

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

CITIZENS FOR RESPONSIBILITY AND
ETHICS IN WASHINGTON, *et al.*,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,

Defendant,

CROSSROADS GRASSROOTS POLICY
STRATEGIES

Intervenor-Defendant.

Civil Action No. 1:16-cv-00259-BAH

**CROSSROADS GRASSROOTS POLICY STRATEGIES’
REPLY MEMORANDUM IN SUPPORT OF
DEFENDANTS’ PARTIAL MOTIONS TO DISMISS**

Crossroads Grassroots Policy Strategies (“Crossroads GPS”) respectfully submits this Reply Memorandum in support of Defendants Federal Election Commission’s (“Commission” or “FEC”) and Crossroads GPS’s partial motions to dismiss. The FEC’s motion contends that the statute of limitations bars Plaintiffs’ challenge to the validity of an FEC regulation, 11 C.F.R. § 109.10(e)(1)(vi) (the “Regulation.”) Crossroads GPS has joined in that motion but the FEC has and will fully brief it. So, in the interest of efficiency, Crossroads GPS will not duplicate the FEC’s various arguments.

Crossroads GPS’s papers included its own partial motion to dismiss. That motion has a different target than the FEC’s motion. Crossroads GPS challenges Plaintiffs’ claims that the FEC’s dismissal of the administrative complaint violated the Administrative Procedure Act (“APA”), 5 U.S.C. § 706. Crossroads GPS contends that FEC enforcement decisions such as its dismissal orders are subject to review only under Federal Election Campaign Act of 1971, as

amended (the “FECA”), 52 U.S.C. § 30109(a)(8)(C), not the APA. Plaintiffs’ Opposition provides no substantive response, and its procedural challenge is baseless.

I. THE FECA PROVIDES AN ADEQUATE REMEDY FOR AND THUS PRECLUDES PLAINTIFFS’ APA CHALLENGES TO THE FEC’S DISMISSAL OF THE ADMINISTRATIVE COMPLAINT.

Plaintiffs’ Complaint includes three claims. Each claim asserts that the FEC’s dismissal order violated the APA, 5 U.S.C. § 706. According to Claim One (¶111), “the FEC’s dismissal was ... in violation of ... 5 U.S.C. § 706.” According to Claim Two (¶124), “under ... 5 U.S.C. § 706 ... the FEC has acted arbitrary [sic] or capriciously ... or acted contrary to law in dismissing MUR 6696.” And according to Claim Three (¶131), the “FEC is in violation of its statutory responsibilities under ... 5 U.S.C. § 706 ... in dismissing MUR 6696.”

Crossroads GPS moved (at 3-4) to dismiss “the portions of Plaintiffs’ Claims One and Three, as well as the portion of Plaintiffs’ Claim Two ... that are brought pursuant to the APA ... §706” and that challenge the FEC’s action “in dismissing Plaintiffs’ administrative complaint.”¹ Crossroads GPS grounded its motion (at 2-3) on this Court’s recent holding that the FECA, 52 U.S.C. 30109(a)(8), “precludes review of FEC enforcement decisions under the APA.” *CREW v. FEC*, No. 14-cv-1419-CRC, 2015 U.S. Dist. LEXIS 114114 at *14 (D. D.C. Aug. 13, 2015).

Plaintiffs do not deny that the FEC’s dismissal order was an enforcement decision. Nor do they dispute this Court’s ruling that such enforcement decisions cannot be challenged under the APA. Instead, Plaintiffs argue at length (at 11-14) that “courts have consistently allowed plaintiffs to challenge the validity of FEC regulations under the APA.” That may be so, but it is irrelevant to Crossroads GPS’s motion.

¹ Plaintiffs also shoehorned into Claim Two (¶ 124) the assertion that the Regulation “is unlawful and invalid” under the APA. That aspect of the claim is addressed by the FEC’s partial motion to dismiss.

Crossroads GPS moves to dismiss Plaintiffs' claims that the FEC's dismissal order violated the APA. Because Plaintiffs' Opposition offers no legal basis for such claims, they should be dismissed as a matter of law.

II. CROSSROADS GPS'S MOTION TO DISMISS IS PROCEDURALLY PROPER.

Lacking a substantive response to Crossroads GPS's motion, Plaintiffs mount a procedural challenge. Although Crossroads GPS brought its motion at the earliest possible time, Plaintiffs assert it came too late. They are mistaken. Crossroads GPS's motion is timely and otherwise procedurally proper.

Plaintiffs say (at 10-11) that the Order that set a schedule for Crossroads GPS to join in and supplement the FEC's submission did not affirmatively authorize Crossroads GPS to raise additional grounds for dismissal. Even if that is so, however, the Order certainly did not forbid such a motion. Nor do Plaintiffs claim it did. Instead, Plaintiffs assert that Rule 12(b) required Crossroads GPS to move to dismiss before filing its Answer. That argument fails at several levels.

First, Plaintiffs' position improperly would convert a seemingly innocuous efficiency provision in the local rules into a broad obstacle to Rule 12(b) motions by intervening defendants. Under Fed. R. Civ. P. 24(c), a motion to intervene must be accompanied by a proposed "pleading." For an intervening defendant such as Crossroads GPS, this means a proposed answer; a motion to dismiss is not a "pleading." 7C WRIGHT AND MILLER, FED. PRACTICE & PROCEDURE § 1914 n.10 (3d ed. Apr. 2016 update) (citing *Gabauer v. Woodcock*, 425 F.Supp. 1 (D. Mo. 1976)). To avoid needless delay, LCvR 7(j) provides that a proposed pleading is "deemed to have been filed and served by mail on the date [of] the order granting the motion" to intervene. Thus, the very instant a proposed intervenor defendant becomes a party

entitled to move to dismiss, its Answer is deemed filed. As Plaintiffs read the rules, such a defendant thus is precluded from making a Rule 12(b) motion.

Nothing suggests that LCvR 7(j) was intended to have such a draconian effect on defendants' right to invoke Rule 12(b). Instead, the "deemed" filing called for by the local rule should be construed to preserve an intervening defendant's right to file a prompt Rule 12(b) motion to dismiss. This is particularly so where, as here, the substantive ground for dismissal was pleaded as a defense in the proposed Answer (Aff. Def. 1) and there is no prejudice. *See* Fed. R. Civ. P. 83 (local rules must be consistent with Federal Rules).

In any event, because the pleadings now are closed and there is no risk of delaying trial, Crossroads GPS's Rule 12(b)(6) motion is timely under Rule 12(h) and can and should be entertained and decided under the identical standards that govern a Rule 12(c) motion for judgment on the pleadings. *Bloom v. McHugh*, 828 F.Supp.2d 43, 49 (D.D.C. 2011) (collecting authority for deeming Rule 12(b)(6) motions as Rule 12(c) motions); *see also* 5C WRIGHT AND MILLER, FED. PRACTICE AND PROCEDURE § 1361 (3d ed. Apr. 2016 update) (Rule 12(h) allows a motion to dismiss for failure to state a claim, even after a responsive pleading has been filed).

Although Plaintiffs repeatedly refer to Crossroads GPS's motion to dismiss, they cite two cases (at 11) for the asserted proposition that Crossroads GPS cannot "shoehorn a new motion into its notice of joinder." Both of those cases actually go the other way. *Cole v. Carey* holds that new grounds for dismissal presented in a notice of joinder "should be considered as a separate motion to dismiss" and grants that motion. 2007 WL 4355171, at *1 (E.D. Cal. 2007), *report and recommendation adopted*, No. 2:-06-cv-0336, 2008 WL 596093 (E.D. Cal. 2008). Similarly, *Miss. Band of Choctaw Indians v. Miss*, holds that, because new arguments in a notice of joinder are deemed a motion to dismiss, they trigger a local rule requiring citation of

supporting authorities before they can be considered. 1991 WL 255614, at *4 (S.D. Miss. 1991). Because no supporting authorities had been presented there, the motion was dismissed. By contrast, Crossroads GPS in its partial motion to dismiss provided supporting authority – indeed, authority to which the Opposition has no rebuttal.

Litigation is not a game, and procedural gamesmanship is strongly disfavored. In addition to being mistaken, Plaintiffs’ “procedural” arguments claim no prejudice, nor could they. After all, Plaintiffs received fair notice of the Crossroads GPS motion, had ample time to respond on the merits, and did so. Under the recently revised Fed. R. Civ. P. 1, the Federal Rules must be “construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action” (emphasis added). Procedural fencing such as Plaintiffs pursue here is not in that spirit and should be firmly rejected.

CONCLUSION

In short, Crossroads GPS’s motion to dismiss is properly before the court. As that motion shows, Plaintiffs’ APA challenges to the FEC dismissal order are contrary to settled law. Accordingly, those claims should be dismissed with prejudice.

Respectfully submitted,

/s/ Thomas W. Kirby

Michael E. Toner (D.C. Bar No. 439707)

E-mail: mtoner@wileyrein.com

Thomas W. Kirby (D.C. Bar No. 915231)

E-mail: tkirby@wileyrein.com

Eric Wang (D.C. Bar No. 974038)

E-mail: ewang@wileyrein.com

WILEY REIN LLP

1776 K Street NW

Washington, DC 20006

Tel.: 202.719.7000

Fax: 202.719.7049

*Counsel for Crossroads Grassroots Policy
Strategies*

June 30, 2016

CERTIFICATE OF SERVICE

I hereby certify that, on June 30, 2016, I served a true and correct copy of Crossroads Grassroots Policy Strategies' Reply Memorandum in Support of Defendants' Motions to Dismiss, by means of electronic filing, on:

Daniel A. Petalas
Lisa J. Stevenson
Kevin Deeley
Harry J. Summers
Seth Nesin
Federal Election Commission
Office of General Counsel
999 E Street, NW
Washington, DC 20463

Stuart C. McPhail
Adam J. Rappaport
Citizens for Responsibility and Ethics in Washington
455 Massachusetts Avenue, N.W.
6th Floor
Washington, DC 20001

/s/ Thomas W. Kirby
Thomas W. Kirby