

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

GIFFORDS,)	
)	
Plaintiff,)	Civ. No. 19-1192 (EGS)
)	
v.)	
)	
FEDERAL ELECTION COMMISSION,)	REPLY IN SUPPORT OF
)	MOTION TO DISMISS
Defendant.)	
)	

**FEDERAL ELECTION COMMISSION’S REPLY
IN SUPPORT OF ITS MOTION TO DISMISS**

The Federal Election Commission (“FEC” or “Commission”) has moved to dismiss because plaintiff Giffords has failed to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6); Mem. in Supp. of FEC’s Mot. to Dismiss, or in the Alternative, for Summ. J. (“Mem.”) (July 2, 2019) (Docket No. 19).¹ Plaintiff challenges the FEC’s alleged failure to act upon four administrative complaints, all filed with the agency in the latter half of 2018, pursuant to 52 U.S.C. § 30109(a)(8) of the Federal Election Campaign Act (“FECA”). As the FEC showed, however, plaintiff cannot demonstrate that the FEC’s handling of these matters was “contrary to law” under the deferential standards of review. Relatively little time has passed

¹ The Commission’s motion to dismiss was filed on July 1, 2019, together with an alternative motion for summary judgment (Docket No. 17) which was to be placed under seal pursuant to the protective order that had been previously issued (Minute Order, June 21, 2019; Proposed Protective Order, Docket No. 16-1). The Court denied this initial filing without prejudice for failure to include a motion to seal. (Min. Order, July 2, 2019.) However, the FEC had also filed a redacted version of its dispositive motion, in which all parts submitted in support of its motion to dismiss were unredacted and publicly available. (*See* Mem. (July 2, 2019) (Docket No. 19).) Plaintiff Giffords has filed an opposition to that motion to dismiss (Docket No. 22), and the Commission now replies.

since the complaints were filed, Giffords concedes that the four matters are complex, and the FEC has discretion in allocating its limited resources, particularly during what the agency has shown to be a period of heavy administrative enforcement activity. (*See* Mem. at 12-22.)

In its opposition, plaintiff does not seem to seriously dispute the Commission's showing as to these key factors, but it essentially argues that cases alleging FEC delay cannot be resolved on a Rule 12(b)(6) motion because doing so would involve deciding questions of fact. (*See* Pl.'s Opp'n to Def.'s Mot. to Dismiss ("Opp.") (Docket No. 22).) Indeed, plaintiff appears to take the position that the mere filing of section 30109(a)(8) delay suits after the 120-day jurisdictional threshold for such suits insulates them from dismissal. But plaintiff provides no support for its positions, and they are incorrect. Plaintiff also claims that particular elements of the FEC's motion, including the short time that has passed and the complexity of the four matters, cannot by themselves justify dismissal. However, those are red herrings. The FEC's actual position is that all of the factors it has raised together mean that plaintiff's claim fails as a matter of law, even assuming the facts plaintiff alleges are true. Plaintiff's complaint should be dismissed.

I. THE PASSAGE OF TIME SINCE THE ALLEGED ADMINISTRATIVE COMPLAINTS, ALL FILED IN THE LATTER HALF OF 2018, HAS NOT BEEN UNREASONABLE

The Commission showed that the limited time the four FEC administrative enforcement matters plaintiff describes have been pending is not unreasonable under the relevant standards of review. (Mem. at 15-16.) Under those standards, Giffords must allege agency delay that is "arbitrary and capricious." *Common Cause v. FEC*, 489 F. Supp. 738, 744 (D.D.C. 1980); *see In re Nat'l Cong. Club*, Nos. 84-5701, 84-5719, 1984 WL 148396, at *1 (D.C. Cir. Oct. 24, 1984). In evaluating a claim of unreasonable delay, courts consider a number of factors, including the length of the alleged delay, the novelty and complexity of the matters involved, and the need to

defer to agency expertise in allocating limited public resources. *See Common Cause*, 489 F. Supp. at 744; *Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (“*TRAC*”). With regard to the FEC in particular, the D.C. Circuit has made clear that the 120-day period in section 30109(a)(8) is merely a jurisdictional threshold, so there is no specific timetable for the handling or resolution of these matters by the agency. *See FEC v. Rose*, 806 F.2d 1081, 1091-92 (D.C. Cir. 1986).

Plaintiff does not dispute that these are the applicable standards, nor does it claim that any definite timetable exists for FEC action on administrative enforcement matters. Instead plaintiff argues, in effect, that whether a time frame is reasonable in this context can never be resolved on a motion to dismiss. (Opp. at 3-5.) Plaintiff goes so far as to claim that after alleging that 120 days has passed, plaintiff has done “all that is required to survive a Rule 12(b)(6) motion.” (*Id.* at 5.) Thus, it is plaintiff’s view that no delay case should be dismissed on this ground because doing so “requires a factual review of the evidence regarding the agency’s actions.” (*Id.* at 4.) But plaintiff cites no authority to support its position. Of course, the facts of a particular case are important, but that clearly does not preclude the possibility that a plaintiff’s allegations can be accepted as true and found legally deficient. At the same time, plaintiff actually claims that the Commission has argued that *all* delay suits must be dismissed for failure to state a claim. (*Id.*) However, the Commission has argued only that the passage of time here, together with the other key factors discussed below, means that plaintiff has failed to state a claim in the circumstances of this case. (Mem. at 15-16.)

Plaintiff claims (Opp. at 4-5) that the FEC’s reliance on case law showing that the agency need not *complete* action on an administrative enforcement matter within far longer time periods than the brief ones involved here is misplaced because plaintiff’s suit challenges a mere “failure

to act.” However, the standards for evaluating the overall time consumed by the underlying enforcement matters are relevant to plaintiff’s claims, and plaintiff offers no alternative guidance for judging interim progress. These cases make clear that judicial review of the speed with which the Commission handles such matters is deferential and that there is no set time frame for the agency to handle them. *See, e.g., Rose*, 806 F.2d at 1091-92.

In sum, plaintiff cannot justify its position that no section 30109(a)(8) claim can be dismissed as long as it was filed after the jurisdictional filing threshold of 120 days. And plaintiff cannot show that the time that has passed here constitutes “arbitrary and capricious” delay under the applicable standards.

II. THE COMPLEXITY OF THE ENFORCEMENT MATTERS PLAINTIFF DESCRIBES IS A CRITICAL FACTOR WEIGHING AGAINST ANY FINDING OF UNREASONABLE DELAY

The Commission showed that the matters about which plaintiff complains are legally and factually complicated (Mem. at 16-18), and in fact plaintiff has conceded the “complexity” of the relevant activities (Opp. at 5). Plaintiff also does not dispute the FEC’s showing that FECA’s mandatory administrative process takes significant time, nor that these enforcement matters involve economic and political issues, not issues of human safety that would be more urgent to resolve. (Mem. at 16-18.) However, plaintiff claims that the complexity of the underlying administrative proceeding cannot justify dismissal of its delay suit. (Opp. at 5.) But the Commission never claimed that complexity alone was sufficient; again, plaintiff exaggerates the FEC’s position. And as with plaintiff’s arguments as to timing, discussed above, plaintiff claims that “whether or how [complexity of the allegations] bears on the reasonableness of the Commission’s inaction” (Opp. at 5) can only be considered at the “*merits* stage,” not in a Rule 12(b)(6) motion. But the *Common Cause* and *TRAC* factors governing review here clearly

include analysis of the nature of the underlying claims, and plaintiff provides no authority to support the claim that these factors cannot be considered at the dismissal stage. *See Common Cause*, 489 F. Supp. at 744; *TRAC*, 750 F.2d at 80.

Thus, while the Commission does not argue that the complexity of issues raised administratively alone renders the court complaint legally insufficient, the nature of the legal and factual issues is highly relevant to whether the agency has acted reasonably in handling them.

III. THE COMMISSION HAS DISCRETION IN ALLOCATING ITS LIMITED RESOURCES DURING A PERIOD OF HEAVY ENFORCEMENT ACTIVITY

Finally, the Commission showed that it receives considerable judicial deference in allocating its resources, and it cited a wealth of public data showing the heavy enforcement workload it has experienced during the time that the alleged enforcement complaints at issue here have been pending. (Mem. at 18-22.) Plaintiff does not dispute that the FEC gets this deference or that the FEC has recently experienced a busy docket. But plaintiff argues (Opp. at 6-7) that these factors alone are insufficient to compel dismissal for failure to state a claim under Rule 12(b)(6). Once again, however, the FEC does not claim that this deference and the high volume of enforcement matters constitute a shield against all delay suits. Instead, when considered together with the other key factors discussed above, they mean plaintiff cannot meet its burden to show that the FEC has acted unreasonably here.

Plaintiff fails to provide any specific reason to doubt the sources of information the Commission cites to demonstrate its heavy enforcement workload, but it vaguely asserts (Opp. at 6) that the agency's arguments "appear to rely in part on cherry-picked data." However, the Commission cited only documents freely available on the Commission's website at www.fec.gov. (Mem. at 19-21.) Because this data is publicly available and not subject to reasonable dispute, the court may take judicial notice of it in ruling on this motion to dismiss, as

the Commission showed. *See* Mem. at 19 n.6; *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1059 (D.C. Cir. 2007); *Bradley v. Vox Media, Inc.*, 320 F. Supp. 3d 178, 181 (D.D.C. 2018). Indeed, plaintiff does not dispute the accuracy of the FEC's data. And it provides no other information to counter the FEC's showing, despite the public nature of the information from which the Commission drew the data it supplied.²

IV. CONCLUSION

For all the foregoing reasons, plaintiff has failed to state a claim on which relief can be granted, and its court complaint should be dismissed.

Respectfully submitted,

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² Plaintiff does specifically object (Opp. at 6 n.2) that the Commission erred in relying upon its Statement of Material Facts to support two statements it made regarding the significant delay caused by the 2018-2019 partial government shutdown (Mem. at 21). However, the Court can take judicial notice of the public sources of information for that disruption of government services and its effect on the FEC, even if they were inadvertently not included in the motion to dismiss portion of the Commission's filing. *See* FEC Plan for Agency Operations in the Absence of a Fiscal Year 2019 Appropriation (Dec. 2018), https://www.fec.gov/resources/cms-content/documents/FEC_shutdown_plan_updated_Dec_2018.pdf; OPM Memorandum for Chief Human Capital Officers (Jan. 27, 2019), <https://www.chcoc.gov/content/pay-and-benefits-employees-affected-lapse-appropriations-1>. Plaintiff does not dispute the accuracy of the FEC's statements and the general time of the shutdown is hardly subject to reasonable dispute.