UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

FEDERAL ELECTION COMMISSION, Plaintiff, v. JODY L. NOVACEK, et al., Defendants.	Civ. No. 09-CV-00444 PLAINTIFF FEC'S MOTION TO DISMISS

PLAINTIFF FEDERAL ELECTION COMMISSION'S
MOTION TO DISMISS DEFENDANT'S COUNTERCLAIMS

The Federal Election Commission respectfully moves this Court, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss the counterclaims filed by Jody L. Novacek, the Republican Victory Committee, Inc. ("RVC"), BPO, Inc., and BPO Advantage LP because defendants can prove no set of facts that would entitle them to relief. A brief in support of this motion and a proposed order is submitted herewith.

Respectfully submitted,

Thomasenia P. Duncan
General Counsel

David Kolker
Associate General Counsel

Kevin Deeley
Assistant General Counsel

s/ Greg J. Mueller
Greg J. Mueller
Attorney

Federal Election Commission
999 E Street, N.W.
Washington, DC 20463
(202) 694-1650

November 30, 2009

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FEDERAL ELECTION COMMISSION, Plaintiff, v. JODY L. NOVACEK, et al., Defendants.	Civ. No. 09-CV-00444 PLAINTIFF FEC'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS COUNTERCLAIMS

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

Thomasenia P. Duncan
General Counsel

David Kolker
Associate General Counsel

Kevin Deeley
Assistant General Counsel

Greg J. Mueller
Attorney

Federal Election Commission
999 E Street, N.W.
Washington, DC 20463
(202) 694-1650

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Pursuant to Fed. R. Civ. P. 12(b)(6), plaintiff Federal Election Commission ("FEC" or "Commission"), has moved to dismiss the counterclaims filed by Jody L. Novacek, the Republican Victory Committee, Inc. ("RVC"), BPO, Inc., and BPO Advantage LP because defendants (collectively "Novacek") can prove no set of facts that would entitle them to relief. Defendants' counterclaims allege that the Commission "ignored evidence" (Claim 1), proceeded with "malice and contempt" (Claim 2), and was "negligent" in how it conducted its investigation (Claim 3). All three claims allege a defect in the administrative process without identifying a specific cause of action or alleging *any* specific underlying facts. The claims — addressed collectively below — should be dismissed because they fail to state a claim and fail to identify a statutory waiver of sovereign immunity.

The Commission brought this civil enforcement action under the Federal Election Campaign Act, as amended, 2 U.S.C. §§ 431-55 ("Act") after Novacek made fundraising solicitations by phone and in mailers that fraudulently misrepresented the source of the solicitation as the Republican Party and/or Republican National Committee ("RNC"), in knowing and willful violation of the Act. Compl. ¶ 1, Mar. 9, 2009. Novacek made misrepresentations to vendors and the general public stating or implying that the RVC was raising money for the Republican Party and the RNC. *Id.* Novacek and the RVC raised more than $75,000 as a result of these solicitations. *Id.* In addition, Novacek and the RVC violated the Act by failing to include on their communications the required disclaimer information in the manner specified by statute. *Id.*

The Commission is the independent agency of the United States government with exclusive jurisdiction over the administration, interpretation and civil enforcement of the Act. *See generally* 2 U.S.C. §§ 437c(b)(1), 437d(a), and 437g. The FEC is a non-partisan, six-

member Commission, of which no more than three members may belong to the same political party. 2 U.S.C. § 437c(a)(1). After an investigation, if at least four Commissioners vote to find "probable cause to believe" that a violation has occurred, the Commission must attempt to correct or prevent the violation by engaging in conciliation with the respondent for at least 30 days. 2 U.S.C. § 437g(a)(4)(A)(i). If conciliation fails, the Commission may bring a *de novo* suit against the respondent, if at least four Commissioners affirmatively vote to do so. 2 U.S.C. § 437g(a)(6).[1]

I. NOVACEK FAILS TO STATE A CLAIM AGAINST THE COMMISSION

A. Novacek Pleads No Underlying Facts and Identifies No Cause of Action

The Court should dismiss defendants' claims because their general allegations are devoid of factual support and fail to identify a cause of action. To survive a motion to dismiss, a plaintiff is required to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1949 (2009). Counterclaims and affirmative defenses are subject to the same pleading requirements as complaints. *Woodfield v. Bowman,* 193 F.3d 354, 362 (5th Cir. 1999).

Novacek offers no facts to support her claims. When she alleges that the Commission "ignored evidence," she does not offer facts explaining what evidence was ignored or showing how she was harmed by that alleged action. Likewise, when Novacek alleges "malice," "contempt," and a "negligent investigation," she does not allege how those labels and

[1] A more extensive description of the Commission's statutory enforcement procedures, the procedural history in this case, and the underlying statutory violations can be found in the Commission's Memorandum in Support of its Motion for Summary Judgment, filed contemporaneously with this motion.

conclusions could be reached. "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do." *Iqbal,* 129 S. Ct. at 1949 (internal citations and quotation marks omitted). "While *pro se* complaints are held to less stringent standards than those drafted by lawyers, 'conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.'" *Adeleke v. Heaton,* No. 08-11211, 2009 WL 3682539, at *2 (5th Cir. Nov. 5, 2009) (quoting *Taylor v. Books a Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002) (and applying standard from *Iqbal* to complaint by *pro se* plaintiff); *see also Smith v. Commonwealth of Virginia,* No. 3:08-800, 2009 WL 2175759, at *2 (4th Cir. July 16, 2009) ("The *Iqbal/Twombly* standard applies to *pro se* litigants as well as represented parties. . . .").

Novacek's conclusory labels also do not constitute causes of action. Novacek has failed not only to allege the necessary facts, but also to set forth the elements of any causes of action. "'Dismissal is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief. . . .'" *Campbell v. City of San Antonio,* 43 F.3d 973, 975 (5th Cir. 1995) (quoting 2A James W. Moore et al., Moore's Federal Practice ¶ 12.07 (1995) (footnote omitted)). Malice, contempt, ignoring evidence, and negligent investigation are not causes of action.

B. Novacek Has Failed to State a Claim Against the Commission

Novacek's allegation that the Commission improperly conducted the administrative process that underlies this action amounts to nothing more than a generalized complaint without any basis in law. At their core, Novacek's claims are based entirely on *ipse dixit* — she believes none of the Commission's actions were justified because she believes she did not violate the Act. Resp. to Compl. ¶¶ 6-8, filed July 29, 2009 (Dkt # 12). There is no legal basis for Novacek to challenge the Commission's actions here; instead, she must defend herself on the merits in this action. *AT&T Co. v. EEOC,* 270 F.3d 973, 975 (D.C. Cir. 2001) (after an agency files suit, "[o]f

course, the Company could not challenge that decision as final agency action under the APA; it would instead simply defend itself against the suit"); *United States v. Sage Pharmaceuticals, Inc.*, 210 F.3d 475, 480 (5th Cir. 2000) (rejecting claim that the government's action was arbitrary and capricious under the APA because the government allegedly had not taken similar action against defendant's competitors: "a claim that the FDA's action is arbitrary and capricious is not a defense to an enforcement proceeding").

Novacek's argument that she was not provided with certain information upon request during the administrative investigation or a hearing upon request, Counter Compl. ¶ 4, is not a basis for damages when, as here, there is no statutory basis for such opportunities or damages. The procedures in 2 U.S.C. § 437g(a) provide respondents like Novacek numerous statutory opportunities to respond to the administrative complaints filed against them and to the General Counsel's recommendation, if any, that the Commission find "probable cause" to believe that they have violated the Act. *See* 2 U.S.C. §§ 437g(a)(1), 437g(a)(3); *Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996) (explaining that section 437g(a) procedures were "purposely designed to ensure fairness not only to complainants but also to respondents"). But Novacek cites no provision providing her additional rights, and there is none. Moreover, to the extent that Novacek is suggesting a due process claim, there is no such cause of action regarding the conduct of agency investigatory proceedings that do not adjudicate legal rights. *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 742 (1984); *Hannah v. Larche*, 363 U.S. 420, 440-43 (1960); *Gold v. SEC*, 48 F.3d 987, 991 (7th Cir. 1995) ("Due process does not require notice, either actual or constructive, of an administrative investigation into possible violations of the securities laws.") (footnote omitted).

As the Supreme Court explained in *Hannah*:

> [W]hen governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used.

Hannah, 363 U.S. at 442; *see also Gold*, 48 F.3d at 991 n.8 (quoting *Hannah*).

The Commission has no legal authority to adjudicate legal rights or impose remedies in its administrative investigations under 2 U.S.C. § 437g(a). If the Commission finds, after an investigation, that there is probable cause to believe the Act has been violated, it is required to attempt to resolve the matter through informal conciliation. 2 U.S.C. § 437g(a)(4). If the respondent does not voluntarily enter into a conciliation agreement, the Commission's only recourse is to institute a *de novo* civil suit in federal court. 2 U.S.C. § 437g(a)(6)(A). Only a court, acting in such a lawsuit, can adjudicate that a violation has occurred and impose a remedy. 2 U.S.C. § 437g(a)(6)(B).

More fundamentally, the Commission's process leading up to and including its decision to initiate suit is not subject to judicial review. This case is about defendants' alleged violations of the Act, not the Commission's underlying decision to bring these allegations to this Court for judicial resolution. The Commission's decision to enforce the Act against Novacek is simply not reviewable: It is not final agency action that determines rights and obligations, and the Act does not provide courts with the authority to review the Commission's decision to exercise its prosecutorial discretion and initiate *de novo* litigation. Only "final agency action" that determines rights or obligations is subject to judicial review. 5 U.S.C. § 704. "[T]o be final, agency action must mark the consummation of the agency's decisionmaking process, and must either determine rights or obligations or occasion legal consequences." *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 483 (2004) (*citing Bennett v. Spear*, 520 U.S. 154, 177-178

(1997)) (internal quotation marks omitted). "An agency's decision . . . to bring suit," however, "'determine[s] the legal rights and liabilities of no one.'" *Atlantic Richfield Co. v. Dep't of Energy*, 769 F.2d 771, 787 (D.C. Cir. 1984) (citation omitted)). *Accord NAACP v. Meese*, 615 F. Supp. 200, 203 (D.D.C. 1985) ("Only the courts . . . have the power to take any of these steps, and it is these courts, not the [agency], which take final action."). Therefore, the Commission's decision to file suit under 2 U.S.C. § 437g(a)(6), as well its prior determination under 2 U.S.C. § 437g(a)(4)(A) that there was "probable cause" to believe that Novacek violated the Act, are not final agency actions. Those decisions neither adjudicate defendants' liability nor receive deference in this *de novo* action. The "district court stands ready to dismiss the suit if it has no factual basis." *McLaughlin v. Lodge 647*, 876 F.2d 648, 653 (8th Cir. 1989).

The courts' inability to review decisions that are not final agency actions is grounded in the separation of powers. As the Supreme Court has observed:

> Just as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected. It will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other.

United States v. Morgan, 313 U.S. 409, 422 (1941) (quotation marks and citations omitted). "[T]he exercise of prosecutorial discretion, at the very core of the executive function, has long been held presumptively unreviewable." *In re Sealed Case*, 131 F.3d 208, 214 (D.C. Cir. 1997). "[G]iven the limited resources and policy objectives of the federal government, not every violation of federal law is prosecuted in federal court," *id.*, and law enforcement agencies like the Commission have prosecutorial discretion to decide which violations to pursue. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

The Act, in fact, grants federal courts the ability to review certain Commission decisions, but the decision to sue is not one of them. If the Commission *dismisses or delays* proceedings regarding an administrative complaint, an "aggrieved" administrative complainant may file a petition with the United States District Court for the District of Columbia. 2 U.S.C. § 437g(a)(8)(A). *See Stockman v. FEC*, 138 F.3d 144, 151-156 (5th Cir. 1998). However, there is no similar provision granting any court the ability to review the Commission's decision to *initiate* suit to enforce the Act. Indeed, the D.C. Circuit court has expressly concluded that it has "no statutory authority to review the FEC's decision to sue." *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 709 (D.C. Cir. 1996). This litigation provides Novacek an opportunity to attempt to refute the showing made by the Commission that she violated the Act, but Novacek's complaints about the Commission's investigation fail to state a claim.

Moreover, to the extent that Novacek might have objected to the investigation while it was ongoing, any such claims would now be moot because the investigation has ended. For example, if Novacek is complaining about the administrative subpoenas the Commission issued during its investigation, she could have filed a motion to quash a subpoena before the Commission, as permitted by 11 C.F.R. § 111.15(a), but she did not. Moreover, Commission subpoenas — whether for interrogatories, documents, or depositions — are not self-enforcing. *See* 2 U.S.C. §§ 437d(b), 437c(b)(1). Thus, if Novacek believed that any subpoena to her was improper or infringed her constitutional rights, her proper recourse would have been to seek judicial relief at the time the Commission sought to enforce the subpoena. *See, e.g., FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981) (denying enforcement of FEC subpoena).

C. Novacek's Request for Damages is Barred Because the United States Has Not Waived Sovereign Immunity

Novacek's request for damages is also foreclosed because the United States has not waived sovereign immunity. Federal courts do not have jurisdiction over a claim against an agency of the federal government unless Congress enacts a statute that expressly and unequivocally waives the United States' immunity to suit. *See United States v. Mitchell*, 463 U.S. 206, 212 (1983); *Freeman v. United States*, 556 F.3d 326, 334-35 (5th Cir. 2009). "Waivers of the Government's sovereign immunity, to be effective, must be 'unequivocally expressed,'" and any such waiver must be construed strictly in favor of the sovereign. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992) (citation omitted). A waiver must be expressed unequivocally in statutory text and will not be implied. *See Lane v. Pena*, 518 U.S. 187, 192 (1996) (citations omitted). Novacek seeks to obtain $5 million from an agency of the United States based on allegations of misconduct by the Commission, but she fails to identify any statutory waiver of sovereign immunity that would permit such a claim. The Court is therefore without jurisdiction to hear defendants' counterclaim for damages and it should be dismissed.

D. Novacek Has No Cause of Action for any Alleged Constitutional Violations

To the extent that Novacek may seek to rely on *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), to provide an implied cause of action for monetary damages on her constitutional claims, it is well settled that such actions under *Bivens* cannot be brought against a federal agency such as the Commission. *Drake v. FAA*, 291 F.3d 59, 72 (D.C. Cir. 2002) (citing *FDIC v. Meyer*, 510 U.S. 471 (1994)). "[N]o cause of action for damages for constitutional violations — whether called a *Bivens* action or not — is to be implied against government agencies." *Taylor v. FDIC*, 132 F.3d 753, 768 (D.C. Cir. 1997) (citing *FDIC v. Meyer*). Thus, it

is apparent that Novacek has no cause of action against the Commission based on any alleged constitutional violation under the *Bivens* doctrine. Likewise, the APA does not provide for monetary relief. 5 U.S.C. § 702 ("[a]n action in a court of the United States seeking relief other than money damages….").

E. If Novacek's Counterclaims Are Construed as Alleging Selective Prosecution, They Must Fail

Selective prosecution is a limited doctrine that cannot properly be invoked in a counterclaim. Defendants' counterclaims are an improper effort to turn this enforcement case, where the facts and issues to be litigated involve the defendant's own conduct, into a case about why the agency decided to pursue the case against particular defendants. Even if Novacek is attempting to make a selective prosecution argument, that theory provides only a very limited *defense*; it does not form the basis for an affirmative counterclaim.

"Selectivity is not the same as applying the law to one person alone. A government legitimately could enforce its law against a few persons (even just one) to establish a precedent, ultimately leading to widespread compliance. The prosecutor may conserve resources for more important cases." *Falls v. Town of Dyer*, 875 F.2d 146, 148 (7th Cir. 1989). Only when a proponent of a selective prosecution defense satisfies the "demanding" burden of proving that a prosecution unjustifiably "had a discriminatory effect and that it was motivated by a discriminatory purpose" will a court question the exercise of the government's broad discretion and power to prosecute. *United States v. Armstrong*, 517 U.S. 456, 463-65 (1996).

"[A] defendant must present specific facts, not mere allegations, which establish a colorable basis for the existence of both discriminatory application of a law and discriminatory intent on the part of government actors. This is a high threshold. As has been true historically, it will be the rare defendant who presents a sufficiently strong case of selective prosecution to

merit discovery of government documents." *United States v. Bourgeois*, 964 F.2d 935, 939 (9th Cir. 1992). The judiciary is "ill equipped to assess a prosecutor's charging decisions," noting that the factors to be considered, such as "the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." *Id.* at 939 (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)). The Court also expressed the concern that judicial oversight of prosecutorial decision-making could undermine law enforcement. *Id.* at 939-940 (citing *Wayte*, 470 U.S. at 607-08 (noting that examination of the decision to prosecute delays the court proceedings, could chill law enforcement, and may undermine prosecutorial effectiveness)).

To the extent that Novacek contends she has been selectively prosecuted, that contention is not a valid counterclaim and, in any event, is not supported by specific facts.

F. Counterclaims Have Not Been Properly Brought By the RVC and BPO

Novacek may represent herself *pro se*, but she may not represent the RVC or either of the BPO entities because she is not an attorney. "[T]he 'clear' rule is 'that a corporation as a fictional legal person can only be represented by licensed counsel.'" *Donovan v. Road Rangers Country Junction, Inc.*, 736 F.2d 1004, 1005 (5th Cir. 1984) (quoting, *K.M.A., Inc. v. General Motors Acceptance Corp.*, 652 F.2d 398, 399 (5th Cir.1982); *accord Southwest Express Co., Inc. v. Interstate Commerce Comm'n*, 670 F.2d 53, 56 (5th Cir. 1982). Accordingly, the counterclaims as brought by RVC, BPO, Inc. and BPO Advantage LP should be dismissed.

II. CONCLUSION

Defendants' contention that the Commission ignored evidence, proceeded with malice, and was negligent in its investigation fail to state a claim and defendants' counter complaint should be dismissed in its entirety.

Respectfully submitted,

Thomasenia P. Duncan
General Counsel

David Kolker
Associate General Counsel

Kevin Deeley
Assistant General Counsel

s/ Greg J. Mueller
Greg J. Mueller
Attorney

Federal Election Commission
999 E Street, N.W.
Washington, DC 20463
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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

FEDERAL ELECTION COMMISSION, Plaintiff, v. JODY L. NOVACEK, et al., Defendants.	Civ. No. 09-CV-00444 Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that, on November 30, 2009, I caused Defendant Federal Election Commission's motion to dismiss defendants' counterclaims, memorandum of law in support, and proposed order to be served by email (pursuant to the stipulation of the parties under Fed. R. Civ. P. 5(b)((2)(E)) upon:

Jody L. Novacek
jodylnovacek@hotmail.com

s/ Greg J. Mueller
Greg J. Mueller
Attorney

Federal Election Commission
999 E Street, N.W.
Washington, DC 20463
(202) 694-1650

November 30, 2009

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

FEDERAL ELECTION COMMISSION, Plaintiff, v. JODY L. NOVACEK, et al., Defendants.	Civ. No. 09-CV-00444 ORDER

ORDER

This matter having come before the Court upon the Plaintiff Federal Election Commission's Motion to Dismiss Defendants' Counterclaims, and the Court having read and considered the motion, memoranda of law, and other materials submitted in support thereof and in opposition thereto, it is hereby ORDERED that Plaintiff's Motion is GRANTED and Defendants' counterclaims are hereby DISMISSED WITH PREJUDICE.

It is SO ORDERED this ____ day of _____, 2009.

_____
Honorable Barbara M.G. Lynn
United States District Judge