UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| COMBAT VETERANS FOR CONGRESS POLITICAL ACTION COMMITTEE, *et al.*, | ) | |
| Plaintiffs, | ) | Civ. No. 1:11-cv-02168-CKK |
| v. | ) | |
| FEDERAL ELECTION COMMISSION, | ) | REPLY MEMORANDUM SUPPORTING FEC MOTION FOR SUMMARY JUDGMENT |
| Defendant. | ) | |

**DEFENDANT FEDERAL ELECTION COMMISSION'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

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September 14, 2012

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Plaintiffs Combat Veterans for Congress PAC ("Combat Veterans" or "Committee") and its treasurer David H. Wiggs continue to try to evade their statutory responsibilities by shifting all blame for three late-filed campaign finance reports to the Committee's former agent and by raising an ever-expanding set of meritless procedural objections, which now reach back to procedures adopted well before those reports were even due. But none of these diversions changes the simple fact that plaintiffs incurred $8,690 in administrative fines because of the Committee's failure to file three campaign finance disclosure reports by the statutory deadlines around the time of the November 2010 general election. Indeed, plaintiffs again concede that their reports were filed late, and they do not dispute that the Federal Election Commission ("Commission" or "FEC") correctly calculated the fines under the regulatory formula.

Instead, plaintiffs insist that the Committee's former treasurer bears sole liability for the fines under the theory that the Committee and its treasurer are essentially one and the same. But as we explain below, that theory is pure fiction and contrary to the plain language of the Federal Election Campaign Act, 2 U.S.C. §§ 431-57 ("FECA"). A political committee is a legally defined entity under FECA and is distinct from its treasurer, one of its agents.

To the extent any of plaintiffs' allegations of procedural flaws are properly raised here, they also lack merit. And even if the Commission had erred in some minor technical aspect of its administrative procedures, any such error would plainly be harmless with regard to plaintiffs and any remand in this matter would be futile. There is no doubt that the Commission properly determined that plaintiffs were liable for the late reports, and plaintiffs received all the procedural rights they were due. Accordingly, the FEC's motion for summary judgment should be granted and plaintiffs' cross-motion should be denied.

## ARGUMENT

### I. THE FEC PROPERLY FINED PLAINTIFFS FOR VIOLATING FECA BY FILING THREE LATE DISCLOSURE REPORTS

This case involves deferential judicial review of the Commission's final administrative determinations and assessed fines for late-filing violations by Combat Veterans and its treasurer immediately before and after the November 2010 general election. There are no disputes regarding either the applicable legal standards or the relevant facts in this case; plaintiffs do not even respond to the portions of the Commission's brief addressing those matters. (*See* FEC Memorandum in Support of Its Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment (July 9, 2012) (Doc. 22-1) ("FEC Mem.") at 1-15.) Plaintiffs also previously conceded all the factual and legal defenses which can be raised under the Commission's streamlined procedures for administrative fine matters, and because plaintiffs' additional arguments in this litigation were not presented during the administrative proceedings, many were waived. (FEC Mem. at 15-16, 24-25; *see* 11 C.F.R. § 111.35.) Furthermore, as the Commission has shown, plaintiffs' new arguments are also without merit.[1] (FEC Mem. at 25-35.) Thus, the final determinations and fines imposed by the Commission should be upheld.

[1] Notably, plaintiffs appear to have dropped their earlier argument (Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Summary Judgment (June 9, 2012) (Doc. 18-1) at 36-42) that the Commission's determinations were unlawful because the Commission did not conduct in-person oral hearings in the three administrative fine matters. As we have shown (FEC Mem. at 32-35), there is no legal requirement that the Commission offer such a hearing. Plaintiffs' sole mention of potential hearings in their most recent brief is a statement that, if a hearing had been conducted, plaintiffs could have clarified their previous arguments regarding treasurer liability. (Plaintiffs' Memorandum in Further Support of Its Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment (Aug. 10, 2010) (Doc. 26) at 15.) That conclusory suggestion does not remotely support a due process claim.

### A. Plaintiffs Have Conceded That the Late Reports Violated FECA and That the Requirements for the "Best Efforts" Defense Under the Commission's Administrative Fines Regulations Were Not Met

As previously discussed (FEC Mem. at 15-16), Combat Veterans *conceded* in all three administrative fine matters that the three reporting violations in fact occurred. Plaintiffs also conceded that the three administrative fines assessed by the Commission were correctly calculated using the penalty schedule, 11 C.F.R. § 111.43, and conceded that the Commission's regulatory "best efforts" defense did not excuse the unlawful conduct here. (*See* FEC Mem. at 15-16 (quoting AF# 2199 at AR093, AF# 2312 at AR097 and AF# 2355 at AR090).) In fact, plaintiffs now describe the former treasurer's failure to file the disclosure reports by the statutory deadlines as "reckless," "intentional[]," and possibly "knowing" and "willful." (Plaintiffs' Memorandum in Further Support of Its Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment (Aug. 10, 2010) (Doc. 26) ("Pls.' Opp.") at 1, 2, 20, 26, 29, 32, 33.) These concessions are fatal. The failure by the Committee and its agent to file the disclosure reports on time obviously cannot qualify for the best efforts exception, which requires a showing that, among other things, an event beyond the committee's control prevented a timely filing.[2] 11 C.F.R. §§ 111.35(b)(3) and (c).

Plaintiffs again attack the Commission's "best efforts" regulation as being unreasonably narrow (Pls.' Opp. at 31-33). But as the Commission explained (FEC Mem. at 16 n.25), that claim has been waived and plaintiffs cannot challenge the regulation on its face in a case brought

[2] Plaintiffs now attempt to qualify their concessions in the administrative proceeding by stating that "of course the reports were filed late, but the *Committee* was not responsible for filing them and thus did not violate the law, its former treasurer did" (Pls.' Opp. at 15 (emphasis in original)) — an argument we address *infra* section I.B. Plaintiffs continue to concede, however, that "if the former Treasurer were not liable in his personal capacity, but rather in some official capacity," the Commission could "arguably extend the finding to the substitute treasurer." (Pls.' Opp. at 22.)

under 2 U.S.C. § 437g(a)(4)(C)(iii). Moreover, a facial attack on the regulation appears nowhere in plaintiffs' complaint.

Even if plaintiffs could properly bring this claim, it is meritless. The regulation is a reasonable effort to balance the congressional mandate for efficient resolution of these routine late-filing matters with a recognition that on rare occasions, such as in the event of a natural disaster, it may be genuinely beyond a committee's power to file a report on time. 11 C.F.R. § 111.35. The regulation implements 2 U.S.C. § 432(i), which states that "[w]hen the treasurer of a political committee shows that best efforts have been used to obtain, maintain, and submit the information required by this Act for the political committee, any report or any records of such committee shall be considered in compliance with this Act." If negligence or recklessness — *i.e.*, the kind of behavior plaintiffs claim the Committee's former treasurer engaged in — were to qualify as "best efforts," the exception would swallow the rule. Likewise, no reasonable definition of "best efforts" could ever extend to a committee's simple failure to manage its treasurer, *i.e.*, the committee's own agent. Thus, even if plaintiffs had properly brought a challenge to the best efforts regulation, no other reasonable regulatory interpretation of 2 U.S.C. § 432(i) could possibly excuse the Committee's failure to ensure that its agent was competent to carry out the duties of a treasurer.

### B. A Political Committee Is Legally Responsible for FECA Violations Stemming from the Late Filing of the Committee's Own Reports, Contrary to Plaintiffs' Claim That Liability Rests Solely with the Committee's Agent, Its Treasurer

Contrary to plaintiffs' claims (Pls.' Opp. at 15-25), FECA imposes liability for the late filing of political committee reports directly on the *committee*, as both the language of the statute and common sense make clear, and as previously explained. (*See* FEC Mem. at 21-24; 2 U.S.C. § 434(a)(4) (stating that "[a]ll *political committees* other than authorized committees of a

candidate *shall file*" certain reports, including those at issue here) (emphasis added).) Neither the Commission nor any court has ever interpreted FECA to impose liability for reporting violations solely on a treasurer and not on the committee, and there is no basis for this Court to do so.[3]

Plaintiffs' arguments are based upon several novel and unsupported premises regarding the nature of political committees and the relationship between committees and their treasurers. Plaintiffs argue that the "treasurer is not an agent of the Committee," and "not some mere functionary or agent" of the committee. (Pls.' Opp. at 18-19.) Rather, in plaintiffs' view, the treasurer is the "principal or master"; indeed, plaintiffs even go so far as to suggest that "there is no committee but for the treasurer." (*Id.* at 18-22.) But these fatuous theories turn FECA upside down and lead plaintiffs to the erroneous conclusion that, because (in their view) treasurers are personally liable for reporting violations that occur during their tenure, the political committee and any successor treasurers (like Combat Veterans' current treasurer, Mr. Wiggs) are free from any liability. (Pls.' Opp. at 19-20.)

First, contrary to plaintiffs' view, FECA establishes political committees as specially defined, independent legal entities, not merely the alter ego of a treasurer. In particular, FECA defines the term "political committee" to mean "any committee, club, association, or other group of persons" which either receives contributions or makes expenditures aggregating more than $1,000 during a calendar year. 2 U.S.C. § 431(4)(A); *see also* 2 U.S.C. §§ 431(8), (9) (defining "contribution" and "expenditure"). Thus, a political committee must be *more* than a single person, such as the treasurer; in fact, the primary actors in political committees often are persons

[3] The Commission's interpretation of FECA and its regulations, including the agency's policy regarding when it is appropriate to name treasurers as personally liable, is entitled to deference. (*See* FEC Mem. at 13-15.)

other than the treasurer, as may well be the case with Combat Veterans itself.[4]

In addition, under FECA, it is the *committee* that must designate a treasurer and report any change in treasurer status. Specifically, each political committee is required to file a statement of organization (FEC Form 1) with the Commission, and the Act requires that this registration statement identify the individual who will serve as the committee's treasurer. 2 U.S.C. §§ 433(a), (b)(4).[5] Thus, the political committee designates the treasurer, not the other way around. Recognizing this statutory requirement, it was Combat Veterans that filed its initial statement of organization in 2009 listing Mr. Curry as treasurer.[6] Later, after Mr. Curry failed to file the Committee reports at issue, Combat Veterans' counsel filed amended statements of organization naming himself as assistant treasurer in November 2010 and naming David Wiggs as successor treasurer in January 2011.[7] Thus, the Act's requirement that committees designate treasurers in writing on the committee's own statement of organization, and Combat Veterans' own practice of naming treasurers, also flatly refute plaintiffs' claims.

Although 2 U.S.C. § 434(a)(4) clearly specifies that "[a]ll political committees other than

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[4] Political committees sometimes retain outside professionals to serve as treasurer and perform the recordkeeping and reporting tasks. For example, Combat Veterans' lead counsel has served as the Committee's assistant treasurer. Moreover, Combat Veterans has a president or chairman, Joseph R. John, who was designated as an "agent" of the committee on its initial statement of organization filed with the Commission on October 26, 2009. (Statement of Organization (Oct. 26, 2009) (FEC Exhibit ("Exh.") 4 at 4).) From the administrative record and plaintiffs' exhibits, it appears that Mr. John actively participated in the Committee's activities, including discussions with the Committee's then-treasurer, Mr. Curry, and others regarding the reports at issue. Thus, not only does FECA's plain language establish as a matter of law that political committees have a distinct legal identify from their treasurers, but the facts in this case show that Combat Veterans was not the alter ego of Mr. Curry.

[5] *See also* 11 C.F.R. § 102.2(a)(1)(iv). The Commission's regulations require committees to report any change in treasurer status within ten days. 11 C.F.R. § 102.2(a)(2).

[6] (Statement of Organization (Oct. 26, 2009) (FEC Exh. 4).)

[7] (Amended Statements of Organization (Nov. 8, 2010 and Jan. 12, 2011) (FEC Exhs. 5 and 6, respectively.)

authorized committees of a candidate shall file" periodic reports of the committee's receipts and disbursements, plaintiffs make the perplexing claim that the Commission cites this provision out of context. (Pls.' Opp. at 17-18.) But, in fact, it is plaintiffs who rely upon stray language from the statute and elsewhere that does nothing to alter the basic statutory scheme in which committees and their treasurers are both responsible for filing reports. Plaintiffs cite no court decisions or legislative history to support their radical re-interpretation of FECA, in which the treasurer is the sole legally responsible actor. (*Id*.) The supposedly "clear and unambiguous" provisions upon which plaintiffs rely merely specify that it is the treasurer, a human being, who must of necessity review and file reports on behalf of the committee, which exists only as legal entity. *See* 2 U.S.C. §§ 434(a)(1), 434(a)(11)(C); 11 C.F.R. §§ 104.14(d), 104.18(g). The unremarkable fact that FECA recognizes that a human being must file the reports in no way implies that FECA assigns all liability to the treasurer and none to the committee. Indeed, the FEC urges political committees to name assistant treasurers (the role once played by plaintiffs' counsel) to act when the treasurer is unavailable,[8] further undermining plaintiffs' claim that a committee is the mere alter ego of a single human being, *i.e.*, the treasurer.

Moreover, under the current statute, candidates *themselves* are deemed to be agents of their campaign committees. As originally enacted in 1971, the Act imposed reporting obligations upon both candidates for federal office and their authorized campaign committees.[9] In 1979, the Act was amended to deem the candidate to be an agent of his or her authorized principal campaign committee. 2 U.S.C. § 432(e).[10] Thus, all financial activity by a federal

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[8] FEC Campaign Guide for Nonconnected Committees (May 2008) at 4, *available at* http://www.fec.gov/pdf/nongui.pdf.

[9] Federal Election Campaign Act of 1971, Pub. L. No. 92-255 § 304.

[10] *See* Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187 § 104 (deleting phrase "and each candidate for election to such office").

candidate is attributed to that candidate's committee, and must be reported by the committee. Yet according to plaintiffs' theory, if the treasurer is the "principal or master" (Pls.' Opp. at 19) of the committee, then the candidate would essentially be an agent for the treasurer of the candidate's own committee; again, this is a non-sequitur that would turn FECA upside down.

Recognizing the role committee treasurers play on behalf of political committees, the Commission now names treasurers as respondents in enforcement and administrative fine matters in their "official capacity" and substitutes "successor" treasurers when there is a change in treasurer. Statement of Policy Regarding Treasurers Subject To Enforcement Proceedings ("Treasurer Policy"), 70 Fed. Reg. 3 (Jan. 3, 2005). As previously described, the purpose of naming treasurers is to ensure that there is someone to receive notifications and perform remedial actions, such as amending reports and paying penalties. The Commission rarely seeks payments from the treasurer's personal funds.[11] (*See* FEC Mem. at 17-19.)[12]

Plaintiffs suggest (Pls.' Opp. at 22-24) that the Commission erred by failing to consider Mr. Curry's potential personal liability but, as the Commission has shown (FEC Mem. at 19), that is simply not correct. The Reviewing Officer provided a written analysis to the Commission that explicitly suggested that the Commission might consider Mr. Curry's personal liability, but noted that *if* the Commission wished to do so, it would need to bifurcate the matter and refer

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[11] Plaintiffs cite a footnote from a *draft* of the Commission's Treasurer Policy (Pls.' Opp. at 17 (quoting Proposed Statement of Policy Regarding Naming of Treasurers in Enforcement Matters, 69 Fed. Reg. 4092, 4093 n.8 (Jan. 28, 2004)), but this statement merely explains that the treasurer *could also be named in her personal capacity* when the statute or regulations impose a legal obligation "specifically on committee treasurers and when a reasonable inference from the alleged violation is that the treasurer knew, or should have known, about the facts constituting a violation." 69 Fed. Reg. at 4093.

[12] *See also* Guidebook for Complainants and Respondents on the FEC Enforcement Process (FEC May 2012), *available at* http://www.fec.gov/em/respondent_guide.pdf.

Mr. Curry to the Office of General Counsel; a separate enforcement action, known as a "Matter Under Review," would then be opened under 2 U.S.C. § 437g(a)(1) to consider the issue. The analysis also explained that the Office of General Counsel did *not* believe the facts warranted such a course of action. (*See* FEC Mem. at 19-21.) In any event, the Reviewing Officer's ultimate written recommendation did not advocate pursuing Mr. Curry in his personal capacity. (*Id.; see* AF# 2199 at AR104-105, AF# 2312 at AR108, AF# 2355 at AR101). Rather, the Reviewing Officer recommended that the Commission determine that plaintiffs had violated FECA, and all six Commissioners voted to adopt the recommendation, effectively rejecting the option to pursue Mr. Curry in his personal capacity. Moreover, even if the FEC had pursued Mr. Curry in his personal capacity, that action would not have absolved plaintiffs from liability.

Despite FECA's clear language and structure, plaintiffs invent a legal interpretation that would impose sole legal liability for reporting violations upon the person who was committee treasurer at the time of the violation and would write out of the statute a political committee's independent obligation to file disclosure reports. That interpretation would also eliminate any incentive for committees to ensure that their own treasurers are competent, diligent, and honest.

In sum, in light of (1) FECA's unambiguous definition of a "political committee" and the duties of such organizations, (2) the treasurer's role in the reporting process, and (3) plaintiffs' dispositive concessions that three of the Committee's reports were filed late, there simply is no factual or legal basis for overturning the Commission's final determinations that plaintiffs are responsible for the admitted FECA violations at issue here.

### C. Plaintiffs' Belated Claims That the Commission's Administrative Fine Regulations Must Directly Account for "Ability to Pay" Lack Merit

Plaintiffs also criticize the size of the fines assessed for their three late reports and argue that the FEC administrative fine schedule's lack of an "ability to pay" element violates the

Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06, and the Constitution. (Pls.' Opp. at 26-31.) But plaintiffs challenge neither the fines' calculation under the FEC's established schedule, *see* 11 C.F.R. § 111.43, nor the facial validity of that regulation. Plaintiffs also ignore that these fines were assessed in three different matters (AF ## 2199, 2312 and 2355) and involved the late-filing of three different disclosure reports by Combat Veterans (the October Quarterly, and Pre-General and Post General Election Reports). The three fines total $8,690.

Plaintiffs rely heavily (Pls.' Opp. at 26-31) on the analysis in *Cox for United States Senate Comm., Inc. v. FEC,* No. 03-C-3715, 2004 WL 783435 (N.D. Ill. Jan. 22, 2004), but that decision supports the *Commission's* position, not plaintiffs'. In *Cox,* the district court *rejected* a political committee's challenge to an administrative fine and explained the governmental interest in disclosure, the harm to the public, and the relative seriousness of the violation. The court also upheld the "strict application" of the Commission's fine schedule and a much larger fine than the ones at issue here:

> Plaintiffs, in effect, are asking this Court to exercise its own judgment and rehear Plaintiffs' administrative appeal. This is precisely the type of second-guessing that this Court must avoid. *See FEC v. Democratic Senatorial Campaign Comm.,* 454 U.S. [27, 37 (1981)]; *Smith [v. Office of Civilian Health & Med. Program of the Uniformed Servs.*], 97 F.3d 97 F.3d 950, 955 (7th Cir. 1996)]. Since the record is clear that the relevant factors were considered and the applicable regulations were strictly applied to Plaintiffs' violations, the Court concludes that the decision to assess a civil fine of $22,150 is supported by a rational basis and does not indicate a clear error of judgment. In light of that conclusion, further analysis is neither required, nor permitted.

*Cox,* 2004 WL 783435, at *5. *Cox* also rejected claims that the $22,150 fine was unconstitutionally excessive (*see id.* at *13-*14); in contrast, the three fines at issue here, ranging between $990 and $4,400, are only a fraction of the size of the $22,150 fine in *Cox*. Plaintiffs assert that *Cox* was wrongly decided (Pls.' Opp. at 30), but they cite no contrary legal authority.

Plaintiffs suggest (Pls.' Opp. at 29-30) that their late reports are less important than the

violation at issue in *Cox* because Combat Veterans is not a candidate committee, but Congress plainly concluded that *all* political committees must file periodic disclosure reports by specified statutory deadlines. Moreover, although *Cox* involved a candidate committee, the reporting violations concerned loans the candidate had made to his own campaign. Although Congress requires that such loans be reported, they obviously do involve less potential for corruption than contributions from other individuals or interest groups. In any event, plaintiffs' policy views about which violations are more serious should be addressed to Congress, not this Court.

Plaintiffs also argue that the Commission's administrative fine regulations should take into consideration plaintiffs' ability to pay, claiming that, since Combat Veterans' most recent disclosure report (July 2012) lists cash-on-hand of only $3,794, payment of the $8,690 in fines would force it to shut down, in violation of its constitutional rights. Plaintiffs are wrong. First, the Commission's administrative fine schedule indirectly takes into account a committee's resources because the amount of a committee's financial activity (receipts and disbursements) is a significant factor in the regulatory formula. Here, as we have explained, the three fines were based in part on Combat Veterans' financial activity on the three reports, falling into categories ranging from $25,000 to $99,999.99. *See* FEC Mem. at 10; 11 C.F.R. § 111.43.

Second, and more fundamentally, as the court recognized in *Cox*, the FEC's administrative fine schedule incorporates *all the congressionally-required factors* identified in 2 U.S.C. § 437g(a)(4)(C). 2004 WL 783435, at *9. Plaintiffs do not dispute this portion of the *Cox* decision. (*See* Pls.' Opp. at 27 ("FECA did not expressly provide ability to pay criteria in the Administrative Fine section of FECA").) Indeed, plaintiffs concede that Congress directed the Commission to include only "such other factors as the Commission considers appropriate," yet plaintiffs criticize the Commission for failing to add ability to pay during the agency's

rulemakings. (Pls.' Opp. at 28 (quoting 2 U.S.C. § 437g(a)(4)(C)(i)(II)).) In any event, plaintiffs' complaint does not facially challenge the regulatory formula, which merits considerable deference, and plaintiffs have provided no basis for invalidating this rulemaking decision.

Finally, even if relevant, plaintiffs' factual arguments regarding Combat Veterans' ability to pay also lack merit. Plaintiffs suggest that many political committees are "very small operations that can ill afford to pay steep fines for filing late reports" and that large fines might discourage other committees from being organized (Pls.' Opp. at 28), but those arguments do not apply to committees like Combat Veterans, which is well-established and has a documented history of successful financial activity. Indeed, according to the Committee's disclosure reports on file with the Commission, the Committee raised more than $128,740 and spent more than $124,000 during the 2009-2010 election cycle, with receipts totaling $38,583 through the July 2010 Quarterly Report.[13] Combat Veterans' receipts during the current (2011-2012) election cycle appear to be matching this pace, with the July 2012 quarterly report (January 2011 to July 2012) showing $38,555 in receipts.[14] Thus, Combat Veterans' cash-on-hand appears to follow the rhythm of the election cycle. In any event, nonconnected political committees like Combat Veterans can accept an unlimited number of contributions from individuals and political action committees in amounts up to $5,000. 2 U.S.C. § 441a(a)(1).

In sum, there is no basis to disturb either the FEC's administrative determination that plaintiffs violated FECA by filing three reports late or the agency's assessment of the fines.

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[13] *See* Combat Veterans' 2009 Year-End Report, Amended Detailed Summary Page of Receipts for 2009 Year-End Report, Amended July 2010 Quarterly Report and 2010 Year-End Report (FEC Exhs. 7-10, respectively).

[14] *See* Combat Veterans' 2011 Year-End Report and July 2012 Quarterly Report (FEC Exhs. 11 and 12, respectively). Plaintiffs' alleged inability to pay is also belied by the Committee's listing of about $19,000 in receipts and $19,000 in disbursements in its July 2012 Quarterly Report — including about $8,000 for "catering for fundraiser" at a Tampa Bay hotel. FEC Exh. 12 at 2, 18-19.

## II. DESPITE PLAINTIFFS' GROWING LIST OF TECHNICAL OBJECTIONS, THE COMMISSION'S INTERNAL PROCEDURES ARE LAWFUL, AND ANY ERROR HERE WAS PLAINLY HARMLESS

Plaintiffs' litany of complaints about alleged deficiencies in the Commission's voting procedures cannot obscure the simple fact that all six Commissioners voted to determine that plaintiffs violated FECA by failing to file three election-related disclosure reports in a timely manner — *after* plaintiffs had exercised all the procedural rights to which they were entitled. In their Opposition, plaintiffs again complain about the FEC's no-objection voting procedure for its preliminary reason-to-believe determinations (Pls.' Opp. at 6-9), but they also: (1) claim that Commission votes to approve staff recommendations do not constitute valid Commission determinations (*id*. at 3-4, 9-11), (2) object to the practice of Commissioners authorizing their respective staffs to perform the ministerial act of signing ballots on their behalf (*id*. at 12), and (3) speculate that the potential for outside employment must make Commissioners too busy to conduct FEC business properly (*id.* at 7). But plaintiffs do not stop with these flawed claims. They also question whether the Sunshine Act was properly followed when the Commission established certain voting procedures *before* these administrative fine matters arose (*id.* at 4-6), even though any such complaint is not properly raised here and is meritless in any case.

Despite plaintiffs' shotgun assault, the Commission's procedures are lawful, and any minor technical error that plaintiffs may have identified would plainly be harmless. Plaintiffs do not attempt to show otherwise. They had the full benefit of all relevant procedures that FECA and the Commission's regulations provide, and all six Commissioners voted to make final determinations that plaintiffs violated FECA. Thus, remand to the Commission to correct any perceived procedural errors would simply require the same Commissioners to go through the useless formality of casting the same votes again in a slightly different manner, a remedy that

would clearly be futile — because it would not change the outcome — and inappropriate. *See, e.g., FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 708-09 (D.C. Cir. 1996).

The Commission adopted streamlined voting procedures for certain routine, straightforward matters, such as assessing the late financial disclosure reports at issue in this case. These procedures are consistent with congressional intent to simplify and expedite the process for handling these matters. (*See* FEC Mem. at 28-32.) More generally, Congress authorized the Commission to develop its own rules for conducting its activities, 2 U.S.C. § 437c(e), and the Commission's voting procedures as set forth in Directive 52 lawfully implement that authority. *See* FEC Directive 52 (Sept. 10, 2008) (FEC Exh. 1), also *available at* http://www.fec.gov/directives/directive_52.pdf (rev. 9/10/08); FEC Mem. at 30.

### A. The Commission's Vote to Find Reason to Believe That Combat Veterans and Its Treasurer Violated FECA Was Proper

Plaintiffs' various objections to the reason-to-believe findings, *made prior to the Commission's final determination*, lack merit. Plaintiffs renew their formalistic claims (*see* Pls.' Opp. at 2-4, 6-9) that there were insufficient "affirmative votes" to find reason to believe that plaintiffs violated FECA, but as explained in the FEC's opening brief (FEC Mem. at 28-32), the Commission's procedures in handling these routine matters are lawful.

The preliminary reason-to-believe stage in matters involving late-filed disclosure reports generally requires only a straightforward determination of when the report was due and when it was actually filed. (FEC Mem. at 29.) The Commission's Reports Analysis Division ("RAD") is responsible for setting forth such information for the Commissioners' consideration, and RAD indisputably did so in the reports at issue here. (AF# 2199 at AR003; AF# 2312 at AR010; AF# 2355 at AR003; *see* FEC Mem. at 29.) At the reason-to-believe stage, staff recommendations are circulated to the Commission on a no-objection basis. Appended to each

ballot provided to the Commissioners is the recommendation on which the Commissioners are to vote; for example, the recommendation in this case was that the Commission "[f]ind reason to believe that [plaintiffs] . . . violated 2 U.S.C. 434(a)." (AF# 2199 at AR003; AF# 2312 at AR010; AF# 2355 at AR003; *see* FEC Mem. at 28-29.) A Commissioner who agrees with the recommendation may vote in favor of that recommendation by submitting a ballot marked "I do not object to the attached report" (*see* AF# 2199 at AR001; AF# 2312 at AR008; AF# 2355 at AR001) or by opting to submit no objection to the recommendation within a 24-hour period. (*See* FEC Mem. at 29.) Under Directive 52, adopted in 2008, either of these options constitutes an affirmative vote to approve the recommendation. *See* FEC Directive 52 at 3. Thus, the no-objection procedure followed in this case abides by Directive 52. As previously explained (FEC Mem. at 30), no provision of FECA specifies the precise method by which Commissioners are to approve reason-to-believe recommendations, and courts cannot require agencies to implement procedures beyond those required by statute. Agencies remain "free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *See Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 542-543 (1978) (internal quotation marks and citation omitted).[15]

Plaintiffs also claim (Pls.' Opp. at 9-10) that there was no "finding" at the reason-to-believe stage, evidently because the Commission did not actually state that it was "finding"

[15] The Commission showed (FEC Mem. at 24-25) that plaintiffs had waived certain claims because they did not raise them during the administrative phase of these matters, but the Commission never claimed that plaintiffs were precluded from challenging the balloting, as plaintiffs now suggest (Pls.' Opp. at 12-13). In fact, the Commission provided the ballots when plaintiffs requested them and consented to plaintiffs' request to amend their complaint to add claims regarding the ballots. (Amended Petition for Review of FEC Determination and Complaint for Declaratory and Injunctive Relief (June 20, 2012) (Doc. 20).) At that time the Commission also directed plaintiffs' attention to Directive 52, but plaintiffs did not incorporate their objections to the Directive in their amended complaint. (*Id.*)

reason to believe, but this is another trivial, formalistic objection. RAD's reports expressly recommended that the Commission "[f]ind reason to believe" that the Committee and its treasurer violated 2 U.S.C. §434(a), and RAD's charts attached to its recommendations provided relevant details, such as the dates the Commission received the reports, how many days after the due date the reports were received, and the level of financial activity reported. And the Commission Secretary's three signed certifications of the Commissioners' votes track RAD's recommendations. (AF# 2199 at AR008; AF# 2312 at AR020; AF# 2355 at AR014)

It is undisputed that the FEC timely notified plaintiffs of the reason-to-believe findings and provided the statutorily mandated opportunities for plaintiffs to respond. (AF# 2199 at AR012; AF# 2312 at AR029; AF# 2355 at AR024.) Plaintiffs took full advantage of their right to respond (AF# 2199 at AR013-14, 16-17; AF# 2312 at AR03031; AF# 2355 at AR025-26), and they do not argue here that any voting irregularity deprived them of any due process or other opportunity to be heard. Thus, even if the balloting procedure at the reason-to-believe stage were deficient — and it was not — any error would be harmless. *See infra* sections II.B, II.C.

### B. The Commission's Final Determination That Combat Veterans and Its Treasurer Violated FECA Was Proper

Plaintiffs now raise technical objections to the Commission's final determination voting, but there is no dispute that the Commission made its final determination through a written "tally vote," in which all six Commissioners submitted ballots. *See* FEC Directive 52 at 3. It is also undisputed that all six Commissioners voted affirmatively to make final determinations that plaintiffs had violated FECA as set forth in the FEC Reviewing Officer's report. Plaintiffs do not contest the validity of the ballots of Commission Chair Hunter and Commissioner Weintraub. (Pls.' Opp. at 11.) Plaintiffs do, however, contest the validity of the remaining four ballots.

First, plaintiffs dispute the validity of the ballots cast by Commissioners Walther and Bauerly because those Commissioners directed their executive assistants to sign their names on their behalf (Pls.' Opp. at 12). This objection is frivolous. Directive 52 explicitly provides that a Commissioner may direct another person to physically indicate a Commissioner's decision on a ballot "in a purely ministerial capacity."[16] This procedure is not a "delegation" of the Commissioner's vote, as plaintiffs claim, but a simple authorization to affix the Commissioner's signature as directed. *Id.* The ballots of Commissioners Walther and Bauerly are proper affirmative votes.[17] And those two votes, along with those of Commission Chair Hunter and Commissioner Weintraub, establish the four affirmative votes required by the statute for a final agency determination. *See* 2 U.S.C. §§ 437g(a)(2), 437g(a)(4)(C)(i)(I).

Plaintiffs also challenge the validity of the last two ballots (Pls.' Opp. at 11), but since FECA requires only *four* affirmative votes, any error associated with those ballots would be harmless. In any event, plaintiffs' claims lack merit. Although Commissioner McGahn cast his ballot by email and his vote was thus not recorded on the usual ballot form, and Commissioner Petersen cast his ballot after the deadline, both Commissioners voted to make a final determination that plaintiffs had violated FECA as set out in the Reviewing Officer's report.

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[16] Directive 52 provides (at 4-5): "A Commissioner may not delegate to any person his or her vote or decision-making authority. However, a Commissioner may delegate to a member of his or her staff the authority to affix the Commissioner's name to a circulation vote provided the Commissioner has given instructions to the staff member regarding the matter being acted on and the staff member is acting in accordance with those instructions. In this way, the Commissioner is actually casting the vote and the staff member is signing in a purely ministerial capacity. In each instance in which a Commissioner's staff member has acted as agent in casting the Commissioner's vote, the Secretary shall maintain with the ballot any written authorization, instructions, or after-the-fact ratification provided by the Commissioner."

[17] Plaintiffs similarly attack the validity of the ballots cast at the reason-to-believe stage that were signed or marked by executive assistants, and for the same reason, that claim lacks merit.

Finally, plaintiffs again contend (Pls.' Opp. at 10-11) that the Commissioners' formal approval or adoption of the Reviewing Officer's recommendation does not itself constitute a "final determination," evidently because plaintiffs believe the Commission must employ some special incantation to do so, such as, "We now make the following final determination." But as previously demonstrated (FEC Mem. at 32 n.42), this argument is no more than a semantic game. Plaintiffs offer no support for the notion that a formal vote to approve a recommendation to make a determination does not constitute a Commission determination.

### C. Plaintiffs Suffered No Prejudice from the Procedural Irregularities They Allege, and Any Remand to Correct Harmless Error Would Be Futile

Even if plaintiffs had identified a genuine flaw in the Commission's voting procedures, plaintiffs plainly suffered no prejudice, so any conceivable error was harmless. The Supreme Court has explained that "[i]n administrative law, as in federal civil and criminal litigation, there is a harmless error rule." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 659-60 (2007) (citing *PDK Labs, Inc. v. United States Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (discussing section 706 of the APA)). "[T]he harmless error rule requires the party asserting error to demonstrate prejudice from the error." *First Am. Discount Corp. v. C.F.T.C.*, 222 F.3d 1008, 1015 (D.C. Cir. 2000) (internal quotation marks and citations omitted). And courts have consistently found that "[m]ere technical procedural error is insufficient to warrant reversing the agency's administrative decision." *Milas v. United States*, 42 Fed. Cl. 704, 712 (1999); *see Wagner v. United States*, 365 F.3d 1358, 1361 (Fed. Cir. 2004) (strict compliance with procedural requirements "is not required where the error is deemed harmless"); *Del Norte Cnty. v. United States*, 732 F.2d 1462, 1467 (9th Cir. 1984) ("insubstantial errors in an administrative proceeding that prejudice no one do not require administrative decisions to be set aside") (citation omitted). As the Supreme Court has stated, the allegedly injured party bears the

burden of demonstrating harm rather than the agency having to prove that there was no harm. *See Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

As previously explained (FEC Mem. at 31-32), plaintiffs here have failed to demonstrate *any* harm. Plaintiffs had full notice of the allegations against them and took full advantage of the procedures available to try to defend themselves. Plaintiffs admit that the three reports at issue were filed late, and the Commissioners voted on tally to make their final determination and impose the administrative fines. It is impossible to see how any alleged procedural error plaintiffs claim — the streamlined voting procedures at the reason-to-believe stage, the ministerial signing of some ballots by executive assistants at the direction of the Commissioners they serve, whether each vote took precisely the correct form, and whether the Commission used the proper words when it voted to approve clear staff recommendations — could have caused any harm whatsoever to plaintiffs. Indeed, plaintiffs make no real effort to articulate how any of these alleged irregularities caused them cognizable harm.[18]

Even if the Commission had followed plaintiffs' preferred procedures, the end result would have been exactly the same. Thus, any errors in the Commission's voting procedures caused plaintiffs no prejudice and fall within the parameters of harmless error as indicated by the cases the Commission cited in its opening brief, to which plaintiffs do not respond. *See* FEC Mem. at 31-32; *Horning v. S.E.C.*, 570 F.3d 337, 347 (D.C. Cir. 2009) (holding that agency's procedural error in adjudication against plaintiff was harmless because plaintiff "had notice from the outset of the nature of the charges against him" and could not "suggest a single thing he

[18] The errors alleged here stand in stark contrast to instances in which error *has* been found to be harmful. These include occasions in which the government used an unannounced new method to calculate royalties, depriving a recipient of expected revenue, *Jicarilla Apache Nation v. United States Dept. of Interior*, 613 F.3d 1112, 1121 (D.C. Cir. 2010), and an administrator's interpretation of a statute contradicted prevailing agency precedent, *PDK Labs*, 362 F.3d at 799.

would have done differently" absent the error). *See also FEC v. Club for Growth, Inc.*, 432 F. Supp. 2d 87, 90-91 (D.D.C. 2006) (finding harmless error when Commission failed to send notice letter within the statutorily mandated five days); *accord*, *Nader v. FEC*, No. 10-989, 2012 WL 1216242, at *2-*3 (D.D.C. 2012), *appeal docketed*, No. 12-5134 (D.C. Cir. April 12, 2012).

Moreover, "[i]f the agency's mistake did not affect the outcome, if it did not prejudice the petitioner, it would be senseless to vacate and remand for reconsideration." *PDK Labs,* 362 F.3d at 799. Because plaintiffs do not even attempt to show that any of the errors they allege affected the result in this matter, a remand to the Commission would be "an unnecessary formality [since] the outcome is clear." *See Legi-Tech*, 75 F.3d at 709. *See also Donovan on Behalf of Anderson v. Stafford Constr. Co.,* 732 F.2d 954, 961 (D.C. Cir. 1984) ("remand on this issue would serve no purpose [because] only one conclusion would be supportable."); *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. (UAW) v. NLRB*, 459 F.2d 1329, 1347 (D.C. Cir. 1972) (remand is unnecessary when "there is no longer anything to be gained"). In other words, even if the Court were to remand the case to the agency, that result would simply force the Commission to repeat the administrative fine process with no expectation that plaintiffs would avoid the same final determination and assessment of administrative fines.[19]

The D.C. Circuit's decision in *Legi-Tech* is instructive. In that case the D.C. Circuit rejected Legi-Tech's argument that a constitutional defect in the composition of the FEC at the time the Commission found "probable cause" to believe that Legi-Tech had violated FECA rendered the case invalid from the outset. (The Commission had reconstituted itself and ratified its prior determination, but it had not restarted the entire enforcement process.) The Court found it would futile to require the Commission to restart the matter from the beginning: "Even were

[19] The statute of limitations applicable to these administrative fine matters is five years, so the limitations period will not run until late 2015. *See* 28 U.S.C. § 2462.

the Commission to return to square one . . . it is virtually inconceivable that its decision would differ in any way the second time from that which occurred the first time." 75 F.3d at 707-708 (citations omitted). A remand here would be equally futile because the very same Commissioners would be the ones to consider the matter a second time, and there is no evidence whatsoever that any of them would vote in a way that would alter the outcome. *See id.*; *Club for Growth, Inc.*, 432 F. Supp. 2d at 93 (declining to remand because it would be futile, and rejecting claim that a showing of futility requires that the same Commissioners would vote on the matter again). *See also, e.g., AFGE, AFL-CIO v. FLRA*, 778 F.2d 850, 862 n.19 (D.C. Cir. 1985) ("remand would be [an] idle and useless formality 'because there is not the slightest doubt that the Board would simply reaffirm its order.'") (quoting *NLRB v. Am. Geri-Care, Inc.*, 697 F.2d 56, 64 (2nd Cir. 1982); *Envirocare of Utah, Inc. v. Nuclear Regulatory Comm'n*, 194 F.3d 72, 79 (D.C. Cir. 1999) ("remand is necessary only when the reviewing court concludes that there is a significant chance that but for the error the agency might have reached a different result") (internal quotation marks and citations omitted).

### D. Plaintiffs' Sunshine Act Claims Are Not Properly Raised and in Any Event Lack Merit

Plaintiffs do not confine their procedural complaints to the votes taken in the administrative matters under review here, but now add claims under the Government in the Sunshine Act ("Sunshine Act"), 5 U.S.C. § 552b, regarding Commission decisions far removed from this case. Specifically, plaintiffs' Opposition now challenges the Commission's adoption of Directive 52 in 2008 and its internal clarification in April 2010 that its policy regarding the naming of treasurers in traditional enforcement matters would apply to administrative fine matters as well. (Pls.' Opp. at 4-6, 16.) But these claims are not set forth in plaintiffs' complaint

and are not properly raised here. In any event, the claims lack merit, and any error would plainly have caused no harm to plaintiffs in the administrative fine matters under review.

For the first time in their Opposition (Pls.' Opp. at 4-6), plaintiffs allege that the Commission's adoption of Directive 52 and its clarification about the application of its Treasurer Policy violated the Sunshine Act. Plaintiffs never explain precisely how these Commission actions violated that statute, but in any case, these claims are beyond the scope of the plaintiffs' complaint and not appropriately before the Court. "Federal Rule of Civil Procedure 8(a)(2) requires only a short and plain statement of the claim showing that the pleader is entitled to relief in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks omitted). "The complaint and the evidence of a plaintiff . . . must be sufficient to put defendants on notice of any theory of recovery upon which the plaintiff is relying." *Kelly v. Lahood*, 840 F. Supp. 2d 293 (D.D.C. 2012) (internal quotation marks omitted) (*quoting Overby v. Nat'l Ass'n of Letter Carriers*, 595 F.3d 1290, 1297 (D.C. Cir. 2010)).

Neither plaintiffs' amended complaint nor their initial summary judgment memorandum provided the Commission with notice that any of plaintiffs' myriad theories of relief involve alleged violations of the Sunshine Act. Even if plaintiffs had not been aware of the FEC's internal clarification of the Treasurer Policy when they filed their original complaint, the Commission directed plaintiffs to Directive 52 *before* they amended their complaint. While that amended complaint added a claim about the reason-to-believe ballots, it said nothing about the Sunshine Act, and plaintiffs have not sought to further amend their complaint. Having failed in their amended complaint to plead facts or seek relief based on the Sunshine Act, the Committee cannot properly advance such claims for the first time in their opposition to the Commission's

motion for summary judgment. *See Holmes-Martin v. Leavitt*, 569 F. Supp. 2d 184, 193 (D.D.C. 2008) ("Plaintiff must plead facts which support [plaintiff's] claim") (emphasis omitted).

Even if they were properly before the Court, plaintiffs' Sunshine Act claims are utterly meritless. As previously explained (FEC Mem. at 18), since 2005 the Commission has explicitly named as a respondent in enforcement matters a committee's current treasurer in his or her official capacity. In April 2010, the Commission clarified that the Treasurer Policy also applied to administrative fine matters. *See generally* Memorandum to the Commission re: New Procedures for Successor Treasurers in Administrative Fines Matters (LRA # 784) (April 2, 2010) (FEC Mem. Exh. 2); *id*. at 5 ("Successor treasurers will be substituted for predecessor treasurers in administrative fines matters, just as they are substituted in other enforcement matters."). Plaintiffs allege (Pls.' Opp. at 16) that the FEC's adoption of this procedure "in an undisclosed executive session" violated the Sunshine Act. This allegation has no basis in fact or law. The FEC did not adopt this clarification of its policy in a meeting but by circulation vote, which does not offend the Sunshine Act. *See Pac. Legal Found. v. Council on Envtl. Quality*, 636 F.2d 1259, 1266 (D.C. Cir. 1980) ("The Sunshine Act does not require an agency to hold meetings in order to function. . . . Congress intended to permit agencies to consider and act on agency business by circulating written proposals for sequential approval by individual agency members without formal meetings."). Indeed, as plaintiffs recognize (Pls.' Opp. at 9), the FEC can make decisions by notational voting in lieu of holding meetings regulated by the Sunshine Act. *See Common Cause v. NRC*, 674 F.2d 921, 935 n.42 (D.C. Cir. 1982) ("The Sunshine Act does not . . . prevent agencies from making decisions by sequential, notational voting rather than by gathering at a meeting for deliberation and decision."). And plaintiffs make no effort to show that this clarification required public notice or that it would have changed the outcome here. In

fact, the Committee would be liable for its own late-filed reports before and after the clarification.

Even if the Commission had violated the Sunshine Act with respect to either Directive 52 or its April 2010 extension of the Treasurer Policy to administrative fines matters, which it did not, no proper and available remedy would include invalidation of these prior Commission actions, much less setting aside the administrative fines in this case. The D.C. Circuit has explained that "release of transcripts, not invalidation of the agency's substantive action, is the remedy generally appropriate for disregard of the Sunshine Act." *Braniff Master Exec. Council of Air Line Pilots Ass'n Int'l v. Civil Aeronautics Bd.*, 693 F.2d 220, 226 (D.C. Cir. 1982) (internal quotation marks omitted)*; see also Pan Am World Airlines, Inc. v. Civil Aeronautics Bd.*, 684 F.2d 31, 36 (D.C. Cir. 1982) (explaining that while Sunshine Act does not prohibit invalidation of agency action, it "strongly indicates a congressional policy that release of transcripts, not invalidation of the agency's substantive action, shall be the normal remedy for Sunshine Act violations").[20] And plaintiffs fail to show how any Sunshine Act violation in these

[20] Although agency action might be set aside when the agency action is intentional, prejudicial to the party making the claim, and "of a serious nature," *see Pan Am*, 684 F.2d at 36-37, plaintiffs have not adduced anything remotely suggesting that the Commission's alleged Sunshine Act violations were intentional or prejudiced plaintiffs. *See also* S. Rep. No. 94-354, at 34 (1975) ("It is expected that a court will reverse an agency action solely on [the ground that it was taken at an improperly close meeting] only in rare instances where the agency's violation is intentional and repeated, and the public interest clearly lies in reversing the agency action."). The same holds true for the Commission's notification regarding the September 2008 meeting where it adopted Directive 52. Although plaintiffs suggest otherwise (Pls.' Opp. at 6 n.2), the Commission's notice prior to that meeting complied with the requirements of the Sunshine Act. On September 3, 2008, one week before the meeting, the Commission provided, as required by section § 552b(e)(1) of the Sunshine Act, notice of the time, place, and general subject matters of the meeting, and that it would be closed. And even if, as plaintiffs argue, this 2008 notification did not sufficiently describe the category of matters that were therein discussed pursuant to the Supreme Court's decision, three years later, in *Milner v. Department of the Navy*, 131 S. Ct. 1259 (2011), the Committee has offered nothing to show that the purportedly deficient notification was intentional, prejudiced plaintiffs, or amounted to more than harmless error.

prior FEC actions could have affected the outcome of the administrative fines in this case, let alone constituted harmful error. *See supra* section II.C. The chain of events between the adoption of these FEC actions and plaintiffs' administrative fines is far too attenuated and speculative to demonstrate that the alleged violations of the Sunshine Act had any meaningful connection to the FEC's final determination that plaintiffs violated FECA.

**CONCLUSION**

Plaintiffs cannot avoid liability through a barrage of meritless procedural objections, which would be no more than harmless error even if correct, or by blaming the Committee's own agent for the late filing of the Committee's reports. The Commission's motion for summary judgment should be granted and plaintiffs' motion for summary judgment should be denied.

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