UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RALPH NADER,

Plaintiff,

v. Civil No. 10-989-BAH

FEDERAL ELECTION COMMISSION,

Defendant.

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiff Ralph Nader ("the Candidate") submits this Memorandum of Points and Authorities in support of his Motion for Summary Judgment against Defendant Federal Election Commission ("FEC" or "the Agency"). The underlying facts giving rise to this action are set forth in the Administrative Complaint that the Candidate filed with the FEC on May 30, 2008 ("Administrative Complaint"), AR00001-100, as supplemented by letters submitted to the FEC by the undersigned counsel on September 24, 2008 ("First Supplement"), AR00609-728, and on January 7, 2010 ("Second Supplement").[1] AR01732-90. Those facts are summarized in the Complaint that the Candidate filed with this Court on June 11, 2010 ("Complaint") and are not disputed by the FEC in its Answer to the Complaint, which was filed on August 23, 2010 ("FEC Answer"). Indeed, the FEC cannot dispute the underlying facts in this matter, because on April 13, 2009 – nearly two years after the Administrative Complaint was filed – the Agency closed the file without even notifying most of the respondent parties (collectively, "Respondents") that a complaint had been filed against them, and without conducting any investigation whatsoever.

[1] The Second Supplement is incorrectly dated January 7, 2009.

Because the FEC does not and cannot dispute the underlying facts set forth in the Administrative Complaint, those facts are incorporated by reference into the Candidate's Statement of Material Facts as to Which There Is No Genuine Dispute. In brief, the Administrative Complaint alleges that:

> Respondents are members, allied entities and/or affiliates of the Democratic Party who conspired to prevent Ralph Nader and Peter Miguel Camejo ("Nader-Camejo") from running as independent candidates for President and Vice President of the United States, respectively, during the 2004 General Election. Respondents' purpose was to help Democratic candidates John Kerry and John Edwards win the election by denying voters the choice of voting for a competing candidacy. To achieve this purpose, Respondents filed 24 complaints and/or intervened in legal or administrative proceedings to challenge Nader-Camejo's nomination papers in 18 states, including Arizona, Arkansas, Colorado, Florida, Illinois, Iowa, Maine, Michigan, Mississippi, Nevada, New Hampshire, New Mexico, Ohio, Oregon, Pennsylvania, Washington, West Virginia and Wisconsin.
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> Respondents initiated these legal proceedings with the knowledge and consent of [then-DNC Chair] Terry McAuliffe and John Kerry, and coordinated their efforts with the DNC, the Kerry-Edwards Campaign and at least 18 state or local Democratic Parties. Respondents repeatedly confirmed that the purpose of their litigation was to benefit the Kerry-Edwards Campaign by draining the Nader-Camejo Campaign of resources and forcing Nader-Camejo from the race, thereby denying voters the choice of voting for them.

AR00002-03.

> In addition to filing 24 state court complaints to challenge Nader-Camejo's nomination papers, Respondents launched a nationwide communications campaign intended to convince Nader-Camejo supporters to vote for Kerry-Edwards. Respondents hired political consultants and pollsters, produced advertisements and press materials, and paid to broadcast these advertisements on television, radio and other media outlets throughout the country. Respondents also established two websites to publicize their efforts, www.thenaderfactor.com and www.upforvictory.com.

AR00008-09.

In the course of such conduct, the Administrative Complaint alleges, Respondents made millions of dollars in unlawful campaign contributions and expenditures, in violation of numerous limitations and prohibitions set forth in the Federal Election Campaign Act of 1971 ("FECA" or "the Act"). Respondents committed further violations by establishing several

Section 527 organizations to coordinate and finance their opposition to the Nader-Camejo 2004 independent presidential candidacy, which they failed to register as political committees, as FECA required them to do. These allegations are detailed and specific, AR00001-100, and thoroughly documented by reference to 73 exhibits, including Internal Revenue Service ("IRS") filings, FEC filings, court records, Respondents' own email records and documents, and numerous other sources available in the public domain, AR00101-104, all of which the FEC could have verified with relative ease, had the Agency taken the steps required by law in response to the filing of a complaint.

The question presented by the instant motion, therefore, is whether the facts set forth in the Administrative Complaint, if true, are legally sufficient to provide reason to believe that Respondents violated the Act, or whether, instead, the Act permits the FEC to dismiss the Administrative Complaint and close the matter without even notifying most Respondents that a complaint had been filed against them. As set forth below, the FEC's inaction and mishandling of this matter is clearly contrary to law. Further, the Agency makes almost no attempt to provide any rationale for its choices. Summary judgment against the FEC is therefore warranted, and the matter should be remanded to the Agency, with instructions that it comply with its statutory obligations under the Act.

STANDARD OF REVIEW

A motion for summary judgment should be granted "when the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits or declarations, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *American Fed. of Labor v. FEC*, 177 F. Supp. 2d 48, 54. (D.D.C.

2001) ("*American Fed. of Labor I*"), *aff'd*, 333 F.3d 168 (D.C. Cir. 2003) ("*American Fed. of Labor II*") (citing Fed. R. Civ. P. 56(c)).

In ruling on cross-motions for summary judgment, the Court should grant summary judgment if one of the moving parties "is entitled to judgment as a matter of law upon material facts that are not genuinely disputed." *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004) ("*Shays I*"), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005) ("*Shays III*") (citations omitted). Summary judgment is warranted where a moving party informs the Court of the basis for its motion and identifies those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which demonstrate the absence of a genuine issue of material fact. *See id.* (citations omitted).

ARGUMENT

I. THE ADMINISTRATIVE PROCEDURE ACT REQUIRES THAT AGENCY ACTION BE SET ASIDE WHERE IT IS FOUND TO BE ARBITRARY AND CAPRICIOUS.

Because the Candidate is challenging the FEC's dismissal of the Administrative Complaint, the Court reviews the Agency's final action under the arbitrary and capricious standard of the Administrative Procedure Act ("APA"). *See American Fed. of Labor I*, 177 F. Supp. 2d at 54. The APA provides that "the reviewing court shall…hold unlawful and set aside agency action, findings, and conclusions found to be…arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In applying this standard, the Court must consider whether the FEC has "articulate[d] a satisfactory explanation for [its] action including a rational connection between the facts found and the choice made." *Shays III*, 414 F.3d at 97 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). An agency's action is arbitrary and capricious, therefore, if the Agency:

> relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the Agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Shays I, 337 F. Supp. 2d at 53-54. In short, such action should be set aside if it represents "a clear error of judgment." *Id.* at 53; *see Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005) (court should set aside FEC dismissal of Administrative Complaint if "contrary to law" or "an abuse of discretion") (citations omitted)).

Although the arbitrary and capricious standard is "deferential," and a reviewing court should affirm "if a rational basis for the Agency's decision exists," the Court "may not supply a reasoned basis for the Agency's action that the Agency itself has not given." *Shays I*, 337 F. Supp. 2d at 54 (citations omitted). Instead, the Agency must enable the Court "to see what major issues of policy were ventilated and why the Agency reacted to them as it did." *Id.* (quoting *Republican Nat'l Comm. v. FEC*, 76 F.3d 400, 407 (D.C. Cir. 1996)). Further, the "degree of deference" that the Court accords to an agency is determined by "the thoroughness, validity, and consistency of [the] agency's reasoning," *id.* (quoting *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981)), and "agency inconsistency" may be grounds for holding agency action to be arbitrary and capricious. *Shays III*, 414 F.3d at 112 (citation omitted). Agency action also must be set aside as arbitrary and capricious where the Agency entirely fails to articulate any rationale for its choice. *See Shays I*, 337 F. Supp. 2d at 54 (citing *Republican Nat'l Comm.*, 76 F.3d at 407).

II. THE FEC'S FAILURE TO SERVE THE ADMINISTRATIVE COMPLAINT OR CONDUCT AN INVESTIGATION IN THIS MATTER IS ARBITRARY AND CAPRICIOUS BECAUSE IT CONSTITUTES A COMPLETE ABDICATION OF THE AGENCY'S STATUTORY DUTY.

This case presents yet another instance in which the FEC has effected a "complete abdication of [its] responsibility" under the Act. *Shays v. FEC*, 340 F. Supp. 2d 39, 40 (D.D.C. 2004) ("*Shays II*") (denying stay on appeal where FEC promulgated rules that abrogated both congressional intent and public interest). This time, the Agency's "total abdication" arises from its failure to take the most rudimentary steps mandated by the Act and its own regulations in response to the filing of the Candidate's Administrative Complaint. Comp. ¶ 72. Specifically, as the FEC admits, it did not even notify most Respondents that a complaint had been filed against them – much less did it serve them or seek their response.[2] FEC Answer ¶ 2. Instead, the FEC dismissed this matter, nearly two years after it was commenced, without conducting any investigation whatsoever, thereby undermining the congressional intent embodied in FECA, as well as the public interest in ensuring that millions of dollars in corporate and labor union funds are not illegally used to influence federal elections.

A. The FEC's Failure to Serve the Administrative Complaint on Respondents Violates the Plain Language of the Act and the FEC's Own Regulations.

The FEC's failure to serve Respondents in this case was contrary to law because it violates the unambiguous language of the Act. "Within 5 days after receipt of a complaint," the Act states, "the Commission shall notify, in writing, any person alleged in the complaint to have committed…a violation." 2 U.S.C. § 437g(a)(1)) (emphasis added). Not surprisingly, given its use of the term "shall," the D.C. Circuit has construed the foregoing provision to be mandatory. *See American Fed. of Labor II*, 333 F.3d at 170 ("When the [FEC] receives a sworn complaint

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[2] The FEC failed to notify or serve the following Respondents, each of whom is clearly named in the Administrative Complaint: Terry McAuliffe; John Edwards; the 18 state Democratic Parties that filed or materially supported complaints challenging Nader-Camejo 2004 nomination petitions; the 95 lawyers and 53 law firms that filed or materially supported such complaints; Service Employees International Union; and the individual officers, employees or agents of the Section 527 Respondents. AR00001-02; AR00020-43. The FEC notified and served only the following Respondents: Americans for Jobs; National Progress Fund; The Ballot Project, Inc.; Uniting People for Victory; America Coming Together ("ACT"); the DNC; and Kerry-Edwards 2004, Inc.

alleging that an election law violation has occurred, it must first notify the alleged violator and give it an opportunity to respond to the accusation") (emphasis added). Thereafter, the Agency reviews "the complaint and any responses filed thereto to determine whether there is 'reason to believe' that a violation of FECA has occurred or is about to occur." *American Fed. of Labor I*, 177 F. Supp. 2d at 52 (quoting 2 U.S.C. § 437g(a)(2)) (emphasis added); *see also Hagelin*, 411 F.3d at 239.

The FEC's failure to serve Respondents in this case also violates the Agency's own regulations. *See* 11 C.F.R. § 111.5(a) (specifying that FEC "shall within five (5) days after receipt notify each respondent that the complaint has been filed…and enclose a copy of the complaint") (emphasis added). The only exception to this requirement arises where an initial review reveals that a complaint is not in "substantial compliance with the technical requirements" set forth in the FEC's regulations. *Id.* (citing 11 C.F.R. § 111.4). Even in such cases, however, the FEC must "notify the complainant and any person(s) or entity(ies) identified … as respondents" that no action will be taken. 11 C.F.R. § 111.5(b). Further, "a copy of the complaint shall be enclosed" with such notice. *Id.* (emphasis added).

In this case, the FEC does not contend that it failed to serve the majority of Respondents based on any technical defect in the Administrative Complaint, nor did it notify the Candidate and the Respondents that it was taking no action due to such a defect, as it would have been required to do. *See id.* Instead, the FEC admits that it failed to serve the Administrative Complaint upon certain Respondents "until a few months after it was filed due to an administrative oversight," and further admits that it failed to "treat all of the over 100 individuals and entities referenced in the Administrative Complaint as respondents required to respond to the complaint." FEC Answer ¶ 2. Because such delay or complete failure to serve the Administrative

Complaint "violates the plain meaning" of the Act and the FEC's own regulations, it is "arbitrary, capricious and contrary to law." *American Fed. of Labor I*, 177 F. Supp. 2d at 59; *see also Everett v. United States*, 158 F.3d 1364, 1367 (D.C. Cir. 1998) (agency interpretation of own regulation will not prevail where inconsistent with plain terms). Therefore, the Agency's dismissal of the Administrative Complaint should be set aside, and the matter remanded with instructions that the FEC notify and serve Respondents as required by the Act and its own regulations.

B. The FEC Cannot Provide Any Rationale for Its Failure to Serve the Administrative Complaint on Respondents.

The FEC's failure to serve the Administrative Complaint on a majority of Respondents in this case is also arbitrary and capricious because "the Agency has not … articulated any rationale for its choice." *See Shays I*, 337 F. Supp. 2d at 54 (quoting *Republican Nat'l Comm.*, 76 F.3d at 407). At most, the FEC's First General Counsel's Report ("FGCR") makes oblique reference to certain factors relating to the case, but never actually states that they form the basis for its inaction. The FEC has therefore failed to "articulate a satisfactory explanation for [its] action including a rational connection between the facts found and the choice made." *Shays III*, 414 F.3d at 97 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

The FEC first suggests, in a footnote, that its "general practice" is not to notify "persons and entities" it deems to be "non-respondents" to a complaint. AR01730.05 n.2. Even if that assertion were accurate, however, it would not be relevant, because the persons and entities that the FEC failed to serve in this case are clearly identified as "Respondents" in the Administrative Complaint. *See supra* n.2; AR00001-02, AR00020-43. Moreover, as the FEC acknowledges, the single matter cited to support its assertion of a supposedly "general practice" actually involved "unique circumstances" arising from the claims of a "frequent litigant" who alleged, without

citing "any of the Act's specific limitations…or prohibitions," that a federal judge had decided patent and copyright cases against him in order to benefit President Clinton. *See* FEC First Gen. Cnsl. Rep. at 3-4, *Judge Paul L. Friedman*, MUR 5237 (Feb. 25, 2002).

The FEC also hints that its failure to serve Respondents might be justified if their conduct were only "remotely related to the subject matter of the Act," or if the Administrative Complaint contained only "conclusory legal allegations" pertaining to them. AR01730.05 n.2. If the Agency actually intends such claims to serve as its rationale in this case, however, it is simply incorrect. The FEC failed to serve Respondents who are specifically alleged to have violated specific provisions of the Act. AR00090-98. While the merits of those allegations are discussed *infra* at Part III.A-C, that fact alone suffices to establish that the FEC's failure to serve such Respondents was contrary to law. *See supra* Part II.A; *see also American Fed. of Labor I*, 177 F. Supp. 2d at 52 n.4 (defining a respondent as "any person alleged in the complaint to have committed a violation of FECA") (citing 2 U.S.C. § 437g(a)(1), (3)).

The only other inkling of a rationale for the FEC's failure to serve Respondents, as required by the Act and its own regulations, is suggested by the Agency's FGCR, which acknowledges that the Administrative Complaint "name[s] over 150 persons and entities," but states:

> Originally, it appeared that the complaint might be duplicative of previous MURs dismissing similar allegations, and, in order to reserve resources, as well as to comply with the practice of avoiding over-notification, we initially notified only the DNC and the Kerry Committee of the complaint.

AR01730.06. Setting aside the FEC's dubious claim that it has discretion to disregard the Act's mandatory language requiring that it serve a complaint on each respondent, the simple fact is that the instant matter is <u>not</u> duplicative of any previous MUR, as the Agency now concedes. AR01730.06. Moreover, the mere fact that the Administrative Complaint names more than 150

Respondents provides no support for the FEC's failure to serve them – particularly where each one is specifically alleged to have violated specific provisions of the Act. AR00090-99. The scope of the Administrative Complaint is commensurate with the scope of Respondents' violations, which arise from a nationwide effort planned and coordinated by Respondents in Washington, D.C. and executed by additional Respondents in 18 states, many of whom deliberately concealed the coordinated nature of their conduct, necessitating specific pleading and evidence to refute such concealment. AR00043-90.

The "rationale" advanced by the FEC for its failure to serve Respondents in this matter thus boils down to its willful disregard for the Act's requirements, in order to "reserve resources" for unspecified purposes. AR01730.06. That is a plainly unsatisfactory explanation for the Agency's inaction. *See Shays III*, 414 F.3d at 97. As the FEC has demonstrated, it is perfectly capable of prosecuting cases far more voluminous than the instant matter. *See*, *e.g.*, *American Fed. of Labor I*, 177 F. Supp. 2d at 53 & n.7 (describing FEC investigation of "more than 150" respondents and third-party witnesses, involving "numerous subpoenas" and "45,000 to 55,000 pages" of documents). In short, therefore, the FEC has failed to provide any satisfactory rationale for its choice not to serve Respondents, and the Agency's action should be set aside on that basis, too.[3]

C. The FEC's Failure to Serve the Administrative Complaint Is a Radical Departure From the Agency's Established Practice.

The lack of any satisfactory rationale to justify the FEC's failure to serve Respondents in this case is critical, because that "choice" represents a radical departure from the Agency's

established practice, as mandated by the Act and its own regulations. *See Shays III*, 414 F.3d at 112 (describing "agency inconsistency" as a possible "reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the [APA]") (citation omitted). As the D.C. Circuit has observed, the FEC's "sole purpose" is to regulate those who "act, speak and associate for political purposes," and the Agency has exclusive jurisdiction over such conduct. *American Fed. of Labor II*, 333 F.3d at 170. Plainly, however, the FEC cannot accomplish its purpose if it fails to notify individuals and entities when a complaint is filed against them. The FEC's action in this matter should therefore be set aside on the additional ground that the Agency's departure from established practice undermines its sole purpose, as well as the congressional intent and public interest embodied in FECA.

III. THE FEC'S DISMISSAL OF THE ADMINISTRATIVE COMPLAINT IS ARBITRARY AND CAPRICIOUS BECAUSE IT IS CONTRARY TO LAW.

The FEC does not dispute any of the material facts set forth in the Administrative Complaint, nor could it, because the Agency dismissed this matter without conducting any investigation whatsoever. AR01810-11. Indeed, in its Answer to the Complaint that the Candidate filed in this Court, the FEC repeatedly concedes that it is "without knowledge or information sufficient" to dispute the underlying allegations in this matter. FEC Answer at 1-16. The only question presented by the instant motion with respect to those allegations, therefore, is whether, assuming that they are true, they provide reason to believe that Respondents violated the Act. *See Shays II*, 340 F. Supp. 2d at 41 n.1 ("Generally speaking, district courts reviewing

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[3] The FEC's inability to provide a rationale for its decision not to serve Respondents apparently caused the agency considerable confusion, and necessitated the filing of an Amended Administrative Record in this matter. *See* FEC's Notice of Filing Amended Administrative Record, *Nader v. FEC*, No. 10-cv-00989-HHK (D.D.C. 2010). In a memorandum of "errata" submitted therewith, AR01730.01, the FEC deletes language in its original FGCR, which recommends that the agency "Dismiss the complaint as to all other people or entities named in the complaint, as supplemented," in order to account for its failure to serve those Respondents. AR01683.

agency action under the APA's arbitrary and capricious standard do not resolve factual issues, but operate instead as appellate courts resolving legal questions") (citation omitted). If so, the FEC had a statutory obligation to "proceed with an investigation." *American Fed. of Labor II*, 333 F.3d at 170 (citing 2 U.S.C. § 437g(a)(1), (2)).

The tortured reasoning that the FEC relied upon to dispose of this matter demonstrates that the Agency clearly did have reason to believe that Respondents violated the Act. Indeed, the FEC's factual and legal analysis is an exercise in selective amnesia, with the Agency examining each allegation and piece of evidence in the Administrative Complaint anew, in isolation from all the others, and inevitably concluding that, "without more," such individual allegations and pieces of evidence fail to establish that Respondents committed a single violation. AR01730.01-1730.79. In each case, however, there is more – *much* more – alleged in the Administrative Complaint, which the FEC simply disregarded.

Furthermore, while the FEC casually attributes its delay in serving several Respondents and its complete failure to serve most others as an "administrative oversight," FEC Answer ¶ 2, that dereliction of its most basic statutory duty was no harmless error. On the contrary, it provided the FEC with the faulty foundation on which the Agency's entire disposition of this matter rests. *See infra* Part III.A-C. Rather than "stamp[ing] the [FEC's] 'business-as-usual' tactics and…delay with the judicial imprimatur of approval," this Court should set aside the Agency's dismissal and remand this matter for further proceedings. *Shays II*, 340 F. Supp. 2d at 41.

A. The FEC Had Reason to Believe That Count 1 Alleges Violations of the Act, and Therefore Its Dismissal of Those Claims Without Serving the Relevant Respondents or Conducting an Investigation Was Arbitrary and Capricious.

Count 1 of the Administrative Complaint alleges that Respondents DNC, 18 state or local Democratic Parties, Kerry-Edwards 2004, The Ballot Project, at least 95 lawyers from 53 law firms, and an unknown number of DNC and state Democratic Party employees jointly engaged in an effort to deny Nader-Camejo ballot access and prevent them from participating as candidates in the 2004 presidential election, and that these Respondents collectively spent nearly $1 million and solicited more than $2 million more in unreported and illegal corporate in kind contributions and expenditures for this purpose, in violation of 2 U.S.C. §§ 434,441a and 441b. AR00090-93. The FEC's own General Counsel concluded that these claims are "based on a viable theory."[4] AR01730.08; AR01730.10. Nevertheless, the FEC dismissed Count 1 in spite of that conclusion, because it supposedly lacked sufficient information to proceed with an investigation.

The Administrative Complaint, the FEC contended, fails to specify "which firms allegedly provided free services or to whom, which of those firms are incorporated, and of those, which firms compensated their attorneys who worked on the ballot challenges." AR01730.10. This assertion is patently false: the Administrative Complaint clearly specifies that Respondent law firms "provided their legal services for the benefit of the Kerry-Edwards Campaign," and that, with one named exception, the 95 Respondent lawyers "apparently received normal compensation from their law firm employers." AR00092. Further, the Administrative Complaint identifies each Respondent law firm and lawyer by name and provides their addresses. AR00022-39. If the FEC actually doubted whether a particular Respondent law firm were incorporated, therefore, it could have resolved such doubt with nothing more than an internet connection and a few keystrokes.

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[4] The FEC does not appear to have addressed the claim that the state Democratic Party Respondents violated 2 U.S.C. § 441a(d). AR00093.

The FEC also imposed an improper burden on the Candidate by requiring direct evidence amounting to proof that Respondent law firms compensated Respondent lawyers who challenged Nader-Camejo nomination papers. AR01730.10. To trigger the FEC's statutory duty to conduct an investigation, the Candidate was only required to provide the FEC with "reason to believe" that Respondents may have violated the Act. *See American Fed. of Labor II*, 333 F.3d at 170 (citing 2 U.S.C. § 437g(a)(1), (2)). Further, no complainant has access to the billing records of private law firms. By contrast, the FEC easily could have obtained the relevant information by serving the administrative compliant upon the law firm Respondents, as it was required by law to do, and seeking their response. *See supra* Part I.A-C. Failing that, the FEC could have subpoenaed the necessary documents. *See American Fed. of Labor II*, 333 F.3d at 178.

The FEC declined to make such rudimentary inquiries because it speculated that "any free attorney services may have been provided by volunteers without any sponsorship from their employers," and that "without such information, there is no reason to believe a violation of the Act occurred, and therefore insufficient grounds to investigate the 2004 activities and billing practices" of the Respondent law firms. AR01730.10. Such reasoning is plainly circular: the FEC declined to investigate Respondent law firms' billing practices because it lacked information regarding Respondent law firms' billing practices. *See Shays I*, 337 F. Supp. 2d at 87 (finding "circular and conclusory" analysis to be arbitrary and capricious). The FEC was presented with specific and credible allegations that Respondents violated the Act, based on a legal theory that its own General Counsel deemed to be viable, and the Agency therefore had a statutory duty to investigate. *See American Fed. of Labor II*, 333 F.3d at 170.

The FEC's reasoning is also wrong as a matter of law. The value of legal services that Respondent law firms provided falls under the Act's volunteer exception only if the attorneys

employed by the law firms received no compensation for the services rendered. 2 U.S.C. 431(8)(B)(i). Respondent lawyers who received the usual compensation from their employer law firms while providing such services, by contrast, are not volunteers but paid employees, and the value of their services constitutes an in kind contribution by the Respondent law firms. 2 U.S.C. 431(8)(A)(ii) (the term 'contribution' includes "the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose"); *see* FEC Advisory Opinion ("AO") 2006-22 (law firm's payment of compensation to firm employees for legal services rendered to political committee free of charge is a contribution). Therefore, contrary to the FEC's assertion, AR01730.10, Respondent lawyers cannot be considered "volunteers" if they received normal compensation from Respondent law firms while working on Respondents' challenges.

Even Respondent lawyers who qualified as volunteers under the Act by taking unpaid leaves of absence would still be prohibited from using corporate law firm resources, including office space, office equipment, office supplies and support staff services. Only one out of 95 named Respondent lawyers claimed to have taken such leave, and even that attorney appears to have used prohibited corporate resources. AR00085, AR00092. Because the applicable law and evidence in the record both contradict the FEC's conclusion regarding the claims in Count 1, its dismissal lacks any "rational basis," and should be reversed. *Shays I*, 337 F. Supp. 2d at 87 (citation omitted).

With respect to Respondent Reed Smith, the FEC erred yet again by failing to serve or investigate the firm on ground that the allegations against it are "contradictory." AR01730.10. On the contrary, the allegations that Reed Smith billed its services to "charity, without charging any client," and that Respondent DNC retained the firm during the 2004 election, are not

mutually exclusive. AR01730.10-1730-11. Instead, the DNC could have – and did in fact – retain Reed Smith and pay the firm $136,142, AR00083, while by its own admission, Reed Smith *also* provided an additional $1 million in unpaid legal services in connection with Respondents' Pennsylvania challenge. AR00620. Because the FEC's dismissal of the claims against Reed Smith rest on nothing more than a logical fallacy, they too find "no support in the record," and should be set aside. *Shays III*, 414 F.3d at 102.

Furthermore, the First Supplement and Second Supplement provided the FEC with undisputed evidence that Respondents' Pennsylvania challenge, which Reed Smith filed, was prepared using funds and resources misappropriated from the taxpayers of Pennsylvania, for the benefit of Respondent Kerry-Edwards 2004. AR00609-728; AR01732-90. Nevertheless, the FEC simply disregarded certain evidence, *compare*, *e.g.*, AR01733 *with* AR01730.42 n.1 *and* AR01730.55 n.1, and further asserted that such conduct "does not constitute a FECA violation." AR01730.42 n.1 *and* AR01730.55 n.1. Taxpayer funds and resources plainly fall within the Act's definition of a contribution as "anything of value," however, and Respondents' failure to report the value of such contributions thus violated the Act. 2 U.S.C. §§ 431(8)(A)(i), 434. The FEC's failure to serve and investigate Reed Smith was therefore contrary to law and an abuse of discretion.

B. The FEC Had Reason to Believe That Count 2 Alleges Violations of the Act, and Therefore Its Dismissal of Those Claims Without Serving the Relevant Respondents or Conducting an Investigation Was Arbitrary and Capricious.

Count 2 alleges that Respondents SEIU and ACT made illegal and unreported contributions in connection with their effort to prevent the Nader-Camejo Campaign from accessing Oregon's ballot. The FEC deemed the allegations supporting Count 2 to be "insufficient," because "the available information" does not establish that SEIU and ACT

coordinated their Oregon efforts with Respondents DNC or Kerry-Edwards 2004. AR01730.44; AR01730.57. Given that the FEC did not serve the Administrative Complaint on SEIU, however, the record cannot support that conclusion. AR01730.05. On the contrary, evidence in the record contradicts the FEC's conclusion. The fact that SEIU's Secretary-Treasurer is a DNC official, for instance, plainly establishes a factual predicate providing reason to believe that the two organizations may have coordinated Respondents' Oregon efforts – particularly in view of evidence that the DNC was coordinating similar efforts in other states. AR00076. The FEC nevertheless rejected such evidence on the ground that it does not, "without more," establish coordination. AR01730.45. There is "more," of course, but the FEC simply failed to investigate, as it was required by law to do. *See American Fed. of Labor II*, 333 F.3d at 170 (citing 2 U.S.C. § 437g(a)(1), (2)).

Moreover, even if it were true that ACT and SEIU did not coordinate with the DNC and Kerry-Edwards 2004, the Act prohibits labor organizations such as SEIU from making any "contribution *or expenditure* in connection with any election at which presidential and vice presidential electors…are to be voted for." 2 U.S.C. § 441b(a) (emphasis added). Therefore, SEIU's expenditures to influence the 2004 presidential election, as alleged in Count 2, violate the Act whether or not the labor union coordinated with the DNC and/or Kerry-Edwards 2004, 2 U.S.C. §§ 431(9)(A), 441b(a). By disregarding such violations, the FEC erred as a matter of law.

The FEC is obviously aware of the Act's distinction between a "contribution" and an "expenditure," because the Agency itself applied the distinction in its analysis of whether ACT committed the violations alleged in Count 2. AR01730.68-69. Indeed, the FEC appears to concede that it had reason to believe that ACT – and therefore SEIU – made expenditures in connection with Respondents' efforts to deny the Nader-Camejo Campaign ballot access in

Oregon, because the Agency "determined not to proceed further" with respect to such violations, on the ground that ACT is "essentially defunct." AR01730-69. Even if that rationale were valid with respect to ACT, however, it is plainly inapplicable to SEIU, and cannot excuse the FEC's disregard of the labor union's prohibited expenditures.

The FEC's arbitrary and capricious dismissal of the claim that SEIU made an unreported and unlawful contribution of $1 million to the DNC is even clearer. This claim relies, in part, on two of SEIU's own documents, one of which states that "SEIU gave $1 million to the DNC and has made large donations to groups that share our goals," and another that states, "SEIU contributed $1,000,000 to fund various DNC activities." AR00518-526. The FEC nevertheless dismissed this claim – without making any inquiry of SEIU – on the ground that such statements have "a number of possible meanings," and that it "seems unlikely" that SEIU would commit such a violation. AR01730.45.

To support such speculation, the FEC asserted that the foregoing claim "has been generally refuted by SEIU in a prior MUR." AR01730.45. (citing MUR 5612). That is patently false. The claim was never even addressed in MUR 5612 – much less was it "refuted". The FEC also noted that its "disclosure database does not reveal any direct contributions by SEIU itself to the DNC," and asserted that "we have no information to the contrary." AR01730.46. SEIU's apparent failure to report its prohibited contribution to the DNC, however, is one of the violations that SEIU allegedly committed. AR00093-94. Furthermore, the FEC certainly *could* have had information to confirm the alleged violation, had it served the Administrative Complaint on SEIU as required by law, and conducted an investigation.

C. The FEC Had Reason to Believe That Count 3 Alleges Violations of the Act, and Therefore Its Dismissal of Those Claims Without Serving the Relevant Respondents or Conducting an Investigation Was Arbitrary and Capricious.

Count 3 alleges that the Section 527 Respondents National Progress Fund, Uniting People for Victory, The Ballot Project and Americans for Jobs, as well as the individual named Respondents who served as their officers, directors or agents, violated the Act by failing to register their Section 527 organizations, and by failing to comply with the Act's reporting requirements, prohibitions and limitations.[5] AR00040-43; AR00098. The FEC asserted "prosecutorial discretion" to justify its dismissal of Count 3, on the ground that the Section 527 Respondents are "defunct." AR01730.59; AR01730.73; AR01730.76; AR01730.78. Even if the Agency had such discretion, however, this rationale is plainly inapplicable to the individual named Respondents.

The FEC also asserted that "the age of the alleged violations would create problems of proof and raise obstacles under the five-year statute of limitations." The Administrative Complaint was filed on May 30, 2008, however – only three and one-half years into the applicable five-year statute of limitations. The FEC's position thus renders the statute of limitations established by FECA a nullity. Moreover, it was the FEC's own "administrative oversight" that delayed service of the Administrative Complaint on The Ballot Project and ACT for several months after it was filed (albeit still well within the five-year statutory period). Even that delay need not present "problems of proof," however, because the Administrative Complaint meticulously documents the violations alleged in Count 3 by citation to the relevant, publicly available IRS documents and other materials, and even itemizes each unlawful contribution that the individual named Respondents accepted on behalf of their Section 527 organizations.

[5] The FEC erroneously asserted that Plaintiff alleges that ACT failed to register as a political committee. AR01730.65-1730.66. In fact, the Administrative Complaint makes that allegation against the Section 527 Respondents National Progress Fund, Uniting People for Victory, The Ballot Project and Americans for Jobs – not ACT. AR00008-20; AR00098.

AR00008-20. The FEC could easily confirmed such violations simply by verifying the evidence included in the Administrative Complaint.

Because the record does not support the FEC's conclusory assertion that it would encounter "problems of proof," its wrongful dismissal of Count 3 was not only contrary to law, but a clear abuse of discretion. The FEC's failure to investigate the apparently knowing and willful violations alleged in Count 3 rewards the individual named Respondents who committed them, while penalizing Plaintiff for the scope of such violations, and for Respondents' attempts to conceal them. Therefore, the FEC's wrongful dismissal of Count 3 was arbitrary and capricious.

CONCLUSION

For the foregoing reasons, the Candidate's Motion for Summary Judgment should be granted, the Federal Election Commission's dismissal of the Administrative Complaint should be set aside, and this matter should be remanded for further proceedings consistent with the Act's requirements. Further, Plaintiff should be awarded reasonable costs and attorneys' fees pursuant to 28 U.S.C. § 2412(d)(1)(A).

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Respectfully Submitted,

/s/Oliver B. Hall

Oliver B. Hall, Esquire
D.C. Bar No. 976463
1835 16th Street NW
Washington, D.C. 20009
(617) 953-0161
oliverbhall@gmail.com
Counsel of Record