UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAN LA BOTZ, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	No. 1:13-cv-00997-RC

DEFENDANT FEDERAL ELECTION COMMISSION'S
MOTION TO DISMISS

The Federal Election Commission ("Commission") moves to dismiss this suit pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. In support thereof, the Commission relies upon the accompanying memorandum of points and authorities. A proposed order also accompanies this motion.

Respectfully submitted,

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September 13, 2013

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FEDERAL ELECTION COMMISSION'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

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I. INTRODUCTION

Plaintiff Dan La Botz filed this challenge under 2 U.S.C. § 437g(a)(8) to the Federal Election Commission's ("Commission" or "FEC") dismissal of his administrative complaint. That complaint claimed that the Ohio News Organization ("ONO" or "OHNO") and its corporate members had excluded La Botz from candidate debates they sponsored prior to the November 2010 general election for the United States Senate, allegedly resulting in corporate contributions to the candidates who were included, in violation of 2 U.S.C. § 441b. The Commission dismissed the administrative complaint in May 2011 on its merits. Plaintiff filed suit to challenge the dismissal, and this Court held that the Commission's dismissal was contrary to law. *La Botz v. FEC*, 889 F. Supp. 2d 51 (D.D.C. 2012) ("*La Botz I*"). On remand, the Commission again dismissed the administrative complaint, but this time on prosecutorial discretion grounds, and La Botz again filed suit. The Commission now moves to dismiss this second suit for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

The Court lacks Article III jurisdiction over plaintiff La Botz's claim. Plaintiff's 2010 Senate campaign is over, and, on this record, there is no basis to believe that he will ever again seek to participate in a general election debate sponsored by ONO. Although this Court found that there was jurisdiction to consider plaintiff's prior claim, the facts supporting jurisdiction have now changed in a critical way: Plaintiff now states that he will move from Ohio to New York in January 2014, so any future congressional office he may seek will be in New York. While plaintiff also claims that he is likely to appear on an Ohio general election ballot in the future because he is likely to run for President of the United States, there is no evidence that ONO has ever sponsored or would ever sponsor debates for presidential candidates or out-of-

state congressional candidates. Thus, this matter is moot and unlikely to recur because the link between plaintiff and ONO is now far too attenuated.

Even if jurisdiction did exist, plaintiff has failed to sustain his burden of demonstrating that the Commission's dismissal of his administrative complaint was contrary to law under 2 U.S.C. § 437g(a)(8). The Commission has broad prosecutorial discretion, and the agency properly exercised that discretion in dismissing plaintiff's complaint, an option this Court specifically cited in remanding the matter last year. Here, the Commission explained that resolving factual inconsistencies in the record would require extensive investigation that would not be a wise use of the agency's limited resources, particularly in light of the remote chance that plaintiff — who received less than one percent (1%) of the vote in the 2010 general election — would be able to meet any objective debate participation criteria that ONO might use.

Plaintiff's new court complaint also raises several merits claims, specifically a claim that the Commission wrongly concluded that ONO could properly limit debate participation to the two "frontrunners" and complaints that the Commission failed to require sufficient contemporaneous evidence from ONO. However, the Commission's regulations and this Court's prior decision in the case both make clear that debates may permissibly be limited to two candidates chosen on the basis of voter support levels. The Commission receives considerable deference in its administrative enforcement decisions, particularly when they involve interpretations of the agency's own regulations. And plaintiff's complaints about how the Commission evaluated the evidence lack merit because the agency made no determination that ONO need not provide any evidence; on the contrary, the agency's exercise of prosecutorial discretion was based in part on the potential difficulty in obtaining and reviewing such evidence.

Therefore, plaintiff's complaint should be dismissed.

II. BACKGROUND

A. The Parties

Plaintiff Dan La Botz was the Socialist Party of Ohio candidate in the November 2, 2010 general election in Ohio for a United States Senate seat. (Complaint ("Compl.") (Doc. 1) ¶ 9.) There were six candidates on that ballot: Rob Portman, Lee Fisher, Eric Deaton, Michael Pryce, plaintiff La Botz, and write-in candidate Arthur Sullivan. (AR0079, AR0082.)[1] Candidates Portman and Fisher, the Republican and Democratic Party nominees, together received 96.25% of the votes cast. The other four candidates together received the remaining 3.75% of the votes, with plaintiff La Botz receiving 0.69%, or 26,454 of the 3,815,098 total votes cast. *See* FEC, Federal Elections 2010: Election Results for the U.S. Senate and the U.S. House of Representatives (July 2011) at 33, available at http://www.fec.gov/pubrec/fe2010/federalelections2010.pdf.

The Federal Election Commission is an independent agency of the United States government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act, 2 U.S.C. §§ 431-457 ("FECA" or "Act"). *See generally* 2 U.S.C. §§ 437c(b)(1), 437d(a), 437g. Congress authorized the Commission to "formulate policy" under FECA, *see, e.g.*, 2 U.S.C. § 437c(b)(1), and to make rules and issue advisory opinions, 2 U.S.C. §§ 437d(a)(7), (8); 437f; 438(a)(8). The Commission is also authorized to institute investigations of possible violations of the Act, 2 U.S.C. §§ 437g(a)(1)-(2), and the agency has exclusive jurisdiction to initiate civil enforcement actions in the United States district courts, 2 U.S.C. §§ 437c(b)(1), 437d(a)(6), 437d(e), 437g(a)(6).

[1] The administrative complaint and other documents referenced in this section are contained in the Certified Administrative Records filed by the Commission. References beginning with the notation "AR" refer to the sequentially numbered pages of those certified administrative records.

B. Legal Background

1. Procedural Background and Standard of Review

FECA permits any person to file an administrative complaint with the Commission alleging violations of the Act. 2 U.S.C. § 437g(a)(1); *see also* 11 C.F.R. § 111.4. Before the agency may file a civil suit, the Act requires that it take the following steps: find "reason to believe" a violation has occurred, conduct an investigation of the matter, find "probable cause to believe" a violation has occurred, and attempt to resolve the matter through conciliation. *See* 2 U.S.C. §§ 437g(a)(2)-(6); *Hagelin v. FEC*, 411 F.3d 237, 239 (D.C. Cir. 2005).

Under 2 U.S.C. § 437g(a)(8)(A), federal courts have limited judicial review of the FEC's administrative enforcement of the Act. Specifically, administrative complainants who can demonstrate standing under Article III and satisfy other jurisdictional requirements may file suit to challenge dismissal of complaints or "a failure of the Commission to act on such complaint[s]" within 120 days after the complaint was filed. 2 U.S.C. § 437g(a)(8)(A). *See, e.g.*, *Nader v. FEC*, No. 12-5134, ___ F.3d ___, 2013 WL 3956997 (D.C. Cir. Aug. 2, 2013) (dismissing section 437g(a)(8) suit on standing grounds); *Citizens for Responsibility and Ethics in Washington v. FEC* ("*CREW*"), 475 F.3d 337 (D.C. Cir. 2007) (same). Dismissal suits must be filed "within 60 days after the date of the dismissal." 2 U.S.C. § 437g(a)(8)(B).

"A court may not disturb a Commission [decision] to dismiss a complaint unless the dismissal was based on an 'impermissible interpretation of the Act . . . or was arbitrary or capricious, or an abuse of discretion.'" *Common Cause v. FEC*, 108 F.3d 413, 415 (D.C. Cir. 1997) (quoting *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986)). The sole remedy the district court may grant in such a case is a declaration "that the dismissal of the complaint or the failure to act is contrary to law" and an order "direct[ing] the Commission to conform with such declaration within 30 days." 2 U.S.C. § 437g(a)(8)(C). *See Perot v. FEC*, 97 F.3d 553, 557-558

(D.C. Cir. 1996). If the Commission fails to conform to the court's declaration, the administrative complainant "may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint." 2 U.S.C. § 437g(a)(8)(C). Thus, "[a]part from § 437g(a)(8)(C), there is no private right of action to enforce FECA against an alleged violator." *Perot*, 97 F.3d at 558 n.2 (citations omitted).

2. Law Governing Debate Sponsors

FECA prohibits corporate contributions in connection with federal elections. 2 U.S.C. § 441b(a). Expenditures coordinated with candidates or their campaigns are considered contributions. 2 U.S.C. § 441a(a)(7)(B). The definition of "expenditure," however, does not include "nonpartisan activity designed to encourage individuals to vote." 2 U.S.C. § 431(9)(B)(ii). "Funds provided to defray costs incurred in staging candidate debates in accordance with the [Commission's candidate debate regulations] are not contributions" and "not expenditures." 11 C.F.R. §§ 100.92, 100.154. Section 110.13 specifies the types of organizations that may sponsor candidate debates and discusses debate structure and criteria for candidate selection. 11 C.F.R. §§ 110.13(a)-(c). The regulation provides that "[b]roadcasters (including a cable television operator, programmer or producer), *bona fide* newspapers, magazines and other periodical publications may stage candidate debates in accordance with this section and 11 CFR 114.4(f), provided that they are not owned or controlled by a political party, political committee or candidate," and those organizations, "acting as press entities, may also cover or carry candidate debates." 11 C.F.R. § 110.13(a). The "structure of debates" is "left to the discretion of the staging organization(s)," provided that the debates "include at least two candidates" and that "[t]he staging organization(s) does not structure the debates to promote or

advance one candidate over another." 11 C.F.R. § 110.13(b). In addition, basic requirements apply to the selection of debate participants:

> For all debates, staging organization(s) must use pre-established objective criteria to determine which candidates may participate in a debate. For general election debates, staging organization(s) shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate.

11 C.F.R. § 110.13(c). Both the Commission and courts that have evaluated debate participation criteria have found a requirement of polling results showing at least fifteen percent voter support for a candidate to be a reasonable objective criterion for inclusion. *See, e.g.*, Matters Under Review ("MUR") 4451 and 5004[2]; *Buchanan v. FEC*, 112 F. Supp. 2d 58, 73 (D.D.C. 2000); *Natural Law Party of U.S. v. FEC*, No. 1:00CV02138 (ESH) (Sept. 21, 2000), *aff'd. mem.*, No. 00-5338 (D.C. Cir. Sept. 29, 2000).

C. Procedural History

1. Plaintiff's Administrative Complaint

In September 2010, Dan La Botz filed an administrative complaint with the FEC alleging that several organizations and entities violated provisions of FECA and the Commission's implementing regulations. In particular, the administrative complaint alleged that the Ohio Newspaper Organization — described as an unincorporated association or consortium of the eight largest newspapers in Ohio — made prohibited corporate contributions to Rob Portman and Lee Fisher, the Republican and Democratic Party candidates for U.S. Senate from Ohio in the 2010 general election. (Compl. ¶ 5; *see* Plaintiff's Administrative Complaint ("Admin. Compl.) (AR0002-AR0054).)

[2] Documents from the files of closed FEC enforcement matters are available on the Commission's web site. Matters closed since 1999 are available in the Enforcement Query System. *See* http://eqs.sdrdc.com/eqs/searcheqs. Matters closed prior to 1999 are available in the Matter Under Review Archive. *See* http://www.fec.gov/MUR.

La Botz alleged that ONO and the eight news organizations impermissibly excluded him from three one-hour debates in October 2010, which included Portman and Fisher. These debates, allegedly sponsored and paid for by ONO's corporate members, were televised by broadcast operators owned by or affiliated with ONO members and by independent broadcast operations. In particular, La Botz claimed that the decision to invite Portman and Fisher to participate in the 2010 Ohio senatorial debates and to exclude him was not based on pre-existing objective criteria, as required by 11 C.F.R. § 110.13, but upon Portman's and Fisher's status as nominees of the two major political parties. La Botz alleged that ONO and its members structured the debate participation criteria so that only the Democratic and Republican nominees could satisfy them. (Admin. Compl. ¶¶ 35, 41 (AR0011-AR0013).) Plaintiff also complained that ONO and the newspapers never notified him that they were considering hosting the debates, and "kept their criteria secret and failed to disclose them" publicly, thus denying "qualified candidates (including La Botz) the opportunity to meet the alleged criteria." (*Id.* ¶ 41 (AR0012-AR0013).) In La Botz's view, because ONO and its corporate members allegedly did not comply with the Commission's regulations regarding the staging of candidate debates, the expenditures allegedly made by ONO and the newspapers in connection with the debates violated the ban on corporate contributions and expenditures in 2 U.S.C. § 441b(a). (*Id.* ¶ 42 (AR0013).) La Botz also alleged that Portman and Fisher violated 2 U.S.C. § 441b(a) by accepting those prohibited contributions. (*Id.* ¶ 43 (AR0013).)

2. Commission Enforcement Proceedings

The Commission's Office of General Counsel designated the administrative complaint as MUR 6383, sent La Botz an acknowledgment letter, and sent notification letters to ONO, the eight newspaper organizations, the principal campaign committees for the Portman and Fisher

campaigns, and the committees' respective treasurers. These respondents submitted responses to the administrative complaint. (AR0055-AR0060.)

The response by ONO and its members argued that ONO had acted appropriately in not inviting La Botz to the debates and that it had complied with the Commission's candidate debate regulations. (AR0077-AR0104.) The response explained that ONO had employed pre-established objective criteria — including reliance on independent polling data, information about candidates' levels of campaign activity, and other objective information — to determine which candidates had voter support sufficient to merit inclusion in the debates. The response denied that ONO had used nomination by a particular political party as the sole criterion to determine whether to invite a candidate. (*Id.*) Counsel for the Portman and Fisher committees also denied that any violations had occurred. (AR0064; AR0106-AR0108.)

The Office of General Counsel reviewed the administrative complaint and rated it under the Commission's Enforcement Priority System, a comprehensive case management system established in 1993 that focuses the agency's limited resources on more significant cases and envisions the periodic dismissal of less significant cases. (AR0109-AR0113.) *See Stockman v. FEC*, 944 F. Supp. 518, 521 (E.D. Tex. 1996), *aff'd*, 138 F.3d 144 (1998). Based on the resulting score, the administrative complaint was rated in the lowest category. For these lowest-rated matters, the Commission typically exercises its prosecutorial discretion to dismiss the complaint or, if there are no facts to support the allegations, makes a "no reason to believe" finding, which would also terminate the matter. The Commission ordinarily does not proceed with an investigation in these matters due to its limited resources. (*See* AR0115).[3] The Office of

[3] The Enforcement Priority System's scoring system is privileged, and information regarding the rating in this case has been redacted from the certified administrative record documents filed with the Court.

General Counsel prepared a General Counsel's Report recommending that the Commission find no "reason to believe" that the respondents named in La Botz's administrative complaint violated 2 U.S.C. § 441b(a) and that the Commission close its file in the matter. (AR0115-AR0122.) The General Counsel's Report analyzed the relevant legal and factual issues, including submissions by those involved in the matter, and concluded that ONO's debate selection criteria were pre-existing and objective, consistent with criteria previously found to satisfy the requirements of 11 C.F.R. § 110.13(c). (*Id.*)

All six Commissioners voted in favor of the recommendations in the General Counsel's Report. The Commission's Secretary and Clerk therefore certified that on May 19, 2011, the Commission found "no reason to believe" that the respondents in MUR 6383 had violated 2 U.S.C. § 441b(a). (AR0123.) The Office of General Counsel notified La Botz and the respondents of the Commission's action by letters dated June 3, 2011. (AR0124-AR0128.)

3. The Court's Decision in *La Botz I*

On July 8, 2011, La Botz filed a court complaint alleging that the dismissal of his administrative complaint was contrary to law and seeking a remand of MUR 6383 to the Commission. *See La Botz v. FEC*, No. 11-1247-RC (D.D.C. filed July 8, 2011), Complaint, Demand for Relief, at 18; 2 U.S.C. § 437g(a)(8). The Commission filed a motion to dismiss. In September 2012, this Court denied the Commission's motion to dismiss and remanded the underlying administrative enforcement matter to the agency. *La Botz I*, 889 F. Supp. 2d 51. The Court found jurisdiction for plaintiff's claims about the 2010 election because they were capable of repetition yet evading review under the mootness doctrine. *Id*. at 58. The Court also held that there was insufficient evidence to support the Commission's dismissal of the administrative complaint, but the Court noted that the matter might have been dismissed as a matter of

prosecutorial discretion, particularly in light of the low likelihood that the plaintiff could benefit from any objective debate participation criteria that ONO would be willing to adopt. *Id*. at 63 n.6.

The Commission did not appeal the Court's decision. On remand, the Commission's Office of General Counsel designated the administrative proceedings as MUR 6383R.

4. Enforcement Proceeding On Remand

La Botz submitted a supplement to his administrative complaint to the Commission. (AR0130-AR0146.) The Commission's Office of General Counsel sent La Botz an acknowledgment letter, and sent notification letters to ONO, the eight newspaper organizations, the principal campaign committees for the Portman and Fisher campaigns, and the committees' respective treasurers. ONO submitted a response to the administrative complaint supplement. (AR0147-AR0150; AR0151-AR0160.)

The Office of General Counsel prepared a General Counsel's Report recommending that the Commission dismiss the allegations in MUR 6383R without making any "reason to believe" determinations, and approve the attached draft Factual and Legal Analysis. (AR0162-AR0184.) The General Counsel recommended that the Commission dismiss as a matter of prosecutorial discretion because the extensive investigation that would likely be required to resolve factual inconsistencies in the record as to whether ONO used permissible selection criteria would not, in this matter, be an efficient use of the agency's limited resources. The Commissioners voted 4-1 (one seat on the six-member Commission was vacant) in favor of the recommendations in the General Counsel's Report, adopted a Factual and Legal Analysis, and closed the file in the matter. The Commission's Secretary and Clerk therefore certified the Commission's actions on

May 20, 2013. (AR0185-AR0186.) The Office of General Counsel notified La Botz and the respondents of the Commission's action by letters dated May 24, 2013. (AR0187-AR0201.)[4]

5. Plaintiff's Current Suit

On July 1, 2013, plaintiff La Botz filed this second suit, again challenging the Commission's dismissal of his administrative complaint. In his current Complaint, plaintiff states that he will move to New York in January 2014 and that any congressional office he runs for in the future will likely be in New York, but that it is also "likely" that he will run for President. (Compl. ¶ 9.) Plaintiff acknowledges that the Commission exercised its prosecutorial discretion when it dismissed his administrative complaint (Compl. at 3-4), but challenges the Commission's view that staging organizations may limit candidate debates to the two frontrunners. Plaintiff also claims that the Commission wrongly held that no contemporaneous documentation is required to satisfy the Commission's candidate debate selection criteria and that this alleged holding unlawfully shifts the burden of proving eligibility away from staging organizations. (Compl. at 4, ¶¶ 65-74.)

III. THE COURT LACKS JURISDICTION OVER PLAINTIFF'S CLAIMS, AND IN ANY EVENT THE COMMISSION'S DISMISSAL OF HIS ADMINISTRATIVE COMPLAINT WAS PROPER

A. This Court Lacks Article III Jurisdiction to review The Commission's Dismissal of Plaintiff's Administrative Complaint in MUR 6383R

Plaintiff La Botz claims he was impermissibly excluded from ONO's senatorial debates in 2010. But those debates are now over, La Botz was not a candidate for U.S. Senate from Ohio in 2012, and there is no indication in the record that he will ever be such a candidate from Ohio in the future. In fact, plaintiff La Botz has now stated that he will move from Ohio to New York

[4] The notification letters included copies of the Factual and Legal Analysis approved by the Commission. (*See* AR0188-AR0198).

in January 2014, and any future congressional races he may enter would be in New York. (Compl. ¶ 9.) While La Botz states that he is "likely" to run for President of the United States and thus might appear on an Ohio general election ballot as a presidential candidate, there is no allegation or record evidence that ONO has ever sponsored or would ever sponsor presidential debates. (*Id.*) Thus, although in *La Botz I* the Court found jurisdiction in reliance on La Botz's declaration that "it is likely that [he] will run for federal office in Ohio again in the future" (889 F. Supp. 2d at 59 (quoting La Botz declaration)), that is no longer the case. In addition, ONO now has adopted new written candidate debate selection criteria, which further reduces the likelihood that La Botz could somehow be harmed by a lack of written criteria in the future. (AR0154-AR0156; AR0183 at 10 n.8). Because there is virtually no chance that plaintiff will ever again encounter allegedly improper ONO debate selection criteria, this Court lacks Article III jurisdiction, whether the issue is analyzed as a matter of constitutional standing or mootness,.

In *La Botz I*, this Court analyzed the issue of La Botz's potential future candidacy under the mootness doctrine. "The doctrine of mootness is a logical corollary to Article III's case-or-controversy requirement: if subsequent events make it impossible for the court to grant any effectual relief to the prevailing party, 'any opinion as to the legality of the challenged action would be advisory.'" *La Botz I*, 889 F. Supp. 2d at 58 (quoting *City of Eire v. Pap's A.M.*, 529 U.S. 277, 287 (2000); other citations omitted). An exception to this rule exists if a practice no longer affects the parties but "'is capable of repetition, yet evading review.'" *Id.* (quoting (*FEC v. Wis. Right to Life*, 551 U.S. 449, 462 (2007)). To invoke this exception, a plaintiff must show that "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party

will be subject to the same action again." *La Botz I*, 889 F. Supp. 2d at 59 (quoting *Wis. Right to Life*, 551 U.S. at 462).[5] *See also Herron for Congress v. FEC*, 903 F. Supp. 2d 9, 14 (D.D.C. 2012) (holding that a candidate alleging campaign finance violations "must demonstrate a 'reasonable expectation' or a 'demonstrated probability' that 'the same controversy will recur involving the same complaining party'" (quoting *Murphy v. Hunt*, 455 U.S. 478, 482 (1982)).

In *La Botz I*, the Court found that plaintiff fell within the "capable of repetition" exception, but plaintiff's imminent departure from Ohio for New York means there is no "reasonable expectation that [he] will be subject to the same action again." 889 F. Supp. 2d at 59 (citation omitted). This is no longer a matter of assessing how likely it is that La Botz will decide to run again for Senate in Ohio, the basis on which this Court found jurisdiction in *La Botz I*, *id*. Instead, on this record there is no chance of that whatsoever, and thus no basis to conclude that La Botz will ever again have reason to seek to participate in a debate sponsored by ONO. And even if La Botz did run for President and appear on an Ohio general election ballot in that capacity, there is no evidence that ONO would ever sponsor a presidential debate; indeed, the Commission on Presidential Debates has sponsored all multi-party presidential debates since 1988. *See* Commission on Presidential Debates, http://www.debates.org/. La Botz has failed to meet his burden of showing by a preponderance of the evidence that ONO is likely to exclude him from another debate. *See Herron*, 903 F. Supp. 2d at 15 (finding that when a candidate's claim that a past controversy will recur rests not on evidence but on "an unlikely chain of

[5] The Court noted a potential "discrepancy in the case law" regarding whether "a plaintiff need only show that *others similarly situated* might suffer a comparable harm in the future" to invoke the exception. 889 F. Supp. 2d at 59. Even if such a discrepancy exists, however, *Pharmachemie B.V. v. Barr Labs, Inc.*, 276 F.3d 627, 633 (D.C. Cir. 2002), would control here, not older or out-of-Circuit decisions.

hypothetical occurrences, the court must conclude that the controversy is not likely to reappear" (citations omitted)).

Though this Court previously analyzed the Commission's redressability argument as one of mootness, rather than standing, the Courts of Appeals' recent decision in *Nader* provides further information regarding standing doctrine. *Nader*, 2013 WL 3956997 (D.C. Cir. Aug. 2, 2013). La Botz would lack standing because, as explained above, there is now virtually no chance on this record that any decision by this Court would have any effect on La Botz. Under the familiar formulation for Article III standing, a plaintiff must establish: "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. [TOC], Inc.*, 528 U.S. 167, 180-181 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)).

In the *Nader* case, a presidential candidate challenged the dismissal of an administrative complaint he had filed with the Commission pursuant to section 437g(a)(8). The Court of Appeals *sua sponte* concluded that the candidate could not demonstrate competitive standing because it was too speculative that he would again run for president and thus could again be subjected to allegedly unlawful actions by those about whom he complained. *Id*. at *2. Any injury La Botz suffered from actions taken by ONO in the 2010 general election cannot be redressed here because it is similarly too speculative that a decision of this Court could have any effect on La Botz. Should the Court choose to analyze La Botz's standing in light of *Nader*, it should find that there is virtually no chance that he will be subject to ONO's debate participation standards and thus he lacks standing.

B. The Commission's Dismissal of Plaintiff's Administrative Complaint Was Not Contrary to Law

Even if this Court finds that it has jurisdiction, plaintiff La Botz falls far short of meeting his burden to justify overturning the Commission's dismissal of the administrative complaint under the highly deferential standard of review applicable here. The Commission's decision to dismiss the complaint fits squarely within its broad prosecutorial discretion and was not contrary to law.

1. The Standard of Review Under 2 U.S.C. § 437g(a)(8) Is Highly Deferential

In reviewing the Commission's dismissal of an administrative complaint under 2 U.S.C. § 437g(a)(8), "[a] court may not disturb a Commission decision to dismiss a complaint unless the dismissal was based on an 'impermissible interpretation of the [FECA] . . . or was arbitrary or capricious, or an abuse of discretion.'" *Common Cause*, 108 F.3d at 415 (internal citation omitted); *accord Hagelin*, 411 F.3d at 242; *In re Carter-Mondale Reelection Comm., Inc.*, 642 F.2d 538, 542 (D.C. Cir. 1980); *Akins v. FEC*, 736 F. Supp. 2d 9 (D.D.C. 2010). *See FEC v. DSCC*, 454 U.S. 27, 31, 37, 39 (D.D.C. 1981). The "arbitrary and capricious" standard of review is "highly deferential" and "presume[s] the validity of agency action." *Am. Horse Prot. Ass'n, Inc. v. Yeutter*, 917 F.2d 594, 596 (D.C. Cir. 1990). "[T]he party challenging an agency's action as arbitrary and capricious bears the burden of proof." *San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 37 (D.C. Cir. 1986).[6]

The Supreme Court has held that the Commission "is precisely the type of agency to which deference should presumptively be afforded." *DSCC*, 454 U.S. at 37. *See also Hagelin*, 411 F.3d at 243; *Common Cause*, 842 F.2d at 448. Thus, "in determining whether the

[6] When reviewing agency action, district courts review the entire case as a pure question of law in a manner similar to an appellate tribunal. *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001).

Commission's action was 'contrary to law,' the task for the [Court is] not to interpret the statute as it [thinks] best but rather the narrower inquiry into whether the Commission's construction [is] 'sufficiently reasonable' to be accepted by a reviewing court." *DSCC,* 454 U.S. at 39 (citations omitted). Unless "Congress has directly spoken to the precise question at issue," the Court must defer to a reasonable construction by the Commission. *Chevron, U.S.A., Inc. v. NRDC,* 467 U.S. 837, 842-844 (1984); *see also FEC v. Nat'l Rifle Ass'n. of Am.,* 254 F.3d 173, 187 (D.C. Cir. 2001). A court will find an abuse of discretion only when the agency cannot meet "its minimal burden of showing a 'coherent and reasonable explanation for its exercise of discretion.'" *Carter/Mondale Presidential Comm., Inc. v. FEC,* 775 F.2d 1182, 1185 (D.C. Cir. 1985) (quoting *MCI Telecom. Corp. v. FCC,* 675 F.2d 408, 413 (D.C. Cir. 1982)). And when a federal agency is interpreting its own regulation, as the Commission is here, "deference is at its zenith." *Balt. Gas & Electric Co. v. Natural Res. Def. Council, Inc.,* 462 U.S. 87, 103 (1983); *Nat'l Wildlife Fed'n v. Westphal,* 116 F. Supp. 2d 49, 57 (D.D.C. 2000) (citing *Baltimore Gas & Electric Co.*).

2. The Commission Reasonably Exercised Its Prosecutorial Discretion When It Decided to Dismiss Plaintiff's Administrative Complaint Without Conducting a Potentially Difficult and Costly Investigation

As this Court noted in *La Botz I,* the Commission's prosecutorial discretion is "'considerable.'" 889 F. Supp. 2d at 63 n.6 (citations omitted). The Commission's Factual and Legal Analysis in MUR 6383R (AR0188-AR0198) carefully analyzed the administrative complaint, supplement and the responses. After discussing the available evidence and describing the administrative investigation that would be necessary to resolve the remaining issues, discussed *infra,* the Analysis concluded that the evidence in the record supporting the allegation in the Complaint was too limited to warrant undertaking a resource-intensive review. (AR0195-

AR0198.) Such an investigation would thus be an inefficient use of the Commission's limited resources, particularly in light of the small chance that La Botz could meet any objective debate participation criteria that ONO would be likely to adopt. (AR0197 and n.9.) The Commission therefore exercised its prosecutorial discretion and dismissed the matter without further action pursuant to *Heckler v. Chaney*, 470 U.S. 821 (1985), and Commission policy regarding enforcement dismissals. The Commission's decision was lawful and supported by the record.

a. The Commission has broad prosecutorial discretion

Agencies are "far better equipped than the courts to deal with the many variables involved in the proper ordering of [their] priorities." *Heckler*, 470 U.S. at 831-32. While the Commission's exercise of prosecutorial discretion is not entirely unreviewable, "the Commission, like other Executive agencies, retains prosecutorial discretion." *CREW v. FEC*, 475 F.3d at 340 (citing *Akins*, 524 U.S. 11, 25 (1998)). That discretion is broad, *La Botz I*, 889 F. Supp. 2d at 63 n.6, and it extends to the Commission's decision not to pursue an enforcement action regarding a particular fact pattern, which "involves a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise," *Heckler*, 470 U.S. at 831. These decisions require the agency to consider a number of factors:

> whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.

Id.

The Commission's decision to dismiss an allegation without finding reason-to-believe or conducting an investigation is quintessentially the type of decision that falls within an agency's prosecutorial discretion. As the Supreme Court has explained, a "prosecutor exercises considerable discretion in matters such as the determination of which persons should be targets

of investigation, what methods of investigation should be used, what information will be sought as evidence." *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807 (1987); *see also Sloan v. United States Dep't of Hous. and Urban Dev.*, 236 F.3d 756, 762 (D.C. Cir. 2001) (footnote omitted) ("[T]he sifting of evidence, the weighing of its significance, and the myriad other decisions made during investigations plainly involve elements of judgment and choice."). An enforcement agency's decision to deem credible the representations of a party or witness falls squarely within that discretion. An agency is "not bound to launch full-blown proceedings simply because a violation of the statute is claimed." *Porter Cnty Chapter of Izaak Walton League of Am. v. NRC*, 606 F.2d 1363, 1369 (D.C. Cir. 1979). The Commission itself has explained that it generally "will dismiss a matter when the matter does not merit further use of Commission resources . . . or when the Commission lacks majority support for proceeding with a matter for other reasons." *FEC Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process*, 72 Fed. Reg. 12,545, 12,546 (Mar. 16, 2007).

Moreover, the Act "suggests that Congress determined that the FEC should make preliminary investigative decisions on the basis of all the information submitted to it by the charging and responding parties." *Orloski v. FEC*, 795 F.2d 156, 168 (D.C. Cir. 1986). Those decisions are based upon the administrative record: materials "that were 'before the agency at the time the decision was made.'" *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996) (quoting *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981)). Thus, the question before the Court is not whether further investigation might have revealed that a violation occurred, but whether the Commission abused its discretion, based upon the evidence before it, in deciding not to pursue an investigation.

b. The Commission's decision not to expend additional resources to investigate plaintiff's allegations was reasonable

In this case, plaintiff La Botz cannot meet the substantial burden of demonstrating that the Commission was unreasonable in concluding that further investment of the agency's resources was unwarranted. A substantial investigation would likely have been required to clarify conflicting evidence in the record, and the agency determined that such an effort would not be worthwhile in this case. It is "surely committed to the Commission's discretion to determine where and when to commit its investigative resources." *Stark v. FEC*, 683 F. Supp. 836, 840 (D.D.C. 1988). La Botz fails to provide any reason for the Court to second-guess the Commission's decisions regarding use of its investigative resources.

La Botz does not question the qualifications of ONO or its members to stage candidate debates, 11 C.F.R. § 110.13(a), nor does he claim that the debates impermissibly promoted one of the two participating candidates over the other, 11 C.F.R. § 110.13(b).[7] Thus, the only factual issue La Botz raises is whether ONO established and applied pre-existing objective criteria for selecting candidates to participate in the 2010 debate.

As discussed in the Court's prior decision, ONO did not provide a contemporaneous written standard for its 2010 debates, and the administrative record contains contradictory evidence as to whether ONO established and employed pre-established objective selection criteria. Several documents in the record were relevant to these issues, including a September 8, 2010 email from Bruce Winges, editor and vice president of the *Akron Beacon Journal*, purportedly sent in response to an online petition for La Botz's inclusion in the 2010 debates (and subsequently attached to plaintiff's administrative complaint); and an October 11, 2010

[7] Likewise, La Botz does not challenge the governing debate regulation itself. Any such challenge could not be brought under 2 U.S.C. § 437g(a)(8).

affidavit from Benjamin Marrison, editor of the *Columbus Dispatch*, submitted to the Commission as part of ONO's response to the administrative complaint in MUR 6383.

The Commission analyzed those two documents, noting inconsistencies and shortcomings in both:

> Marrison's sworn affidavit states that the ONO used pre-established criteria. Marrison Aff. ¶¶ 6, 8, 12. (*See* AR0083-AR0085.) But, as the district court noted, Marrison's statement is not entirely consistent with Winges's email asserting that the ONO used major party status as the sole selection criterion. *La Botz*, 889 F. Supp. 2d at 61-62. Marrison, who is editor of the *Columbus Dispatch*, does not explain why or how he had first-hand knowledge of the events; his affidavit was written after the fact and is not supported by any contemporaneous written policy. *Id*. (citing *Ponte v. Real*, 471 U.S. 491, 509 (1985) ("The best evidence of why a decision was made as it was is usually an explanation, however brief, rendered *at the time of the decision*." (emphasis in original))). Thus, given the shortcomings of Marrison's affidavit, Winges's e-mail – which lists a possibly contradictory set of criteria "allow[ing] for only the major-party candidates to debate" – would suggest that the ONO may not have used pre-established objective criteria.
>
> Yet it is unclear whether Winges had any more personal knowledge about the selection criteria than Marrison; they each appeared to hold equivalent positions at two member newspapers of the ONO. It is also possible that Winges may have misunderstood the ONO's criteria, given that he also mistakenly stated that the Commission on Presidential Debates looked only to major party status. *See* Compl., Attach. 8; *supra* note 3. And the Complaint does not provide context for the e-mail – which appears to be part of a larger e-mail chain not included in the Complaint – other than it was sent in response to an online petition. Accordingly, the e-mail, although contemporaneous, does not conclusively establish that the ONO used major party status as the sole selection criteria in 2010, any more than the Marrison affidavit conclusively establishes the contrary.

(AR0196-AR0197.)

The Commission also noted that a third document describes the criteria used by ONO: a September 14, 2010 letter from ONO's counsel to La Botz's counsel stating that ONO used "front runner status based on then-existing Quinnipiac and party polling, [and] fundraising reports, in addition to party affiliation." (AR0196-AR0197.) The ONO had thus notified La Botz of the selection criteria before the debates took place, and before he filed his administrative complaint.

The Commission also noted that "it appears that La Botz likely would have been excluded under any pre-established objective standard that the ONO would have been willing to adopt in 2010, including the specific criteria stated in the ONO's Response," (AR0197 n.9) (citing *La Botz*, 889 F. Supp. 2d at 57, n.1), and that "ONO has since promulgated a written selection criteria policy, which presumably will be applied to future debates, in an effort to 'eliminat[e] future complaints or issues.' ONO Supp. Resp. at 2." (AR0197 n.8.)

Given the inconsistent statements concerning the ONO's criteria in the record, the Commission considered investigating whether the ONO employed pre-established criteria but determined such an investigation "would not be straightforward." (AR0197.) To reach a conclusive determination, the Commission noted that a review of ONO's internal communications would be required, including of its eight constituent media entities. (*Id.*) When balanced against the sworn testimony of the ONO and other evidence in the record, and the other considerations mentioned above, the Commission reasonably concluded the Winges email was insufficient evidence of a violation to justify opening an investigation: "*The single ambiguous item in the record that supports the allegation in the Complaint does not, in our view, warrant undertaking such a resource-intensive review and would be an inefficient use of the Commission's limited resources.*" (*Id.* (emphasis added; footnotes omitted)).

Relying in part on its specific policy contemplating dismissal of a matter "when the matter does not merit further use of Commission resources, due to . . . the vagueness or weakness of the evidence," the Commission thus exercised its prosecutorial discretion and dismissed. *See FEC Statement of Policy Regarding Commission Action in Matters at the Initial Stage of the Enforcement Process*, 72 Fed. Reg. at 12,546. (AR0198.)

As discussed *supra*, the Commission has "'broad discretionary power in determining whether to investigate a claim,' and its decisions to dismiss complaints are entitled to great deference as well, as long as it supplies reasonable grounds." *Nader*, 823 F. Supp. 2d at 65 (quoting *Akins*, 736 F. Supp. 2d at 21). In this instance, the Commission's decision to dismiss the complaint clearly was reasonable, and the Commission's Analysis adequately explains exercise of prosecutorial discretion to take no further action. Whether a violation likely occurred and whether the Commission's resources are better used elsewhere are factors "peculiarly within [the Commission's] expertise" and are sensibly invoked here. *Heckler*, 470 U.S. at 831.

This Court previously recognized that the Marrison affidavit and Winges e-mail were contradictory. *La Botz I*, 889 F. Supp. 2d at 62. Thus, an extensive investigation would have been necessary to conclusively resolve the plaintiff's allegation. And while an investigation might have yielded additional evidence, the Court also recognized that the Commission was not required to conduct such an investigation. This Court specifically noted "it seems possible that the FEC's decision to dismiss La Botz's administrative complaint could have been justified entirely by the FEC's prosecutorial discretion, which is considerable," *Id.* at 63 n.6 (citing *Nader*, 823 F. Supp. 2d at 63; other citations omitted), and the Commission found that it was. This Court also specifically found that "a denial of La Botz's complaint based on prosecutorial discretion might be a wise use of the FEC's limited resources" given that it is "unlikely that La Botz would have benefited from the application of any objective criteria," 889 F. Supp. 2d at 63 n.6, and the Commission once again agreed.

Ultimately, "[t]he FEC is in a better position than is [La Botz] to evaluate the strength of his complaint, its own enforcement priorities, the difficulties it expects to encounter in investigating [La Botz's] allegations, and its own resources." *Nader*, 823 F. Supp. 2d at 65.

The Commission coherently explained its reasonable exercise of its broad prosecutorial discretion here, and the agency's decision should not be disturbed.

3. Plaintiff's New Claims Fail as a Matter of Law

In his new court complaint, plaintiff does not directly challenge the Commission's exercise of prosecutorial discretion, but he does advance several claims regarding ONO's candidate selection criteria and the Commission's review of the evidence in this matter. These claims are largely beside the point in light of the Commission's exercise of its prosecutorial discretion, but in any event the claims are without merit.

a. A "two frontrunner" debate participation standard based on voter support levels is consistent with the FEC's debate regulations and supported by this Court's decision in *La Botz I*

La Botz claims that the Commission's decision to dismiss his administrative complaint was unlawful because the Commission's decision permits sponsoring organizations to limit candidate debates to the "two frontrunners." (*See* Compl. at 4, ¶ 65.) But the Commission's debate regulation, 11 C.F.R. § 110.13, does permit organizations to sponsor debates with as few as two candidates, as long as they use "pre-established objective criteria to determine which candidates may participate in a debate," such as polling and other data measuring public support, as this Court recognized. *La Botz I*, 889 F. Supp. 2d at 60. The Commission's regulation does explicitly prohibit the use of "nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate." 11 C.F.R. § 110.13(c). But the Commission did not approve the use of such a sole criterion in this matter. Instead, as the Commission made clear, it has permitted sponsoring organizations to utilize a variety of

factors to select candidates for debates.[8] This Court expressed its approval for such criteria in its prior opinion involving plaintiff's administrative complaint. *La Botz I*, 889 F. Supp. 2d at 63-64.

In this case, ONO's response to the administrative complaint in MUR 6383 described its debate selection criteria as "first ensur[ing] the eligibility of the candidates then par[ing] down the field of candidates to the two frontrunners" based on polling, conversations with political reporters and sources regarding the race, and financial disclosures . . .. (AR0081 (citations omitted).) On remand, the Commission declined to investigate whether in fact ONO had utilized this standard, but as a preliminary matter the Commission concluded that ONO's stated criteria "were acceptably 'objective,'" citing the Court's decision in *La Botz I*. (AR0194-AR0195.) Plaintiff flatly denies that the *La Botz I* decision resolved whether a "two frontrunner" standard satisfied the FEC's safe harbor requirements for debate-staging organizations,"[9] but plaintiff is mistaken.

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[8] The Commission's Analysis in MUR 6383R, for example, states:

> Objective selection criteria are "not require[d] [to contain] rigid definitions or required percentages." *See* FGCR at 19, MURs 4956, 5962, 4963 (Union Leader Corp., *et al*). To qualify as 'objective," the criteria need not be stripped of all subjectivity or be judged only in terms of tangible, arithmetical cut-offs. Rather, it appears that they must be free of 'content bias,' and not geared to the 'selection of certain pre-chosen participants.'" *Id.* at 23. Major party status can be a factor considered by a staging organization so long as it is not the only factor. 11 C.F.R. § 110.13(c); 60 Fed. Reg. at 64,262. Both polling data and financial disclosure are considered objective criteria. *See La Botz*, 889 F. Supp. 2d at 63-64; *Buchanan v. FEC*, 112 F. Supp. 2d 58, 74 (D.D.C. 2000) (concluding that polling data is objective); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 682 (1998) (citing lack of financial support as an objective indicator).

(AR0194.)

[9] (*See* Compl. at 3 ("[T]he FEC erroneously claimed that this Court had endorsed this position[.]"); *id.* at 4 n.1 ("Compounding this error is the FEC's apparent belief that this Court somehow approved this erroneous conclusion in *La Botz*").)

Indeed, in *La Botz I*, after plaintiff challenged the "two frontrunners" standard, the Court's opinion discussed requirements for a minimum level of public support and affirmatively indicated its approval of those standards. In fact, while the Court ultimately held that the Commission's earlier decision to dismiss the administrative complaint on the merits was not supported by substantial evidence, the Court made "clear that its holding only applies to the FECs determination that ONO used pre-existing criteria to select its debate participants," and explicitly distinguished that from other issues raised in the case. *La Botz,* 889 F. Supp. 2d at 63. The Court stated:

> The FEC also listed a number of criteria that could be considered "objective" under FEC regulations. . . . The court has no quarrel with the FEC's reasoning on this score. Precedent makes clear that polling data may provide an objective measure of a candidate's viability. . . . The same goes for fundraising reports, which measure a candidate's level of financial support. . . . In addition, party support is an acceptable consideration, provided that party affiliation is not the *only* consideration. . . . Thus, the court has every reason to believe that these criteria are "objective" under FEC regulations.

La Botz I, 889 F. Supp. 2d at 63-64 (emphasis in original) (citing and quoting *Buchanan,* 112 F. Supp. 2d at 74 regarding polling data; other citations omitted). Thus, plaintiff's challenge to the "two frontrunner" standard has already been resolved, and plaintiff's claim here is frivolous.

b. Plaintiff's complaints about how the Commission evaluated the evidence in this matter lack merit

Plaintiff also claims that the Commission committed a legal error by not insisting that ONO produce contemporaneous documentation to support ONO's assertion that it used pre-existing objective criteria to select candidates for the 2010 debates. In plaintiff's view, the Commission thus impermissibly shifted the burden of proof from ONO (the staging organization) to La Botz (the administrative complainant) when it dismissed La Botz's administrative complaint. (Compl. at 4, ¶¶ 71-74.)

However, the Commission made no determination that a final assessment of whether ONO used objective criteria could be done without a review of contemporaneous evidence. As an initial matter, the Commission noted that under its previous decisions "undocumented affirmative statements submitted by or on behalf of respondents will suffice [to demonstrate criteria had been established in advance] so long as the evidence shows that the criteria were used in a manner consistent with the media organization's affirmative statements." (AR0195 (citations and internal quotation marks omitted).) The Commission did not, however, hold in this matter that such an evidentiary showing could be made without any contemporaneous evidence.

More fundamentally, contrary to La Botz's claim, the Commission dismissed his administrative complaint on prosecutorial discretion grounds in part because of the potential cost and difficulty in conducting an administrative investigation to obtain and evaluate *just such evidence*. In any case, the agency reached no conclusions as to the existence or application of any evidentiary burdens generally.

Plaintiff also argues that the Commission's debate regulation creates an "exception" to which debate sponsors must prove entitlement (Compl. at 4, ¶ 74), but plaintiff cites no legal authority that the Act or Commission regulations create such a burden, let alone impose an independent recordkeeping obligation on sponsoring organizations. The debate regulation specifies that "staging organizations must use pre-established objective criteria" (11 C.F.R. § 110.13(c)), but it does not mandate any particular recordkeeping or documentation requirements. (AR0194.) *Buchanan*, the district court decision principally relied upon by plaintiff, correctly notes that "[s]taging organizations must be able to show that their objective criteria were used to pick the participants, and that the criteria were not designed to result in the

selection of certain pre-chosen participants." 112 F. Supp. 2d at 74. But there is nothing in that decision that suggests that these "objectivity" requirements limit or preclude the Commission's prosecutorial discretion to dismiss administrative complaints on the basis of the wise use of its resources or other factors.

Finally, contrary to plaintiff's suggestion (Compl. at 4, ¶¶ 7, 74), this Court's decision in *La Botz I* imposes no such burden on ONO. The Court held that the Commission's initial decision to dismiss plaintiff's administrative complaint was not supported by substantial evidence. But the Court did not say anything suggesting that ONO faced any specific evidentiary burden, much less one that could foreclose an agency dismissal based on prosecutorial discretion.

Plaintiff's new legal claims therefore lack merit.

IV. CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the Court dismiss the complaint in this matter for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) or, in the alternative, for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

Respectfully submitted,

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September 13, 2013

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAN LA BOTZ, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	No. 1:13-cv-00997-RC

[PROPOSED] ORDER

Upon full consideration of the defendant Federal Election Commission's Motion to Dismiss, plaintiff Dan La Botz's opposition, and the Commission's reply, it is hereby

ORDERED that the Federal Election Commission's Motion to Dismiss is GRANTED, and it is further

ORDERED that the above-captioned case be DISMISSED**.**

Dated: _____, 2013

_____
RUDOLPH CONTRERAS
United States District Judge