

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

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US DISTRICT &
BANKRUPTCY COURTS
2013 FEB 25 P 11: 23

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PETER J. VROOM,

Plaintiff.

v.

Federal Election Commission,

Defendant.

Plaintiff, Civ. No. 12-143
(RMC)

**PLAINTIFF PETER VROOM'S OPPOSITION TO
THE FEC'S MOTION TO DISMISS AMENDED COMPLAINT**

February 25, 2013

I. INTRODUCTION

In its Motion to Dismiss Vroom's Amended Complaint, the FEC argues that Vroom does not suffer informational injury required for standing because even if the GE and Penske PAC's disaffiliated illegally, Vroom can still calculate the aggregate amount of GE PAC and Penske PAC contributions: "*Because Vroom already knows or has access to the information he supposedly seeks, he cannot demonstrate any informational injury that is both "concrete and particularized" and "actual [and non-hypothetical]."*" The FEC apparently finds no inconsistency in making this argument while simultaneously professing that its duties include "*ensuring accurate campaign contribution information is made available to the public.*" Certainly, Vroom and the *Alliance for Corporate Integrity*, which he operates, cannot report information to its members from the FEC database that they know to be inaccurate nor can they ethically engage in internal aggregations of the contributions of Penske and GE and attribute them to GE alone. Accordingly, Vroom has properly chosen to prevail upon the judiciary, as specifically provided for in FECA, to: 1) direct the FEC to fully and properly consider its own factors of affiliation required for the GE/Penske PACs to disaffiliate; and 2) direct the FEC to consider the 100 pages of Vroom's 102 page FEC complaint that the FEC itself has acknowledged it misplaced and failed to consider as part of its Legal and Factual Review Process

II. ARGUMENTS

A. *FEC v. Akins* Provides standing when "Relevant" Information is Denied

The injury to Vroom and the members of the Alliance for Corporate Integrity results from the FEC's failure to provide accurate information. The FEC's apparent

willingness to engage in the public reporting of inaccurate information is worse than no information being provided at all because it is misleading. To support its position that Vroom should not be granted standing, the FEC improperly attempts to apply its own self-serving and extremely narrow interpretation of the Supreme Court's ruling in *FEC v. Akins*. The FEC argues that "*This case is not like FEC v. Akins, 524 U.S. 11 (1998), in which the plaintiffs were concretely and actually injured by a true absence of information about an organization that was not under any obligation to file reports with the FEC.*" However, completely contrary to the FEC's claim, the Supreme Court in *FEC v. Akins* did not limit the scope of its ruling to circumstances involving only the complete "absence" of information. In fact, the Supreme Court described the plaintiff's inability to obtain "relevant" information and to determine "who provides which candidates with financial support."

The injury of which respondents complain — their failure to obtain **relevant** information—is injury of a kind that FECA seeks to address. Buckley, supra, at 66–67 (“political committees” must disclose contributors and disbursements to help voters understand who provides which candidates with financial support).

This is exactly what Vroom and his organization are being denied -- the ability to accurately determine which corporate entity, GE or Penske, is the actual source of the financial contributions being made to federal candidates

1. The Similar Fact Circumstances in *Vroom v. FEC* and *FEC v. Akins*

The FEC further argues that in *FEC v. Akins* the parties had standing because they indicated that they wanted the information so that they could vote against candidates receiving financial support from AIPAC. Similarly, in Vroom's case, he and his organization need "accurate" information in order to report to its members the true extent

of GE's political contributions and influence. Vroom's organization tracks political contributions made by corporations and compares the voting records of the recipients of those contributions to determine the scope of potential influence related to the financial support provided. This information is then utilized by Alliance members in their analysis of candidates to support and oppose for federal office. This use is almost identical to the fact circumstances in *Akins*.

2. Vroom Described in Detail the Importance of Gaining Accurate Information for the Purpose of Voting and Supporting Candidates for Federal Office

In its Motion to Dismiss, the FEC inexplicably and incorrectly states that: "*Vroom nowhere explains how the information he purportedly seeks would be "useful [to him] in voting."* (FEC Motion to Dismiss, page 11) However, Vroom explained at length in his amended complaint that he not only suffers informational injury as a voter from the tainted information but also as an individual who must make determinations about which federal candidates to support financially.

Under *Atkins*, denial to plaintiffs of information to which they are statutorily entitled and which would be useful for evaluating candidates for election constitutes a sufficient injury in fact to meet their burden of establishing their standing to sue. In this case, Vroom not only maintains status as a voter in national elections and needs this information in his evaluation of candidates but also in his current and past career as a lobbyist, congressional campaign manager, congressional chief of staff and trade association CEO. In these capacities, Vroom very actively participates in the political process involving the analysis of candidates for election to federal political office and he regularly utilizes the FEC website and its database for this purpose. Accordingly, he relies upon the FEC to ensure the accuracy and validity of these reports (Vroom Amended Complaint, pages 7-8)

As a lobbyist, Vroom makes individual political contributions to candidates and advises organizations he represents on potential recipients of campaign contributions. The decision-making process necessarily includes ascertaining the volume of contributions federal candidates receive from large corporations, including GE. The importance of having accurate information in making these decisions is self-evident.

B. Redress of Vroom's Injury Can be Fully Satisfied by The Court

Vroom alleges in his original and Amended Complaint that he and his organization are being deprived of accurate information on the amount of campaign contributions that should be attributed to the GE PAC and that a Court Order requiring the FEC to properly and completely consider the factors of affiliation and to fully address the allegations in his complaint will result in "additional factual information." Until this action is undertaken by the FEC, Vroom and his organization are unable to rely on the campaign contribution data currently attributed by the FEC to the GE and Penske PACs.

As discussed in *FEC v. Akins*, FECA specifically provides to this Court the authority to review FEC decisions to determine whether they are "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law."

(Administrative Procedures Act)

(c) Finally, FECA explicitly indicates a congressional intent to alter the traditional view that agency enforcement decisions are not subject to judicial review. *Heckler v. Chaney*, 470 U. S. 821, 832, distinguished. (P. 26.)

Vroom contends that the circumstances involved in the FEC's repeated mishandling of Vroom's FEC complaint as detailed in his judicial complaint and the FEC's failure to respond to Vroom's repeated requests for the FEC's reconsideration of

his complete complaint based on those circumstances, represents “arbitrary and capricious” action by the FEC

1. *Wertheimer v. FEC* is not Applicable to *Vroom v. FEC*

The FEC wrongly alleges in its Motion to Dismiss that Vroom’s situation is similar to *Wertheimer v. FEC*, 268 F.3d 1070 (D.C. Cir. 2001), in which plaintiff Wertheimer argued that the FEC’s dismissal of their complaint injured them by “depriv[ing] them of required information about the source and amount of candidates’ financing.” Id. at 1073 However, the fact circumstances in Wertheimer are not the same. Wertheimer involved whether expenditures made by the political parties (DNC and RNC) for purposes of advertising for their respective presidential candidates should be shown as “coordinated” for the purpose of attribution of those funds to the presidential candidates. Unlike Wertheimer, Vroom is not seeking a legal determination with respect to the coordination of campaign funds but is instead attempting to address the gross failure by the FEC to consider the information in his FEC complaint as acknowledged to him by the FEC staff and as clearly demonstrated through the content of the FEC’s legal and factual analysis dismissing his complaint Nor does *Wertheimer* involve issues of PAC disaffiliation and or allege serious internal procedural irregularities involved in the FEC’s approval of the GE/Penske PAC disaffiliation Lastly, the court concluded that the plaintiffs had “failed to show either that they are directly being deprived of any information or that the legal ruling they seek might lead to additional factual information, and that they therefore lacked injury-in-fact. Id.” In contrast, Vroom’s judicial complaint firmly establishes both the injury and the potential for the Court to redress the injury by

requiring the FEC to properly consider his complete complaint and to apply the FEC's ten factors of affiliation to the GE/Penske PACs.

Vroom's complaint fully satisfies the Akins test discussed in Wertheimer. He alleges that he and his organization are being deprived of accurate information on the amount of campaign contributions that should be attributed to the GE PAC and that a Court Order requiring the FEC to properly consider the factors of affiliation and to fully address the allegations in his complaint will result in "additional factual information." It stands that in the absence of the FEC's proper and complete review of Vroom's complaint, neither Vroom, the Alliance for Corporate Integrity or other voters can rely on the campaign contribution data currently attributed to the GE and Penske PACs.

C. The FEC's Mishandling and Misplacement of Vroom's Complaint

Vroom's judicial complaint establishes that the FEC acknowledged its misplacement and failure to consider the documentation contained in his FEC complaint against GE/Penske. In addition, both his administrative and judicial complaints present detailed information relating to the FEC's approval of the GE/Penske PAC disaffiliation under highly unusual circumstances, including: 1) the Commission's approval of disaffiliation against the strong recommendation of the FEC's own Office of General Counsel; stating that GE continued to control Penske and that disaffiliation should be **denied**, 2) a request made less than 24 hours prior to the Commission vote on disaffiliation by an unnamed individual within the FEC, presumably a Commissioner, for the Office of General Counsel to produce a second "Draft B" opinion recommending disaffiliation; 3) the numerous personal and career relationships existing between GE/Penske counsel for the Advisory Opinion, the FEC staff and FEC Vice Chairman

Petersen; 4) the transcript of the Commission hearing showing that Commissioner Weintraub, in speaking for disaffiliation and approval of Draft B, acknowledged “behind the scenes” lobbying prior to the vote to gain support for the GE/Penske Disaffiliation request “*I appreciate the work that went on behind the scenes for folks to get to the place where I think we will have votes to approve it*”; 5) Rosemary Smith, the FEC Associate General Counsel whose division was responsible for the drafting of the GE/Penske disaffiliation AO, recused herself from the AO hearing, 6) prior to the GE/Penske disaffiliation at razor thin 49.9%/50.1% ownership, the FEC had never before in its history granted disaffiliation to two organizations where one of the organizations maintained more than a 40% outside “minority” interest in the other, 7) Kevin Plummer, Executive Assistant to FEC Commissioner Petersen, also recused himself from the AO hearing. Both Plummer and Commissioner Petersen were former colleagues of Carol Laham at the Wiley Reins law firm. Laham served as Penske’s lead counsel in making the AO request to the FEC and had also previously worked as a staff attorney in the FEC’s Office of General Counsel. Commissioner Petersen did not recuse himself and in fact, made the Motion to adopt Draft B to allow disaffiliation.

1. Potential Violations of Standards of Conduct and Ethics Rules for FEC

Commissioners and Employees

As referenced in the immediately preceding section and more fully described and documented in Vroom’s original judicial complaint, the circumstances surrounding the FEC’s consideration of the GE/Penske PAC disaffiliation and its subsequent review of Vroom’s administrative complaint raise serious questions relating to potential violations of the FECA and the FEC’s Ethics Rules. Many of these questions remain unanswered,

including: 1) who within the Commission instructed the Office of the General Counsel to produce a “Draft B” opinion recommending disaffiliation less than 24 hours prior to the Commission hearing? 2) who within the General Counsel’s Office participated in the eleventh hour drafting of Draft B that utilized false legal citations to support disaffiliation? 3) Why did V Chairman Petersen fail to recuse himself from the vote on disaffiliation when he had formerly been a law partner with Pense’s lead counsel for the Advisory Opinion? 4) who was involved in the last minute “behind the scenes” effort to gain support for the disaffiliation as referenced in Commissioner Weintraub’s hearing comments? 5) Why was the FEC willing to set completely new historical precedence by permitting a 49.9%/50.1% ownership entity to disaffiliate?

FEC ethics rules strictly forbid any ex parte communications among Commission members involving enforcement matters. At the discretion of the Court, the FEC’s Office of Inspector General should be requested to review the FEC’s handling of the disaffiliation and Vroom’s complaint to determine if any violations of FECA law and FEC regulations took place.

Title 11 - Federal Elections
I - FEDERAL ELECTION COMMISSION.
SUBCHAPTER A - GENERAL. PART 111 -
COMPLIANCE PROCEDURE (2 U.S.C. 437g, 437d(a)).
Subpart A - Enforcement.

§ 111.22Ex parte communications.(a) In order to avoid the possibility of prejudice, real or apparent, to the public interest in enforcement actions pending before the Commission pursuant to 11 CFR part 111, except to the extent required for the disposition of ex parte matters as required by law (for example, during the normal course of an investigation or a conciliation effort), no interested person outside the agency shall make or cause to be made to any Commissioner or any member of any Commissioner’s staff any ex parte communication relative to the factual or

legal merits of any enforcement action, nor shall any Commissioner or member of any Commissioner's staff make or entertain any such ex parte communications

2. Impact of the FEC's Failure to Enforce FECA

Vroom's complaint describes not only the informational injury imposed by the FEC's capricious actions but the very direct impact of the FEC's failure to enforce FECA on the sanctity of our campaign finance process. This enforcement failure allows GE and other large corporations to exploit FECA campaign contribution limits through the use of numerous affiliated entities, such as the Penske Truck Leasing joint venture, in order to multiply their political contributions and corresponding political influence. The FEC curiously states in its Opposition to Vroom's Amended Complaint that "*Vroom has failed to establish that the ruling sought would yield anything more than a legal characterization or duplicative reporting of information that under existing rules is already required to be disclosed.*" *Id. at 1075.*" It is difficult to comprehend on what basis the FEC would make such a cavalier statement in the face of overwhelming evidence of its abject failure to fulfill its enforcement responsibilities under FECA. For example, a review of the campaign contributions received by Rep. Jim Gerlach (R-PA) from the GE and Penske PACs during the last three two-year election cycles shows the financial benefit Rep. Gerlach's campaign has received as the direct result of the FEC's approval of the GE/Penske PAC disaffiliation in July 2009. No longer subject to the \$10,000 combined contribution limit, the GE and Penske PAC's have acted to substantially increase their combined contributions to Rep. Gerlach

Rep. Jim Gerlach (R-PA)	2012	2010	2008
GE	6000	3500	2000
Penske	8000	8000	8000
Total	14000	11500	10000

III. CONCLUSION

For the foregoing reasons, Vroom requests that the Court instruct the FEC to consider Vroom's complete complaint and to evenly apply its own precedence from previous FEC AO rulings and the FEC's ten factors of affiliation to determine whether the GE and Penske PAC's are affiliated, or alternatively, to issue a declaratory judgment that declares that the GE and Penske PACs are in fact affiliated, and that the decision to the contrary that the FEC issued is arbitrary and capricious. Finally, Vroom requests, at the discretion of the Court, that the FEC Inspector General be required to initiate an investigation of the circumstances involved in the GE/Penske PAC disaffiliation and the mishandling of his administrative complaint to the FEC.

Respectfully submitted,



Peter Vroom

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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2013, I personally delivered for filing with the Court, Plaintiff Peter Vroom's Opposition to the FEC's Motion to Dismiss Vroom's Amended Complaint. I also certify that on that same date, I caused to be sent by email a copy of the same materials to Defendant at the following addresses

Anthony Herman (D.C. Bar No 424643)
FEC General Counsel
FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463

A handwritten signature in black ink that reads "Peter J. Vroom". The signature is written in a cursive style with a large, stylized initial "P".

Peter J. Vroom
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