UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UTILITY WORKERS UNION OF AMERICA, LOCAL 369, AFL-CIO, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Case Number: 09-cv-01022-JDB REPLY

REPLY IN SUPPORT OF DEFENDANT FEDERAL ELECTION COMMISSION'S MOTION TO DISMISS THE COMPLAINT

The Opposition and Conditional Motion for Leave to Amend filed by Plaintiff Utility Workers Union of America, Local 369, AFL-CIO ("Opposition") confirms that plaintiff's complaint should be dismissed. The Opposition expressly affirms that Plaintiff Utility Workers Union of America, Local 369, AFL-CIO ("Local 369") "does not challenge the FEC's interpretation of 'solicitation'" (Opp'n at 5 (internal quotation marks omitted)), and acknowledges that the Court may set aside the Federal Election Commission's ("Commission") dismissal of Local 369's administrative complaint only if the Commission's decision was "contrary to law" (*id.* at 3). As explained below, the Opposition demonstrates that Local 369's quarrel with the Commission concerns the parties' conflicting assessment of a document attached to Local 369's Complaint. Because the Court is not required to accept as true Local 369's conclusory characterization of that document, the content of which is undisputed, but instead must defer to the Commission's reasonable application of the relevant law to the facts presented in Local 369's administrative complaint, the Commission's motion to dismiss should be granted.

The Opposition contends that dismissal is unwarranted here, however, because (1) Local 369 believes that the language in the Covanta Policy "encourages or facilitates contributions to the Covanta federal PAC" (Opp'n at 2), and (2) the Commission's "dual claims that [it] (a) is accorded substantial deference; and (b) acted reasonably in dismissing the [administrative] Complaint . . . do not belong in a motion to dismiss" (Opp'n at 5). Local 369 "misunderstand[s] the role the district court plays when it reviews [an] agency action." *Marshall County Health Care Auth. v. Shalala*, 988 F.2d 1221, 1225 (D.C. Cir. 1993). In a case like this one, the district court "sit[s] as an appellate tribunal [and] the legal questions raised by a 12(b)(6) motion and a motion for summary judgment are the same," *id.* at 1222-23, and Local 369's inaccurate and conclusory characterizations of a document that it attached to the Complaint are insufficient to survive dismissal.

ARGUMENT

I. THE QUESTION BEFORE THE COURT IS WHETHER THE COMMISSION REASONABLY APPLIED ITS UNDISPUTED INTERPRETATION OF "SOLICITATION"

Local 369's action against the Commission under 2 U.S.C. § 437g(a)(8) seeks review and reversal of the Commission's dismissal of Local 369's administrative complaint. The question before the Court on the Commission's motion to dismiss, therefore, is whether the Commission's dismissal of Local 369's administrative complaint was "contrary to law," *i.e.*, whether it was "'sufficiently reasonable' to be accepted by a reviewing court," *FEC v. Democratic Senatorial Campaign Comm.* ("*DSCC*"), 454 U.S. 27, 39 (1981) (citations omitted) — *not* whether this Court, in the first instance, could independently find that Local 369's allegations are sufficient to conclude that there is reason to believe that Covanta violated the Federal Election Campaign Act ("FECA"). *Id.; see also Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005) (explaining that

"'extremely deferential standard'" applies to "FEC's determination that a complaint failed to establish 'reason to believe'"). In other words, to affirm the Commission's dismissal of Local 369's administrative complaint, the Court need not conclude that the Commission's decision was the same one "the court would have reached if the question initially had arisen in a judicial proceeding." *DSCC*, 454 U.S. at 39.

Local 369 apparently misunderstands this distinct "role the district court plays when it reviews agency action." *Marshall County*, 988 F.2d at 1225. Like the appellants in *Marshall County*, Local 369 appears to assert that its claim that "the FEC erred in dismissing [its] administrative complaint" (Opp'n at 2) is "similar to factual allegations — allegations [Local 369 is] entitled to 'prove' as if the complaint alleged" that a Commissioner negligently committed a tort. *See Marshall County*, 988 F.2d at 1225 (rejecting appellants' contention that their claim that Secretary of Health and Human Services "acted arbitrarily and capriciously" is "entitled to [be] 'prove[n]' as if the complaint alleged that the Secretary, driving her car negligently, had run into one of [appellants'] hospitals"). But this assertion is wrong. "The district court sits as an appellate tribunal" in cases such as this one, *id.*, and "[t]he entire case on review is a question of law, and only a question of law," *id.* at 1226. "And because a court can fully resolve any purely legal question on a motion to dismiss, there is no inherent barrier to reaching the merits at the 12(b)(6) stage." *Id.* "[Local 369's] complaint, properly read, actually presents no factual allegations, but rather only arguments about the legal conclusion to be drawn about the agency action." *Id.* Thus, although Local 369 is correct that "a Rule 12(b)(6) Motion deals only with the 'legal sufficiency of a claim'" (Opp'n at 5), it fails to recognize that in this case, "the sufficiency of the complaint is the question on the merits, and there is no real distinction in this context between the question presented on a 12(b)(6) motion and a motion for

summary judgment." *Marshall County*, 988 F.2d at 1226. Local 369 is thus mistaken in its assertion that the Commission's "dual claims" concerning deference to the Commission's administrative decision and the reasonability of that decision "do not belong in a motion to dismiss." (Opp'n at 5.)

II. LOCAL 369 CANNOT SURVIVE A MOTION TO DISMISS BY RELYING UPON ITS OWN CONCLUSORY CHARACTERIZATIONS OF THE FACTS

A. The Court Need Not Accept As True Local 369's Legal Conclusions

"[T]he tenet that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements." *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 1937, 1940 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Nor does that tenet apply to "a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

The Opposition ignores this precedent and simply asserts that "the Court should accept as true" Local 369's legal conclusion "that the Covanta Handbook encourages or facilitates contributions to the Covanta federal PAC." (Opp'n at 2.) But Local 369 cannot avoid judgment against it simply by mischaracterizing this legal question as a "disputed question of fact."[1] (Opp'n at 2.) Indeed, in this case, there are no facts in dispute: Local 369's entire claim is based on the undisputed contents of the Covanta Policy, a document that Local 369 has attached to and incorporated in the Complaint. "As there is no dispute as to the facts of this case, the matter is appropriate for disposition on the basis of the pleadings and attached documents." *Orenbuch v.*

[1] If this argument were correct, any plaintiff could defeat a motion to dismiss in an action under 2 U.S.C. § 437g(a)(8) simply by mischaracterizing the Commission's legal conclusion as a disputed fact, even in cases like this one where there is no dispute about the facts concerning the entity that allegedly violated the law.

Computer Credit, Inc., No. 01 Civ. 9338 JSM, 2002 WL 1918222, at *1 (S.D.N.Y. Aug. 19, 2002) (granting Rule 12(b)(6) motion to dismiss).

Nor is Local 369 correct that the Court simply must accept as true what plaintiff calls "mixed question[s] of law and fact." (Opp'n at 4 (emphasis omitted).) The Supreme Court has held that "where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited." *Nat'l Labor Relations Bd.* ("*NLRB*") *v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 131 (1944), *overruled in part on other grounds, Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992). Thus, even if viewed as a "mixed question," the Commission's specific application of its own interpretation of the meaning of "solicitation" in the administrative proceeding below "is to be accepted if it has 'warrant in the record' and a reasonable basis in law." *Id.* *See also Fulani v. FCC*, 49 F.3d 904, 912 (2d Cir. 1995) (applying "'reasonable basis' standard" in reviewing Federal Communication Commission determination that a "broadcaster exercise[d] 'sufficient control over the content and format of [a] program'") (citing *NLRB*, 322 U.S. at 130-31; *In re Request of U.S. News and World Report, L.P., for Declaratory Ruling*, 2 F.C.C.R. 7101, 7102 (1987)). "This standard of scrutiny prescribes 'deference' by th[e] court to the agency's judgment." *Fulani*, 49 F.3d at 912. Local 369's contention that the Court simply must accept "as true" all of the Complaint's allegations, including what plaintiff calls "mixed question[s] of law and fact" (Opp'n at 4 (emphasis omitted)), fails to accord any deference to the Commission's decision and emasculates the "contrary to law" standard, which all parties agree applies here. (*See* Opp'n at 3.) *See also Hagelin*, 411 F.3d at 242; *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986).

Moreover, Local 369's assertion is flawed not only because of its conclusory nature but, more fundamentally, because it misstates the question before the Court. As indicated *supra* in Section I, the question here is not, in the first instance, whether "the Covanta Handbook encourages or facilitates contributions," but instead whether the Commission's prior determination of the answer to that question — its dismissal of Local 369's administrative complaint — was reasonable.[2] Although Local 369 characterizes the Commission's arguments concerning *Chevron* deference and the reasonability of the Commission's underlying administrative decision as constituting "[t]he bulk of the Motion," the Opposition responds to neither argument, save for the erroneous assertion that such arguments "do not belong in a motion to dismiss" (Opp'n at 5), and the straw-man claim that the Commission "is not entitled to so much deference that any petition for review of its actions must be dismissed at the complaint stage" (*id.* at 2).[3]

B. The Commission Reasonably Concluded That The Covanta Policy Does Not Solicit Contributions

Local 369's basis for opposing dismissal rests primarily on its *characterizations* of the Covanta Policy, not on any disputed facts about what that Policy states. The Policy, which is attached to and incorporated in Local 369's Complaint, is itself properly before the Court in deciding the motion to dismiss, and the language in the Policy speaks for itself. *See Tellabs, Inc.*

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[2] Local 369's inclusion of a separate motion for leave to amend the Complaint in the caption of its Opposition was unnecessary. In any event, Local 369's proffered amendment — to add an allegation "explicitly alleg[ing] that the FEC's dismissal of Local 369's complaint was unreasonable, as well as unlawful" — would not cure the Complaint's fatal defect.

[3] The Commission has never suggested that "*any* petition for review of its actions must be dismissed at the complaint stage." (Opp'n at 2 (emphasis added).) Instead, the Commission has simply invoked the applicable legal standard — which Local 369 asks the Court to eschew — that requires dismissal of actions such as this one because the reasonableness of the agency's underlying administrative decision must be upheld based on the complaint, the materials incorporated within it, and the applicable law. (*Compare* Mem. at 7, *with* Opp'n at 5.)

v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007) (citing 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (3d ed. 2004 and Supp. 2007)); *Marshall County*, 988 F.2d at 1226. Courts are "not obliged to reconcile plaintiffs' own pleadings that are contradicted by other matters . . . incorporated by reference by a plaintiff in drafting the complaint." *Fisk v. Letterman*, 401 F. Supp. 2d 362, 368 (S.D.N.Y. 2005); *see also IAC/InterActivCorp Sec. Litig.*, 478 F. Supp. 2d 574, 585 (S.D.N.Y. 2007) ("Nor should a court accept allegations that are contradicted or undermined by . . . written materials properly before the court.").

The Opposition identifies no reason for the Court to reject the Commission's interpretation and to hold instead that Local 369's proffered conclusion is the only reasonable one: that, in its view, the Covanta Policy "*effectively* invites contributions to Covanta's federal PAC." (Compl. ¶ 31 (emphasis added).) As explained in the Commission's Memorandum, Local 369 makes that assertion in part by inaccurately paraphrasing the actual language in the Covanta Policy, changing the subject of the sentence in question and inserting additional words in that sentence. (*See* Mem. at 11.) The Commission reasonably determined that the actual language of the Covanta Policy — a general description of Covanta's policy regarding political contributions that included the clause "contributions to the PAC by eligible employees are voluntary" (Compl. Attach. A, Ex. 11, at 11) — neither encourages nor facilitates contributions. (*See also* Mem. at 5-6, 10-11.) The Opposition's mere reiteration of Local 369's contrary conclusion is insufficient to challenge the reasonableness of the Commission's determination. *See Northwest Coal. for Alternatives to Pesticides v. Lyng*, 673 F. Supp. 1019, 1024 (D. Or. 1987).

C. Local 369 Still Fails To Identify Any Mention of Covanta's State PAC in the Covanta Policy

The Opposition likewise fails to clarify the purported connection between "a solicitation of contributions to Covanta's State PAC and the alleged solicitation of contributions to the Federal PAC at issue in the Complaint." (Opp'n at 5.) Although the Commission's Memorandum specifically cited Local 369's "fail[ure] to identify, let alone explain, the supposed link between the Covanta Policy and any Covanta state PAC solicitation" (Mem. at 13), even in its Opposition Local 369 still fails to identify the supposedly relevant portions of the Covanta Policy, instead simply reasserting that "Covanta's Handbook references *all* of its political activities, whether state or federal in nature" (Opp'n at 5 (emphasis in original).) Here, too, the *actual* language in the Covanta Policy fails to substantiate Local 369's characterization. And Local 369 simply ignores the Commission's clarification that "even if such a link existed, the presence of an indirect solicitation to Covanta's *state* PAC would not constitute a solicitation to Covanta's *federal* PAC." (Mem. at 13 (emphasis added).)

D. Directing Questions About Political Contributions to Covanta's General Counsel Does Not Constitute a Solicitation

The Opposition also fails to address the relevant authority contradicting Local 369's claim that a statement directing inquires about political contributions to Covanta's General Counsel amounts to a solicitation for contributions. As explained in the Commission's Memorandum, "[t]he Commission has repeatedly concluded that a corporate communication 'may engender some inquiries' about the company's separate segregated fund, including 'from readers who are not solicitable,' without being deemed a solicitation." (Mem. at 13-14 (citing FEC Advisory Op. 2000-07, 2000 WL 725744, at *1, *3; FEC Advisory Op. 1982-65, *available at* http://saos.nictusa.com/aodocs/1982-65.pdf).) Rather than distinguishing this authority,

Local 369 simply offers its own conclusion to the contrary. (Opp'n at 6.) A difference of opinion on the Commission's application of a standard that the Commission has developed, however, does not amount to a colorable challenge to the reasonableness of the Commission's legal conclusion. (Mem. at 8 (citing *DSCC*, 454 U.S. at 39; *Northwest Coal. for Alternatives to Pesticides*, 673 F. Supp. at 1024).)

E. Local 369 Does Not Deny That Its Interpretation Would Undermine Measures Designed To Ensure That Contributions Are Made Voluntarily

The Opposition completely fails to reply to the Commission's explanation of the policy dilemma posed by Local 369's interpretation of 2 U.S.C. § 441b(b)(3) and 11 C.F.R. § 114.5(a), which help ensure that contributions to separate segregated funds are made voluntarily. (*See* Mem. at 14-15.) To be sure, a decision finding that a corporation violated the FECA and Commission regulations by advising its employees of the voluntary nature of any contributions they make to the corporation's federal PAC would conflict with the fundamental objective of the very provisions Local 369 seeks to invoke.

CONCLUSION

For the foregoing reasons and those explained in the Commission's Memorandum, the Commission respectfully requests that this Court dismiss the Complaint with prejudice for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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