UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

ALLIANCE FOR DEMOCRACY, HEDY EPSTEIN, and BEN KJELSHUS Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	)	Civil Action No. 02-0527 (EGS)

DETAILED DISCOVERY PLAN AND AUTHORITY IN SUPPORT THEREOF

Introduction

The dispute in this case is whether Defendant Federal Election Commission ("FEC") has acted contrary to law by its failure to resolve the investigation of a simple administrative complaint, designated Matter Under Review ("MUR") 5181 by Defendant for administrative purposes, in twenty months (and counting). On March 8, 2001, Plaintiffs Alliance for Democracy, Hedy Epstein, and Ben Kjelshus filed with Defendant an administrative complaint alleging serious violations of the nation's campaign finance laws by the campaign committee and leadership PAC of sitting-Attorney General John Ashcroft during his 2000 Missouri Senate campaign. Specifically, Plaintiffs complained that Mr. Ashcroft's leadership PAC, "Spirit of America," impermissibly contributed a fundraising list of 100,000 donors, valued between $100,000 and possibly more than $2 million, to Ashcroft's 2000 Senate campaign in Missouri and that neither the PAC nor the campaign committee reported the contribution. Plaintiffs contend that Defendant's failure to act expeditiously in resolving this simple administrative complaint is contrary to law.

At the July 12, 2002 Initial Status Conference before the Court, Plaintiffs informed the Court that, pursuant to Fed.R.Civ.P. 26, they intended to take discovery of Defendant as well as limited third-party discovery. Defendant insisted that Plaintiffs were entitled to no discovery beyond a chronology of actions and events undertaken by Defendant in connection with MUR 5181. As a result, the Court stated its intention "to allow the plaintiffs to file a proposed discovery plan that will inform the court of the reasons for any additional discovery that the plaintiffs would like to take, the need for any additional discovery and the reasons for any additional discovery, and . . . [required Plaintiffs] to be very precise about the need for and the reasons for [additional discovery]." Transcript of Initial Status Conference, at 29-20. The Court then issued Orders on July 12, 2002, and October 18, 2002, requiring Plaintiffs to submit this Detailed Discovery Plan.[1]

Detailed Discovery Plan

In a "failure to act" case pursuant to 2 U.S.C. § 437g(a)(8)(A), the Court determines whether Federal Election Commission ("FEC") delay of investigation and resolution of an administrative complaint is reasonable by reference to standards generally applicable to review of agency inaction. See In re: National Congressional Club, 1984 WL 148396, Case Nos. 84-5701, 84-5719 (D.C. Cir. Oct. 24, 1984) (citing Common Cause v. Federal Election Comm'n, 489 F. Supp. 738, 744 (D.D.C. 1980) and Telecommunications Research & Action Center v.

[1] The July 12, 2002 Order required Plaintiffs to propound interrogatories and a detailed discovery plan by August 15, 2002. Because there was motion practice regarding an appropriate protective order, Defendant did not (and could not) provide the chronology to Plaintiffs until the Court decided the motion and entered its own protective order. As a result, Plaintiffs were unable to draft their interrogatories and discovery plan with sufficient detail and the Court granted an extension of time until 17 days after the entry of a protective order. Upon issuing a protective order on October 18, 2002, the Court also issued another order requiring Plaintiffs to propound their interrogatories and detailed discovery plan by November 4, 2002.

FCC, 750 F.2d 70 (D.C. Cir. 1984) ("TRAC")). The general standard is guided by the following factors:

> (1) the time agencies take to make decisions must be government a rule of reason; (2) where Congress has provided a timetable or other indication of the speech with which it expects the agency to proceed in the enabling statute, that statutory scheme may support content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

TRAC, 750 F.2d at 80. In the context of FEC inaction, however, the Court specifically considers "the credibility of the allegation, the nature of the threat posed, the resources available to the agency, and the information available to it, as well as the novelty of the issues involved." Common Cause, 489 F. Supp. at 744.

Pursuant to Rule 26, Federal Rules of Civil Procedure, Plaintiffs intend to take the following listed discovery relevant to the TRAC and Common Cause factors in order to meet their burden under the standards set forth in those cases. Plaintiffs' understanding of the Court's Order is that Plaintiffs must provide a sufficiently detailed discovery plan to Defendant so that Defendant will have enough information to object to particular categories of discovery and/or to argue to the Court that the discovery sought is not available in a lawsuit pursuant to 2 U.S.C. § 437g(a)(8). The discovery listed below does not include the chronology of events and actions undertaken in connection with MUR 5181 that Defendant has already provided in the Declaration of Greg J. Mueller, filed under seal with the Court on July 29, 2002, and which Defendant contends is the only permissible discovery in this lawsuit. An explanation of the need for the discovery listed below and the authority demonstrating the propriety of such discovery also follow.

1. 20 Interrogatories (attached as Exhibit A), as permitted by the Court's July 12, 2002 and October 18, 2002 Orders;

2. Rule 34 Document Requests that seek (1) all documents reviewed in preparing the Declaration of Greg J. Mueller filed under seal with the Court on July 29, 2002, [**redacted**] (2) all documents reviewed, referred to, or identified in responding to any of the interrogatories served by Plaintiffs on the FEC, including but not limited to the responses to interrogatories 3 and 18; (3) all documents explaining, discussing, or referring to the Enforcement Priority System used by the FEC; (4) all documents referring or relating to the FEC's evaluation of MUR 5181 in accordance with the criteria of the Enforcement Priority System; (5) [**redacted**]; (6) any organizational charts of the Office of General Counsel at the FEC; and (7) [**redacted**];

3. 30(b)(6) deposition of Defendant regarding MUR 5181, [**redacted**], the enforcement process, alternate dispute resolution, the Enforcement Priority System, interrogatory responses provided, and documents produced;

4. 30(b)(6) deposition of Spirit of America PAC regarding current and planned future political activity, creation of the donor list at issue in MUR 5181, and transfer of the donor list at issue in MUR 5181 to Ashcroft 2000;

5. 30(b)(6) deposition of Ashcroft 2000 regarding receipt of the donor list at issue in MUR 5181 and rental of the list to other entities;

6. Requests for Admissions; and

7. Any further discovery relevant to Plaintiffs' claims, not yet anticipated, that Plaintiffs' taking of the discovery listed above brings to light.

Need for Listed Discovery

I. Discovery from Defendant

Without discovery from Defendant, Plaintiffs will have limited ability to make a showing that Defendant failed to act expeditiously, as required by the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431 et seq., and will have limited ability to make a showing of the five Common Cause factors -- the credibility of the allegation, the nature of the threat posed, the resources available to the agency, and the information available to it, as well as the novelty of the issues involved – [**redacted**].[2]

The following are non-comprehensive examples of the types of information that are available via additional discovery from Defendant, which are not available from the chronology of events and actions undertaken in connection with MUR 5181 already provided to Plaintiffs by Defendant.

First, a comparison of the carefully tailored interrogatories, served by Plaintiffs concurrently with this Detailed Discovery Plan and Authority in Support Thereof, with the chronology reveals that the interrogatories seek information that is not included in the chronology. Indeed, by allowing Plaintiffs 17 days from the filing of the sworn chronology so that information from the chronology could be reflected in the interrogatories, see Transcript of Initial Status Conference, at 34-35, the Court itself appears to have contemplated that the

[2] Notwithstanding the assertion by Defendant's counsel at the July 12, 2002 initial status conference that "expeditiously" is no longer the standard, see Transcript of Initial Status Conference, at 20 ("Expeditiously is in the old cases. That word doesn't exist in the Act anymore. The Act was amended and the word expeditiously was removed.") (emphasis in original), a case decided soon after "expeditiously" was removed from § 437g(a) determined that the "expeditious" standard survived the amendment of § 437g(a). See Rose v. Federal Election Comm'n, 608 F. Supp. 1, 31 (D.D.C. 1984) (Memorandum Order on Reconsideration after

interrogatories would seek information beyond what is contained in the chronology. The interrogatories include specific questions going directly to the resources available to the FEC [**redacted**], the information available to the FEC [**redacted**], and the novelty of the issues involved in MUR 5181. Responses to the interrogatories are clearly required for Plaintiffs to make their case to the Court.

Next, although the total universe of what Plaintiffs would learn by reviewing the requested documents is unknown, it is clear that the documents at a minimum will shed light on the Common Cause factors. [**redacted**] Finally, a review of documents regarding or relating to the Enforcement Priority System, and its application to MUR 5181, would provide information about the decision-making process [**redacted**] at the FEC that the chronology simply does not provide.

Additionally, Plaintiffs plan to take a 30(b)(6) deposition of Defendant to discover further detail about and make sense of the interrogatory responses provided; for explanation, identification, and authentication of the documents; and for [**redacted**].

Finally, for reasons of efficiency and judicial economy, see Fed.R.Civ.P. 1, Plaintiffs plan to serve Requests for Admissions pursuant to Fed.R.Civ.P. 36 prior to any motions for summary judgment.

II. Discovery from Spirit of America PAC

Spirit of America PAC is a leadership PAC, formed by current Attorney General John Ashcroft in 1996. See Walter Pincus, "Possible Ashcroft Campaign Violation," Washington Post, at A4 (February 1, 2001). According to the Center for Responsive Politics, leadership PACs are political action committees created by congressional leaders as a way to gain clout

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reversal by In re Nat'l Congressional Club, 1984 WL 148396 (D.C.Cir.)); see also 2 U.S.C. § 437d(a)(9).

with their colleagues by helping fund other members' campaigns. See http://www.opensecrets.org/pubs/law_bagtricks/loop8.asp. The formation of a leadership PAC is often indicative of a politician's aspirations for higher office, including the presidency. See id.; http://www.opensecrets.org/pacs/pacfaq.asp. According to press accounts, Ashcroft formed Spirit of America to raise money for conservative candidates while he explored his prospects for a presidential run. See Pincus, "Possible Ashcroft Campaign Violation," supra.

Plaintiffs plan to take the 30(b)(6) deposition of Spirit of America PAC in order to discover evidence regarding the "credibility of the allegation" in MUR 5181 and the "nature of the threat posed" by Defendant's inaction. Plaintiffs plan to ask questions regarding the creation of the donor list at issue in MUR 5181, the cost of its creation, the transfer of the donor list, any compensation received for transfer of the donor list to Ashcroft 2000, and why the transfer was not reported in disclosure forms, in order to discover evidence in support of the credibility of their allegations. Plaintiffs also plan to ask questions about Spirit of America's past as well as future political activity to determine the potential for repetition of the violation alleged in MUR 5181 during future campaigns.

III. Discovery from Ashcroft 2000

Finally, Plaintiffs plan to take the 30(b)(6) deposition of Ashcroft 2000. Like the planned 30(b)(6) deposition of Spirit of America PAC, Plaintiffs will ask questions regarding receipt and rental of the donor list at issue in MUR 5181 in order to discover evidence in support of the credibility of their allegations.

IV. Discovery from Unknown Sources

At this stage of litigation, prior to reviewing any discovery, it is impossible for Plaintiffs to know the universe of discovery that may be relevant to their claims against the FEC. Plaintiffs do not wish to waive their ability to take discovery that could not have been anticipated at this

point in time from Defendant, Spirit of America PAC, Ashcroft 2000, or anyone else, and the relevance of which will only become apparent through the discovery listed and explained above.

Authority Demonstrating Propriety Of Listed Discovery

Rule 26 governs and allows broad discovery in all civil matters, and there is no reason to depart from it here. Plaintiffs' counsel has found no case law regarding § 437g(a)(8) that suggests that there should be restrictions on the permissible type of discovery. After researching 33 different federal agencies, Plaintiffs' counsel was able to find only one other agency with an enforcement provision comparable to § 437g(a)(8), and could not find any case law restricting (or discussing) discovery in such enforcement proceedings. The two agencies that counsel for the FEC, at the July 12, 2002 scheduling conference, stated were comparable to the FEC – the Securities Exchange Commission ("SEC") and the Equal Employment Opportunity Commission ("EEOC") – are not comparable in any way to § 437g(a)(8) enforcement actions regarding FEC inaction. Overall, the only somewhat analogous case law regards the Administrative Procedure Act, which allows and governs judicial review of the inaction of *other* agencies. Case law regarding the Administrative Procedure Act supports the plaintiffs' contention that there should not be limits on discovery in this matter.

I. RULE 26, FEDERAL RULES OF CIVIL PROCEDURE, ALLOWS BROAD DISCOVERY IN CIVIL CASES AND THERE IS NO REASON TO DEPART FROM THE RULE.

The Federal Rules of Civil Procedure specifically apply to *all* civil cases in United States district courts, excluding only those cases listed in Rule 81. Fed. R. Civ. P. 1. Rule 81 does not exclude enforcement cases under §437g(a)(8) from the purview of the Federal Rules of Civil Procedure. See Rule 81(a) (listing specific proceedings to which the Federal Rules of Civil Procedure do not apply: prize proceedings in admiralty; bankruptcy proceedings; copyright

proceedings; mental health proceedings in the District Court for the District of Columbia; proceedings to review orders of the Secretary of Agriculture, the Secretary of the Interior, and the Petroleum Control Board; and proceedings to enforce orders of the National Labor Relations Board). Thus, the Federal Rules of Civil Procedure – including Rule 26, which governs discovery in civil matters – applies to the case before this Court.

Rule 26 allows broad discovery, permitting "discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party." Fed.R.Civ.P. 26(b). The rule is given a liberal construction. Schlagenhauf v. Holder, 379 U.S. 104, 114-115 (1964). It allows the Court to limit discovery, but only if the discovery is "unreasonably cumulative or duplicative" or "obtainable from some other source that is more convenient, less burdensome, or less expensive," if "the party seeking discovery has [already] had ample opportunity . . . to obtain the information sought," or if "the burden or expense of the proposed discovery outweighs its likely benefit." Fed.R.Civ.P. 26(b)(2). Upon motion and a showing of good cause by a party from whom discovery is sought, the Court may also preclude discovery "to protect a party or person from annoyance, oppression, or undue burden or expense." Fed.R.Civ.P. 26(c)(1). None of the permissible reasons to limit discovery delineated by the Federal Rules of Civil Procedure is applicable here.

Moreover, there is no case law regarding § 437g(a)(8) or any other federal agency that suggests the Court should depart from Rule 26. Indeed, what case law exists suggests that Plaintiffs are entitled to any discovery "that is relevant to the claim or defense of any party." Under this rule, Plaintiffs would clearly be entitled to the discovery listed in this document because each of these items is relevant to a claim or defense in this litigation, as explained above on pages 4-8, supra.

A. There is No Case Law Regarding § 437g(a)(8) Cases That Suggests Rule 26 Is Inapplicable.

There is no case law regarding § 437g(a)(8) that suggests the Court should depart from Rule 26. Plaintiffs' counsel found only one case, Walther v. Federal Election Comm'n, 82 F.R.D. 200 (D.D.C. 1979), that applies the relevancy standard in a § 437g(a)(8) case, but it did so in a way that is not applicable to the case before this Court. In Walther, the plaintiffs challenged the FEC's dismissal of multiple administrative complaints rather than the FEC's failure to act on the complaints. Because the information before the FEC is the universe of what is necessary for a court to review the dismissal of a complaint, the Court concluded that the third-party discovery at issue was not relevant because the "sole issue . . . concern[ed] the decision of the FEC." Id. at 202. The same is not true of a failure to act case, where the FEC does not have the relevant information before it. Moreover, to the extent Walther ever applied to failure to act cases (like the case before this Court) rather than to dismissal cases alone, Walther is no longer good law. Five years after Walther, the D.C. Circuit Court decided In re: National Congressional Club, Case Nos. 84-5701, 84-5719, 1984 WL 148396 (D.C. Cir. Oct. 24, 1984), the seminal case that outlined the factors that the Court considers in evaluating "failure to act" claims. Under the legal standard outlined by the D.C. Circuit and now applicable, it would be virtually impossible for Plaintiffs to prove their case without discovery of third parties. For example, Plaintiffs require third-party discovery to establish the nature of the threat posed as well as the credibility of the allegations. Thus, Plaintiffs' proposed third-party discovery – like their proposed discovery directed to the FEC -- satisfies the relevancy standard of both Rule 26 and Walther.[3]

[3] It is not clear to Plaintiffs whether Defendant has standing to protest Plaintiffs' proposed third-party discovery. See, e.g., Smith v. Midland Brake, Inc., 162 F.R.D. 683, 685 (D.Kan. 1995); Oliver B. Cannon & Son, Inc. v. Fidelity & Casualty Co. of NY, 519 F.Supp. 668, 680 (D.Del. 1981). Nevertheless, in the interest of a comprehensive submission and to provide assistance to the Court, Plaintiffs have briefed the issue of third-party discovery as if Defendant

Simply stated, Walther demonstrates that the Rule 26 relevancy standard is appropriate but its finding that third-party discovery is not permissible is either limited to § 437g(a)(8) dismissal claims or cannot survive the D.C. Circuit's decision in In re National Congressional Club.

B. There Is No Other Specific Federal Agency Whose Statutory or Case Law Suggests That the Court Should Depart From Rule 26.

In a review of 33 federal agencies, Plaintiffs' counsel was able to locate only one statute comparable to § 437g(a)(8) that authorizes citizen-enforcement lawsuits regarding an agency's failure to act in a timely manner.[4] As with the enforcement provision in FECA, however, there is no relevant case law regarding the scope of discovery under this statute. Moreover, the two

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does have standing to object to third-party discovery. In doing so, Plaintiffs do not concede that Defendant has standing to argue against third-party discovery.

[4] In response to this Court's request, Plaintiffs' counsel undertook an investigation of 33 different federal agencies to determine whether any were subject to procedures comparable to § 437g(a)(8) of FECA. Plaintiffs' counsel researched the following federal agencies: Administration on Aging; Administration for Children and Families; Agricultural Marketing Service; Architectural & Transportation Barriers Compliance Board; Census Bureau; Bureau of Indian Affairs; Bureau of Land Management; United States Commission on Civil Rights; Commodities Futures Trading Commission; Consumer Product Safety Commission; Office of Fair Housing & Equal Opportunity; Federal Bureau of Prisons; Federal Communications Commission; Federal Consumer Information Center; Federal Deposit Insurance Corporation; Federal Maritime Commission; Food & Drug Administration; Food Safety & Inspection Service; Grain Inspection, Packers, & Stockyards Administration; Health Resources & Services Administration; Mine Safety & Health Administration; National Highway Transportation Safety Administration; National Labor Relations Board; National Transportation Safety Board; Occupational Safety & Health Administration; Office of Surface Mining Reclamation and Enforcement; Patent & Trademark Office; Pension & Welfare Benefits Administration; Securities & Exchange Commission; and Small Business Administration.

Plaintiffs' counsel narrowed the list to these 33 agencies from an initial list of approximately 450 references, found on the web page "A-Z Index of All Federal Agencies" within the website www.firstgov.gov. From this list of approximately 450 references, Plaintiffs' counsel removed duplicate entries, cabinet departments, defense and diplomacy-related entities, ceremonial offices, judicial entities, and public corporations (like Voice of America). Plaintiffs' counsel viewed the websites of the vast majority of the remaining entities to determine the likelihood that each would take public complaints and, for those agencies that it seemed likely, Plaintiffs' counsel did further web site and statutory research. Plaintiffs' counsel also conducted several searches of the U.S. Code on Westlaw and of all leading administrative law treatises for variations on the language in 2 U.S.C. § 437g(a)(8), and failed to find any analogous reference other than 30 U.S.C. § 1281(g).

agencies identified at the July 12 conference as comparable to the FEC by the FEC's counsel – the SEC and the EEOC -- are not comparable with respect to citizen enforcement provisions. Therefore, no analogous statutory or case law regarding any particular federal agency suggests that the Court should deviate from Rule 26.

1. Although the Office of Surface Mining Reclamation and Enforcement is subject to a similar enforcement provision, there is no case law regarding the permissibility of discovery in such proceedings and therefore no reason to depart from Rule 26.

The Office of Surface Mining Reclamation and Enforcement in the Department of the Interior is subject to a specific enforcement provision allowing an affected party to seek review of unlawful delay by that agency. Under the enforcement provision, "any party with a valid legal interest . . . who is aggrieved" may seek review of inaction by the Secretary of the Interior in designating federal land as either suitable or unsuitable for noncoal mining. See 30 U.S.C. § 1281(g) ("Any party with a valid legal interest who has appeared in [certain surface-mine reclamation] proceedings … and who is aggrieved by the Secretary's decision (or by his failure to act within a reasonable time) shall have the right of appeal by review by the United States district court….") (emphasis added). The similarity of the procedural enforcement mechanism of 30 U.S.C. § 1281(g) to § 437g(a)(8), however, provides no additional insight into the scope of permissible discovery under § 437g(a)(8) because Plaintiffs' counsel was unable to find any case law regarding the topic for cases brought under 30 USC § 1281(g). At a minimum, however, this statute provides no reason to deviate from the norm of Rule 26, Federal Rules of Civil Procedure.

2. Because SEC Procedures Do Not Provide Relevant Guidance For The Permissibility of Discovery In This Litigation, There is No Reason to Depart from Rule 26.

At the July 12 conference before the Court, counsel for the FEC suggested that the FEC and the SEC are similar to each other. Although there are similarities in the structure, authority,

and jurisdiction of the two agencies, these similarities are unrelated to judicial review of the agencies' failure to act in a timely manner. For example, both agencies have the authority to investigate violations of the statutes that regulate the field in which they operate and have subpoena authority to aid such investigations. Compare 2 U.S.C. § 437d(a)(1) with 15 U.S.C. § 78u(b). Both agencies also have rule-making authority. Compare 2 U.S.C. § 437d(a)(8) with 15 U.S.C. § 78w. The similarities between the agencies, however, do not include their obligations to private citizens who make complaints.

FECA provides a procedure by which citizens can ensure that the FEC acts on the administrative complaints that they have filed. 2 U.S.C. § 437g(a)(1). There is no comparable statutory mandate on the SEC to act on "a complaint" filed by "[a]ny person." Although the SEC maintains a "complaint center" to process complaints made by members of the public, some of which lead to investigations, the mechanism of receipt and processing of such complaints is not a system created by Congress and no statute requires the SEC to actually investigate each complaint. See SEC, SEC Complaint Center, *at* http://www.sec.gov/complaint.shtml. Rather, the SEC has discretion to investigate whenever it deems necessary. See 15 U.S.C. § 78u ("The [SEC] may, in its discretion, make such investigations as it deems necessary…").

Likewise, SEC inaction on any particular complaint made by a member of the public is not subject to judicial review. As for most agencies, review of SEC conduct is available only upon issuance of a "final order" by the SEC. 15 U.S.C. § 78y. While review of such conduct is similar to review of FEC inaction in that it may be triggered by "[a] person aggrieved" by an order, 15 U.S.C. § 78y(a)(1), there is no provision for an aggrieved person to challenge the SEC's failure to issue a final order—precisely the sort of review allowed under § 437g(a)(8)(A) and sought here. See, e.g., Amalgamated Clothing & Textile Workers Union v. SEC, 15 F.3d

254, 256 (2d Cir. 1994) (discussing when SEC action is "final" for purposes of judicial review). Thus, case law relating to the SEC sheds no light on the discovery question before this Court.

3. Because EEOC Procedures Do Not Provide Relevant Guidance For The Permissibility of Discovery In This Litigation, There is No Reason to Depart from Rule 26.

Counsel for the FEC also identified the EEOC as similar to the FEC. Like the SEC, the EEOC bears certain structural and investigative similarities to the FEC, but the judicial consequences of EEOC inaction is quite unlike that regarding the FEC. For example, the EEOC "shall make an investigation" "[w]henever a charge is filed by or on behalf of a person claiming to be aggrieved," just as the FEC is obliged to act on an administrative complaint. In initial action on such a charge, the EEOC must attempt informal conciliation methods, none of which are to be made public by the agency. 42 U.S.C. § 2000e-5(b). By law, the EEOC is barred from making public any charge filed or information obtained by investigating a charge until proceedings are instituted in court, 42 U.S.C. § 2000e-8(e). Again, this is similar to the procedures surrounding the FEC's duty to handle an administrative complaint. Here, however, the resemblance ends.

If the EEOC fails to act on a complaint within a certain time or declines to bring a civil action against the party complained against after investigating a charge, a person aggrieved (either the initial claimant, if any, or "any person whom the charge alleges was aggrieved by the alleged unlawful … practice") may bring his or her own civil action against the party complained against, 42 U.S.C. § 2000e-5(f)(1), but not against the EEOC. That is, a complainant's remedy for EEOC inaction is not enforcement against the EEOC itself, but rather is a private right of action to challenge the allegedly offensive conduct against the subject of the administrative complaint. Thus, civil suits following EEOC inaction are entirely unlike § 437g judicial review actions and are not instructive regarding the discovery question before this Court.

II. THE ADMINISTRATIVE PROCEDURE ACT PROVIDES THE CLOSEST ANALOGOUS LAW REGARDING THE SCOPE OF PERMISSIBLE DISCOVERY, AND ITS RELEVANT CASE LAW SUPPORTS UNLIMITED DISCOVERY.

At the July 12 scheduling conference, the Court asked counsel what discovery is permitted when the Court reviews inaction by other administrative agencies. Most other agencies are subject to the procedures and remedial scheme of the Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq. (2002). Compare 5 U.S.C. § 706 (scope of APA review of agency action) with 2 U.S.C. § 437g(a)(8) (FECA enforcement provision); see also Stockman v. Federal Election Comm'n, 138 F.3d 144, 155-156 & n. 18 (5th Cir. 1998) (noting that judicial review of FEC inaction is not available under APA). Nevertheless, because the APA is generally applicable to agency inaction, the case law regarding discovery under the APA is the closest analogue to the issue before this Court. Cf. In re: National Congressional Club, Case Nos. 84-5701, 84-5719, 1984 WL 148396 (D.C. Cir. Oct. 24, 1984) (looking at, inter alia, APA case law to determine legal standard by which FEC inaction should be judged).

This Court must undertake a level of review akin to (but more thorough than) that under an APA challenge. Under the APA, the Court must determine whether agency inaction is "not in accordance with law" or "arbitrary and capricious." See 5 U.S.C. § 706(2)(A). Ruling on a § 437g(a)(8) complaint, this Court determines whether the FEC's failure to act is "contrary to law"; the D.C. Circuit has interpreted this language as equivalent to the standards of the APA. See Common Cause v. Federal Election Comm'n, 906 F.2d 705, 706 (D.C. Cir. 1990) (challenging FEC complaint dismissal); Common Cause, 489 F. Supp. at 744. Accordingly, the Court should rule that the FEC must provide at least as much discovery as the APA would oblige in an action challenging a decision not to act made by another agency.

As a general rule, the APA requires that a court reviewing agency inaction "shall review the whole record." 5 U.S.C. § 706.[5] Courts have determined that "the whole record" includes "any document that might have influenced the agency's decision." See Bethlehem Steel Corp. v. United States Environmental Protection Agency, 638 F.2d 994, 1000 (7th Cir. 1980) (quoting Nat'l Courier Ass'n v. Bd. of Governors of the Federal Reserve System, 516 F.2d 1229, 1241 (D.C. Cir. 1975)); see also Portland Audubon Soc'y v. Endangered Species Committee, 984 F.2d 1534 (9th Cir. 1993) ("'The whole record' includes everything that was before the agency pertaining to the merits of its decision."). It is well settled that a court must have access to a complete administrative record, and "the agency may not unilaterally determine the scope of the record by leaving out records detrimental to its case." National Treasury Employees Union v. Seidman, 786 F. Supp. 1041, 1046 (D.D.C. 1992) (citation omitted); see also Natural Resources Defense Council v. Train, 519 F.2d 287, 291 (D.C. Cir. 1975) (reversing district court that limited review to a partial record). Special documents prepared for litigation are no substitute for the actual record before an agency at the time of its action or inaction. See, e.g., Crowley's Yacht Yard, Inc. v. Peña, 886 F. Supp. 98 (D.D.C. 1995) (finding three affidavits filed in lieu of administrative record inadequate to allow proper APA review of agency's rulemaking and vacating resulting rule as arbitrary and capricious). Thus, for example, the chronology already provided by the FEC is clearly insufficient to satisfy the FEC's discovery obligations in this case. Rather, Plaintiffs and this Court are at a minimum entitled to view everything considered by the FEC [**redacted**]regarding this matter. This would include all documents, as detailed above, that Plaintiffs will seek by a Rule 34 document request.

[5] It is this section of the APA, by explicitly stating that the Court shall review the "whole record," that modifies the otherwise liberal construction given to Rule 26 and generally limits discovery in APA cases to the administrative. It is worth noting that there is no comparable limiting statutory language within FECA.

The APA also allows discovery beyond "the whole record" in "cases where agencies are sued for a failure to take action," the type of APA closest to the § 437g(a)(8) claim before this Court. See Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989); cf. Cobell v. Babbitt, 91 F.Supp.2d 1, 38 (D.D.C. 1999) ("Extrinsic evidence is appropriate for consideration when the processes utilized and factors considered by the decisionmaker require further explanation for effective review."), aff'd, 240 F.3d 1081 (D.C. Cir. 2001); Allick v. Lujan, Case No. 89-2269, 1990 WL 108999 (D.D.C. July 17, 1990) (allowing discovery beyond record because challenged agency decision was result of "relatively informal, less structured process" and therefore "precise boundaries or the applicable administrative record may be less clear"). Such discovery beyond the record includes any information that "shed[s] light on the factors and considerations relied upon by the agency." Esch, 876 F.2d at 992. Thus, Plaintiffs are entitled to go beyond the record at the FEC and take the third-party discovery, detailed above, all of which shed light on the factors and considerations that case law indicates should have been relied upon by the FEC.

CONCLUSION

For the foregoing reasons, this Court should not depart from the Federal Rules of Civil Procedure and should allow Plaintiffs to conduct the discovery outlined above in their detailed discovery plan.

Date: November 4, 2002

Respectfully Submitted,

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