondent has admitted a violation, as in this case.

statement to the Commission that the facts therein, if true, allege a violation of FECA. 2 U.S.C. § 437g(a)(1). Then it is up to the Commission to determine if those facts in combination with public information present a reason to believe a violation has occurred sufficient to initiate an investigation. 2 U.S.C. § 437g(a)(2). The complainant does not see the respondent's reply and, consequently, must rely on the Commission to gather any relevant public information and understand the significant issues present in that information without the assistance of the complainant. As shown below, the Commission failed to live up to the responsibility entrusted to it by Congress to consider and understand the significance of relevant available information.

Commission regulations governing public disclosure of its actions require the Commission to make public the fact that it made a finding of no reason to believe, no probable cause to believe, or otherwise terminated a proceeding and the basis for such action "no later than thirty (30) days from the date on which the required notifications are sent to complainant and respondent." 11 C.F.R. § 111.20(a). In addition, 11 C.F.R. § 5.4(a)(4) requires the Commission to place Commissioner opinions, General Counsel's reports, and non-exempt investigatory materials in enforcement cases on the public record within 30 days from the date on which respondents are notified the Commission has voted to close an enforcement file. A failure to follow these self-imposed deadlines would, at least, hamper the ability of a claimant to file a challenge to the dismissal within 60 days of the decision pursuant to 2 U.S.C. § 437g(a)(8).

When the Commission follows the recommendation of its general counsel and dismisses an administrative complaint, the General Counsel's Report to the Commission provides the basis for district court review. *See Federal Election Commission v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 38 and n. 19 (1981). When the Commission rejects the General Counsel's recommendation to pursue a possible violation of the FECA, the reasoning of the Commissioners

who voted to dismiss the complaint – generally set forth in a Statement of Reasons – provides the basis for judicial review. *See Federal Election Commission v. Nat'l Republican Senatorial Comm.*, 842 F.2d 436, 449 (D.C. Cir. 1988).

After the Commission dismisses a complaint, any "party aggrieved" may seek judicial review of that dismissal in the United States District Court for the District of Columbia, 2 U.S.C. § 437g(a)(8)(A), within 60 days after the date of the dismissal," 2 U.S.C. § 437g(a)(8)(B). If the District Court declares the dismissal "contrary to law," the Court may order the Commission "to conform with such declaration within 30 days." 2 U.S.C. § 437g(a)(8)(C). "'[C]ontrary to law'" in this context includes action that is "'arbitrary and capricious.'" *Democratic Congressional Campaign Committee v. Federal Election Commission,* 831 F.2d 1131, 1135 n.4 (D.C. Cir. 1987) (citing *Orloski v. Federal Election Commission,* 795 F.2d 156, 161 (D.C. Cir.1986)).

**C. Proceedings At The Commission**

**1. The Herron For Congress Administrative Complaint**

On September 29, 2010, the plaintiff filed an administrative complaint with the Commission against Steve Fincher For Congress and its treasurer. AR at 1 – 18. On October 14, 2010, the plaintiff filed a supplement to its complaint. AR at 28 – 29. The complaint and supplement filed by HFC described the following facts:

> On July 23, 2010, the Fincher Campaign filed with the Commission the Campaign's pre-primary election report, covering the period July 1, 2010 through July 16, 2010. That report disclosed a loan of $250,000 made to the Campaign on July 8, 2010. The loan was reported on Line 13(a) as having been made or guaranteed personally by the candidate. On Schedule C to this report, the Campaign reported the loan source as being "Personal Funds."
>
> Mr. Fincher has filed two personal financial disclosure reports with the Clerk of the U.S. House, pursuant to the Ethics in Government Act of 1978. The first report was filed on October 29, 2009, covering calendar year 2009 up to September 29, 2009; and the second report was filed on May 17, 2010, covering

> January 1, 2009 through May 15, 2010. These reports showed *no* personal financial assets of Mr. Fincher, *at all—no* bank accounts, no stocks, no bonds, no certificates of deposit. The only asset of any kind disclosed was Mr. Fincher's farm.
>
> Clearly, it seems impossible that Mr. Fincher had $250,000 in cash available to loan to his campaign on July 8, 2010 yet had *no* personal funds at all, of any kind, at any time in 2010 through at least May 15. An Associated Press article on August 27, 2010 . . . reported that 'Warren Nunn, chairman of the Gates Banking and Trust Co., said his bank was the source of the loan to Fincher, a longtime customer. "*We did advance Stephen a loan,"* Nunn said. . . . Nunn, who has given the Fincher campaign $4,800, declined to say what kind of collateral Fincher put up for the loan' (emphasis added).

A copy of the disclosure report was attached to the administrative complaint. The supplement to the complaint, AR at 28-29, stated:

> The Fincher Campaign . . . filed with the FEC its quarterly report for the third quarter of 2010. Remarkably, Schedule C on that report continues to indicate that the source of the $250,000 loan made to the Fincher Campaign in July was Stephen Fincher's personal funds. That is exactly what the Fincher Campaign reported in its pre-primary report filed on July 23, 2010.
>
> Since that pre-primary report was filed, however, the chairman of Gates Banking &, Trust Co. of Tennessee told the Associated Press, on August 27, that Gates Bank was actually the source of the loan to the Fincher Campaign, as set forth in the Herron Campaign's original complaint. That bank chairman also refused to say whether Mr. Fincher had put up any collateral to secure the loan—and the Herron Campaign has been unable to find any UCC security statement on file with the Tennessee Secretary of State indicating that the Gates Bank took any security interest in any collateral in respect of this loan. Further, the filing of the complaint with the FEC has also been publicized.
>
> In short, Mr. Fincher and his campaign have been on notice for many weeks now that the failure to disclose the campaign's loan from the Gates Bank, and to report the terms on Schedule C, is unlawful. Yet Mr. Fincher and his campaign have continued flagrantly to ignore and refuse to comply with the clear requirements of the law and now have done so again even after being put on notice.

In short, HFC alleged that SFC knowingly and willfully failed to properly describe the Bank loan in violation of 2 U.S.C. § 434(b)(3)(E) and 11 CFR §§ 104.3(d)(1) and (2) (the "reporting violation"), *see* AR at 2, and SFC accepted a corporate contribution because there was insufficient unsecured collateral for the loan in violation of 2 U.S.C. § 441b(a) (the "corporate contribution violation"). The Commission designated the administrative complaint MUR 6386 for administrative purposes. AR at 19.

**2. SFC's and The Bank's Replies to the Administrative Complaint**

On October 6, 2010, the Commission mailed the administrative complaint to SFC and the Bank. AR at 20 - 21 and 22 - 23, respectively.

After two requests for extensions, which were granted, Steve Fincher For Congress and its treasurer filed a reply to the administrative complaint on November 26, 2010, AR at 58 – 81, and filed a supplement on December 6, 2010, which consisted primarily of copies of amended Commission reports, AR at 82 - 685. After requesting and receiving an extension from the Commission, on November 17, 2010, the Bank filed a reply to the administrative complaint, AR at 37 - 57.

The SFC reply admitted that the Fincher Campaign had violated the FECA's reporting provisions: "a review of how the loan was reported to the FEC revealed inadvertent reporting errors and omissions that require the need for amended reports to be filed with the FEC." AR at 59.

Both the SFC's reply and the Bank's reply admitted that on July 7, 2010, Stephen Fincher obtained a $250,000 signature loan for campaign-related purposes from the Bank with a rate of interest of 6.500% per year until paid in full. AR at 37, 42-45, 59 – 60. The maturity date was November 30, 2010. *Id*. The replies attached a "Multipurpose Note and Security Agreement." AR at 42-45, 67-70.

The SFC reply stated that the "collateral for this note was a 2010 crop production note, on file with the Tennessee Secretary of State, and the deed of trust on the Fincher home held by Gates Banking and Trust serves as evidence of the perfected security interest established by the Bank in the collateral." AR at 60. "In addition the bank cross collateralized the loan with a deposit account held by the Finchers jointly, on which the bank possessed a right of offset." AR at 60. The Bank reply described the same collateral for the loan and provided a copy of a UCC1 Filing for the Stephen and Lynn Fincher Farms crop production and a Deed of Trust for Stephen and Lynn Fincher's residence. AR at 37 – 39, 42 – 45, 51 – 54.

The Bank's attorney asserted that 6.5% "represented the usual and customary interest rate at the time of the loan for this category of loan at this lending institution," but provided no documentation or affidavit to support the assertion. AR at 37 – 38.

The Bank admitted that it did not file a separate UCC Financing Statement for the campaign loan, but asserted that Stephen Fincher's campaign note was secured by a previously perfected a security interest in Stephen Fincher's 2010 crops production and his personal residence, and an undisclosed amount of deposited funds. AR at 38.

Both replies asserted that the value of the collateral was greater than the amount of the $250,000 campaign loan. Although the Bank's attorney asserted that the Bank had performed a loan analysis that evaluated the collateral (but did not describe the evaluation, or assert whether the evaluation was performed when the original loan was made or when the $250,000 campaign loan was made), no documentation of the value of the collateral was provided. Indeed, neither reply even asserted a value for the collateral. AR at 38, 60.

### 3. The General Counsel's Recommendation

On March 9, 2011, the Commission's staff submitted the First General Counsel's Report to the Commission, which described the relevant law, the facts and their analysis supporting their recommendation that the Commission: (1) find reason to believe Steve Fincher for Congress and its treasurer violated 2 U.S.C. § 434(b)(3)(E) and 11 CFR § 104.3(d)(4) (the "reporting violation"); (2) find no reason to believe the reporting violation was knowing and willful; (3) find no reason to believe that the campaign and the bank violated 2 U.S.C. § 441b(a) (the "corporate contribution violation"), and (4) enter into conciliation with Steve Fincher For Congress and its treasurer regarding the reporting violation. AR at 687-712. In other words, as more fully described below, the staff recommended that the Commission not conduct an investigation, but settle the matter solely with respect to the admitted reporting violation.

#### a. The Reporting Violation.

The staff described the law applicable to the reporting requirements for the loan as follows:

> The Act provides that each report shall identify the person who makes a loan to the reporting committee during the reporting period, together with the identification of any endorser or guarantor of such loan, and date and amount or value of such loan. 2 U.S.C. § 434(b)(3)(E). When a candidate obtains a bank loan in connection with the candidate's campaign, the candidate's principal campaign committee shall disclose on Schedule C-1 to the report covering the period when the loan was obtained, the date, amount, and interest rate of the loan, the name and address of the lending institution, and the types and value of collateral or other sources of repayment that secure the loan, advance, or line of credit, if any. 11 C.F.R. § 104.3(d)(4).

AR at 690.

The staff recommended finding reason to believe that a violation of 2 U.S.C. § 434(b)(3)(E) occurred and to negotiate a settlement of that violation, AR at 697-98,

because "[t]he committee acknowlege[d] that it failed to properly report the loan on its original 2010 Pre-Primary Report" as described in the administrative complaint. AR at 691.

The staff did not recommend a finding of a knowing and willful violation because "[w]hile the public would have been better served by more timely amendments, [the staff] have no information suggesting that the Committee intentionally delayed submitting them." AR at 692.

**b. The Corporate Contribution Violation.**

The staff described the legal prohibition and exceptions applicable to the purported loan, as follows:

> The Act prohibits corporations such as Gates Bank from making, and the Committee from knowingly accepting, a contribution in connection with any federal Campaign. 2 U.S.C. § 441b(a). [footnote omitted] The FEC's regulations provide that a loan of money to a political committee or a candidate is not a contribution by the lending institution if such loan is made in accordance with applicable banking laws and regulations and is made in the ordinary course of business. 11 C.F.R. § 100.82(a). A loan will be deemed in the ordinary course of business if it (1) bears the usual and customary interest rate of the lending institution for the category of loan involved; (2) is made on a basis that assures repayment; (3) is evidenced by a written instrument; and (4) is subject to a due date or amortization schedule. *Id.*

AR at 693:[3] The staff accepted the Gates Bank &Trust Company's unsupported assertion that 6.5% was the usual and customary interest rate because "[w]e have no information to the contrary." AR at 694. The staff merely recited the committee's and the bank's argument, without any independent analysis, that the loan was made on a basis that assured repayment; *i.e.* the loan was cross collateralized with other bank debt and personal accounts, the bank had perfected a security interest on Mr. Fincher's personal residence and 2010 crop production; and the value of the collateral was greater than the loan amount. AR at 694-95. The staff did note

[3] The staff failed to note and discuss that a $250,000 contribution also violates the limits on contributions in 2 U.S.C. § 441a(a).

that there was no separate perfected security interest for the campaign loan, and "the bank did not provide information as to the value of Fincher's farm, the 2010 crops, and his personal residence or the amount of funds in Fincher's non-interest bearing deposit account, or whether the collateral was adequate to satisfy Fincher's total indebtedness. AR at 695. In a footnote, the staff noted that the bank's UCC1 financing statement was filed on January 5, 2010 for a $600,000 debt. *Id*.

The staff accepted the unsworn and unsupported statements from the Bank's and SFC's attorneys without any independent analysis. The staff failed to review any documents not provided by the Bank, failed to request additional documents form the Bank, and failed to analyze the documents provided by the Bank. Nevertheless, the staff concluded there was no RTB that there was a corporate contribution because "we have no information suggesting that the $250,000 loan to the Fincher Committee was under collateralized. As noted, the loan was repaid in full before the maturity date." AR at 694 – 96.

**4. The Commissioners' Decisions**

On June 14, 2011, the Commission considered the recommendations in the First General Counsel's Report to: (1) find reason to believe that SFC and its treasurer violated 2 U.S.C. § 434(b)((3)(E) and 11 CFR §104.3(d)(4) (the "reporting provisions"); and (2) find no reason to believe that SFC, its treasurer and the Bank violated reporting provisions knowingly and willfully; (3) find no reason to believe that SFC, its treasurer and Bank violated 2 U.S.C. § 441(b)(a) (the corporate contribution provision); and (4) enter into conciliation with the committee and its treasurer regarding a Conciliation Agreement, which includes a civil money penalty. AR at 713 – 714, 719 – 720, 723 – 724.

The Commissioners agreed with the General Counsel's recommendation to find no reason to believe that SFC, its treasurer and the Bank violated the reporting provisions knowingly and willfully, and to find no reason to believe that SFC, its treasurer and the Bank violated the corporate contribution provision. *Id.*

In spite of the unanimous agreement among the six Commissioners to accept the Office of the General Counsel's first recommendation to find reason to believe that SFC and its treasurer violated the reporting provision, three Commission votes to make that finding failed. Finally, the Commissioners voted 5-1 to close the file in MUR 6386 without making a finding that a reason to believe that a violation occurred. *Id.*

On July 21, 2010, FEC Commissioners Bauerly, Walther and Weintraub issued a Statement of Reasons explaining their votes in MUR 6386 (the "BWW SOR"). AR at 719 – 722. "All six Commissioners voted to find reason to believe that the SFC violated 2 U.S.C. § 434(b)(3)(E) and 11 CFR § 104.3(d)(4)," and to find no reason to believe that the Bank violated the corporate contribution prohibition, 2 U.S.C. § 441b(a), as recommended in the First General Counsel's Report. However, the Commission divided 3-3 on whether to seek a civil money penalty in a Conciliation Agreement from the Fincher Campaign, and then divided 3-3 on whether to send a letter of caution to the committee. AR at 719 – 720.

On September 15, 2011, Commissioners Hunter, McGahn and Petersen filed a Statement of Reasons for their votes a month after the Complaint herein was filed (the "HMP SOR"). AR at 723 – 730. These Commissioners also agreed that they had reason to believe the reporting of the loan was a violation of FECA, and SFC and the Bank did not violate 2 U.S.C. § 441(b)(a). AR at 723 and 725. However, unlike the General Counsel and the other Commissioners, these

Commissioners viewed the reporting violation as technical and concluded that a civil penalty was not appropriate. AR at 723 - 730.

After all of the Commissioners voted at least once (but not simultaneously) to find RTB, and after all of the motions to find RTB failed, the Commission voted to close the file without making any RTB finding or imposing any sanction because the Commission could not agree on the appropriate sanction. AR at 713 – 714, 719 – 720, 723 – 724.

## III. DISCUSSION

### A. Customary Agency Deference Is Not Applicable In This Case

It is well established that this Court "may set aside the FEC's dismissal of a complaint only if its action was 'contrary to law,' *see* 2 U.S.C. § 437g(a)(8), e.g., 'arbitrary or capricious, or an abuse of discretion,' *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986)." *Hagelin v. Federal Election Commission*, 411 F.3d 237, 242 (D.C. Cir. 2005). "Courts must judge the propriety of the agency's action solely on the grounds invoked by the agency, and a decision of 'less than ideal clarity' must still be upheld so long as 'the agency's path may reasonably be discerned.'" *Common Cause v. Federal Election Commission*, 906 F.2d 705, 706 (D.C. Cir. 1990) (citations omitted). Alongside its decisions to prosecute and conduct investigations, the FEC's decisions to dismiss complaints are entitled to great deference as long as it supplies reasonable grounds. *Akins v. Federal Election Commission*, 736 F. Supp.2d 9, 21 (D.D.C. 2010)." *Nader v. Federal Election Commission*, --- F.Supp.2d ----, 2011 WL 5386423 (D.D.C. 2011). However, "[i]ntelligent review requires justifications by the Commission or Commissioners for the FEC's dispositions." *Democratic Congressional Campaign Committee v. Federal Election Commission*, 831 F.2d 1131, 1135 (D.C. Cir. 1987). Thus, the courts will not sustain the Commission's decision "if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action . . . the proper course,

except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Utility Workers Union of America, Local 369, AFL-CIO v. Federal Election Comm'n,* 691 F.Supp.2d 101, 106 (D.D.C 2010) citing *Safe Extensions, Inc. v. FAA,* 509 F.3d 593, 599 (D.C. Cir. 2007).

There is no doubt that the Commission's interpretation of its own statute and regulations is due deference by this Court.[4] Indeed, the Supreme Court has held that the Commission "is precisely the type of agency to which deference should presumptively be afforded," in part because the Commission "is inherently bipartisan in that no more than three of its six voting members may be of the same political party, § 437c(a)(1), and it must decide issues charged with the dynamics of party politics, often under the pressure of an impending election." *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). However, such deference is not unlimited. Here, the Commissioners split along party lines, party politics was not an issue or even involved, and there was no pending election. Deference may apply to interpretations of the statutes the Commission administers and its own regulations, but courts "must reject administrative constructions of the statute [it administers], whether reached by adjudication or by rule-making, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *Id*. at 32. Furthermore, the Commission's own actions may limit the Court's deference to the Commission's statutory and regulatory interpretations because "the thoroughness, validity, and consistency of an agency's

[4] *See e.g. Udall v. Tallman* 380 U.S. 1, 16 (1965)("When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration"); *Hagelin v. Federal Election Commission*, 411 F.3d 237, 242 (D.C. Cir. 2005)(same).

reasoning are factors that bear upon the amount of deference to be given an agency's ruling." *Id.* at 37.

Whether there was adequate collateral to support the purported campaign loan and whether the Bank had perfected a security interest in collateral supporting the campaign loan involves banking law and the law of secured transactions – not the election laws. It does not involve the interpretation of the election laws or the expertise "with the dynamics of party politics." *Id.* Accordingly, no deference is owed in another specialty area such as banking, which has its own regulatory scheme administered by at least four other federal agencies and state banking authorities. In fact, Congress recognized that the Commission's responsibilities might exceed its electoral area of expertise and granted it special authority in such situations. "In carrying out its responsibilities under this Act, the Commission shall, to the fullest extent practicable, avail itself of the assistance, including personnel and facilities of other agencies and departments of the United States. The heads of such agencies and departments may make available to the Commission such personnel, facilities, and other assistance, with or without reimbursement, as the Commission may request." 2 U.S.C. § 437c(f)(3).

There is no evidence in the administrative record, however, that the Commission consulted any banking agency or even any banking or secured transactions treatise. For example, there are no citations to the laws governing secured transactions or the banking regulations. However, this matter required the Commission to evaluate agricultural and residential lending transactions, even though it admitted it had no expertise in that area of commerce or the law. "The Commission is without knowledge or information sufficient to form a belief" "regarding the usual practice of Tennessee banks beyond what is required by the

Commission's regulations, including whether a loan in made 'in the ordinary course of business' under 11 C.F.R. 100.82(a)," Answer ¶42, including:

1. The usual and normal practice and regulatory requirements for Tennessee banks making similar loans require the bank to maintain a file that contains an appraisal or, at the very least, an evaluation and inspection report of the offered collateral, a UCC and real estate title search and certification, a signed financial statement (balance sheet) on the debtors and three years' federal income tax returns.
2. The loan would be memorialized by promissory note, a security agreement granting security in described collateral, a UCC 1 filing to perfect the security interest and a deed of trust on the real estate.
3. When relying on collateral for a previous loan, the bank would have a document that authorizes the use of the collateral for "future advances."
4. There should also be documentation that there are no other security filings on the collateral or, as in this case where Helena Chemical Company has a security filing on the crops, there should be a subordination agreement from Helena giving the bank's security interest in the crops priority over Helena's which is now prior.
5. There should be a document showing the ownership of the collateral, which in this case would show that there were others who had an ownership interest in the 2010 crops.

*See* Answer ¶ 42. In its Answer, the Commission stated it "is also without knowledge or information sufficient to form a belief as to the factual allegations in the third sentence [above] regarding documents that may be in the possession of Gates Bank, or allegations in the fourth sentence [above] regarding a prior filing in favor of Helena Chemical Company." *Id*.

Accordingly, this Court owes no deference to the Commission's decision regarding the evaluation of collateral and the perfection of security interests.

As described below, the Commission's decision to dismiss HFC's administrative complaint was based on an avoidance of the relevant facts and documents, illogical reasoning about the assertions made by the respondents, and an illogical decision not to find RTB when all concerned agreed that there was RTB. Furthermore, the written explanation for some of the Commission's decisions fails to explain how the Commission reached its conclusions. Because the HFC is contesting the Commission's application of the banking laws and the laws for perfecting secured transactions -- but not contesting Commission's construction of its own regulations -- the Commission is not due any deference here.

**B. The FEC Dismissal of the Reporting Violation Was Arbitrary And Capricious**

As described above, according to the two Statements of Reasons, all six Commissioners agreed on the only issue required by 2 USC § 437(g)(a)(2): there was reason to believe SFC and its treasurer violated the FECA's reporting requirements when SFC reported the funds from the Bank as a contribution from Stephen Fincher. Instead of making the RTB finding, the Commission dismissed the administrative complaint. AR at 719 – 720, 723 -724. The explanation provided by all six Commissioners for dismissing the complaint without finding RTB was that they could not agree on a subsequent question -- the appropriate sanction. The BWW SOR cited previous enforcement cases and concluded that the position of the HMP SOR "represents a 'race to the bottom.'" AR at 722. "The Commission has a duty to ensure the accurate and complete public disclosure of the source of campaign funds. Requiring civil penalties for reporting violations demonstrates that the Commission takes compliance with these core provisions of the FECA seriously and encourages compliance." *Id*. The HMP SOR was

issued long after this suit was filed. Answer ¶ 54. The HMP SOR disagreed with the precedent cited in the BWW SOR and considered the error as a technical violation. Accordingly, they decided that "a monetary penalty was not warranted. . . . Finally, the decision not to impose a civil penalty in this matter was an appropriate exercise of agency discretion." AR at 728 (footnote omitted). [5]

As an initial matter, as noted above, 2 U.S.C. § 437g(a)(2) requires the Commission to take certain actions if at least four Commissioners find RTB a violation has occurred. Imposing sanctions is not one of those actions. The question of the appropriate sanction does not arise until after RTB is found, and the Commission considers the issues raised in 2 USC §§ 437g(a)(4)-(5) relating to probable cause to believe ("PCTB") a violation has occurred. Even if the command to find RTB in 2 USC § 437g(a)(2) were not obligatory, this provision expresses Congress's view of the spirit of the law that the Commission makes such findings when appropriate and, only after it has done so, should the Commission consider PCTB and the appropriate sanction. Here, all six Commissioners determined that it was appropriate to make a RTB finding. The only reasoning provided was about the appropriate sanction. No Commissioner gave any reason for not making an RTB finding.

Accordingly, the decision to dismiss the administrative complaint without finding reason to believe that SFC and its treasurer violated the filing provisions, 2 U.S.C. § 434(b)(3)(E) and 11 C.F.R. § 104.3(d)(4), was arbitrary, capricious and contrary to law. Because the appropriate sanction is an independent and subsequent decision to an RTB finding, the Commissioners

[5] HFC agrees with the reasoning in the BWW SOR. However, it is not necessary to determine whether the HMP SOR is contrary to law or arbitrary or capricious because the plaintiff is not asking this Court to determine the appropriate sanction for the reporting violation and the Commission will have another opportunity to consider this matter and describe its reasoning after a remand.

SORs' reliance on its inability to decide on a sanction does not provide a reasoned explanation for their decision to dismiss the administrative complaint. Accordingly, this Court should remand this matter to the Commission for an RTB finding that SFC and its treasurer violated the reporting provisions, 2 U.S.C. § 434(b)(3)(E) and 11 C.F.R. § 104.3(d)(4).

### C. The FEC Failed To Find Reason to Believe There Was A Knowing and Willful Reporting Violation.

The FECA requires political committees to identify any person who provides it with a loan along with the identity of any endorser or guarantor. 2 U.S.C. § 434(b)(3)(E).

> When a candidate obtains a bank loan in connection with the candidate's campaign, the candidate's principal campaign committee shall disclose on Schedule C-1 to the report covering the period when the loan was obtained, the date, amount, interest rate of the loan, the name and address of the lending institution, and the types and value of collateral or other sources of repayment that secure the loan, advance, or line of credit, if any. 11 CFR § 104.3(d)(4)." AR at 690. In this case,"[t]he Committee acknowledge[d] that it failed to properly report the loan on its original Pre-Primary Report.

AR at 691. The phrase "knowing and willful" indicates that "actions [were] taken with full knowledge of all of the facts and a recognition that the action is prohibited by law." 122 Cong. Rec. H 2778 (daily ed. May 3 1976); *see also Federal Election Comm'n v. John A. Dramesi for Cong. Comm*., 640 F. Supp. 985, 987 (D.N.J. 1986) (distinguishing between "knowing" and "knowing and willful"). A knowing and willful violation may be established "by proof that the defendant acted deliberately and with knowledge," but need not show that the defendant "had specific knowledge of the regulations" or "conclusively demonstrate a defendant's "state of mind." *United States v. Hopkins*, 916 F. 2d 207, 214 (5th Cir. 1990). Repeated in many enforcement cases, *e.g*. MUR 5496 (Huffman, *et al*.) Factual and Legal Analysis at 11.

The Commission had reason to believe that SFC knowingly and willfully violated the reporting provisions, 2 U.S.C. § 434(b)(3)(E) and 11 CFR § 104.3(d)(4). SFC acknowledged

responsibility to accurately and timely describe the Fincher campaign loan in its reports to the Commission and failed to do so. AR at 58. Indeed, SFC's treasurer certified that the reports were complete and accurate to the best of her knowledge. AR at 6. SFC admitted that merely reviewing their filing revealed the error. AR at 58. Indeed, there was no need to investigate the circumstances surrounding the loan because the candidate obtained the loan and delivered the check to SFC as an agent for SFC. *See* 11 CFR § 104.7((b)(3). Making such an obvious error of a very large contribution (one that is approximately one hundred times the contribution limit) on a Commission report and certifying the accuracy of the report, without a reasonable explanation for the error, is reason to find RTB that the admitted violation was knowing and willful.

A $250,000 contribution was not a small amount from an unknown contributor that could have been inadvertently overlooked. The Commission's did not assert that it believed that the violation was inadvertent. Nor did the Commission cite to or explain its understanding of the terms "inadvertent" or "knowing and willful." More importantly, the Commission did not explain why it thought there was no need to investigate SFC's assertion of an inadvertent error.

Indeed, the Commission's explanation for <u>not</u> finding the violation of the reporting provisions to be knowing and willful did not even refer to the admitted violation. Instead, it only referred to the late filing of amendments, which was not an issue in this case. "While the public would have been better served by more timely amendments, we have no information suggesting that the Committee intentionally delayed submitting them, so we do not recommend that the Commission find that the Committee's reporting violations were knowing and willful." AR at 692. At best, this explains why the Commission did not find RTB that a violation occurred for the late amendments.

This total avoidance of the question of the knowing and willful violation of the original filing, and the failure to provide a reasonable explanation not to find that the violation of the reporting provisions was knowing and willful was arbitrary and capricious and contrary to law.

### D. The FEC Failed To Find Reason to Believe There Was A Corporate Contribution

2 U.S.C. § 441b(a) prohibits corporate contributions. The term contribution includes, among other things, any loan to the extent it has not been repaid. 2 U.S.C. § 431(8)(A)(i). However, 2 U.S.C. § 431(8)(A)(vii) and 11 CFR § 100.82(a) exempt a loan from a bank to a political committee from the corporate contribution prohibition if it meets four regulatory criteria. Relevant here is the requirement that the loan be made on a basis that assures repayment. To assure repayment:

> The lending institution making the loan has perfected a security interest in collateral owned by the candidate or political committee receiving the loan, the fair market value of the collateral is equal to or greater than the loan amount and any senior liens as determined on the date of the loan, and the candidate or political committee provides documentation to show that the lending institution has a perfected security interest in the collateral. Sources of collateral include, but are not limited to, ownership in real estate, personal property, goods, negotiable instruments, certificates of deposit, chattel papers, stocks, accounts receivable and cash on deposit.

11 CFR § 100.82 (e)(1)(i) (emphasis added). As described below, the information in the possession of the Commission did not support its conclusion that (1) the value of the collateral equaled or exceed the amount of the loan, and (2) there was a perfected security interest in the collateral.[6]

[6] HFC is not challenging the legality of the loan under the appropriate banking regulations. Nor is HFC challenging the Commission's regulations. Rather, even a loan that meets the banking regulations for safety and soundness may be considered an illegal corporate contribution under FECA.

As noted above, "[t]he Commission will find 'reason to believe' in cases where the available evidence in the matter is at least sufficient to warrant conducting an investigation, and where the seriousness of the alleged violation warrants further investigation or immediate conciliation." 72 Fed. Reg. 12,545 (2007). "The Commission finds 'no reason to believe' when the complaint, any response filed by the respondent, and any publicly available information, when taken together, fail to give rise to a reasonable inference that a violation has occurred, or even if the allegations were true, would not constitute a violation of the law." *Id* at 12,546.

Here, the Office of the General Counsel merely repeated the Bank's attorney's unsupported assertion that Multipurpose Note and Security Agreement (Attachment A of the Bank's response) "provides that the loan was cross-collateralized with other bank debt owed by Fincher, and with accounts held by Fincher." AR at 42 -45. It appears that the staff accepted the Bank's assertion that the Bank did not need to file a separate UCC1 Financing Statement for the 2010 crops to secure the campaign loan "since the same assets were the collateral for" a previous loan on those crops, and the Bank had a perfected security interest in Fincher's personal residence through the mortgage. *Id*. The purported collateral and the method of perfecting the security interest are: *Id*.

| COLLATERAL | INSTRUMENT PERFECTING A SECURITY INTEREST |
|---|---|
| Fincher's personal residence | Deed of Trust (AR at 51-54) |
| Lien on all 2010 crops | UCC1 Financing Statement (AR at 56) on file with the state AR at 57) |
| Right of offset to Fincher's deposit accounts | None provided and not discussed by the FEC |

In this case, there is no evidence in the Administrative Record that the Commission reviewed relevant information on the Tennessee State's official web site reporting UCC filings and property value assessments regarding the purported collateral, consulted any government

banking agency, or even any banking statutes, regulations, treatises or cases regarding banking practices or perfecting a security interest. The Commission ignored its own decisions in previous enforcement matters involving similar regulatory questions and decisions regarding signature notes, and commercial loans and deeds of trust. The Commission also ignored its own regulation prohibiting a candidate from contributing or using as collateral the entire value of property jointly owned by the candidate and spouse. Instead, the Commission's staff concluded that the Bank had a perfected security interest in sufficient collateral based solely on the assertion of the unsworn statement of the Bank's lawyer regarding statements made to him from unnamed person(s) at the Bank. AR at 695. Indeed, the Commission admitted it had no evidence of the value of the purported collateral other than the unsupported assertions by the respondents' lawyers that the value of the collateral exceeded the $250,000 campaign note. As described below, neither the residence nor the crops provided adequate collateral for the campaign loan. In addition, neither the Deed of Trust nor the UCC Financing Statement provided a perfected security interest for the campaign loan.

**1. The Value Of The Purported Collateral Was Insufficient To Assure Repayment And The Commission's Explanation For Finding Sufficient Collateral Was Arbitrary And Capricious.**

The Commission failed to find reason to believe that the purported loan had insufficient capital to meet the requirements of 11 CFR § 100.82(a) for the following reason:

> While the bank did not provide information as to the value of Fincher's farm, the 2010 crops, and his personal residence or the amount of funds in Fincher's non-interest bearing deposit account, or whether the collateral was adequate to satisfy Fincher's total indebtedness, we have no information suggesting that the $250,000 loan to Fincher's committee was under-collateralized. As noted, the loan was repaid in full before the maturity date.

AR at 696. This reasoning is not supported by the evidence or the law, and therefore, the Commission's decision was arbitrary and capricious, and contrary to law.

**a. There Was Reason To Believe The Collateral Was Insufficient Pursuant To Adverse Inference Rule.**

The Commission noted that the Bank did not provide information about the value of the purported collateral even though it had such documentation.[7] There is no evidence in the administrative record that the Commission even reviewed these documents.

The adverse inference rule is a well-established legal principle applied by the Commission in previous enforcement decisions.

> [W]hen a party has relevant evidence within-his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." *International Union (UAW) v NLRB,* 459 F.2d 1329, 1336 (D.C. Cir 1972); *see also, Arvi-Edison Water Storage Disst. v. Hodel,* 610 F. Supp. 1206, 1218 n.4 (D.D.C. 1985). The theory underlying this rule is that, all things being equal, "a party will of his own volition introduce the strongest evidence available to prove his case." *International Union (UAW),* 459 F.2d at 1338. Conversely, if the party fails to introduce such evidence, then the trier of fact may infer that the evidence was withheld because it contravened the position of the party suppressing it. *Id*.

[7] The Bank admitted that it made a loan analysis but did not provide that analysis or any documents upon which it would have relied to the Commission. AR 39. Banks are required to maintain a loan file when they lend funds for home mortgages and for business purposes such as agricultural operations. *See e.g*. 12 C.F.R. § 27.3(b) and (c) (Information required For Home Loans); 12 C.F.R. § 290.271 (FDIC Records For Lending Transactions); 17 C.F.R. Pt 391 Subpt B. App A (FDIC Interagency Guidelines Establishing Standards For Safety and Soundness); Federal Reserve Board Commercial Bank Examination Manual, Agricultural Loans section 2140.1 at pp. 8-9 (www.federalreserve.gov/boarddocs/supmanual/cbem/0005cbem.pdf).

As demonstrated in MURs 5381 and 5421 *supra* at 35 – 37, for example, the typical loan file might contain an appraisal or, at the very least, an evaluation and inspection report of the offered collateral, a UCC and real estate title search and certification, a signed financial statement (balance sheet) on the debtors and three years' federal income tax returns. The loan would be memorialized by promissory note, a security agreement granting security in described collateral, a UCC filing to perfect the security interest and a deed of trust on the real estate. When relying on collateral for a previous loan, the bank would have a document that authorizes the use of the collateral for future advances. There should also be documentation that there are no other security filings on the collateral. There should be a document showing the ownership of the collateral, which includes other lien holders.

MUR 5026 (Zimmer 2000, Inc., *et al*.) General Counsel's Report No. 3 at 9 n. 7.[8]

There is no legal support, and the Commission offers none, for its conclusion that the lack of documentation of the value of the purported collateral, which the Bank admits was available, permits reliance on the unsupported assertion by the Bank's lawyer that the value of the collateral exceeded $250,000. AR at 706. Instead, the Commission should have drawn the adverse inference, as it has done in previous enforcement decisions, that the existence of documents that were not provided by the respondents would demonstrate that value of the purported collateral was insufficient. However, the Commission failed to even consider the adverse inference rule, much less draw the appropriate conclusion from the respondents' withholding of available documentation regarding the valuation of the purported collateral for the campaign loan. Accordingly, the Commission's decision and explanation for not finding RTB that there was a corporate contribution was arbitrary and capricious.

**b. There Was Reason To Believe That The Bank Could Not Rely On the Purported Collateral To Support The Signature Loan.**

There was evidence to suggest that the campaign note was not secured by cross-collateralizing Stephen and Lynn Fincher's residence or the Stephen and Lynn Farms crops that the Commission did not discuss.

The campaign loan itself lists Stephen L. Fincher as the sole debtor. AR at 41. The space on the note where the collateral should be listed is blank: "SECURITY: I give you a security interest in the property described below to secure the obligations of this Loan: SIGNATURE." AR at 41. There was nothing "described below" or any document annexed to

[8] *See also* MUR 5398 (LifeCare Holdings, Inc. *et al*.) General Counsel's Report No. 2 at 4 ("[T]he evidence may be viewed in the context of the adverse inference that may be drawn as to the unavailability of testimony by persons with knowledge of" relevant facts, in the totality of the evidence the Commission considers in its enforcement decision).

the note. Thus, the purported campaign loan appears to be unsecured. The Bank admitted "that it did not file a separate UCC financing statement for the campaign loan." Answer ¶41 (c).

The Commission relied on the assertion by the Bank's attorney that the boiler plate clause on "page two of the security agreement provides that the loan was cross-collateralized with other bank debt owed by [Stephen] Fincher, and with accounts held by [Stephen] Fincher." AR at 695. However, the two loans identified by the Commission were the Stephen and Lynn Fincher's Deed of Trust, AR at 51, and the UCC1 filing on Stephen and Lynn Fincher Farms, AR at 56. To create a security interest in collateral for a loan, the debtor must grant one in property in which he has an interest.[9] Because the debtors and the owners of the collateral for the residence mortgage and the crop loan include Lynn Fincher, they are different than the debtor of the campaign note, Stephen Fincher. There is no evidence in the administrative record and the respondents did not assert that Lynn Fincher had agreed to permit her interest in the residence and the crops to serve as collateral for her husband's signature loan. The Commission did not discuss whether Stephen Fincher's signature loan, which did not describe any collateral and which, on its face, did not contain an agreement from Lynn Fincher, could have permitted the Bank to levy against her portion or any portion of the property she jointly owned with her husband. Thus, the Commission did not know whether the Bank could levy on that collateral if Stephen Fincher defaulted on the signature loan. In short, because Lynn Fincher did not agree to

[9] Written security agreement is enforceable when it is signed by debtor and contains description of collateral. Tenn. Code Anno. § 47-9-203(1)(b). A security agreement requires a document that clearly evidenced an agreement by parties that a security interest be created and granted by debtor in described collateral. Tenn. Code Anno. §§ 47-9-105. Under Tennessee law, pledged property secures only debts that parties have agreed it will secure. Tenn. Code Anno. §§ 47-1-201(37), 47-9-102.

provide her interest in her co-owned property as collateral for Stephen Fincher's campaign loan, there was no suggestion that there was cross-collateral for the campaign loan.

More specifically, the Deed of Trust describes real property owned by Stephen L Fincher and his wife Lynn Fincher. AR at 51 -54. Thus, Stephen Fincher owned only an expectancy in the property, which was not considered by the Commission to determine whether it could have provided collateral for the campaign note. "Under Tennessee law, a creditor can reach only the right of survivorship in property held as tenants by the entirety, thereby reducing to a minimal value jointly held property where the creditor holds a claim against only one of the parties." *In re Stewart*, 19 B.R. 165, 168 -169 (Bkrtcy.Tenn. 1982). Thus, because Stephen Fincher and his wife did not sign the signature loan together, the Commission had no evidence that the residence could legally secure the signature loan or whether the Bank could foreclose on the residence if Stephen Fincher failed to repay the signature loan. At the very least, this was an issue the Commission should have considered in its explanation. Accordingly, there was RTB that the residence did not collateralize the campaign loan.

Second, the UCC Financing Statement submitted by the Bank was for a loan to Stephen & Lynn Fincher Farms. AR at 56. There is no information in the administrative record about the legal structure of Stephen & Lynn Fincher Farms, and whether the signature loan could have been collateralized by the crops with only Stephen Fincher's signature and no description of the crops in the signature loan. The Bank has not provided any document to demonstrate that this organization agreed to pledge its assets to support Fincher's campaign loan. The Bank did not say whether there were any other claims on those assets. If the Commission had reviewed the public records, it would have found a prior security filing in favor of the Helena Chemical Company. *See*

www/TN.gov./sos/bussvc/iets3/ieuc/PguccSearchDisplay.jsp?_PgNO_=1&ufn=307133943&udn=Fincher+Farm&ctl=1 (last visited March 18, 2012). Neither SFC's nor the Bank's submission provided any information about the original loan secured by the same collateral that allegedly secured the campaign loan, *e.g.*, the amount of the loan, the date of the loan, the balance owed on the loan, the assessed value of the collateral, the date of the assessment and the procedure for assessing the value of the collateral, whether another party had a prior security interest in any of the collateral, whether any parties in addition to Stephen Fincher and his wife were parties to the original loan, or whether any parties in addition to Stephen Fincher and his wife had an interest in the 2010 crops. Therefore, there is no evidence that the Bank could levy on the crop production if Stephen Fincher defaulted on the campaign note. In fact, the evidence supports the opposite conclusion. From the title, it appears that Stephen & Lynn Fincher Farms are owned, like the residence, by Stephen and Lynn Fincher jointly. Thus, Lynn Fincher clearly has an interest in the crop production, and there is no evidence that she authorized her interest to be used as collateral for the campaign note.

Third, the possibility of any offset against deposits at the Bank was specious. Any deposits could be withdrawn at any time and, therefore, provided no security for the campaign note.

The Commission also relies on the assertion that "the loan was repaid in full before the maturity date," AR at 696, as evidence that there was sufficient collateral to support the loan. This is not logical because there is no evidence that the crops or the residence were sold to pay off the campaign loan. The funds to repay the campaign note could have come from many sources including another loan. Thus, repayment of the campaign note does not provide any evidence of the value of the purported collateral.

In view of the above, there was reason to believe the purported campaign loan was actually an illegal corporate contribution in violation of 2 U.S.C. § 441(b)(a) because the purported loan does not meet the requirement in 11 CFR § 100.82(a) that the loan be sufficiently collateralized. Furthermore, the Commission's explanation for its decision not to find RTB was arbitrary and capricious because it failed to discuss the adverse inference to be drawn from the respondents' failure to provide available evidence, actual evidence that was available to the Commission that Lynn Fincher had an interest in the purported collateral, and the other issues described above that suggest there was no collateral for the campaign note.

**c. Even If there Were Collateral, The Evidence Suggests That The Value Of The Collateral Was Insufficient.**

*Arguendo,* even if Stephen Fincher could have pledged the residence and the crops as collateral for his campaign loan, the available evidence indicates that there was RTB that his interest in the value of those assets was less than $250,000.

First, neither the respondents nor the staff discussed the Commission regulation that only the candidate's interest in the value of collateral co-owned by a candidate and his wife to secure a campaign loan may be used to determine whether there is a basis for assuring repayment of the loan: *e.g.* if a residence is co-owned by a husband and wife, only half of the equity of the residence may be contributed by the candidate outside of FECA's contribution limitations. 11 C.F.R. §§ 100.82(a) and 100.52(b)(4). The administrative record does not disclose Mr. Fincher's interest in any of the so-called collateral, or whether SFC and the Bank deducted Lynn Fincher's interest from the purported value of the collateral when the Bank's attorney artfully asserted that its valuation of the collateral was greater than the amount of the campaign loan. The Deed of

Trust proves Lynn Fincher was a co-owner of the residence, and it appears she also had an interest in the Stephen and Lynn Fincher Farm.[10]

Moreover, the Commission should not have assumed that the Bank's lawyer had asserted that Stephen Fincher's interest in the collateral (minus Lynn Fincher's interest) exceeded $250,000. He artfully stated that the Bank's "loan analysis showed the fair market value of the equity in these assets far exceed the campaign loan amount." AR at 39 (emphasis added). This assertion, while admitting that an analysis was completed but not provided or vouched for by counsel, applies to the total value of the purported collateral. But, the collateral was equally owned by Lynn Fincher. Thus, Stephen Fincher only owned half of the value of the collateral. Even the Bank's lawyer did not assert that half of the value of the collateral exceeded $250,000. Therefore, the Commission should not have relied on the lawyer's assertion that the Stephen Fincher's share of the collateral exceeded the value of the campaign note, as required by the Commission's regulations.

Second, the administrative record demonstrates that the Commission did not review any relevant publicly available filings that might have provided a value of the residence, the crops or whether there were any prior perfected security interests in the purported collateral that would reduce the owners' equity. That in and of itself is contrary to 2 U.S.C. § 437g(a)(2) and the Commission's Statement of Policy for RTB to review: the complaint, any response filed by the

[10] The facts in this case should not be confused with the facts in the Commission's Advisory Opinion 1991-10, which described the right of a candidate to pledge as collateral for a campaign loan half of the value of any assets held jointly with the candidate's spouse pursuant to 11 CFR § 110.10(a). The issue addressed in the advisory opinion was whether a spouse's signature on a loan necessitated by the joint ownership caused the spouse to violate FECA's contribution limits, 2 U.S.C. § 441a(a). As described above, a spouse's signature is necessary under banking law for pledging jointly owned assets. That is not an issue here because there is no evidence that Lynn Fincher signed any document permitting her husband to pledge jointly held property as collateral for his campaign loan.

respondent, and any publicly available information." 72 Fed. Reg. 12,546 (2007) (emphasis supplied). Contrary to the Commission's conclusion that it had "no information suggesting that the $250,000 loan to Fincher's committee was under-collateralized," information suggesting the exact opposite was publicly available. AR at 696.

The Bank asserted that it was relying on the 2010 crop production as collateral from a previous $600,000 loan to Stephen and Lynn Fincher Farms. Stephen and Lynn Fincher Farms' income from crop farming was $124,016 according to Stephen Fincher's United States House Of Representatives Financial Disclosure Statement for 2010. AR at 13. This suggests, if not proves, that the equity in the crops provided as purported collateral for the campaign loan was no more than $124,016, and Stephen Fincher's half was worth no more than $62,008.[11]

Third, Stephen and Lynn Fincher's residence was valued by Tennessee for tax purposes in 2012 at $250,300. *See* http:// www.assessment.state.tn.us/parceldetails3.asp?c=017 (last visited March 13, 2012). The residence was encumbered by a $200,000 mortgage in 2002. AR at 53. This suggests that, even if the mortgage was refinanced, the maximum amount of Stephen Fincher's half of the equity in his and his wife's residence would be $25,150 plus any principal

[11] The Bank had made a $600,000 loan secured by the crops and filed in Tennessee on January 5, 2010. AR 56-57. Neither SFC's nor the Bank's submission provided any information about the original loan secured by the 2010 crops and the deposit account that also allegedly secured the campaign loan, e.g. the date of the loan, the assessed value of the collateral, the date of the assessment and the procedure for assessing the value of the collateral, whether the Bank held a primary security interest in the crops, and the amount in the deposit account. The Bank failed to note and the Commission apparently failed to review the collateral for any previously filed and perfected interest on the crops. It appears that Helena Chemical Company also lent funds secured by the crops, among other things, and filed a UCC1 Financing Statement to perfect its security interest on May 22, 2007, and that UCC1 statement was not terminated before the Bank filed its note. *See* www/TN.gov./sos/bussvc/iets3/ieuc/PguccSearchDisplay.jsp?_PgNO_=1&ufn=307133943&udn=Fincher+Farm&ctl=1 (last visited March 18, 2012). This is an additional reason to question the assertion that there was sufficient collateral, and another reason to question the reasonableness of the Commission's decision and explanation for not finding RTB.

previously paid. And there is no evidence that any principal has been repaid. Thus, it is unlikely that the residence could provide any substantial collateral for the purported campaign loan. The Commission failed to consider and discuss these issues.

Moreover, even if the residence could have been used for collateral for the campaign loan, the amount was limited by the "Additional Loans and Indebtedness" clause in the Deed of Trust. The duration section of that clause is blank and, therefore, does not permit future advances. AR at 53. Even if it were not blank, future advances cannot exceed the amount of the original mortgage absent an amendment and additional taxes being paid. AR at 53. There is no evidence that there was an amortization schedule for principal repayment or that any part of the original $200,000 principal had been repaid, and the Bank did not provide or even assert that it had an amendment and paid additional taxes or that any of the original $200,000 had been repaid. AR at 53. The Commission also failed to consider and discuss this issue.

Fourth, with respect to the deposit account, the Commission did not consider Lynn Fincher's interest in the purported collateral. Moreover, there is no evidence in the administrative record that there were any funds in the deposit account.

The Chart below summarizes the above description of the purported collateral:

| COLLATERAL | INSTRUMENT PERFECTING A SECURITY INTEREST | VALUE OF COLLATERAL |
|---|---|---|
| Fincher's personal residence | Deed of Trust (AR at 51-54) | $25,150 |
| Lien on all 2010 crops | UCC Financing Statement (AR at 56) on file with the state AR at 57) | $62,008 |
| Right of offset to Fincher's deposit accounts | None provided and not discussed by the FEC | 0 |

Fifth, the Commission failed to perform the same type of analysis in this matter that it has performed in the past in responding to prior administrative complaints making similar

allegations. There the Commission relied upon and analyzed bank documents and affidavits upon which it based a thorough analysis and discussion. There is a stark difference between those Commission decisions and the one here.

For example, one of the concerns in MUR 5381 (Rob Bishop for Congress, *et al*.) was the legality of funds from a signature loan obtained by the candidate and subsequently provided to his campaign. MUR 5381 First General Counsel's Report at 20 - 25. The signature loan was cross-collateralized by an outstanding car loan and offset provisions on deposits on accounts. *Id*. at 24. The Commission's extensive analysis relied upon an affidavit from a Bank officer and eight attached documents from the loan file, MUR 5381 Response of America First Credit Union, demonstrated that the credit union's credit "risk analysts and senior loan officers followed every written guideline, internal point score system and computer generated recommendation it routinely uses in making loans." MUR 5381 General Counsel's Report at 21(quoting the America First Credit Union Response). This response was supported by an affidavit and supporting documents. *Id*. 21 – 22. Some of the Commission's analysis was redacted because it described personal financial information. The Commission's analysis in that case, which required five pages to describe, was the antithesis of the one paragraph analysis here. Here, the Commission's analysis was based on the absence of necessary evidence, inattention to the details in the three available documents, and the uncritical acceptance of the respondents' lawyers' arguments with no independent analysis and logical reasoning by the Commission.

MUR 5421 (John Kerry for President, et al.) is another example of an enforcement case that presented similar concerns as this matter. There, the Commission provided an extensive analysis and reasoned explanation in response to bare bones allegations of an excessive contribution resulting from a loan collateralized by a residence. MUR 5421 Factual and Legal

Analysis supporting the Commission's finding of RTB. In that matter, the complainant merely alleged that the jointly-held residence pledged as collateral for loans to the campaign committee exceeded the personal limit for the candidate's spouse. *Id*. at 3. The respondent submitted an appraisal report of his and his wife's residence to demonstrate that the value of the residence was more than twice the amount of the loan. *Id*. at 4. The Commission did not accept the respondent's assertions on its face. Instead, it reviewed the appraisal, the methodology of the appraiser and the qualifications of the appraiser. *Id.* at 6-7. It compared the appraised value and the value assessed for property taxes. *Id*. at 8. After a lengthy analysis, the Commission determined to use the appraised value as the value of the residence. *Id*. The Commission then determined from publicly available mortgage documents (that it discovered on its own) that there might have been a senior lien on the property and discussed the consequences on the value of the collateral. *Id*. at 9 - 11. In spite of the appraisal report that the Commission found credible, the Commission determined that the "public property records raise a question as to whether the value of the collateral was equal to or greater than the loan amount and any senior liens on the date of the loan." *Id*. at 12. Accordingly the Commission found RTB that the value of the collateral was not sufficient to secure the loan. *Id*. at 15. In contrast here, the Commission did not review an appraisal report, the assessed value of property, or check for any liens on the property, and the one paragraph analysis here is practically nonexistent compared to the multi-page, in-depth analysis in MUR 5421. Nevertheless, here the Commission found no RTB here.

In view of the above, in this case there was reason to believe that the combined equity in the crops, the residence and the deposit accounts was less than $250,000. Therefore, the Commission was incorrect when it stated that it had "no information suggesting that the $250,000 loan to Fincher's committee was under-collateralized." AR at 696 (emphasis added).

Accordingly, the Commission's conclusion that there was adequate collateral was arbitrary and capricious, as was its explanation for that decision.

**2. There Was Reason To Believe That There Was No Perfected Security Interest In The Purported Collateral.**

To perfect a security interest, the Bank must make a proper filing. AR at 694. As noted above, Stephen L. Fincher was the sole debtor on the Bank's note for the signature and the loan did not list any property as security for the note. AR at 41. Accordingly, the Bank could not have and did not file a separate UCC financing statement to secure collateral for the signature loan. Answer ¶ 41 (c).

The Commission relied upon the asserted cross-collateralization of Stephen and Lynn Fincher's Deed of Trust, AR at 51, and the UCC1 filing on Stephen and Lynn Fincher Farms 2010 crop production, AR at 56, to satisfy the 11 CFR § 100.82(a) requirement for a perfected security interest in the collateral. AR at 696. As described above, because those properties were co-owned by Stephen Fincher and Lynn Fincher, they could not have provided collateral for the signature loan and, thus, could not have provided a perfected security interest for Stephen Fincher's campaign note.

Accordingly, there is reason to believe that the Bank did not have a perfected security interest in any collateral to support the purported signature loan. The Commission's conclusion to the contrary is not supported by either an analysis of the issues or the law, and therefore, is arbitrary and capricious. Thus, there is reason to believe the purported campaign loan is actually an illegal corporate contribution in violation of 2 U.S.C. § 441(b)(a) because the purported loan does not meet the requirement in 11 CFR § 100.82(a) that the Bank have a perfected security interest in the collateral.

### E. Other Issues

This memorandum cites the State of Tennessee's official Internet web site, a Commission advisory opinion and other Commission enforcement decisions for facts and precedent relevant to this matter that are not in the administrative record. We request that the Court take judicial notice of these facts and precedent. Fed. R. Evid. 201 and 803(8) and (14). Alternatively, we request the Court note that such citations and facts were publicly available, the Commission should have discussed them, but the Commission has ignored them. The failure to consider such facts and precedent is arbitrary and capricious.

Contrary to the Commission's procedures, three Commissioners issued a Statement Of Reasons for their decision more than 60 days after the Commission's decision to dismiss the administrative complaint. Answer ¶54. Accordingly, plaintiff requests that the Court order the Commission, if it decides to issue a Statement Of Reasons after this Court's remand, to do so within 30 days of the Commission's decision pursuant to the remand.

## CONCLUSION

In view of the above, Herron For Congress respectfully requests that this Court remand the dismissal of the administrative complaint to the Commission for action in conformance with the Court's opinion that the Commission should have found reason to believe that Steve Fincher For Congress violated the federal election laws.

Respectfully submitted,

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