

**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

JOHN HAGELIN <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 1:04-cv-00731 (HHK)
)	Judge Henry H. Kennedy, Jr.
FEDERAL ELECTION COMMISSION,)	
)	
Defendant.)	
)	

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The Plaintiffs, by and through their counsel, hereby move for summary judgment pursuant to Fed. R. Civ. P. 56. As detailed in the Memorandum of Points and Authorities accompanying this motion, the Defendant's dismissal of the administrative complaint in *Hagelin et al. v. FEC*, Matter Under Review 5378, was arbitrary, capricious and contrary to law based on undisputed facts in the record. Therefore, the Plaintiffs request that the court grant their summary judgment motion; declare that the Defendant's dismissal was contrary to law; order that the Defendant's finding of no reason to believe is reversed; and order that the Defendant proceed to a probable cause determination within thirty (30) days. A proposed order also accompanies this motion.

Date: June 15, 2004

Respectfully submitted,

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**PLAINTIFFS’ MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

The presidential debates are a central part of the election campaign, “broadcast on national television, watched by millions of Americans, and widely covered by the media.” *Fulani v. League of Women Voters Educ. Fund.*, 882 F.2d 621, 626 (2d Cir. 1989) *quoted in Buchanan v. FEC*, 112 F. Supp. 2d 58, 65 (D.D.C. 2000). Federal laws and regulations require that the sponsor of these debates be a non-profit, non-partisan organization. *See* 11 C.F.R. 110.12 and 11 C.F.R. 114.4(f)(1). Only under this condition is a debate sponsor permitted to solicit and spend unlimited corporate donations for the debates.

Plaintiffs, in an administrative complaint filed nearly one year ago, presented Defendant Federal Election Commission (“FEC” or “Commission”), with compelling evidence that the Commission on Presidential Debates (“CPD”) is a partisan organization and has used millions of dollars in corporate contributions to conduct the presidential debates in a partisan manner, in violation of federal law. The evidence included the CPD’s admitted policy of excluding all third-party candidates from entering the 2000

debate halls, even if they had a ticket, and a “face-book” of prominent third-party candidates that the CPD created and distributed for that purpose. It also included evidence that the major parties founded the CPD and that prominent Democratic and Republican party leaders continue to direct and run the organization.

Plaintiffs, including past and present presidential and vice-presidential candidates and political parties, asked Defendant to protect the 2004 presidential election process by investigating and seeking to end the CPD’s partisan control of the debates. They asked Defendant to enforce federal laws that protect the integrity of the debates – and the broader electoral process – by prohibiting unlimited corporate contributions from being used for partisan purposes in the debates. Indeed, corporate contributions are barred entirely from federal campaigns, *see* 2 U.S.C. §441b(a), in order to prevent “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation with the public’s support for the corporation’s political ideas.” *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990).

The Defendant chose not even to investigate Plaintiffs’ allegations.¹ As detailed below, Defendant accepted the CPD’s purported justification for its exclusion of third-party candidates from the 2000 debates even though it was facially inconsistent, and even though facts in the record discredited the CPD’s rationale. The Defendant did not even consider the additional evidence of the two major party dominance of the CPD, but merely noted that similar evidence had been introduced in a previous case. The

¹ The FEC opens an investigation and conducts discovery after the Commissioners vote to find “reason to believe” that violations have occurred. The Commission’s March 18, 2004 vote to find no “reason to believe,” based solely on Plaintiffs’ complaint and the CPD’s response, precluded an investigation.

Defendant summarily rejected the evidence of the two major parties' control even though in the previous case the Court actually gave credence to the prior evidence, while finding it insufficient *by itself* to prove the CPD's partisanship. *Buchanan v. Federal Election Comm'n*, 112 F.Supp.2d 58, 72 (D.D.C. 2000). Plaintiffs' additional evidence closes the gap.

The Federal Election Campaign Act (FECA) provides for judicial oversight of decisions taken by the Commission, *see* 2 U.S. C. § 437g(a)(8)(A), which is comprised of three Democratic and three Republican commissioners. Pursuant to that provision, Plaintiffs ask this Court to rule that the FEC's dismissal of their administrative complaint is arbitrary, capricious and contrary to law. The need for relief is urgent because the CPD's first debate is scheduled for September 30, 2004, less than four months away.

BACKGROUND

On June 17, 2003 Plaintiffs filed an administrative complaint with the FEC alleging that the CPD operates as a partisan organization and therefore is not qualified under federal law to stage the presidential debates or to raise and spend corporate funds for the debates. *See* Administrative Complaint ("Admin. Compl."), attached as Exh. A to the complaint in this lawsuit ("Fed. Compl."), ¶¶ 8-12.² The administrative

² The exhibits to the Complaint and to Plaintiffs' Memorandum in Support of Summary Judgment are as follows.

Exhibits to the Complaint:

Exh. A: Admin. Compl. and Accompanying Exhibits (Exh. 1, Commission on Presidential Debates' Face-Book; Exh. 2, Deposition of Lewis K. Loss (excerpts) (Oct. 25, 2001); Exh. 3, Deposition of Frank J. Fahrenkopf, Jr. (excerpts) (Dec. 5, 2001); Exh. 4, "About CPD: National Debate Sponsors," and "About CPD: Web Credits" (2002)).

Exh. B: FEC First General Counsel's Report in *Hagelin et. al. v. CPD*, MUR 5378 (Mar. 12, 2004) and Certification (Mar. 18, 2004).

Exh. C: Commission on Presidential Debates' Response to Administrative Complaint (Aug. 8, 2003).

complaint, designated Matter Under Review (MUR) 5378, also alleged that money spent by the CPD to sponsor the debates constituted illegal corporate contributions to the Republican and Democratic Parties, Admin. Compl., ¶ 13, and that the CPD meets the federal definition of a “political committee” and has violated the law by failing to register with the FEC and file reports with the FEC as to its receipts and expenditures. *See* Admin. Compl., ¶¶ 14,15.

The administrative complaint cited numerous facts establishing the Republican and Democratic parties’ control of the CPD to the exclusion of third-parties, including (1) the CPD was founded by the Republican and Democratic Parties; (2) since its founding in 1987, the CPD’s co-chairs have been Frank J. Fahrenkopf, Jr. and Paul G. Kirk, the former heads of the Republican and Democratic Parties’ respective national committees; (3) at least nine of the CPD’s eleven directors are prominent members of the Republican

Exh. D: Deposition of Lewis K. Loss (excerpts) (Oct. 25, 2001);

Exh. E: “Larry King Live” (excerpts) (Oct. 2, 2000).

Exhibits to Plaintiffs’ Memorandum in Support of Summary Judgment:

Exh. 1: FEC First General Counsel’s Report and Certification in *Reform Party et al. v. CPD*, MUR 4987, *Natural Law Party et al. v. CPD*, MUR 5004, and *Mary Wohlford et ano. v. CPD*, MUR 5021 (July 13, 2000) and Corrected Certification (July 20, 2000).

Exh. 2: Memorandum of understanding between Bush/Quayle ’92 and Clinton/Gore ’92 Committees, submitted to the Federal Election Commission on February 19, 2004 in *Open Debates v. CPD*, MUR 5414.

Exh. 3: Memorandum of understanding between Dole/Kemp ’96 and Clinton/Gore ’96 General Committee, Inc., submitted to the Federal Election Commission on February 19, 2004 in *Open Debates v. CPD*, MUR 5414

Exh. 4: Declaration of Plaintiff John Hagelin

Exh. 5: Declaration of Plaintiff Ralph Nader

Exh. 6: Declaration of Plaintiff Patrick Buchanan,

Exh. 7: Declaration of Plaintiff Howard Phillips

Exh. 8: Declaration of Plaintiff Ben Mansky

Exh. 9: Declaration of Plaintiff James Clymer

Exh. 10: Declaration of Plaintiff Winona LaDuke

and Democratic parties; (4) there are no third-party representatives among its directors. Admin. Compl., ¶¶ 9, 11.

Plaintiffs also supplied the FEC with substantial, highly credible evidence of partisan conduct by the CPD in connection with the 2000 presidential debates. This included sworn deposition testimony from CPD officials stating that the CPD decided to exclude all third-party candidates from entering the debate halls of the 2000 presidential debates in 2000, even if they had a ticket. *See* Admin. Compl., ¶¶ 9-10. The testimony shows that the CPD adopted this policy in order to deny these candidates and their parties any “campaigning” opportunities. *See* Exh. 2 to Admin. Compl. at pages 100, line 20 – 101, line 8 (CPD General Counsel Loss testifying, “Our [the CPD’s] concern was that if a third-party candidate who had not qualified for participation in the debate went to the trouble to get a ticket and attend the debate that it would be for the purpose of campaigning in some way, which seemed to imply the potential for disruption.”).

Plaintiffs also provided the FEC with a “face-book” of prominent third-party presidential and vice-presidential candidates that the CPD’s general counsel, Lewis Loss, had prepared and distributed in 2000 so that CPD personnel at the debate-hall doors could recognize the candidates and deny them access to the event even if they had a ticket. *See* Exh. 1 to Admin. Compl.

Finally, additional, compelling evidence further confirms the CPD’s partisan nature and conduct. Using secret Memoranda of Understanding, the two major parties established the terms of the debates in 1992 and 1996, including which candidates may participate; the precise format; and a ban on candidate-to-candidate questioning. *See* 1992 Memorandum of Understanding, Pls. S.J. Exh. 2, and 1996

Memorandum of Understanding, Pls. S.J. Exh. 3. These Memoranda were furnished to the FEC in an administrative complaint filed on February 19, 2004 by the organization Open Debates, designated MUR 5414.

Through these memoranda, the two major parties every four years issue a “take-it-or-leave-it” ultimatum to the CPD: “The debates will be sponsored by the Commission, provided that the Commission agrees to all provisions of this agreement,” and if not, the major party candidates “will immediately use their best efforts to obtain a mutually agreeable alternate sponsor or sponsors....” *See* Pls. S.J. Exh. 2 at 2 and Pls. S.J. Exh. 3 at 1. Thus by accepting the major parties’ terms, the CPD merely implements the Democratic and Republican parties’ agenda for the debates.

The 1996 Memorandum demonstrates the extent to which the two major parties established the terms of the debates. It specifies:

There will be two (2) Presidential debates and one (1) Vice Presidential debate before live audiences. The parties agree they will not (1) issue any challenges for additional debates, (2) appear at any other debate or adversarial forum with any other presidential or vice presidential candidate, or (3) accept any network air time offers that involve a debate format or otherwise involve the simultaneous appearance of more than one candidate.

Pls. S.J. Exh. 3 at 1. It further explicitly excludes all but the two major parties’ candidates: “The parties agree that in the two Presidential debates will be Bill Clinton and Bob Dole. The participants in the Vice Presidential debate will be Al Gore and Jack Kemp.” *Id.* Even in selecting the debate moderator and panelists to question the candidates, the CPD is required to choose from a list dictated by the major parties. *See* Pls. S.J. Exh. 2 at 3-4, 13-16; Pls. S.J. Exh. 3 at 2.

Despite all of the cumulative evidence to the contrary, on March 18, 2004 the Commission voted 5-0, with one recusal, to find no reason to believe that the CPD had violated the relevant laws and regulations and close the file on the case. *See* First General Counsel's Report ("Report") and Certification, Exh. B to Fed. Compl. The Commissioners issued no statement of reasons. However the Report, which recommends the finding of no reason to believe, provides Defendant's rationale for dismissing the case. It dismisses the evidence of the CPD's partisan founding and ongoing control by leaders of the Democratic and Republican parties merely by noting that these had been raised in a previous MUR. *See* Report at 4. The Report acknowledges that the CPD did have a policy of excluding third-party candidates from the 2000 debate halls, but accepts the CPD's defense of its policy as a means taken to prevent disruption of the debates, and finds that it was not motivated by partisanship. *See* report at 5-8.

As discussed in greater detail in the Argument, *infra*, Defendant ignored dispositive evidence to the contrary and obvious omissions and inconsistencies in the CPD's defense of its conduct. *See* Part II:A, *infra*. In addition, Defendant arbitrarily discarded evidence of the two major parties' role in founding and leadership of the CPD merely because it had been presented in a previous case, even though it had not been discredited in the previous case, but merely held insufficient *by itself* to require a "reason to believe" finding. *See Buchanan v. Federal Election Comm'n*, 112 F.Supp.2d 58, 72 (D.D.C. 2000). This evidence of two-party control of the CPD was presented as additional and cumulative to the partisan conduct of the 2000 debates. However, Defendant treated it as a separate "argument," rather than viewing all the evidence as a whole as demonstrating the CPD's partisan nature and conduct.

Plaintiffs were, and continue to be, seriously harmed by Defendant's failure to halt the CPD's partisan conduct of the debates. *See* Admin. Compl., ¶¶ 4-6; Plaintiffs Statement of Material Facts (SMF) ¶¶ 26-41. Plaintiffs include third-party candidates for President and Vice-President who were excluded from the debates in 2000 and the third parties that sponsored these candidates. These parties and their candidates suffered a competitive disadvantage in the 2000 elections due to their exclusion from the debates. One of these candidates, Ralph Nader is running for President as an independent candidate in 2004 and will suffer a competitive disadvantage in his campaign if the CPD is allowed to continue its partisan, exclusionary conduct of the debates. *See* Nader Decl., Pls. S.J. Exh.5. Other former third-party candidates, including Plaintiffs John Hagelin, Patrick Buchanan, and Winona LaDuke, have decided not to run in 2004 in substantial part because the CPD's illegal conduct of the debates places them at an unfair competitive disadvantage with the Republican and Democratic candidates. *See* Hagelin, Buchanan, and La Duke Decls., Pls. S.J. Exhs. 4, 6, and 10.

The Green Party of the United States ("Green Party") and the Constitution Party, both of which fielded candidates for President and Vice-President in the 2000 elections, are also harmed by Defendant's failure to act. The Green Party will hold its presidential nominating convention on June 23-38, 2004. The candidates that it nominates or supports will suffer a competitive disadvantage if the CPD's partisan conduct is allowed to continue. *See* Manski Decl., Pls. S.J. Exh. 8. The Constitution Party will hold its nominating convention on June 23-26, 2004, and its presumed nominee is Michael A. Peroutka. Already, the Constitution Party has secured ballot access in 18 states and has completed or nearly completed the ballot access process in at least four others.

Nevertheless, it expects that its candidates for President and Vice President will suffer a competitive disadvantage due to the CPD's partisan control of the debates and exclusion of third parties. *See* Clymer Decl., Pls. S.J. Exh. 9. Plaintiff Howard Phillips, the Constitution Party's nominee for President in 2000, intends to support the Party's nominee in 2004, and is injured by his chosen candidate's diminished prospects. *See* Phillips Decl., Pls. S.J. Exh. 7.

All of the individual and political-party Plaintiffs have an interest in persuading members of their parties and the public at large that the CPD has unlawfully used large corporate and labor contributions to favor the Republican and Democratic nominees at the expense of third-party and independent candidates. *See* Pls. S.J. Exhs. 4-10. In order to publicize and campaign on this issue, they require an accurate accounting of contributions the CPD has received and expenditures it has made to sponsor the debates. *See id.* Due to Defendant's failure to require the CPD to register as a political committee and report its contributions and expenditures, this information is not available to Plaintiffs.

The CPD has long been planning for the 2004 debates and last year announced its plans to sponsor three presidential debates: on September 30, 2004, at the University of Miami; on October 8, 2004, at Washington University in St. Louis; and on October 13, 2004, at Arizona State University. In addition the CPD plans to sponsor a vice-presidential debate on October 5, 2004, at Case Western Reserve University. *See* CPD Press Release, November 6, 2003, *available at* http://www.debates.org/pages/news_031106.html. The CPD has also begun soliciting financial contributions and other support from corporations and wealthy donors as

sponsors of its debates. The Florida-based Miccosukee Tribe reportedly will put up more than \$1 million to underwrite the debate at the University of Miami. See Robert L. Steinback, "UM to Host 2004's First Presidential Debate," *Miami Herald*, November 7, 2003. Corporate sponsors of the Washington University Debate include A.G. Edwards, Bank of America, BJC HealthCare, and Emerson. See "Washington University in St. Louis hosts the second presidential debate – October 8, 2004," available at <http://debate.wustl.edu>.

ARGUMENT

I. Standard of Review

Summary Judgment is appropriate where "there is no genuine issue as to any material fact and...the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A factual dispute is material only if it "might affect the outcome of the suit under the governing law." *Heller v. Fortis Benefits Insurance Co.*, 142 F.3d 487, 491 (D.C. Cir. 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (1986) (citations omitted). Summary judgment is also appropriate where review is on the administrative record. *City of Williams v. Dombeck*, 151 F.Supp.2d 9, 12 (D.D.C. 2001). Plaintiffs are entitled to summary judgment in this case because no material facts are in dispute.

Plaintiffs may move for summary judgment at this stage of proceedings, even though Defendant is not required to file an answer until July 5, 2004. See Fed.R.Civ.P.

56(a) (allowing summary judgment motion at any time after 20 days from the commencement of the action); *Holtzman v. Richardson*, 361 F. Supp. 544, 548 (E.D.N.Y. 1973) *rev'd. on other grounds sub nom. Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973) (holding that plaintiff may move for summary judgment against United States government at any time after 20 days from the commencement of the action).

II. Defendant FEC's Dismissal of the Administrative Complaint was Arbitrary, Capricious, and an Abuse of Discretion, and Therefore Contrary to Law.

The Commission's finding that the CPD had not engaged in unlawful partisan conduct, and its resulting dismissal of Plaintiffs' complaint, are clearly inconsistent with established facts in the record before the agency. Indeed, the reasoning of the First General Counsel's Report ("Report") fails on its own terms to justify the Commission's decision. Because the dismissal is not based on a reasonable interpretation of the facts, it must be reversed.

The Federal Election Campaign Act of 1974 (FECA), 2 U.S.C. § 437g(a)(8) allows "any party aggrieved by an order of the Commission dismissing a complaint filed by such party" to bring a challenge in court. The standard of review for determining whether the dismissal was proper is whether Defendant acted "contrary to law." 2 U.S.C. § 437g(a)(8)(C). A dismissal is contrary to law if it was arbitrary, capricious, or an abuse of discretion. *Orloski v. Federal Election Comm'n*, 795 F.2d 156, 161 (D.C. Cir. 1986). While this is a deferential standard, upholding FEC decisions for which a rational basis is shown, *id.* at 167, the Court "is not required 'to accept meekly administrative pronouncements clearly at variance with established facts.'" *Antosh v. Federal Elections Comm'n*, 599 F.Supp. 850 (D.D.C. 1984) (quoting *Braniff Airways, Inc. v. Civil Aeronautics*

Board, 379 F.2d 453, 463 (D.C. Cir. 1967)). “[T]he thoroughness, validity, and consistency of an agency’s reasoning are factors that bear upon the amount of deference to be given to an agency’s ruling.” *Federal Election Comm’n v. Democratic Senatorial Campaign Committee* (“DSCC”), 457 U.S. 27, 37 (1981). An agency’s factual determinations “are not final and conclusive unless relevantly supported by the record—an administrative order without factual support is without due process.” *Antosh*, 599 F.Supp. at 853 (quoting *Garvey v. Freeman*, 397 F.2d 600, 610 (10th Cir. 1968)).

The Commission voted 5-0 to adopt the recommendations made in the First General Counsel’s Report (“Report”), *see* Exh. B to the Complaint, with no further statement of reasons from any of the Commissioners. Therefore it is appropriate to rely on the Report in assessing whether there is a rational basis for the Commission’s decision. *See Buchanan v. Federal Election Comm’n*, 112 F.Supp.2d 58, 70 (D.D.C. 2000). As detailed below, the Report is logically inconsistent, ignores relevant and persuasive facts in the record, and fails to provide reasoned factual support for the Commission’s decision. Thus, the Defendant cannot meet “its minimal burden of showing a ‘coherent and reasonable explanation for its exercise of discretion.’” *Carter/Mondale Presidential Comm., Inc. v. Federal Election Comm’n*, 775 F.2d 1182, 1185 (D.C. Cir. 1985) (quoting *MCI Telecom. Corp. v. FCC*, 675 F.2d 408, 413 (D.C. Cir. 1982)).

A. Defendant’s Rejection of Evidence Showing the CPD Sought to Exclude Third-party candidates from the 2000 Debate Halls is Arbitrary, Capricious, and an Abuse of Discretion.

Plaintiffs provided Defendant with evidence that the CPD decided and acted to exclude third-party candidates from entering the debate halls in 2000, even if they had a ticket, in order to deny these candidates an opportunity to campaign before the assembled

media and public. The evidence includes sworn deposition testimony in which CPD officials admit to this policy, and a “face-book” of prominent third-party presidential and vice-presidential candidates which the CPD’s general counsel, Lewis Loss, prepared and distributed in order to implement the policy. *See* Admin. Compl., ¶¶ 9-10.

Without discrediting any of this evidence, Defendant nevertheless found that it failed to show partisan conduct. Defendant accepted the CPD’s assertion that the policy of excluding third-party candidates was not a partisan maneuver but was taken “for the purpose of preventing disruption of the live international television broadcast of the debate.” Report at 6. Yet, in doing so, Defendant ignored facts that entirely discredit the CPD’s purported justification. Defendant may not simply ignore persuasive evidence in the administrative record, *Antosh*, 599 F. Supp. at 855, 856, but rather “must take into consideration all available information concerning the alleged wrongdoing.” *In re Federal Election Campaign Act Litigation*, 474 F. Supp. 1044, 1046 (D.D.C. 1979). Thus, Defendant’s failure to take into account facts contradicting the CPD’s rationale constitutes an abuse of discretion.

First, Defendant ignored evidence showing that the CPD’s policy of exclusion bore no rational relationship to its claimed fear of disruption. The CPD’s stated fear was that Ralph Nader might disrupt the debates, and the CPD’s General Counsel admitted that the CPD felt no such threat from any other candidate. *See* Exh. 2 to Admin. Compl. at 50 (Loss testifying that aside from Nader “we weren’t aware of any other concrete threat”). Yet the CPD’s admitted policy was to exclude all third-party candidates from the debate hall, *see* Exh. 3 to Admin. Compl. at 26; the face-book used to implement that policy included the names and party identification of eight other candidates besides Nader,

seven of them with photographs. *See* Exh. 1 to Admin. Compl. Even if the CPD's concerns regarding Nader were genuine, they could not reasonably justify the exclusion of individuals from whom the CPD did not even claim to fear disruption.

As to Nader himself, the CPD's claimed fear of disruption was clearly pretextual. The CPD did not have any evidence that Nader was planning disruption, and Fahrenkopf admitted, "I don't know of him violating the law or violating any rules in any context where there were rules." Exh. 3 to Admin. Compl. at 45. The primary evidence that the CPD cites in support of its purported fear of disruption by Nader is his remark on "NBC News' Meet the Press," that "Maybe I'll crawl up on the stage there." *See* Letter from Stacey L. McGraw in response to Complaint in MUR 5378 ("CPD Response"), Exh. C to Fed. Compl., at 4. In context it is clear that Nader is joking. CPD Counsel Lewis Loss admitted that the remark caused laughter on the Meet the Press show, and said, "I didn't take seriously that he would literally crawl up on the stage. Among other reasons the secret service would not permit him to do that." *See* Loss Deposition, Exh. D to Fed. Compl., at 45 lines 7-18. And in an interview on Larry King Live the following day, Nader explicitly disavowed any intent to try to get onto the stage.³ *See* Exh. E to Fed. Compl. This evidence was before the FEC, as the relevant television transcripts and the entire Loss deposition were attached to the CPD Response.⁴

Defendant ignored other facts that utterly undermine the CPD's stated rationale for its policy of exclusion. Remarkably, the CPD cited rallies and protests held by

³ Mr. King: Oh, you want to be in the audience
Mr. Nader: Yes, I can't be on the stage. We're excluded. It's a two-party monopoly.
Transcript, "Larry King Live," Oct. 2, 2000, attached as Exh. D hereto.

⁴ The CPD response does not quote the portion of the exchange between King and Nader that Plaintiffs quote here.

Nader's supporters (not his campaign) as a purported justification for excluding *all third-party candidates*. Excluding the candidates would do nothing to address this stated concern. The CPD claimed that it “wished to take reasonable measures to ensure the debate was not disrupted by an *audience member* who had not properly qualified for inclusion in the debate as participants [sic].” See CPD Response at 5 (emphasis added). Yet the CPD took no such measures. If the CPD were actually concerned about disruption by protestors, it would have kept a list of invited guests and checked the identity of all persons entering the debate hall against this list. Instead, the CPD made no effort to control who was invited or to prevent the entry of uninvited persons. See Exh. 2 to Admin. Compl. at 55-56. Because the CPD’s purported justification bears no rational relation to the measures that it actually took or failed to take, Defendant’s acceptance of the justification is arbitrary and capricious.

Finally, the FEC General Counsel is entirely unfounded in asserting that “[t]he complaint’s allegations as to the CPD’s motivation are based entirely upon taking the word ‘campaigning’ from its context in the surrounding circumstances and of the sentence in which it appears.” Report at 7. The statement, made by CPD General Counsel Lewis Loss, as reproduced in full in the Administrative Complaint, ¶ 10, was: “Our concern was that if a third-party candidate who had not qualified for participation in the debate went to the trouble to get a ticket and attend the debate that it would be for the purpose of campaigning in some way, which seemed to imply the potential for disruption.” Exh. 2 to Admin. Compl. at 101. Taken in actual context, it is clear that the CPD’s fear was indeed of *campaigning* by third-party candidates. This context includes the CPD’s admitted lack of any fear of disruption from candidates other than Nader; its

lack of any substantiated concern as to Nader himself; and its failure to address the more likely possibility that a non-candidate could obtain the ticket of an invited guest in order to disrupt the debates. The context also includes the bi-partisan history, staffing and leadership of the CPD. *See* Fed. Compl., ¶¶ 19-20 and 24 to 26. Understood in this context, Mr. Loss's statement expresses a policy designed to support and aid the Republican and Democratic parties and their candidates.

Thus, the Commission failed to take into account facts that disproved the CPD's explanation for its behavior, and failed to consider undisputed facts contrary to the CPD's account. This constitutes an arbitrary and capricious disposition of Plaintiffs' claims. "[T]he Court should correct improper administrative fact-finding 'if [it] becomes aware, especially from a combination of danger signals, that the agency has not really taken a hard look at the salient problems, and has not genuinely engaged in reasoned decision-making.'" *Antosh*, 599 F.Supp. at 853 (*quoting Greater Boston Television v. FCC*, 444 F.2d 841, 851 (D.C.Cir.1970)).

B. Defendant FEC Wrongly Dismissed Evidence of Two Major Parties' Control of the CPD.

Evidence of the two major parties' control of the CPD submitted by Plaintiffs includes its founding by the Republican and Democratic Parties; its continued leadership by the former chairmen of the Republican National Committee, Frank J. Fahrenkopf, and Democratic National Committee, Paul G. Kirk; the fact that nine of its eleven directors are prominent members of the Republican and Democratic Parties; and the use of criteria designed to exclude all but the Republican and Democratic candidates from participating in the debates. *See* Admin. Compl., ¶¶ 9, 11; Fed. Compl., ¶¶ 19-20.

The Report dismisses this evidence merely by noting that these accusations were made in previous administrative complaints that were dismissed by the FEC. *See* Report at 4. However, nothing in the previous actions discredits the evidence offered by Plaintiffs here.

The previous complaints referenced in the General Counsel's report were filed before the 2000 debates by the Reform Party, Patrick Buchanan, et al. (MUR 4987), The Natural Law Party, John Hagelin, et al., (MUR 5004), and Mary and Bill Wolhford (MUR 5021). The General Counsel found no evidence of control by the Democratic and Republican parties of the CPD, *see* Pls. S.J. Exh. 1, First General Counsel's Report in MURs 4987, 5004, and 5021, July 13, 2000, at 15,⁵ and recommended that the Commission find no reason to believe that the CPD had committed violations, *id.* at 19, which was adopted by the Commission in a 6-0 vote. *See* Corrected Certification, Pls. S.J. Exh. 1.

⁵ Most of the General Counsel's analysis in this case focuses on the legitimacy of the candidate selection criteria. *See* Report in MURs 4987, 5004 and 5021 at 15-18. The criteria themselves are not challenged in the instant case, though the requirement of demonstrating 15 percent support is cited as further evidence of the CPD's partisan aims. The General Counsel had earlier reached the opposite conclusion in cases brought in 1996 by John Hagelin, Mike Tompkins and the Natural Law Party, MUR 4451, and by Perot '96 Inc., MUR 4473. There, the General Counsel agreed with the complainants that the CPD's "major purpose may be to facilitate the election of either of the major parties' candidates for president" and therefore recommended that the Commission find reason to believe that the CPD was a political committee. *See* First General Counsel's Report in MURs 4451 and 4473, Feb. 6, 1998, at 29, *available at* http://www.nvri.org/library/cases/Hagelin_v_FEC/report_murs_4451_and_4473.pdf. The Commission nevertheless voted 5-0 to find no reason to believe. Though the complainants filed a wrongful dismissal suit, it was never decided on the merits but rather voluntarily dismissed by Plaintiffs without prejudice. *See Natural Law Party et al. v. FEC*, No. 1:98-cv-01025-ESH, Docket No. 27 (D.D.C. Nov. 27, 2000).

However, in a subsequent wrongful dismissal suit brought by Buchanan and his supporters in MUR 4987, the Court found the plaintiffs' evidence persuasive, though insufficient by itself to require a finding of wrongful dismissal. The Court observed:

Plaintiffs' argument makes sense, and the evidence they have marshaled in support of it is not insubstantial. An ordinary citizen might easily view the circumstances surrounding the creation of the CPD along with the evidence of major party influence over the past three debates as giving 'reason to believe' that the CPD always has supported, and still does support, the two major parties to the detriment of all others.

Buchanan, 112 F.Supp.2d at 72. The Court went on to hold that "[b]ased on the factual record that was before it" the FEC had not abused its discretion in dismissing the complaints.⁶ *Id.* at 73. Key to accepting the FEC's exercise of discretion was "the absence of any contemporaneous evidence" of major party influence over the debates. *Id.* at 72.

Thus, the *Buchanan* decision teaches that the two major parties' history of control and leadership of the CPD would indeed be relevant if there were also evidence of ongoing partisan conduct – precisely the scenario presented in the instant case, which includes evidence of the partisan exclusion of candidates from the 2000 debate halls.

In addition, Defendant had in its possession additional, compelling evidence of the major parties' ongoing control of the debates, namely secret Memoranda of Understanding by which the campaigns of the two major-party candidates established the terms of the debates in 1992 and 1996. *See* Pls. S.J. Exhs. 2 and 3. These contracts, not considered in the *Buchanan* case, stipulate which candidates may participate; the precise

⁶ In a wrongful Dismissal suit brought in 2000 by the Natural Law Party et al. over MUR 5004, the Court ruled for the Defendant for the same reasons set forth in the *Buchanan* decision. *See Natural Law Party v. FEC*, Civ. Action No. 00cv02138 (D.D.C. Sept. 21, 2000, *aff'd on different grounds*, No. 00-5538 (D.C. Cir. September 29, 2000).

format; and a ban on candidate-to-candidate questioning. The 1996 Memorandum, for example, specifies the number of debates and states that the major-party candidates will appear in no other debates. Pls. S.J. Exh. 3 at 1. The major-party campaigns further agree that no other candidate will be permitted to participate in the debates: “The parties agree that in the two Presidential debates will be [major-party candidates] Bill Clinton and Bob Dole. The participants in the Vice Presidential debate will be [major-party candidates] Al Gore and Jack Kemp.” *Id.*

The agreements threaten that if the CPD does not accept their terms, the major parties will find another sponsor: “The debates will be sponsored by the Commission, provided that the Commission agrees to all provisions of this agreement,” and if not, the major party candidates “will immediately use their best efforts to obtain a mutually agreeable alternate sponsor or sponsors....” *See* Pls. S.J. Exh.. 2 at. 2 and Pls. S.J. Exh. 3 at 1. Even in selecting the debate moderator and panelists to question the candidates, the CPD is required to choose from a list dictated by the major parties. *See* Pls. S.J. Exh. 2 at 3-4, 13-16; Pls. S.J. Exh. 3 at 2.

These Memoranda of Understanding further demonstrate that the CPD has conducted the debates entirely on partisan terms dictated by the Democratic and Republican parties. The Memoranda not only would have been available to Defendant if it had initiated an investigation and taken discovery, they in fact were furnished to the FEC in an administrative complaint filed on February 19, 2004 by the organization Open Debates, designated MUR 5414. These Memoranda confirm the partisan control of the debates demonstrated by Plaintiffs’ evidence and further prove that Defendant’s dismissal of Plaintiffs’ charges was arbitrary and capricious

The *Buchanan* decision, far from discrediting the evidence of the two major parties' historic control of the CPD, indicates that such evidence could require a reason to believe finding by the FEC if and when it is accompanied by contemporaneous evidence of ongoing major party influence. *See Buchanan*, 112 F.Supp.2d at 72. The CPD's face-book from the 2000 debates and the sworn testimony of CPD officials constitute exactly such evidence of ongoing major party influence over the CPD. The Memoranda of Understanding further prove this point. Yet the General Counsel's report in the instant case refuses to even analyze whether the two major parties' role in the founding and running the CPD, *combined with* the evidence of the ongoing partisan control and conduct of the CPD, is sufficient to establish unlawful partisan conduct by the CPD. Instead, the General Counsel treats these as two separate "arguments," *see* Report at 4, willfully ignoring Plaintiffs' contention that the evidence viewed as a whole proves the CPD's partisanship.

Therefore Defendant's decision to ignore the evidence of ongoing major party control of the CPD merely because some of it had been presented in the *Buchanan* case is arbitrary and capricious and contrary to law.

In sum, Defendant's finding of no reason to believe that the CPD has committed violations and its dismissal of the Administrative Complaint should be held arbitrary, capricious and contrary to law. Defendant's reasoning is neither thorough, valid nor consistent, *see* DSCC, 457 U.S. at 37; its factual determinations are not supported by the record, *see Antosh*, 599 F.Supp. at 853; and it fails to take into account relevant, persuasive information in the record. *See In re Federal Election Campaign Act*

Litigation, 474 F. Supp. 1046. Accordingly, Defendant should be found to have wrongfully dismissed Plaintiffs' administrative complaint and should be ordered to make a probable cause determination within 30 days. See 2 U.S.C. § 437g (a)(8)(C) ("...[T]he court may declare that the dismissal of the complaint...is contrary to law, and may direct the Commission to conform with such declaration within 30 days...").

CONCLUSION

For the reasons set forth above and for such other reasons as may appear to the Court, Plaintiffs request that their motion be granted and that summary judgment be entered in their favor; that the Court declare that Defendant's dismissal was contrary to law; that the Court order that Defendant's finding of no reason to believe is reversed; and that the Court order that Defendant proceed to a probable cause determination within thirty (30) days.

Dated: June 15, 2004

Respectfully submitted,

/s/ Alan R. Kabat

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**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

JOHN HAGELIN <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 1:04-cv-00731 (HHK)
)	Judge Henry H. Kennedy, Jr.
FEDERAL ELECTION COMMISSION,)	
)	
Defendant.)	
)	

**PLAINTIFFS’ STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE DISPUTE**

Plaintiffs, pursuant to Local Civil Rule 7(h), hereby submit, in support of their motion for summary judgment, the following statement of material facts as to which there is no genuine dispute:

I. Proceedings Before the Federal Election Commission.

1. On June 17, 2003 the Plaintiffs filed an Administrative Complaint with the Defendant Federal Election Commission (“FEC” or “Commission”) against the Commission on Presidential Debates, Inc. (“CPD”), alleging that the CPD is committing direct and serious violations of the Federal Election Campaign Act of 1971 (“FECA”), as amended, 2 U.S.C. §§ 431 *et seq.* (1997 and Supp. 1999), and that these ongoing violations of the federal election laws are having a direct and serious detrimental impact on the 2004 presidential and vice-presidential election cycle that is now underway. *See* Administrative Complaint (“Admin. Compl.”), attached as Exh. A to the complaint in this lawsuit (“Fed. Compl.”).

2. The Administrative Complaint alleged that the CPD operates as a partisan organization and therefore is not qualified under federal law to stage the presidential debates or to raise and spend corporate funds for the debates. *See* Admin. Compl., ¶¶ 2, 8-13, 20, 22.
3. The Administrative Complaint further alleged that because the CPD was not qualified under federal law to run the presidential debates, the funds raised and used by the CPD to sponsor the debates violate the federal ban on campaign contributions by corporations. *Id.*, ¶ 18. It also alleged that the funds raised and used to sponsor the debates violate federal contribution limits, *id.*, ¶ 24, and that the CPD violated federal law by accepting contributions and making expenditures in violation of those limits. *Id.*, ¶ 26.
26. Additionally, the complaint alleged that the CPD meets the federal definition of “political committee, *id.*, ¶ 14, and that the CPD violated federal law by failing to register as a political committee and failing to report receipts and disbursements as required by law. *Id.*, ¶¶ 28, 30.
4. Defendant designated the complaint Matter Under Review (MUR) 5378.
5. On August 8, 2003 counsel for the CPD submitted a response to the Commission. *See* Letter of Stacey McGraw, Aug. 8, 2003 (“CPD Response”), Exh. C to Fed. Compl. On March 12, the FEC’s General Counsel issued a recommendation that the Commission find no reason to believe that the CPD had violated the relevant laws. On March 18, 2004 the Commission voted to find no reason to believe that the CPD had violated the law and to close the file in the case. *See* First General Counsel’s Report (“Report”) and Certification, Exh. B to Fed. Compl.

6. The Commission's finding of no reason to believe meant that Defendant did not open any investigation into the allegations contained in MUR 5378 and did not seek documents or information from the CPD in MUR 5378 beyond the documents and information the CPD chose to submit.

II. Partisan Nature and Conduct of the CPD

7. The CPD is incorporated and based in the District of Columbia and claims status as a non-profit, 501(c)(3) corporation.

8. The CPD sponsored four nationally televised debates between the presidential and vice-presidential candidates of the Republican and Democratic Parties in the 2000 elections. The CPD raised significant monies and obtained numerous corporate co-sponsors of its debates in 2000, including Anheuser-Busch, Ford Motor Company, US Airways, 3 Com and AT&T. See Exh. 4 to Admin. Compl.

9. The CPD's only two co-chairs throughout its existence have been Frank J. Fahrenkopf, Jr. and Paul G. Kirk, Jr., who were serving as the chairmen of the Republican National Committee ("RNC") and Democratic National Committee ("DNC"), respectively, at the time the two major parties formed the CPD. The RNC and DNC jointly issued a press release in 1987 describing the CPD as a "bipartisan" organization designed to sponsor nationally televised debates between the two major parties' nominees. See *Buchanan v. Federal Election Comm'n*, 112 F.Supp.2d 58, 71 (D.D.C. 2000).

10. At least nine of its eleven directors are prominent members of the Republican and Democratic Parties, and none is a representative of third parties. Republican members include Co-Chair Fahrenkopf; former senator John C. Danforth; Congresswoman Jennifer

Dunn; and former senator Alan K. Simpson. Democratic members include Co-Chair Kirk; Antonia Hernandez; Caroline Kennedy Schollossberg; Newton Minnow; and H. Patrick Swygert. See <http://www.debates.org/pages/lead.html> (list of CPD Co-Chairmen, Honorary Chairmen and Board of Directors).

11. The CPD's criteria for candidate inclusion in the debates are defined as (1) evidence of Constitutional eligibility for the office of President; (2) evidence that the candidate has qualified to have his or her name appear on enough state ballots to have a mathematical possibility of winning a majority of the Electoral College; and (3) a level of support of at least 15% of the national electorate as determined by taking the average of five selected national public opinion polling organizations. Thus in order to participate in the debates, a candidate must demonstrate that at least 15 % of the electorate has already decided to vote for him or her. The 15% criterion was first adopted for the 2000 debates. If it had been in place in 1992 it would have excluded then-Presidential Candidate Ross Perot from the 1992 debates because he was polling far below 15% at the time of the debates. Perot ultimately obtained 19% of the vote.

12. In 2000, the CPD made and enforced other explicitly bi-partisan decisions. Prior to the first 2000 debate, the CPD decided to exclude third-party candidates for President and Vice-President from entering the debate halls. CPD General Counsel Lewis Loss stated under oath that before the first presidential debate held in Boston on October 3, 2000, "[T]he CPD had decided that Mr. Nader and third-party candidates more generally, even if they had a ticket to the debate, would not be admitted into the debate hall." See Exh. 2 to Admin. Compl., Deposition of Lewis Loss in the matter of *Nader v. Commission on Presidential Debates, et al.*, Case No. 00-12145-WEY (D.Mass. 2000)

(“Loss Dep.”), page 50, lines 10-13. CPD Co-Chair Frank J. Fahrenkopf, Jr. also testified: “The position was that third party candidates would not be allowed to be present in the debate hall.... The decision was made by – well there were a number of people in the discussion. But fundamentally, Paul Kirk and I, as co-chairmen, made the final decision [for the CPD].” *See* Exh. 3 to Admin. Compl., Deposition of Frank J. Fahrenkopf, Jr. in the matter of *Nader v. Commission on Presidential Debates, et al.*, Case No. 00-12145-WEY (D.Mass. 2000) (“Fahrenkopf Dep.”), page 26, lines 2-16. *Cf. id.* at page 42, lines 15-19 (Fahrenkopf attempting to modify testimony). The decision also applied to all three of the presidential debates and presumptively the vice-presidential debates. *See id.* at pages 26, line 25 to 27, line 23.

13. To carry out the decision, the CPD’s General Counsel, Lewis Loss, prepared and distributed (in Boston) a “face-book” picturing prominent third-party presidential and vice-presidential candidates and identifying their party affiliation, *see* Exh. 1 to the Admin. Compl., so that CPD personnel at the debate-hall doors could recognize the candidates and deny them access to the event even if they had a ticket. *See* Loss Dep. at pages 57-59.

14. According to Mr. Loss’s testimony, the CPD intended the exclusion of all third-party candidates from the debate hall because “campaigning” by these candidates in the debate hall “seemed to imply the potential for disruption.” *See* Loss Dep. at pages 100, line 20 to 101, line 8 (“Our [the CPD’s] concern was that if a third-party candidate who had not qualified for participation in the debate went to the trouble to get a ticket and attend the debate that it would be for the purpose of campaigning in some way, which seemed to imply the potential for disruption.”).

15. In addition to members of the public attending the debates, some 1700 reporters, photographers and media representatives were present in the debate hall covering the events. The CPD's policy of excluding third-party candidates had the effect of preventing them from gaining access to the public and meeting with these reporters in the debate hall, while the Republican and Democratic Presidential and Vice-Presidential candidates had such an opportunity.

16. The CPD's leadership is aware that, to qualify as a debate sponsor, the CPD must be nonpartisan. *See* Fahrenkopf dep. at page 20, lines 16-24 ("If we [the CPD] were bi-partisan, we couldn't meet the requirements of the [election] law, as we understood it, by which you qualified to be a sponsor of debates...So it became very clear to us once we [the CPD] were created that we had to be a nonpartisan [organization] even though Paul [Kirk] and I were the party chairmen.").

17. Additional evidence in the FEC's possession further confirms that the CPD conducts the debates in a partisan manner. Using secret Memoranda of Understanding, the two major parties have established the terms of the debates in debates in 1992 and 1996, including which candidates may participate; the precise format; and a ban on candidate-to-candidate questioning. *See* 1992 Memorandum of Understanding, Pls. S.J. Exh. 2, and 1996 Memorandum of Understanding, Pls. S.J. Exh. 3. These Memoranda were furnished to the FEC in an administrative complaint filed on February 19, 2004 by the organization Open Debates, designated MUR 5414.

18. The 1996 Memorandum demonstrates the extent to which the two major parties established the terms of the debates. It specifies:

There will be two (2) Presidential debates and one (1) Vice Presidential debate before live audiences. The parties agree they will not (1) issue any challenges for

additional debates, (2) appear at any other debate or adversarial forum with any other presidential or vice presidential candidate, or (3) accept any network air time offers that involve a debate format or otherwise involve the simultaneous appearance of more than one candidate.

Pls. S.J. Exh. 3 at 1. It further explicitly excludes all but the two major parties' candidates: "The parties agree that in the two Presidential debates will be Bill Clinton and Bob Dole. The participants in the Vice Presidential debate will be Al Gore and Jack Kemp." *Id.*

19. The 1992 and 1996 Memoranda contain identical language in which the two major parties' candidates accept the CPD as the sponsor of the debates only if the CPD accepts all of the major parties' terms. "The debates will be sponsored by the Commission, provided that the Commission agrees to all provisions of this agreement," and if not, the major party candidates "will immediately use their best efforts to obtain a mutually agreeable alternate sponsor or sponsors...." *See* Pls. S.J. Exh. 2 at 2 and Pls. S.J. Exh. 3 at 1. Both Memoranda further state that the CPD must chose the debate moderator and panelists to question the candidates from a list agreed on by the two major parties. *See* Pls. S.J. Exh. 2 at 3-4, 13-16; Pls. S.J. Exh. 3 at 2.

III. The FEC's Arbitrary and Capricious Dismissal of the Administrative Complaint

20. On March 18, 2004 the Commission found no reason to believe that the CPD had committed the violations alleged and closed the file on the matter. *See* Report, Exh. B to Admin. Compl.

21. The General Counsel's Report accepts the CPD's unsupported contention that the decision to exclude third-party candidates "was made for the purpose of preventing disruption of the live international television broadcast of the debate" and "had nothing to

do with partisanship.” Report at 6, quoting CPD Response at 5. Citing the CPD’s fears of disruption by Nader or his supporters, *see* Report at 6-7, the Report concludes that the CPD “has presented substantial information indicating that its decision [to exclude all third-party candidates from the debate halls] was based on concerns of potential disruption during live television broadcasts, not partisanship.” *Id.* at 7.

22. The only substantiated evidence available to the FEC supported the contrary conclusion. In deposition testimony that Plaintiffs submitted to the FEC, Mr. Loss admitted that the CPD perceived no threat of disruption by any candidate other than Nader. *See* Exh. 2 to Admin. Compl. at 50 (Loss testifying that aside from Nader “we weren’t aware of any other concrete threat”). The General Counsel’s Report nowhere discusses how the CPD’s stated fear of disruption by Nader or his supporters (who were not pictured in the face book) justified a policy of excluding all third-party candidates.

23. The evidence before the FEC also contradicts the CPD’s stated fear of disruption by Nader. Mr. Fahrenkopf testified of Nader, “I don’t know of him violating the law or violating any rules in any context where there were rules.” Exh. 3 to Admin. Compl. at 45. The evidence cited by the CPD in support of its claimed fear of disruption by Nader is that Nader remarked on “NBC News’ Meet the Press,” “Maybe I’ll crawl up on the stage there.” *See* Response at 4. Yet CPD Counsel Lewis Loss admitted that the remark caused laughter on the Meet the Press show, and said, “I didn’t take seriously that he would literally crawl up on the stage. Among other reasons the Secret Service would not permit him to do that.” *See* Exh. D to Fed. Compl., Loss Deposition at 45, lines 7-18. And in an interview on Larry King Live the day after the Meet the Press interview, Nader explicitly disavowed any intent to try to get onto the stage. When King said, “Oh, you

want to be in the audience,” Nader Replied, “Yes, I can’t be on the stage. We’re excluded. It’s a two-party monopoly.” Transcript, “Larry King Live,” Oct. 2, 2000, Exh. E to Fed. Compl. This transcript was before the FEC, submitted as an attachment to the CPD response.

24. The CPD’s response asserts that it “wished to take reasonable measures to ensure the debate was not disrupted by an *audience member* who had not properly qualified for inclusion in the debate as participants [sic].” See CPD Response at 5 (emphasis added). The General Counsel’s Report does not discuss the failure of the CPD to take such measures. The CPD made no effort to control who was invited to attend the debates or to prevent the entry of uninvited persons into the debate halls, with the exception of the third-party candidates and Russ Verney, a former Reform Party candidate for President also pictured in the face book. See Loss Deposition, Exh. 2 to Admin. Compl., at 55-56; CPD’s Face Book, Exh. 1 to Admin. Compl.

25. The General Counsel’s Report rejects the Plaintiffs’ additional evidence regarding the partisan nature and conduct of the CPD, including the CPD’s founding by the co-chairmen of the Republican National Committee and the Democratic National Committee, and the partisan composition of the CPD’s Board of Directors. See Report at 4. The Report states that these assertions were advanced in previous MURs where the Commission found no reason to believe the CPD had violated the law. See *id.* However, the Report nowhere states that this evidence is false or inaccurate. Most significantly, the Report does not examine or discuss this evidence in conjunction with the CPD’s policy of excluding third parties from the 2000 debates, as cumulative evidence of the CPD’s partisanship. Rather, it treats this evidence as separate and unrelated. See *id.*

IV. Injury to Plaintiffs

26. John Hagelin ran for President in 2000 and was pictured and identified by party affiliation, name and candidacy in the CPD's face-book. He has chosen not to run as a candidate for President in the 2004 elections in significant part because he cannot compete fairly with the two major parties, due to the CPD's partisan control of the presidential debates and the resulting exclusion of third parties and their candidates from the debates. *See* Declaration of John Hagelin, Pls. S. J. Exh. 4.

27. As part of Mr. Hagelin's ongoing political activity, he wishes to persuade others that the CPD, as a partisan organization, has inappropriately received corporate donations for the sponsorship of the debates, to the benefit of the Democratic and Republican candidates for President and Vice-President and the detriment of him and other third-party and independent candidates. To engage in this advocacy, he needs accurate reporting of contributions received by the CPD and used to sponsor the debates. He cannot obtain this information due to the FEC's failure to require the CPD to register as a political committee and disclose these contributions and expenditures. *See id.*

28. Ralph Nader was a candidate for the office of President of the United States of America in the 2000 elections and is running as an independent candidate for the Presidency in the 2004 elections. Mr. Nader was pictured and identified by party affiliation, name and candidacy in the CPD's face-book, and was prevented even from entering the auditorium adjacent to the debate hall for the presidential debates held in Boston, Massachusetts on October 3, 2000, although he had a ticket for the event. *See* Declaration of Ralph Nader, Pls. S. J. Exh. 5. This prevented him from meeting with the members of the public and the many reporters covering the debates, and prevented him

from participating in a previously scheduled interview with Fox News at the debate site. *See id.*

29. Should the CPD's partisan control of the presidential debates be allowed to continue, Mr. Nader may be excluded from the debates in 2004, even though in 2000 a large proportion of the public supported his inclusion in the debates. He expects that any continued partisan control and conduct of the presidential debates by the CPD will substantially diminish his ability to compete with the Democratic and Republican candidates for President. *See id.*

30. Mr. Nader also wishes to campaign on the issue that the CPD, as a partisan organization, has inappropriately received corporate donations for the sponsorship of the debates, to the benefit of the Democratic and Republican candidates for President and Vice-President and the detriment of third-party and independent candidates. To this end, he needs and is entitled to accurate reporting of contributions received by the CPD and used to sponsor the debates. He cannot obtain this information due to the FEC's failure to require the CPD to register as a political committee and disclose these contributions and expenditures. *See id.*

31. Patrick Buchanan was a candidate for the office of President of the United States of America in the 2000 elections. Mr. Buchanan was pictured and identified by party affiliation, name and candidacy in the CPD's face-book. He has chosen not to run as a candidate for President in the 2004 elections in significant part because he cannot compete fairly with the two major parties, due to the CPD's partisan control of the presidential debates and the resulting exclusion of third parties and their candidates from the debates. *See Declaration of Patrick Buchanan, Pls. S. J. Exh. 6.*

32. Mr. Buchanan remains politically active. Through his regular television appearances and print commentary, he wishes to persuade others that the CPD, as a partisan organization, has inappropriately received corporate donations for the sponsorship of the debates to the benefit of the Democratic and Republican candidates for President and Vice-President and the detriment of him and other third-party and independent candidates. In order to engage in this advocacy, he needs accurate reporting of contributions received by the CPD and used to sponsor the debates. He cannot obtain this information due to the FEC's failure to require the CPD to register as a political committee and disclose these contributions and expenditures. *See id.*

33. Howard Phillips ran for President in 2000 and was pictured and identified by party affiliation, name and candidacy in the CPD's face-book. He is not running as a candidate in the 2004 elections, but intends to support the nominee of the Constitution Party, who is expected to be Michael A. Peroutka. He expects that the Constitution Party's nominee will be at a substantial disadvantage in competing against the candidates of two major parties due to the CPD's unlawful, partisan control of the presidential debates and the resulting exclusion of third parties and their candidates from the debates. *See Declaration of Howard Phillips, Pls. S. J. Exh. 7.*

34. Mr. Phillips remains politically active and wishes to persuade others that the CPD, as a partisan organization, has inappropriately received corporate donations for the sponsorship of the debates, to the benefit of the Democratic and Republican candidates for President and Vice-President and the detriment of him and other third-party and independent candidates. In order to engage in this advocacy, he needs accurate reporting of contributions received by the CPD and used to sponsor the debates. He cannot obtain

this information, due to the FEC's failure to require the CPD to register as a political committee and disclose these contributions and expenditures. *See id.*

35. Winona LaDuke was a candidate for the office of Vice President of the United States of America in the 2000 elections. She was pictured and identified by party affiliation, name and candidacy in the CPD's face-book. Ms LaDuke has chosen not to run as a candidate for President or Vice-President in the 2004 elections, in significant part because she cannot compete fairly with the two major parties, due to the CPD's partisan control of the presidential debates and the resulting exclusion of third parties and their candidates from the debates. *See Declaration of Winona LaDuke, Pls. S. J. Exh. 10.*

36. Ms. LaDuke remains politically active and wishes to campaign for a more open electoral system. As part of this campaigning, she wishes to persuade others that the CPD, as a partisan organization, has inappropriately received corporate donations for the sponsorship of the debates to the benefit of the Democratic and Republican candidates for President and Vice-President and the detriment of her and other third-party and independent candidates. In order to engage in this advocacy, she needs accurate reporting of contributions received by the CPD and used to sponsor the debates. She cannot obtain this information due to the FEC's failure to require the CPD to register as a political committee and disclose these contributions and expenditures. *See id.*

37. The Green Party of the United States fielded candidates for the offices of President and Vice President of the United States of America in the 2000 elections and is currently preparing to field candidates in the 2004 elections for the office of President and Vice President of the United States. This Party was identified along with its candidates, Nader and LaDuke, who were named and pictured in the CPD's face-book.

The Party will hold its presidential nominating convention in Milwaukee, Wisconsin, on June 23-28, 2004. The Party expects that the candidates it nominates or otherwise supports for President and Vice President in 2004 will suffer a competitive disadvantage in the elections due to the CPD's partisan control of the presidential debates and the resulting exclusion of third parties and their candidates from the debates. *See* Declaration of Ben Manski, Pls. S. J. Exh. 8.

38. Two important parts of the Green Party's agenda are ending the political dominance of the Republican and Democratic parties and exposing the influence of corporations in the electoral process. To this end, the Green Party wants to campaign on and persuade its members and the electorate that the major parties are unfairly controlling the presidential debates through the CPD, and that the CPD is using massive unlawful corporate contributions to benefit the major parties through the debates. In order to engage in this campaigning and public advocacy, the Green Party needs an accurate accounting of the contributions received by the CPD and spent by the CPD to run the debates. Due to the FEC's failure to require the CPD to register as a political committee and report its expenditures and contributions, this information is not available to the Green Party. *See id.*

39. The Constitution Party fielded candidates for the offices of President and Vice President of the United States of America in the 2000 elections. This Party was identified along with its candidates who were named and pictured in the CPD's face-book. The Party is currently preparing to field candidates in the 2004 elections for President and Vice President of the United States, and its nominees will be chosen at its June 23-26, 2004 National Convention. The party anticipates that its Presidential nominee will be

Michael A. Peroutka, who has been designated as the party's stand-in candidate for purposes of gaining ballot access. *See* Declaration of James Clymer, Pls. S. J. Exh. 9.

40. The Constitution Party's candidate appeared on the ballot for President in 41 states in the 2000 elections, and the party expects to appear on a similar number in 2004. The Constitution Party has already secured ballot access in 18 states for the 2004 elections and has completed or nearly completed the ballot access process in at least four others states. Nevertheless, the Party expects that its candidates for President and Vice President in 2004 will suffer a competitive disadvantage due to the CPD's unlawful, partisan control of the presidential debates and the resulting exclusion of third parties and their candidates from the debates. *See id.*

41. The Constitution Party wishes to campaign on and publicly disclose to its members and the electorate that the CPD has wrongly used millions of dollars in corporate and labor union contributions to benefit the Democratic and Republican parties, at the expense of the Constitution Party and other third parties. To this end, the Constitution Party needs accurate information regarding the contributions that the CPD has received and expenditures it has made to sponsor the debates. However, the Constitution Party cannot obtain such information because the FEC has not required the CPD to register as a political committee and report its contributions and expenditures accordingly. *See id.*

V. Plaintiffs' need for expedited relief.

42. The CPD has long been planning for the 2004 debates and last year announced its plans to sponsor three presidential debates: on September 30, 2004, at the University of Miami; on October 8, 2004, at Washington University in St. Louis; and on October 13,

2004, at Arizona State University. In addition the CPD plans to sponsor a vice-presidential debate on October 5, 2004, at Case Western Reserve University. *See* CPD Press Release, November 6, 2003, *available at* http://www.debates.org/pages/news_031106.html.

43. The CPD has also begun soliciting financial contributions and other financial support from corporations and wealthy donors as sponsors of its debates. The Florida-based Miccosukee Tribe reportedly will put up more than \$1 million to underwrite the debate at the University of Miami. *See* Robert L. Steinback, “UM to Host 2004’s First Presidential Debate,” *Miami Herald*, November 7, 2003. Corporate sponsors of the Washington University Debate include A.G. Edwards, Bank of America, BJC HealthCare, and Emerson. *See* “Washington University in St. Louis hosts the second presidential debate – October 8, 2004,” *available at* <http://debate.wustl.edu>.

Date: June 15, 2004

Respectfully submitted,

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**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

JOHN HAGELIN <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 1:04-cv-00731 (HHK)
)	Judge Henry H. Kennedy, Jr.
FEDERAL ELECTION COMMISSION,)	
)	
Defendant.)	
)	

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June 2004, I caused a paper copy of the Plaintiffs’ Motion for Expedited Consideration, Motion for Summary Judgment, Statement of Material Facts as to Which there is no Genuine Dispute, and Proposed Orders Granting Expedited Consideration and Summary Judgment, to be served by first-class mail, postage prepaid, upon the defendant’s counsel at the following addresses:

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