UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*,	)	
Plaintiffs,	)	Civ. No. 17-2770-ABJ
v.	)	
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

PLAINTIFFS' OPPOSITION TO DEFENDANT FEDERAL ELECTION COMMISSION'S MOTION FOR JUDGMENT ON THE PLEADINGS

Two commissioners of the Federal Election Commission ("FEC" or "Commission") dismissed the administrative complaint of plaintiffs Citizens for Responsibility and Ethics in Washington and Anne Weismann (together, "CREW") despite (a) compelling evidence that respondent Government Integrity, LLC ("GI, LLC") was a passthrough for a $1.7 million contribution to a registered political committee, Now or Never PAC, and (b) information indicating that, at the very least, the immediate source of the funds transferred to GI, LLC were two entities whose names have been withheld from the record due to ongoing litigation. In doing so, the two commissioners misconstrued 52 U.S.C. § 30122 to not apply to "funders three or four layers behind the reportable contribution to a Super PAC" who use an LLC as a passthrough. Compl. Ex. 5 at 2 (Statement of Reasons of Vice Chair Caroline C. Hunter and Comm'r Lee E. Goodman). Pursuant to its rights under 52 U.S.C. § 30109(a)(8) to seek judicial review of any dismissal by the FEC of its complaint, CREW brought this legal action to correct that unlawful dismissal below.

On March 30, 2018, the FEC moved to dismiss CREW's complaint under Rules 12(b)(1)

and 12(b)(6) of the Federal Rules of Civil Procedure. Among the reasons cited to dismiss this action was the FEC's belief that the dismissal below was an exercise of nonreviewable prosecutorial discretion. CREW responded to the FEC's argument, and that motion is currently pending.

Now the FEC moves for judgment on the pleadings under Rule 12(c), but the motion is both premature and redundant. It is premature because a Rule 12(c) motion can only be made "[a]fter the pleadings are closed," Fed. R. Civ. P. 12(c), and the pleadings are not closed here as FEC has not yet filed an answer. The motion is redundant because it merely repeats the FEC's arguments that prosecutorial discretion prohibits review of FEC dismissals, notwithstanding 52 U.S.C. § 30109(a)(8)—arguments which were not materially altered by intervening Circuit authority and thus still fail. That authority recognized that even discretionary dismissals are reviewed where they rely on interpretations of law, and further recognized that review is available where, like here, the discretionary dismissal reflects abdication of the agency's statutory obligations. Accordingly, the FEC's motion should be denied as premature and on the merits.

ARGUMENT

I. The Standard of Review

Rule 12(c) provides: "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). To prevail on a Rule 12(c) motion, "the moving party [must] demonstrate[] that no material fact is in dispute and that it is entitled to judgment as a matter of law." *Schuler v. PricewaterhouseCoopers, LLP*, 514 F.3d 1365, 1370 (D.C. Cir. 2008) (internal quotation marks omitted). "[T]he factual allegations of the complaint must be taken as true, and *any* ambiguities or doubts concerning the sufficiency

of the claim must be resolved in favor of the pleader." *Id.* (internal quotation marks omitted). "[U]nlike a Rule 12(b)(6) motion," which focuses merely on the sufficiency of the complaint, "a Rule 12(c) motion asks the court to render a judgment on the merits . . . by looking at the substance of the pleadings and any judicially noted facts." *Murphy v. Dep't of Air Force*, 326 F.R.D. 47, 49 (D.D.C. 2018) (internal quotation marks omitted); *accord Lopez v. Nat'l Archives & Records Admin.*, 301 F. Supp. 3d 78, 84 (D.D.C. 2018) (Berman Jackson, J.) ("[T]he [12(c)] standard . . . comes closer to a summary judgment type of determination."). "[T]he Rule 12(c) burden is substantial." *Murphy*, 326 F.R.D. at 49.

II. The FEC's Pre-Answer Rule 12(c) Motion is Facially Premature

As this Court recently recognized, "[p]leadings are closed for Rule 12(c) purposes when a complaint and an answer have been filed." *Lopez*, 301 F. Supp. 3d at 83 n.6. Thus, a Rule 12(c) motion can be filed only "*after* the defendant has submitted an answer," since "such a motion relies on both sets of pleadings (i.e., the plaintiff's complaint and the defendant's answer) to support an argument made by either party about the merits of the dispute at hand." *Murphy*, 326 F.R.D. at 48-49; *accord* 5C Wright & Miller, Federal Practice and Proc. § 1367 (3d ed.). The FEC, however, has not filed an answer in this action. Its motion for judgment on the pleadings is therefore facially premature and should be denied. *See Doe v. United States*, 419 F.3d 1058, 1061–62 (9th Cir. 2005) (denying motion for judgment on the pleadings filed before defendant's answer); *Murphy*, 326 F.R.D. at 50 (declining request to treat Rule 12(b)(6) motion as Rule 12(c) motion and instructing defendant to file answer before moving under Rule 12(c)); *M.H. v. Reese*, No. 1:15-cv-1427, 2015 WL 7283174, at *5 (N.D. Ga. Nov. 16, 2015) (denying Rule 12(c)

motion because "Defendant has not filed an answer").[1]

The FEC acknowledges that a motion under Rule 12(c) is only available "after the pleadings are closed." FEC Mem. 8, ECF No. 32 (quoting Fed. R. Civ. P. 12(c)). Though it does not address the issue directly, it appears to assume that its prior motion to dismiss, which is still pending here, closed the pleadings. That is incorrect. *See Murphy*, 326 F.R.D. at 50 (recognizing that pleadings were not closed by Rule 12(b)(6) motion); *see also Lopez*, 301 F. Supp. 3d at 83 n.6; Fed. R. Civ. P. 7(a) (listing types of pleadings, which do not include Rule 12(b)(6) motion). And the authority the FEC cites does not support that conclusion. In *Maniaci v. Georgetown Univ.*, 510 F. Supp. 2d 50 (D.D.C. 2007), the defendants had in fact filed an answer, closing the pleadings, *id.* at 60 ("Plaintiff filed his original complaint on September 20, 2006, answered by Defendants on October 12, 2006."). The court merely found that defendant need not wait until the expiration of plaintiff's deadline to amend before filing a motion for judgment on the pleadings. *Id.* The FEC's other authority, *Jung v. Association of American Medical Colleges*, 339 F. Supp. 2d 26 (D.D.C. 2004), is similarly uninstructive. There, the court considered a motion for judgment on the pleadings because "[f]ourteen of the moving defendants have filed answers," *id.* at 36, and as to the other defendants, the court converted the motion into a motion to dismiss under Rule 12(b)(6) because those defendants had not yet filed such a motion, *id.* ("[T]he Court concludes that it is appropriate for it to proceed with consideration of defendants' motion under Rule 12(c) for those defendants that have answered the complaint and under Rule 12(b)(6) for those defendants that have not.); *cf. Knoblauch*, 2006 WL 968642 at *2

[1] *See also State Farm Fire & Cas. Co. v. Sprading Home Inspections, LLC*, No. 4:10-cv-01887, 2011 WL 4056042, at *3 (E.D. Mich. Sept. 13, 2011) (denying plaintiff's Rule 12(c) motion where plaintiff had not answered defendant's counterclaim); *Habeeba's Dance of the Arts, Ltd. v. Knoblauch*, No. 2:05-CV-926, 2006 WL 968642, at *2 (S.D. Ohio Apr. 10, 2006) (denying Rule 12(c) motion where not all defendants had answered, and motion to dismiss was pending).

(denying Rule 12(c) motion where Rule 12(b)(6) motion was pending).

Here, however, the Court should not convert the FEC's Rule 12(c) motion to a Rule 12(b)(6) motion because the FEC has already separately moved to dismiss CREW's complaint under Rule 12(b)(6), and that motion is currently pending. Moreover, both its pending motion to dismiss and its motion for judgment on the pleadings address the same issue: whether the FEC's prosecutorial discretion prevents review here. *See* FEC Mem. 7, 9; *see also* FEC Mot. to Dismiss at 10, ECF No. 22 (arguing issue on review "fall[s] squarely within the agency's enforcement discretion"); FEC Reply in Support of Mot. to Dismiss at 16, ECF No. 31 (asserting FEC's "enforcement discretion" prohibits judicial review). In fact, the FEC's motion for judgment on the pleadings largely incorporates by reference the arguments from its prior motion to dismiss. FEC Mem. 9–10. The FEC is simply using this additional motion to "repeat[] arguments" already presented in the prior motion, and thus it may not properly be considered even as a supplemental motion to dismiss. *Cf. Campbell-El v. District of Columbia*, 881 F. Supp. 42, 43 (D.D.C. 1995); *see also Lockhart v. Coastal Int'l Sec., Inc.*, 905 F. Supp. 2d 105, 112 (D.D.C. 2012) (noting party may only challenge plaintiff's failure to state a claim in Rule 12(c) motion "when not raised in a motion prior to filing a pleading").[2]

The FEC's premature motion for judgment on the pleadings should be denied. The FEC may renew this motion only if the Court denies the pending motion to dismiss and the FEC files a responsive pleading.

[2] Further, the FEC's challenge based on *Heckler v. Chaney*, 470 U.S. 821 (1985), is brought under Rule 12(b)(6), not Rule 12(b)(1), *see Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011); *Seeger v. U.S. Dep't of Def.*, 306 F. Supp. 3d 265, 277 (D.D.C. 2018), and thus is not the type of challenge that a court must hear at any time it is raised, *cf.* Fed. R. Civ. P. 12(h)(3).

III. The FEC's Motion Fails to Show Judicial Review Is Unavailable

Even if the FEC's motion were timely, it fails on the merits. By allowing "any party aggrieved" to challenge an FEC dismissal of an action, the FECA "explicitly indicates" that FEC "enforcement decisions" are not "committed to agency discretion." *FEC v. Akins*, 524 U.S. 11, 19, 26 (1998). The recent decision of *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018), *pet. for en banc review filed*, No. 17-5049 (D.C. Cir. July 27, 2018), does not overcome that explicit indication here, even assuming it is not reversed en banc. First, *CREW* recognized that statements like the one below that rely on a legal interpretation are not immune from judicial review. Second, *CREW* recognized that even discretionary dismissals are reviewable if they reflect abdication, as the dismissal below certainly does.[3]

A. Judicial Review Remains Available for an Agency's Legal Interpretations

As *CREW* recognized, "[t]he interpretation an agency gives to a statute is not committed to the agency's unreviewable discretion" and where "the Commission declines to bring an enforcement action on the basis of its interpretation of the FECA, the Commission's decision is subject to judicial review." 892 F.3d at 441 n.11.[4] Although the FEC interprets *CREW* to block all judicial review of its nonenforcement decisions, FEC Mem. 6–7, *CREW* must be read in light of the Supreme Court's decision in *Akins*, which explicitly allowed review of the FEC's interpretation of law underlying a dismissal, the agency's invocation of its prosecutorial discretion notwithstanding, *Akins*, 524 U.S. at 26. Similarly, here, the two commissioners'

[3] Moreover, *CREW* has no application to CREW's APA claim.

[4] In *CREW*, the Court found the commissioners had not in any way premised their dismissal on an interpretation of law, but rather "placed their judgment squarely on the ground of prosecutorial discretion." *CREW v. FEC*, 892 F.3d 434, 439 (D.C. Cir. 2018), *pet. for en banc review filed*, No. 17-5049 (D.C. Cir. July 27, 2018). *CREW*'s statement that dismissal must "entirely" be based on the legal interpretation alone is thus dicta, *id.* at 441 n.11, and in conflict with *Akins*, *FEC v. Akins*, 524 U.S. 11, 26 (1998).

interpretations of law underlying their decision to dismiss are subject to review.

That accords with the general law of this Circuit outside of the FEC context. For example, in *NAACP v. Trump*, 298 F. Supp. 3d 209, 226–227 (D.D.C. 2018), a court in this district considered whether *Heckler v. Chaney* blocked review of the Department of Homeland Security's nonenforcement decisions under the Deferred Action for Childhood Arrivals program. Noting that nonenforcement decisions were typically not subject to review, *id.* at 227, the district court nonetheless found judicial review was available because the agency's nonenforcement decisions were based on its view of what the law allowed—a "legal determination" that is "not subject to *Chaney's* presumption of unreviewability," *id.* at 234 (citing *Crowley v. Caribbean Transp., Inc. v. Pena*, 37 F.3d 671 (D.C. Cir. 1994)); *see also id.* at 231 (recounting government's concession that "if [an] agency's interpretation of a statute is embedded in a non-reviewable enforcement policy, the former may be reviewable as such"). Notably, the district court recognized that the mere presence of *other* non-legal justifications for the enforcement decision did not preclude review of the underlying legal determination. *Id.* at 233–34 (noting that a contrary conclusion would allow agency to "insulate from judicial review any legal interpretation").

Here, the statement of reasons below reflects just such reliance on a legal determination. As the primary reason given to dismiss the claims against the unknown respondents, the two controlling commissioners cited the fact that they did not believe that the FECA's requirement to report the "true source" of a contribution under 52 U.S.C. § 30122 extended "to funders three or four layers behind the reportable contribution to a Super PAC," particularly where one such layer was an LLC. Compl. Ex. 5 at 2. They further contended that a "reason to believe" finding under 52 U.S.C. § 30109(a)(2)—the procedural posture of the claims as to the Doe defendants—

required "direct evidence." *Id.* at 3; *but see* FEC, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545, 12,545 (Mar. 16, 2007) (stating the "reason to believe" standard is satisfied where "available evidence in the matter is at least sufficient to warrant conducting an investigation," such as "when a complaint credibly alleges" a violation "may have occurred"). The remainder of the statement follows from those predicate legal conclusions.[5]

Thus, the statement below demonstrates that the two commissioners "decline[d] to bring an enforcement action on the basis of [their] interpretation of the FECA" and thus the dismissal "is subject to judicial review." *CREW*, 892 F.3d at 441 n.11.

B. The Two Commissioners Have Abdicated the FECA's "True Source" Requirement Against LLCs

In addition, *CREW* recognized that judicial review of even discretionary agency enforcement decisions is available when the "the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." 892 F.3d at 440 n.9 (quoting *Chaney*, 470 U.S. at 833 n.4 (citing *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (en banc))). The statement below, particularly when read in light of other statements of the two commissioners incorporated therein, represents just such a conscious and express abdication of the agency's statutory responsibility to identify the "true source" of contributions.

In dismissing the claim below, the two commissioners relied upon their express and conscious policy of not enforcing true source reporting obligations where an LLC serves as the

[5] To the extent there is any question about the relative roles various justifications played in the analysis below, at this procedural stage all doubts must be resolved in CREW's favor. *Schuler*, 514 F.3d at 1370.

passthrough agent, particularly where it is used to shield "funders three or four layers behind the reportable contribution to a Super PAC." Compl. Ex. 5 at 2 & n.5. That policy, originating in a different matter but now consistently applied and incorporated by reference below, is set forth in a separate Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman in Matters of MURs 6485 (W Spann LLC, *et al.*), 6487 & 6488 (F8, LLC, *et al.*), 6711 (Specialty Investment Groups, Inc., *et al*.) and 6930 (SPM Holdings LLC, *et al.*), http://eqs.fec.gov/eqsdocsMUR/16044391107.pdf (hereinafter, "LLC Enforcement Policy").[6] This LLC Enforcement Policy, which purports to interpret the application of 52 U.S.C. § 30122's requirements when a contribution is passed through an LLC, in fact nullifies that requirement. It does so by refusing to apply the statute where a contributor directs funds from or through an LLC under the contributor's control to a political committee (or, as here, to another passthrough), and limiting it only to situations where there is "specific evidence" that the LLC is wholly a sham corporation with no income of its own. LLC Enforcement Policy at 12-13.[7]

This policy has been routinely applied in FEC matters. For example, the commissioners applied it in abdicating enforcement of § 30122 when a contributor "exercise[s] sole authority

[6] The LLC Enforcement Policy was not only followed below, *see* Compl. Ex. 5 at 2 & n.5, but is now the policy followed in any complaint involving an LLC passthrough, *see* Statement of Reasons of Vice Chair Caroline C. Hunter and Comm'r Mathew S. Petersen, MURs 6969 (MMWP12 LLC, *et al.*) and 7031, 7034 (Children of Israel, LLC, *et al.*) (Sept. 13, 2018), http://eqs.fec.gov/eqsdocsMUR/6969_2.pdf; Statement of Reasons of Chair Caroline C. Hunter and Comm'r Matthew S. Petersen, MURs 6968 (Tread Standard LLC, *at al*.), 6995 (Right to Rise, *et al.*), and 7014, 7017, 7019, 7090 (DE First Holdings) (July 2, 2018), http://eqs.fec.gov/eqsdocsMUR/6968_2.pdf; First General Counsel's Report at 6 n.27, MURs 7013, 7015 (IGX, LLC) (Oct. 11, 2016), http://eqs.fec.gov/eqsdocsMUR/18044441851.pdf.

[7] And even then, enforcement apparently remains impossible, as this case demonstrates. Evidence shows the LLC in question here, GI, LLC, was just such a sham corporation, Compl. Ex. 2 at 4–5, but the two commissioners *still* refused to enforce the FECA's true source rules to it. *See also* LLC Enforcement Policy at 4–5 (abdicating enforcement against sham LLC).

over the disposition of [an LLC's] assets" to cause the LLC "to make []contributions" simply because the contributor's "personal accounts were depleted." First General Counsel's Report, MUR 6930 at 9–10 (Nov. 19, 2015), http://eqs.fec.gov/eqsdocsMUR/16044386985.pdf; *see also* LLC Enforcement Policy at 5–6. Indeed, they abdicated enforcement even though the LLC was merely a repository of the contributor's assets: *i.e.*, it was the contributor's bank account. LLC Enforcement Policy 5–6. Similarly, the commissioners have abdicated enforcement of 52 U.S.C. § 30122 where the contributor creates and uses an LLC to make a contribution solely to avoid "full public disclosure of his name in connection with the contribution." *Id.* at 3.

The two commissioners are indeed committed to this statement of nonenforcement. CREW has been unable to identify a single case in which the controlling commissioners have enforced 52 U.S.C. § 30122 against an LLC. And the abdication is not limited to LLCs—CREW has been unable to identify *any case* in which the two commissioners have enforced 52 U.S.C. § 30122 to identify *any* true source of a contribution where that contributor was unknown to the public and the recipient wished to keep the contributor secret.[8]

[8] CREW reviewed the FEC's MUR database, http://eqs.fec.gov/eqs/searcheqs, for MURs referencing 52 U.S.C. § 30122, its prior codification, 2 U.S.C. § 441f, and the implementing regulation 11 C.F.R. § 110.4 from the date Commissioner Hunter joined the Commission. At best, the commissioners at times vote to confirm that a contributor who has already publicly confessed to being the source of the contribution should be reported as one. *See*, Conciliation Agreements, MUR 6816 (Americans for Job Security, American Future Fund, and 60 Plus Association) (groups agreed to report organization identified by complainant as contributor), http://eqs.fec.gov/eqsdocsMUR/16044397368.pdf, http://eqs.fec.gov/eqsdocsMUR/16044397356.pdf, http://eqs.fec.gov/eqsdocsMUR/16044397382.pdf. The commissioners might also vote to investigate when the recipient flagged the transfer as unlawful. *See* Response from Friends of Mary Landrieu, Inc. and Nancy Marsiglia, Treasurer at 2, MUR 6234 (Jan. 14, 2010) http://eqs.fec.gov/eqsdocsMUR/12044321473.pdf (stating committee transferred funds to U.S. treasury on suspicion they were unlawful). As long as the recipient and donor want to remain secret, however, and if they have succeeded so far, the two commissioners will abdicate enforcement to allow the contributor to stay hidden.

The LLC Enforcement Policy is a "conscious[] and express[] adopt[ion of] a general policy" to abdicate the FEC's statutory responsibility to enforce 52 U.S.C. § 30122. *CREW*, 892 F.3d at 440 n.9. The two commissioners applied that policy in dismissing the complaint below against the true source of the contribution that was passed through GI, LLC and ultimately on to Now or Never PAC. As such, that dismissal is subject to judicial review. *See CREW v. FEC*, 316 F. Supp. 3d 349, 422 (D.D.C. 2018) (finding abdication warranted judicial review despite commissioners' invocation of prosecutorial discretion where their reasoning relied on invalid regulation that conflicted with FECA).

CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request the Court deny the FEC's motion to for judgment on the pleadings.

Respectfully submitted,

October 5, 2018

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