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CLERK, U.S. DISTRICT COURT
OCALA, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

MARIBETH SCHONBERG,
STEVEN E. SCHONBERG,

Plaintiffs,

v.

Civil Officer BERNIE SANDERS, Agent of the U.S. Senator Bernie Sanders Principal Campaign Committee, A/K/A "Friends of Bernie Sanders," et al,

Defendants

Case No. 5:09-cv-534-Oc-32-JRK

PLAINTIFFS' RESPONSE TO DEFENDANT FEC MOTION TO DISMISS

ARGUMENT

A. ATTORNEY MISTAKES

There were several errors and omissions in the Motion to Dismiss filed by Defendant FEC. Plaintiffs could not determine whether these mistakes were in part caused by a conflict of interest which counsel for the FEC may have in arguing to uphold the constitutionality of the **FECA** Law. Here are some of the mistakes in the defendant's Motion[1]:

[1] pro se plaintiffs had planned to file a Motion for Withdrawal of Attorney because of a potential conflict of interest in the FEC attorneys who are defending both their jobs and the Constitution of the United States. The seven itemized errors or omissions in this response were to be part of that unfiled, and now abandoned, Motion.

> 1. "Plaintiffs' alleged injury is no more than a generalized, speculative assertion that they pay too much for health care — an allegation that could be made by millions of other Americans."[2]

Discussion: While complaining about generalities of alleged injuries, the FEC chose to ignore the specifics. The FEC Motion failed to substantially address plaintiffs' specific claims in paragraphs 10 and 11 on pages 5-6 of Plaintiffs' Complaint regarding their premiums being used to pay for WELLPOINT's bribes of the six legislators, defendants Boehner, Cantor, Lieberman, Lincoln, McCain, and McConnell.[3] The FEC Motion also did not refer to plaintiffs' prayer for relief of $1 in item E on page 12 of Plaintiffs' Complaint. These failures are material omissions, not just simple oversights. Plaintiffs' basis for standing rests in large part on the illegal bribes. This was argued in their Memorandum in Support of Plaintiffs Complaint, pgs 3-6.[4]

> 2. "Plaintiffs provide no support for their contention that the Constitution prohibits the collection of campaign contributions by federal candidates, and there is none."[5]

Discussion: The Motion of the Defendant does not refer the Court or parties to a place in the pleadings where this contention supposedly was made. In fact, plaintiffs have never made this contention; they support campaign contributions from mandatory, public-only funding.[6] This statement in the Motion of the FEC is a clear violation of ABA Model Rule of Professional Responsibility 3.3 (a)(1) which requires "Candor Toward The Tribunal."

> 3. **"Federal Rule of Civil Procedure 12(b)(1)"**[7]

[2] Defendant FEC's Motion to Dismiss pg 4.
[3] See FEC's statements on pg 6 and fn 6, pg 12, id, which ignore the Plaintiffs' argument for standing.
[4] Plaintiffs incorporate by reference their Complaint for Emergency Injunction, Damages, and for Declaratory Judgment and Plaintiffs' Memorandum in Support of Complaint...
[5] FEC Motion to Dismiss, pg 7.
[6] See Exhibit I to Plaintiffs' Memorandum in Support of Complaint.
[7] FEC Motion to Dismiss, pg 8.

Discussion: The FEC used nearly a page and several case citations regarding the legal standard of the Court's subject matter jurisdiction. If the FEC had a basis to challenge the jurisdiction of the Court, it was obliged to set it forth. Otherwise, it should have agreed that subject matter jurisdiction was present. It was a waste of the Court's time and the limited resources of pro se plaintiffs for them to interpret a legal standard and case law that are not at issue.

> 4. "But plaintiffs provide no support, and there is none, for the claim that the Constitution prohibits Congress from creating a mechanism for federal candidates to establish campaign committees to accept limited contributions."[8]

Discussion: As in paragraph 2, supra, plaintiffs never made such a claim anywhere in their pleadings. The sole constitutional basis for plaintiffs' claims is the Emoluments Clause of Article I of the Constitution. It is unethical for an attorney to wrongfully charge that an opposing party made a "claim," and then argue that there is no support for the unmade claim.

> 5. "To accept the unprecedented proposition that such contributions constitute "emoluments" within the meaning of the Emoluments Clause would overturn centuries of practice and render the federal campaign finance system unworkable."[9]

Discussion: The Black's Law Dictionary definition of "emolument" is the only one plaintiffs have meant to apply whenever the term was used.[10] Plaintiffs have never varied from this definition, so what is the "unprecedented proposition?" It is an unwarranted deduction of facts or a legal conclusion masquerading as a fact. *Aldana v. Del Monte Fresh Produce, N.A. Inc.*, 416 F.3d 1242, 1246 (11th Cir. 2005).[11]

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[8] Id, pg 17.
[9] Id, pg 19.
[10] Defined in Plaintiffs' Complaint, pg 8, fn 6.
[11] Language and citation taken from FEC Motion to Dismiss, pg 9, fn 4.

> 6. "Thus, plaintiffs have provided no justification for their claim that the Constitution bars campaign contributions, and 'bribery'– the apparent focus of their court complaint – is barred by other statutes."[12]

Discussion: See paragraphs 2 and 4, supra, regarding no such claims having been made. Plaintiffs also never made the claim that the Constitution bars "bribery," if that is the FEC implication.

> 7. "Plaintiffs contend that this one-sentence provision creates a 'civil office' of the United States, but the text and history of section 432(e)(2) show otherwise. The plain language of the provision merely states that the candidate acts as an agent of the *committee*, not of the United States or any office of the United States."[13]

Discussion: Defendant ignores the plain language of the Emoluments Clause which states, "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office *under the Authority* of the United States…" (emphasis added). The defendant agents act under the Authority of the United States and that is a sine qua non to create their multimillion dollar civil Office fiefdoms.

In conclusion to section A. of their argument, plaintiffs respectfully suggest that if the **FECA** Law was constitutional with respect to the Emoluments Clause of Article I, Defendant FEC would not need to stretch its arguments outside reasonable bounds.

C. BUCKLEY v. VALEO

Defendant FEC correctly referred the Court to the Article I Emoluments Clause in *Buckley v. Valeo*, 424 U.S. at 124-6.[14] Here are two issues that the *Buckley* Court did not or could not analyze:

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[12] FEC Motion to Dismiss, pg 19.
[13] Id, pg 20.
[14] FEC Motion to Dismiss pgs 23-24.

1. Whether a U. S. Senator or Congressman, acting as the Agent for her/his campaign committee, is a civil Officer under the Article I Emoluments Clause.

2. Does 2 U.S.C. § 439a.(a)(2), which allows members of Congress to pay for their government office expenses out of campaign funds, give the members a "governmental power"?

The first issue is the one before the Court, and it is a matter of first impression; defendant FEC has not argued to the contrary. *United States v. Greer*, 440 F.3d 1267, 1273 (11th Cir. 2006) is inapplicable,[15] since the Supreme Court has never ruled on the Agency-civil Officer Emoluments Clause contention of plaintiffs. Defendant FEC did profusely argue that because the Appointments Clause in Article II was discussed in *Buckley*, this Court should use the same theories defining an "officer" as the *Buckley* Court did in its Appointments Clause explanation.[16] But the *Buckley* Court was setting forth an analysis of appointments of commissioners to the FEC; its analysis was so far different and far removed from the question of a member of Congress acting as a civil Officer under Article I that linking the two steeps in credulity.

The Article I Emoluments Clause uses the terms "civil Officer" and "Office under the United States." One can surmise that because the term "Office under the United States" is not preceded by the word "civil" that the Framers meant for there to be a distinction between the two. Inversely, since the term "civil Office" is not immediately followed by the words "under the United States," there should be a difference. If so, the distinction or difference was never elucidated in the Constitution and awaits the Court's determination.

[15] FEC Motion to Dismiss, fn11, pg 22.
[16] *Buckley*, supra.

The second issue above concerns 2 U.S.C. § 439a.(a)(2), which allows members of Congress to use campaign funds "for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office." Defendant FEC chose not to address the matter, since it doesn't fit with the FEC notion that there has to be an "exercise" of governmental authority in order for there to be a civil Office.[17] Without knowing what ordinary and necessary expenses are paid for from campaign funds, plaintiffs can offer no examples. But if any campaign funds are used for the duties of a member of Congress, it must be under the Authority of the United States. The defendant Agents have the power to decide what expenses of their government job will be paid, to whom the expenses will be paid, and the amounts to be paid. The defendant Agents may even have the power, without oversight, to define the terms "ordinary and necessary" in making the payments.

The agency relationship identified in the one-sentence provision of 2 U.S.C. § 432(e)(2) is all that it takes to create a civil Officer. In fact, you could substitute the words "civil Officer" for the word "agent" in the Act, and it would make perfect sense. A civil Officer with the authority to pay the ordinary and necessary expenses of Congress sounds like a job description in the legislative branch of government.

The second part of the Article I Emoluments Clause is referred to as the Ineligibility Clause by Defendant FEC which stated:

> "Even if there was any such 'office' in this context, it would obviously have been created prior to a candidate's election, and there is no showing that candidates receive any 'emoluments' within the meaning of the Clause under 2 U.S.C. § 432(e)."[18]

[17] FEC Motion to Dismiss, p. 23.
[18] Id, fn 13, p.24.

The Defendant is right that the office was created prior to the candidate's election, but it could also be true that both winners and losers of federal elections are civil Officers under the Article I Emoluments Clause. The difference is that the loser never becomes the elected member of the House or Senate, and therefore the loser does not run afoul of the Emoluments Clause. Once the election is over, the victor starts all over again as the newly appointed Agent and civil Officer for her/his re-election campaign.

Plaintiffs agree that emoluments have been given to members of Congress "from the beginning of our Nation," as cited by Defendant FEC, *McCormick v. United States*, 500 U.S. 257, 272 (1991).[19] Giving oneself a $30,000 golf tournament, as Defendant Boehner did, is giving an emolument. Giving oneself the "ordinary and necessary expenses" of their government job is giving emoluments. The **FECA** Law makes these emoluments legal rather than illegal. It doesn't change them from emoluments to something else. *McCormick* also explained that "[s]erving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator," id. Times have changed since 1991. Now, the United States has become a corpacracy at the expense of the People of the United States. See, e.g. *Citizens United v. FEC*, slip opinion of the Supreme Court, October, 2009 Term.[20] The defendant six legislators serve their favorite corporations first and their constituents second.

And what if this Court did find the **FECA** Law unconstitutional? Our country would not automatically revert from the 2010 FEC regulated bribery of Congress to the pre-1971 regulated bribery of Congress. Even the *McCormick* Court recognized public financing as an alternative, noting that the illegal conduct plaintiffs complain of is "...unavoidable so long as

[19] FEC Motion to Dismiss, pg 18.
[20] Text of decision online at http://www.supremecourtus.gov/opinions/09pdf/08-205.pdf.

election campaigns are financed by private contributions or expenditures...," *McCormick*, supra.

D. STANDING

Defendant FEC wants plaintiffs to fall into the *Lujan* abyss of "raising only a generally available grievance about government — claiming only harm to his and every citizen's interest," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-574 (1992). None of the defendants, none of their attorneys, none of their legal or clerical staff, nor even any of the maintenance workers for their places of employment were forced to buy major medical insurance from WELLPOINT, d/b/a Anthem Blue Cross Blue Shield. And if any of them happened to be voluntarily insured by WELLPOINT, it would not have been at the over-inflated premium charged for Plaintiff M. Schonberg's individual policy.[21]

Furthermore, only those members of the class of individuals who purchased from WELLPOINT during the years 2007-2009 would be in the category of persons whose premiums were used to pay excessive compensation to WELLPOINT's executives and managers. It is only this class, albeit large, that could demonstrate their premiums resulted in emoluments from WELLPOINT, INC.WELLPOINT and CEO Braly going to the defendant six legislators.

Plaintiffs have clearly met the bar of standing, *Lujan*, supra at 560-561. But that bar is lower than most, if it's the **FECA** Law that is being challenged. Theoretically,

[21] This week WELLPOINT came under fire from the Obama administration for a 39% premium increase on California individual's policies. See http://www.bet.com/News/InsuranceHikeObamaTarget.htm?flv=1.

anyone running for an elected federal office has standing to challenge the act. See *McConnell v.* FEC, 540 U.S. 93, 2003, e.g.[22]

E. WELLPOINT

Defendant FEC proudly cites 2 U.S.C. § 439a(b) which "specifically prohibits the conversion of any contribution to 'personal use.'"[23] No one, except perhaps the defendant Agents and civil Officers themselves, knows how the six legislators spent the emoluments from WELLPOINT. Plaintiffs also cited 2 U.S.C. § 439a(b) with a list of prohibited expenditures by candidates.[24] But if a golf tournament passes muster, the permitted expenditure list must be expansive, indeed.[25]

In a Freudian-slip, Defendant FEC grumbles that only a "tiny fraction" of the contributions made to the defendant Agents and civil Officers were made by "*Well***PAC,**" (emphasis added),[26] which is a different WELLPOINT campaign committee than the one in plaintiffs' complaint. Plaintiffs referred only to WELLPOINT, INC.WELLPOINT. Between the years 2007-2009, Defendant Boehner received $16,000 from WellPAC,[27] so plaintiffs seriously underestimated how much WELLPOINT gave to the defendant Agents and civil Officers. Not only is the **FECA** Law unconstitutional based on the Article I Emoluments

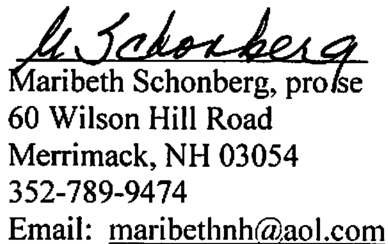
[22] And in Florida, you can make a public announcement of an intention to run for federal office before designating a campaign treasurer and depository. Section 106.021, F.S., taken from http://election.dos.state.fl.us/gen-faq.shtml#link5.
[23] FEC Motion to Dismiss, pg 4.
[24] Plaintiffs' Memorandum in Support of Complaint, pg 9.
[25] E.g. what about drugs, pharmaceuticals, plastic surgery; tanning salon, drug treatment facility, haircuts, facials, hair transplants; purchase or rental of a private jet; clothing rental; bar mitzvah; wedding; dinners at restaurants; books, room and board for kids' college; bribes to other federal election campaigns, etc.?
[26] FEC Motion to Dismiss, fn3, pg 6.
[27] See FEC.gov website at http://query.nictusa.com/cgi-bin/com_supopp/C00197228/. Plaintiffs did not have the time to go through the entire list to identify WellPAC contributions to the other Defendant Agents and civil Officers.

Clause, but it created a very sneaky, complicated maze for even the FEC lawyers to sift through to determine who gave what emoluments to whom.[28]

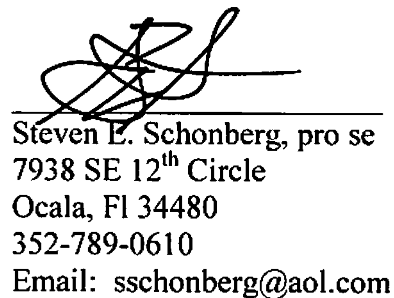
CONCLUSION

The Court should deny the Motion to Dismiss and rein in an out-of-control Legislative Branch as ordained by the Founding Fathers in Article III of The United States Constitution.

RESPECTFULLY SUBMITTED BY:



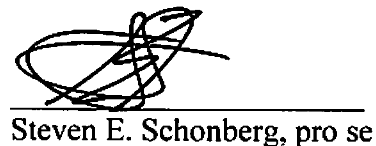
Maribeth Schonberg, pro se
60 Wilson Hill Road
Merrimack, NH 03054
352-789-9474
Email: maribethnh@aol.com



Steven E. Schonberg, pro se
7938 SE 12th Circle
Ocala, Fl 34480
352-789-0610
Email: sschonberg@aol.com

MAILING CERTIFICATION:

The undersigned hereby certifies that a true copy of this pleading was faxed to trial counsel for Defendant FEC on the 12th day of February, 2010.



Steven E. Schonberg, pro se

[28] 2 U.S.C. § 441a allows for multicandidate committees like WellPAC and WELLPOINT INC. WELLPOINT from the same corporation. It also allows one committee to funnel money to another committee and then on to a third, fourth, fifth….committee. In banking, this is known as "money laundering."