

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

GIFFORDS,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

Civil Action No. 19-1192 (EGS)

PLAINTIFF’S OPPOSITION TO DEFENDANT’S MOTION TO DISMISS

Plaintiff Giffords respectfully submits this opposition to Defendant Federal Election Commission’s (“FEC”) motion to dismiss. *See* ECF No. 19. This case challenges the FEC’s failure to act on administrative complaints regarding illegal coordinated election spending by certain National Rifle Association (“NRA”) entities and federal candidates, including President Trump. On July 1, 2019, the FEC filed a sealed motion. *See* ECF No. 17. On July 2, 2019, the FEC filed a public version of that motion, styled a Motion to Dismiss, or in the Alternative, for Summary Judgment, but redacted all the material related to its summary judgment motion. *See* ECF No. 19. Also on July 2, the Court denied without prejudice the sealed motion for failure to comply with local rules governing the procedures for filing sealed material. *See* Minute Order, July 2, 2019. On July 10, the FEC sought reconsideration of that ruling. *See* ECF No. 20. It appears, however, that the public portion of ECF No. 19, consisting of the FEC’s motion to dismiss, remains pending. As such, plaintiff timely files this opposition to that motion now, and requests that the Court deny the motion to dismiss for the reasons discussed below. Briefing and consideration of the FEC’s alternative summary judgment request will not be ripe until the FEC has properly docketed that

motion and plaintiff has had an opportunity to take some limited discovery on the matters addressed therein. *See* Fed. R. Civ. P. 56(d).

STANDARD OF REVIEW

To withstand a challenge under Rule 12(b)(6), “a complaint must set forth ‘factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.’” *Bowman v. Iddon*, 848 F.3d 1034, 1039 (D.C. Cir. 2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A court reviewing a motion to dismiss under Rule 12(b)(6) must “accept[] as true all of the factual allegations contained in the complaint and draw[] all inferences in favor of the nonmoving party.” *Autor v. Pritzker*, 740 F.3d 176, 179 (D.C. Cir. 2014) (quotation marks omitted). Moreover, “[a] complaint survives a motion to dismiss even ‘[i]f there are two alternative explanations, one advanced by [the] defendant and the other advanced by [the] plaintiff, both of which are plausible.’” *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015) (quoting *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) (first bracket added)). Even if the defendant believes that its version will “prove to be the true one . . . that does not relieve defendant[] of [its] obligation to respond to a complaint that states a plausible claim for relief, and to participate in discovery.” *Id.*

ARGUMENT

Plaintiff’s complaint states a claim upon which relief may be granted. The FEC raises three points in support of its contention that plaintiff’s complaint should be dismissed: that (1) courts have concluded that delays greater than 120 days were reasonable in other cases, (2) the facts alleged in plaintiff’s administrative complaint are complex and thus delay is acceptable, and (3) the FEC is otherwise busy right now. Because none of these points demonstrates any legal

insufficiency in plaintiff's complaint, the FEC's motion should be denied and the case should proceed to discovery.

I. Plaintiff Has Alleged a Delay Sufficient to State a Cause of Action Under FECA.

Plaintiff has alleged a period of delay—between 138 and 251 days—that suffices to state a claim for relief under the Federal Election Campaign Act (“FECA”). FECA provides that “[a]ny party aggrieved . . . by a failure of the Commission to act on [an administrative] complaint during the 120-day period beginning on the date the complaint is filed[] may file a petition with the United States District Court for the District of Columbia.” 52 U.S.C. § 30109(a)(8)(A). Thus, to state a cause of action under § 30109(a)(8)(A), a plaintiff must allege that it filed an administrative complaint with the FEC, and that the Commission has not acted on that complaint within 120 days. As the FEC acknowledges, in this case, plaintiff's administrative complaints were pending for between 138 and 251 days when this lawsuit was filed. Mot. at 15 (ECF No. 19).

The FEC contends that this case must nonetheless be dismissed because the 120-day period is a jurisdictional floor, and not a requirement that the agency actually complete its work in that timeframe. In support of this argument, the FEC correctly notes that courts have found longer periods of delay to be reasonable under the factual circumstances of other cases. *See id.* at 15-16. As the FEC acknowledges, however, determining whether delay is reasonable requires courts to apply two fact-intensive balancing tests with a combined ten factors. *See id.* at 13-14 (citing *Common Cause v. FEC*, 489 F. Supp. 738, 744 (D.D.C. 1980), and *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984)).

The fact that a delay suit under § 30109(a)(8)(A) *can* lose on the merits if filed more than 120 days after the administrative complaint does not remotely suggest that all such suits *must* fail as a matter of law. A 120-day delay may be unreasonable under the facts of one case, while a delay

of a year or more might be reasonable under the facts of another case. That is not a determination a court may make upon a Rule 12(b)(6) motion, because it requires a factual review of the evidence regarding the agency's actions. *See, e.g., FEC v. Rose*, 806 F.2d. 1081, 1091 (D.C. Cir. 1986) (weighing the factual circumstances surrounding the Commission's handling of an administrative complaint in assessing delay). To prevail on its motion to dismiss, the FEC would have to show that no set of facts consistent with the complaint would entitle plaintiff to relief. The FEC does not cite a single case for the proposition that plaintiff's complaint must fail regardless of the facts plaintiff will be able to demonstrate regarding the nature and causes of the FEC's delay.

Under the FEC's view, *any* complaint filed after the 120-day period established by § 30109(a)(8)(A) should be dismissed for failure to state a legal claim. In other words, the FEC argues that a statute in which Congress unambiguously authorized administrative complainants to file suit after 120 days actually means that if a complainant brings suit after "only" 138 (or 251) days, that suit fails as a matter of law. The FEC's reading of § 30109(a)(8)(A) has no textual support, and the agency fails to identify how much of a delay it considers sufficient for a plaintiff to survive a Rule 12(b)(6) motion (except to suggest that 251 days is still not enough). *See* Mot. at 15 (ECF No. 19). The FEC notes that its internal goal is "to resolve half of the enforcement matters it [receives] each year within 15 months of the date of receipt." *Id.* at 16. But the FEC's aspirational target has no legal force to set the boundaries for a plausible claim under Rule 12(b)(6); the statutory period established by Congress does. *See* 52 U.S.C. § 30109(a)(8)(A) (120 days).

Finally, the FEC's argument that the complaint must be dismissed because § 30109(a)(8)(A) does not require the FEC to have *completed* the enforcement matters is a strawman. Plaintiff's complaint does not allege that the FEC violated that statute by failing to complete the matters, but rather "a failure of the Commission to act" on them at all. Compl. ¶ 66

(ECF No. 1) (quoting 52 U.S.C. § 30109(a)(8)(A)); *see also id.* ¶ 64. The FEC’s argument that it may lawfully take more than 120 days to *complete* these matters is irrelevant.

Plaintiff has alleged that the Commission has not acted on its administrative complaints within the 120-day period fixed by statute, which is all that is required to survive a Rule 12(b)(6) motion.

II. The Complexity of the NRA’s Misconduct Does Not Require Dismissal of Plaintiff’s Delay Suit.

The complexity of the NRA entities’ scheme to violate campaign finance laws does not justify dismissal of plaintiff’s delay suit for failure to state a legal claim. The FEC contends that the “‘novelty of the issues involved’ is a key factor in evaluating agency delay,” Mot. at 17 (ECF No. 19) (quoting *In re Nat’l Congressional Club v. FEC*, Nos. 84-5701, 84-5719, 1984 WL 148396, at *1 (D.C. Cir. Oct. 24, 1984)), and that because the court complaint in this case describes the underlying scheme as “complex,” the complaint must fail as a matter of law pursuant to Rule 12(b)(6). Nothing in § 30109(a)(8)(A) suggests that only delay suits involving non-complex underlying allegations may be filed within 120 days. The complexity of the allegations subject to the administrative complaints—and whether or how that bears on the reasonableness of the Commission’s inaction—is a factual question to be considered at the *merits* stage; it is not a consideration relevant to a Rule 12(b)(6) motion.

The fact that the NRA’s scheme to illegal contribute large amounts of money to numerous federal candidates has been described—accurately—as “complex” does not render plaintiff’s complaint legally insufficient.¹

¹ In any event, despite repeatedly stressing plaintiff’s description of the underlying scheme as “complex,” the FEC acknowledges that the complaints raise issues “common to many FEC matters.” Mot. at 18 (ECF No. 19).

III. Plaintiff's Allegations Do Not Become Insufficient Because the FEC Claims to Be Busy with Other Matters.

Plaintiff's allegations are not insufficient under Rule 12(b)(6) merely because the FEC asserts that it is busy with other matters. The FEC notes that it is generally afforded deference in setting its workload priorities, and points to data posted on its website outlining statistics about its enforcement docket that it contends demonstrate it is "do[ing] more with less over time." Mot. at 20 (ECF No. 19). The FEC's docket may well be a relevant consideration to the Court's ultimate determination of whether the agency's delay has been unreasonable, although the FEC's assertions about its docket appear to rely in part on cherry-picked data that plaintiff has a right to test through the discovery process. But even taking the FEC's factual assertions as true (which the Court need not do in the context of a Rule 12(b)(6) motion), the FEC's argument proves too much: it seems to contend that its busy docket is a shield against *any* delay suit—as a matter of law. That is simply not a plausible reading of § 30109(a)(8)(A). The fact that the FEC has many pending matters delayed beyond 120 days does not mean that the complainants to every one of those matters thus lose the right to bring the legal claim Congress expressly granted them.² The FEC cannot undo a statutory cause of action by posting workload statistics on its website.

² The FEC also cites to the government shutdown, which began just before the winter holidays in 2018 and stretched into January 2019, as reason why plaintiff's claim should be dismissed as a matter of law. Whether the shutdown rendered the FEC's delay reasonable, however, is a matter of fact, not of legal sufficiency, as evidenced by the FEC's citation to the redacted Statement of Facts accompanying the summary judgment portion of its filing as support for this argument. Mot. at 21 (ECF No. 19). The Court has the discretion to deny the FEC's attempt to improperly insert factual material into a Rule 12(b)(6) motion. *See, e.g., Search v. Uber Techs., Inc.*, 128 F. Supp. 3d 222, 228-29 (D.D.C. 2015) (declining to consider materials outside complaint where "[p]laintiff has not had a meaningful opportunity to present supporting materials outside of his Complaint").

* * *

The FEC's legal arguments fail to establish that plaintiff's complaint is barred by law, and the FEC's factual assertions are not appropriate for a motion to dismiss but rather go to the evidentiary support for plaintiff's complaint. The facts of this case can be assessed only after discovery and both parties' submission of evidence regarding the propriety and reasonableness of the FEC's delay in acting on plaintiff's administrative complaints. For now, the only facts that matter are those that plaintiff has alleged, considered in the light most favorable to it, and those facts properly allege a cause of action under 52 U.S.C. § 30109(a)(8)(A).

CONCLUSION

For the foregoing reasons, the FEC's motion to dismiss should be denied.

Dated: July 16, 2019

Respectfully submitted,

J. ADAM SKAGGS*
DAVID PUCINO*
Giffords Law Center to
Prevent Gun Violence
223 West 38th St. #90
New York, NY 10018
(917) 680-3473
askaggs@giffords.org
dpucino@giffords.org

/s/ Adav Noti
ADAV NOTI (DC Bar No. 490714)
MARK P. GABER (DC Bar No. 988077)
MOLLY E. DANAHY (DC Bar No. 1643411)
Campaign Legal Center Action
1101 14th Street NW, Suite 400
Washington, DC 20005
(202) 736-2200
anoti@campaignlegal.org
mgaber@campaignlegal.org
mdanahy@campaignlegal.org

*Admitted *Pro Hac Vice*

Counsel for Plaintiff