Thomasenia P. Duncan
David Kolker
Harry J. Summers (CA Bar #147929)
Claire N. Rajan (CA Bar #238785)
crajan@fec.gov
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650
(202) 219-0260 (facsimile)

ATTORNEYS FOR THE PLAINTIFF
FEDERAL ELECTION COMMISSION

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

FEDERAL ELECTION COMMISSION, Plaintiff, v. STEPHEN ADAMS, Defendant	Civ. No. 07-4419-DSF (SHx) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FEC'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS AS TO CERTAIN AFFIRMTAIVE DEFENSES ALLEGED BY DEFENDANT Hearing Date: February 4, 2008 Hearing Time: 1:30 p.m. Courtroom: 840 Judge: Dale S. Fischer

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Miscellaneous

FEDERAL ELECTION COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

Pursuant to Fed. R. Civ. P. 12(c), plaintiff Federal Election Commission (FEC or Commission), hereby moves for partial judgment on the pleadings on six affirmative defenses as to which defendant Stephen Adams can prove no set of facts that would entitle him to relief.

The Commission brought this civil enforcement action against Adams under the Federal Election Campaign Act, 2 U.S.C. §§ 431-55 (FECA or Act), after he failed, *inter alia*, to file the statutorily required disclosure reports with the Commission concerning $1,000,000 he spent in four battleground states to influence the presidential election in 2004. Although defendant's Answer admits many of the dispositive facts that establish his liability, he has included many affirmative defenses that attempt to transform this case about a straightforward violation of the law into an impermissible inquiry into the Commission's prosecutorial decisionmaking. In pursuit of this goal, Adams has already served irrelevant and burdensome discovery on the Commission regarding his flawed affirmative defenses.

To narrow the issues in the interest of judicial efficiency and to avoid unnecessary discovery, the Commission now moves for judgment as to six affirmative defenses. Although these defenses are somewhat vague, they appear to rely on two erroneous theories: (1) that the Commission cannot enforce the FECA's reporting and disclaimer requirements at issue against Adams because that would purportedly constitute selective prosecution; and (2) that the Commission did not satisfy the statutory prerequisites to filing this suit because its efforts to conciliate the matter prior to suit were inadequate. These defenses must fail because the pleadings establish no basis for selective prosecution or related claims and show that the FEC satisfied the minimal statutory conciliation

requirement, which is not a jurisdictional bar in any event.

I. BACKGROUND AND PROCEDURAL HISTORY

A. Federal Election Commission

The Commission is the independent agency of the United States government with exclusive jurisdiction over the administration, interpretation and civil enforcement of the Act. *See generally* 2 U.S.C. §§ 437c(b)(1), 437d(a), and 437g. The FEC is a non-partisan, six-member Commission, where no more than three members may belong to the same political party. 2 U.S.C. § 437c(a)(1). At least four affirmative votes are required for the Commission to take certain significant actions, including initiating *de novo* enforcement suits. 2 U.S.C. § 437g(a)(6)(A).

B. Disclosures And Disclaimers For Independent Expenditures Under The FECA

To prevent actual and apparent corruption of federal elections, the FECA comprises an integrated system of contribution and expenditure limits and a comprehensive reporting system that provides a wealth of information to the public. Individuals like Adams may contribute only $2,300 in cash or other things of value to federal candidates per election. *See* 2 U.S.C. § 441a(1)(A) (adjusted for inflation). However, when individuals spend their own money to advocate the election of federal candidates and do so without coordinating with those candidates, their spending on such "independent expenditures" can be unlimited.[1] Nevertheless, all independent expenditures above $250 must be timely reported to the Commission for disclosure to the public. 2 U.S.C. § 434(c)(1).

In *Buckley v. Valeo*, 424 U.S. 1, 80-82 (1976), the Supreme Court upheld

[1] The FECA defines "independent expenditure" as "an expenditure by a person — (A) expressly advocating the election or defeat of a clearly identified candidate; and (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." 2 U.S.C. § 431(17).

the requirement that individuals must report independent expenditures that expressly advocate the election or defeat of a clearly identified candidate. The Court noted that the purposes for this disclosure include: (1) aiding the Commission in law enforcement, particularly in ensuring that limits on individual contributions to candidates are not skirted; and (2) furthering Congress's "effort to achieve 'total disclosure' by reaching 'every kind of political activity' in order to insure that the voters are fully informed and to achieve through publicity the maximum deterrence to corruption and undue influence possible." *Id*. at 76.

The Act has long required that persons making independent expenditures aggregating $1,000 or more *after* the 20th day, but more than 24 hours, before an election file a report with the Commission within 24 hours. 2 U.S.C. § 434(g)(1)(A).[2] In 2002, Congress added an additional requirement that persons who make independent expenditures aggregating $10,000 or more up to and including the 20th day *before* an election file a report within 48 hours. 2 U.S.C. § 434(g)(2)(A), Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, § 212(a), 116 Stat. 81 (2002).[3]

Moreover, the Act requires that independent expenditures include adequate informational disclaimers as part of the communications. Those disclaimers must "clearly state the name and permanent street address, telephone number or World Wide Web address of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee." 2 U.S.C. § 441d(a)(3).

---

[2] This reporting requirement was first enacted in 1976 for independent expenditures made after the fifteenth day prior to the election, 2 U.S.C. § 434(e)(2); Pub. L. No. 94-283, Title I, § 104, 90 Stat. 480 (1976), and was amended four years later to require reporting for expenditures made after the twentieth day prior to the election, 2 U.S.C. § 434(c)(2); Pub. L. No. 96-187, Title I, § 104, 93 Stat. 1348 (1980).

[3] This new timing requirement was one issue in the facial constitutional challenge to BCRA in *McConnell v. FEC*, 540 U.S. 93, 196 (2003). While the Supreme Court found the issue moot there, it noted that "[t]he important state interests that prompted the *Buckley* Court to uphold" FECA still "apply in full" to current disclosure requirements. *Id.*

Two decades ago, the Ninth Circuit relied upon *Buckley* in upholding the constitutionality of the Act's independent expenditure disclosure and disclaimer provisions. *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987). The Court recognized the provisions' importance in preventing circumvention of contribution limits by candidates through "close and secretive relationships with apparently 'independent' campaign spenders" and in keeping "the electorate fully informed of the sources of campaign-directed speech . . . so that they may freely evaluate and choose from among competing points of view." *Id*. at 862.

C. The Commission's Enforcement Procedures Under The FECA

Under the Act, any person may file an administrative complaint with the Commission, alleging a violation of the FECA. 2 U.S.C. § 437g(a)(1). After a person alleged to have committed a violation is notified of the complaint and has an opportunity to respond, at least four of the Commission's six members may find "reason to believe" that a violation of the Act has occurred, authorizing the Commission to undertake an investigation. 2 U.S.C. § 437g(a)(2). The Commission may also make such a determination on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities. *Id.*

After an investigation, if the General Counsel recommends and at least four Commissioners vote to find "probable cause to believe" that a violation has occurred, the Commission must "attempt" to correct or prevent the violation by engaging in conciliation with the respondent for at least 30 days. 2 U.S.C. § 437g(a)(4)(A)(i). If conciliation fails, the Commission may bring a *de novo* suit against the respondent. 2 U.S.C. § 437g(a)(6).

D. Defendant Stephen Adams And His $1,000,000

Independent Expenditures In 2004

Defendant Stephen Adams resides in Ventura County, California. He owns AOA Holding Company, which has a 76% interest in Adams Outdoor Advertising Limited Partnership, of which Adams Outdoor Advertising, Inc., is the managing general partner (collectively AOA). Complaint ¶ 6; Answer ¶ 6 (Exhibit A).

Adams paid AOA $1,000,000 to erect approximately 435 billboards in four states during the two months before the 2004 general election expressly advocating the reelection of George W. Bush. Answer ¶ 2. The four states — Michigan, Pennsylvania, Wisconsin and South Carolina — were chosen by AOA based on Adams' direction to place the billboards in closely contested "battleground" states. Complaint ¶ 20; Answer ¶ 20. The billboards each displayed one of the following messages: "Defending Our Nation," "It's About Our National Security," "A Nation Secure," "One Nation Under God," and "Boots Or Flip-Flops?" Complaint ¶ 23; Answer ¶ 23. The phrases appeared immediately above the campaign slogan "Bush Cheney 04" superimposed on the red and white stripes of the American flag. Complaint ¶ 23; Answer ¶ 23. The billboards first appeared on September 7, 2004, and ran through November 2, 2004, the date of the general election. Complaint ¶ 22; Answer ¶ 22.

Adams admits that he failed to file within the required 48 hours a notice stating his identity, the amount spent on the expenditure, and that the expenditure was not coordinated with a candidate. 2 U.S.C. § 434(g)(2)(A); Answer ¶ 7. Adams filed the notice six weeks later, only five days prior to the general election. Answer ¶ 7. He also admits that the billboards did not include a disclaimer containing his permanent street address, telephone number, or World Wide Web address and stating that the expenditure was not authorized by any candidate. 2 U.S.C. § 441d(a)(3); Answer ¶ 27.

E. The Commission's Administrative Proceedings Regarding Adams

In September and October 2004, the Commission received two complaints alleging violations of the Act in connection with the billboards. Complaint ¶¶ 7-8; Answer ¶¶ 7-8. The Commission notified Adams, and he submitted a response in November 2004. Complaint ¶ 9; Answer ¶ 9. Based on the two complaints and additional information ascertained in the normal course of carrying out its supervisory duties, the Commission found reason to believe that Adams had violated the Act, and notified Adams of those findings in June 2005. Complaint ¶ 10; Answer ¶ 10. The Commission conducted an investigation, and in March 2006 the General Counsel notified Adams that he was prepared to recommend that the Commission find probable cause to believe Adams had violated the Act. Complaint ¶ 11; Answer ¶ 11. Adams submitted a response. Complaint ¶ 11; Answer ¶ 11. On November 8, 2006, the Commission found probable cause to believe Adams had violated the Act, and on November 15, the General Counsel notified Adams by letter of the findings and tendered the Commission's approved conciliation proposal. Complaint ¶¶ 11-12; Answer ¶ 12. Adams states that he "admits that the letter invited him to enter into a conciliation agreement, which [he contends] was unacceptable in material part, including the levy of an excessive, unwarranted, and unreasonable penalty." Answer ¶ 12. The Commission was unable to secure an acceptable conciliation agreement, and on May 17, 2007, by an affirmative vote of at least four of its members, voted to initiate this enforcement action. On May 22, 2007, the General Counsel's Office notified Adams that the Commission had voted to institute a civil action for relief. Complaint ¶ 13; Answer ¶ 13.

II. ARGUMENT

The Commission is entitled to judgment as a matter of law as to six of

defendant's eight affirmative defenses because the pleadings show there is no set of circumstances in which Adams could prevail on these defenses. The Commission challenges the following six affirmative defenses:

> (1) First Affirmative Defense – that the FEC failed to satisfy the jurisdictional prerequisites to this action;
>
> (2) Second Affirmative Defense – that the court lacks jurisdiction because the FEC failed to conciliate with defendant in accordance with FECA;
>
> (3) Third Affirmative Defense - that 2 U.S.C. § 434(g)(2)(A) is unenforceable against Adams based on the First Amendment and the Due Process Clause;
>
> (4) Fourth Affirmative Defense – that 2 U.S.C. § 434(g)(2)(A) is unenforceable against individuals because it has not been "[e]ffectively promulgated" or disclosed "to the general public";
>
> (5) Fifth Affirmative Defense – that 2 U.S.C. § 434(g)(2)(A) has allegedly not been enforced against individuals, therefore the Commission is engaging in selective prosecution here; and
>
> (6) Eighth Affirmative Defense – that the FEC is estopped to assert its causes of action.

Answer at 6-8. These six defenses fall into two categories: first, assertions that the Commission cannot enforce 2 U.S.C. § 434(g)(2)(A) against individuals like defendant, essentially because the Commission has allegedly engaged in selective prosecution; and second, assertions that the Commission did not satisfy the statutory jurisdictional prerequisites to filing this suit. As we explain below, none of these defenses can succeed as a matter of law.

As to the selective prosecution defenses, defendant's Third, Fifth, and Eighth Affirmative Defenses (and perhaps Fourth) collectively allege that 2 U.S.C. § 434(g)(2)(A) is unenforceable against defendant because he is an individual person and because the Commission has purportedly not sufficiently

enforced the applicable provisions against individuals in the past. Answer at 7-8. As we explain below, however, the Commission's decision to bring an enforcement action is not reviewable, and even if it were, Adams cannot prevail on a selective prosecution or related theory based merely on his status as an individual. In any event, the Commission *has* enforced the independent expenditure reporting requirements against individuals.[4]

Defendant's two conciliation defenses likewise cannot succeed. Despite his concession that "this court has jurisdiction over this suit," Answer ¶ 1, defendant's First, Second, and possibly Eighth Affirmative Defenses collectively appear to allege that this Court lacks jurisdiction because the Commission "failed to conciliate this matter with Stephen Adams as required by the [FECA], prior to the filing of a lawsuit in federal court." Answer at 6. As explained below, however, the Commission is entitled to judgment as a matter of law on these defenses because the FECA's only requirement is that the Commission "attempt" to conciliate, *see* 2 U.S.C. § 437g(a)(4)(A), and it did so. Even if the Court were to look beyond the undisputed fact that a conciliation attempt was made and find that attempt insufficient, failure to conciliate would not pose a jurisdictional bar to this action.

A. Judgment On The Pleadings Is Appropriate

Fed. R. Civ. P. 12(C) provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Motions under Rule 12(c) are designed to rid the court's docket of untenable claims and defenses and to limit the unnecessary use of resources for discovery and its related disputes.[5] In this case, defendant has already

[4] If defendant's Fourth Affirmative Defense is viewed as something other than part of a selective prosecution defense, it still cannot succeed. Congress need only enact and publish a statute, as it did here long before Adams spent $1,000,000 on his campaign advocacy, in order for the statute to be enforceable. *See infra* pp. 16-17.

[5] Timely motions under Rule 12(c) may also further the basic purpose of the federal rules "to secure the just, speedy, and inexpensive determination of every action." Fed. R.

commenced aggressive discovery as to the affirmative defenses at issue here, noticing depositions of two senior Commission staff regarding selective prosecution claims and the Commission's prior enforcement of the relevant statutory provisions, and seeking burdensome, intrusive written discovery on the same irrelevant subjects. The Commission seeks to conserve the parties' and the Court's resources by moving now to dispose of defenses that cannot stand as a matter of law.

Courts properly grant judgment on the pleadings when, taking all allegations in the non-moving party's pleading as true, the moving party is entitled to judgment as a matter of law. *McGann v. Ernst & Young*, 102 F.3d 390 (9th Cir. 1996). A motion for judgment on the pleadings pursuant to Fed R. Civ. P. 12(c) is "functionally identical" to a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). *See, e.g., Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989). Courts may dismiss legal claims under Rule 12(b)(6) where the non-moving party "can prove no set of facts in support of his claim which would entitle him to relief." *See, e.g., Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990); *Lonberg v. City of Riverside*, 300 F.Supp. 2d 942, 945 (C.D. Cal. 2004). Courts may grant judgment on the pleadings as to particular claims or parts of a claim. *See Hudson v. City of Los Angeles*, 2006 WL 4729243, at *3 (C.D. Cal. Sept. 7, 2006) (attached as Exhibit B).[6]

B. The Commission Is Entitled To Judgment As To Defendant's Selective Prosecution Defenses Because Such Claims Cannot Rest Merely On His Status As An Individual

---

Civ. P. 1.

[6] A plaintiff may also use Rule 12(c) to strike affirmative defenses from the defendant's Answer. *See, e.g., Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 348 (1971) (an estoppel defense may be resolved on a pretrial motion for judgment on the pleadings or summary judgment); *Austad v. United States*, 386 F.2d 147 (9th Cir. 1967) (affirming the district court's entry of judgment on the pleadings in favor of the government plaintiff on the grounds that defendant's affirmative defenses of waiver, estoppel, and laches could not be proven).

Defendant's affirmative defenses asserting selective prosecution and related claims based on his status as an individual should be dismissed because there is no set of facts under which Adams can prevail. Defendant's Third and Fifth Affirmative Defenses claim that the 48-hour reporting obligation for independent expenditures of more than $10,000 violates the First Amendment and the Due Process Clause because the provision has not been enforced against individuals and that it is selective prosecution to enforce this provision against him. Answer at 7. (Defendant's Eighth Affirmative Defense is an estoppel claim, apparently based on this alleged past Commission practice.) However, even if defendant's factual allegations were true, the Commission's decision to sue is not reviewable by a court, and the very limited exception regarding selective prosecution cannot apply to Adams on the basis of his status as an "individual."

1. The Commission's Decision To Initiate Suit Is Not Reviewable

This case is about defendant's alleged violation of the Act, not the Commission's underlying decision to bring these allegations to this Court for judicial resolution. The Commission's decision to enforce the Act against Adams is simply not reviewable: It is not final agency action that determines rights and obligations, and the FECA does not provide courts with the authority to review the Commission's decision to exercise its prosecutorial discretion and initiate *de novo* litigation.

Only "final agency action" that determines rights or obligations is subject to judicial review. 5 U.S.C. § 704. "[T]o be final, agency action must mark the consummation of the agency's decisionmaking process, and must either determine rights or obligations or occasion legal consequences." *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 483 (2004) (*citing Bennett v. Spear*, 520 U.S. 154, 177-178 (1997)) (internal quotation marks omitted).

"An agency's decision … to bring suit," however, "'determine[s] the legal rights and liabilities of no one.' " *Atlantic Richfield Co. v. Dep't of Energy*, 769 F.2d 771, 787 (D.C. Cir. 1984) (citation omitted)). *Accord* (*NAACP v. Meese*, 615 F. Supp. 200, 203 (D.D.C. 1985) ("[o]nly the courts . . . have the power to take any of these steps"). Therefore, the Commission's decision to file suit under 2 U.S.C. § 437g(a)(6), as well its prior determination under 2 U.S.C. § 437g(a)(4)(A) that there was "probable cause" to believe that Adams violated the Act, are not final agency actions. Those decisions neither adjudicate defendant's liability nor receive deference in this *de novo* action. The "district court stands ready to dismiss the suit if it has no factual basis." *McLaughlin v. Lodge 647*, 876 F.2d 648, 653 (8th Cir. 1989).

The courts' inability to review decisions that are not final agency actions is grounded in the separation of powers. As the Supreme Court has observed:

> Just as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected. It will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other.

United States v. Morgan, 313 U.S. 409, 422 (1941) (quotation marks and citations omitted).

"[T]he exercise of prosecutorial discretion, at the very core of the executive function, has long been held presumptively unreviewable." *In re Sealed Case*, 131 F.3d 208, 214 (D.C. Cir. 1997). "[G]iven the limited resources and policy objectives of the federal government, not every violation of federal law is prosecuted in federal court," *id*., and law enforcement agencies like the Commission have prosecutorial discretion to decide which violations to pursue. *See Heckler v. Chaney*, 470 U.S. 821 (1985). The FECA, in fact, grants federal courts the ability to review certain Commission decisions, but the decision to sue

is not one of them. If the Commission *dismisses or delays* proceedings regarding an administrative complaint, "any party aggrieved" may file a petition with the United States District Court for the District of Columbia. 2 U.S.C. § 437g(a)(8)(A). However, there is no similar provision granting any court the ability to review the Commission's decision to *initiate* suit to enforce the Act. Indeed, one Circuit court has expressly concluded that it has "no statutory authority to review the FEC's decision to sue." *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 709 (D.C. Cir. 1996).

2. Selective Prosecution Is A Limited Doctrine That Adams Cannot Properly Invoke Based On His Status As An Individual

Defendant's selective prosecution defense is an improper effort to turn this enforcement case, where the facts and issues to be litigated involve the defendant's own conduct, into a case about *why* the agency decided to pursue the defendant's particular case. However, selective prosecution is a very limited defense that cannot be based merely on defendant's status as an individual person. Therefore, the Commission is entitled to judgment as a matter of law as to Adams' Third, Fifth, and Eighth Affirmative Defenses -- and his Fourth Defense, to the extent it implicates the same defensive theory.

Because the Supreme Court has already upheld the constitutionality of independent expenditure reporting requirements as applied to individuals, any defense based on defendant's status as an individual must fail. *See Buckley*, 424 U.S. at 76-82; *supra* p. 3. *Buckley* rejected claims that such reporting requirements violate the First Amendment and Due Process Clause, explaining that they serve the important government interests of helping the Commission enforce the Act and providing disclosure of political activity sufficient to inform the nation's electorate. *Buckley*, 424 U.S. at 76-82. Although in 2002 Congress

added the specific requirement that independent expenditures of more than $10,000 made prior to the 20th day before an election must be disclosed within 48 hours, 2 U.S.C. § 434(g)(2)(A), this additional reporting requirement for large independent expenditures plainly serves the same government interests that were recognized in *Buckley*.

Selectivity in the enforcement of laws, without more, offends no constitutional rights. "[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation," so long as the selection was not "deliberately based upon an unjustifiable standard." *Oyler v. Boles*, 368 U.S. 448 (1962). To succeed on a selective prosecution defense, the defendant bears the burden of showing both "that others similarly situated have not been prosecuted *and* [also] that he was selected for prosecution on the basis of an impermissible ground such as race, religion or exercise of the constitutional rights." *United States v. McWilliams*, 730 F.2d 1218, 1221 (9th Cir. 1984) (per curiam) (emphasis added).[7] *See also Wayte v. United States*, 470 U.S. 598, 608 (1985) ("It is appropriate to judge selective prosecution claims according to ordinary equal protection standards.").

Here, Adams has not alleged anything remotely analogous to a prosecution unlawfully motivated by race, religion or any other impermissible ground, let alone alleged any specific facts that would support any such general allegation. Instead, Adams appears to assert only that he was treated differently as an "individual." That is, he asserts that the law has been enforced against organizations such as political committees more often than it has against

[7] Defendants in another recent FEC enforcement case likewise attempted to defend themselves by questioning the pattern of the FEC's enforcement decisions. *FEC v. Friends of Lane Evans, et al.*, No. 04-4003, slip op. at 2 (C.D. Ill. Feb. 8, 2005) (Exhibit C). However, the court analogized that defense to the "speeder's defense," and explained that even if it were true that other cars were speeding, but not ticketed, it "does nothing to prove that the officer issuing the ticket had an improper motivation" as to the speeder in question. *Id.*

individual persons like Adams. Even if this is assumed to be true for purposes of this motion, however, defendant's status as an individual simply cannot support a selective prosecution defense.[8]

In any event, the FEC has in fact enforced the independent expenditure reporting requirements against individuals. The Court can take judicial notice of court decisions and administrative settlements demonstrating that enforcement. *See, e.g.*, *FEC v. Furgatch*, 869 F.2d 1256 (9th Cir. 1989); FEC Conciliation Agreement in Matter Under Review 5123 (Dwight D. Sutherland, Jr.) (Apr. 10, 2003) (Exhibit D).

But even if Adams were the only individual against whom the FEC had ever enforced the independent expenditure reporting requirements, he could not prove a selective prosecution defense. "Selectivity is not the same as applying the law to one person alone. A government legitimately could enforce its law against a few persons (even just one) to establish a precedent, ultimately leading to widespread compliance. The prosecutor may conserve resources for more important cases." *Falls v. Town of Dyer, Indiana*, 875 F.2d 146, 148 (7th Cir. 1989). Only when a proponent of such a claim satisfies the "demanding" burden of proving that a prosecution unjustifiably "had a discriminatory effect and that it was motivated by a discriminatory purpose" will a court question the exercise of the government's broad discretion and power to prosecute. *United States v. Armstrong*, 517 U.S. 456, 463-65 (1996).

Indeed, the flawed basis of defendant's selective prosecution defense requires that any discovery to support this defense be denied. Adams simply cannot satisfy the high threshold that would be required to obtain discovery from

[8] If Adams were to base his selective prosecution claim on his general "exercise of the constitutional rights," *McWilliams*, 730 F.2d at 1221, his claim would still fail. By definition, the Commission's jurisdiction regulates the financing of election campaigns and advocacy. Thus, virtually all of the Commission's enforcement activity involves the exercise of constitutional rights, and Adams could hardly establish a discriminatory or selective motive or effect on this basis.

the Commission on this issue. Thus, any request that judgment on this defense be delayed to allow for discovery must be rejected. As the Ninth Circuit has explained, to obtain such discovery a defendant must satisfy a "high" initial threshold:

> [A] defendant must present specific facts, not mere allegations, which establish a colorable basis for the existence of both discriminatory application of a law and discriminatory intent on the part of government actors. This is a high threshold. As has been true historically, it will be the rare defendant who presents a sufficiently strong case of selective prosecution to merit discovery of government documents.

United States v. Bourgeois, 964 F.2d 935, 939 (9th Cir. 1992). The Ninth Circuit also noted that the judiciary is "ill equipped to assess a prosecutor's charging decisions," noting the factors to be considered, such as "the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." *Id.* at 939 (quoting *Wayte*, 470 U.S. at 607). The Court also expressed the concern that judicial oversight of prosecutorial decision-making could undermine law enforcement. *Id.* (citing *Wayte*, 470 U.S. at 607-08 (noting that examination of the decision to prosecute delays the court proceedings, could chill law enforcement, and may undermine prosecutorial effectiveness)).

This high threshold was adopted to discourage fishing expeditions of the sort in which Adams has already engaged. Defendant has noticed the depositions of two senior FEC staff, asked the FEC to "[i]dentify all individuals at the FEC responsible for or contribut[ing] to any document relating to any independent expenditure reported by any person," and served document requests seeking all documents relating to the total number and amount of independent expenditures reported to the FEC by any individual and any political committee in the sixty

days preceding the general elections held in 2002, 2004, and 2006. *See* Defendant's First Set of Discovery Requests (Exhibit E). In another recent FEC enforcement case, the court denied defendants similar discovery to support a selective prosecution defense because they had failed to supply facts showing discriminatory intent or effect. *Lane Evans*, Order at 4 (Exhibit C). Thus, defendants could not meet the "'rigorous standard' necessary to obtain the discovery" and had "provided nothing other than theory." *Id*.

In sum, because the Third, Fifth, and Eighth Affirmative Defenses cannot succeed, the Court should award the Commission judgment as a matter of law as to these defenses or strike them from the Answer. *See Lonberg*, 300 F. Supp. 2d at 945.

3. Two Years Before Defendant Violated The Reporting Requirements At Issue, Congress Had Enacted And Published The Applicable Provisions

For his Fourth Affirmative Defense, Adams asserts that the FECA reporting provision applicable to his 2004 independent expenditures is unenforceable against individuals like him because 2 U.S.C. § 434(g)(2)(A) "has not been affectively [*sic*] promulgated or disclosed to the general public." Answer at 7.[9] The Supreme Court has made clear, however, that generally "a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply." *Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982). "[A] legislature generally provides constitutionally adequate process simply by enacting the statute, publishing it, and, to the extent the statute regulates private conduct, affording those within the statute's reach a reasonable opportunity both to familiarize themselves with the general requirements imposed and to comply with those requirements." *United*

[9] As mentioned above, it is unclear whether the Fourth Affirmative Defense is simply part of defendant's selective prosecution claim or is meant to raise a separate defense. To the extent the latter is the case, the defense is addressed in this section.

States v. Locke, 471 U.S. 84, 108 (1985).

Independent expenditure reporting requirements have been a feature of the FECA for 30 years, and in 2002 Congress refined the requirements by adding that individuals who make expenditures in excess of $10,000 up to and including the 20th day before an election must file a report within 48 hours. 2 U.S.C. § 434(g)(2)(A). Adams plainly had a "reasonable opportunity" to familiarize himself with a federal law enacted well over two years before he made the independent expenditures at issue here, and he has not even alleged that the provision the Commission is enforcing had not been published. Thus, Adams had legally sufficient notice of 2 U.S.C. § 434(g)(2)(A) and adequate time to comply with its terms. Accordingly, the FEC is entitled to judgment as a matter of law on Adams' Fourth Affirmative Defense.

C. The Commission Is Entitled To Judgment As To Defendant's Conciliation Defenses

1. The Commission Is Required Only To "Attempt" To Conciliate

Defendant's First and Second Affirmative Defenses together amount to a claim that this Court lacks jurisdiction over this case because the Commission allegedly did not properly conciliate this case at the administrative stage and, therefore, did not satisfy the statutory prerequisites to filing suit. Answer at 6. However, Adams has already admitted that the Court has jurisdiction (Answer ¶ 1), and the pleadings establish that the Commission met the FECA's requirement that it make an "attempt" to conciliate. *See* 2 U.S.C. § 437g(a)(4)(A)(i).

When the Commission finds "probable cause" to believe that a violation of the Act has occurred, it must "attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and

persuasion, and to enter into a conciliation agreement with any person involved." *Id*. In its Complaint, the Commission alleged that it had "endeavored for a period of not less than thirty days to correct [the] violations by the informal methods of conference, conciliation and persuasion, and to enter into a conciliation agreement with Defendant." Complaint ¶ 12. In response, "Adams admits that the [FEC] invited him to enter into a conciliation agreement, which was unacceptable in material part." Answer ¶ 12. *See* OGC Letter to B. Kappel of November 15, 2006 (Exhibit F) (notifying Adams that the Commission had found probable cause, attaching a proposed conciliation agreement, and describing the conciliation process).[10] Although defendant's Answer asserts that the Commission's proposed conciliation agreement was unacceptable *to him*, Adams admits that the Commission "invited him" to conciliate. That is all the statute requires.

The Commission's "attempt" to conciliate does not have to be successful; otherwise, the Commission would never have occasion to initiate a civil enforcement action and its statutory authority to do so would be rendered superfluous.

In evaluating whether the Commission complied with the statutory requirement that it "attempt" to conciliate, it is appropriate to show "high deference to the agency's action" because the statutory language "requires that the FEC come to the conciliation table, but it doesn't instruct the FEC on the nature of its offerings." *FEC v. Club For Growth*, 432 F.Supp. 2d 87, 91-92 (D.D.C. 2006). Indeed, Adams' affirmative defense is virtually indistinguishable from the claim the court rejected from the Club for Growth. In that case, the district court denied defendant's motion to dismiss for lack of subject matter jurisdiction and found that the FEC had met the statutory prerequisites to its suit. In doing so, the court

[10] Because this letter was referenced in the pleadings, Complaint ¶ 12; Answer ¶ 12, the Commission may refer to it without converting this motion into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994) (courts may consider "documents whose contents are alleged in a complaint ... but which are not physically attached to the pleading" in a motion to dismiss).

noted that:

> [T]he statute does not require the Commission to resolve the dispute solely through conciliation, but also expressly sanctions the FEC's use of 'persuasion,' ... a process which, by its nature, involves a greater role in convincing and a lesser role in compromising. ... With FECA expressly authorizing the FEC to attempt to 'persuade,' the defendant's argument becomes even more meritless.

432 F.Supp.2d at 92.

Here, the pleadings show that the Commission came to the conciliation table by making the November 15, 2006 conciliation proposal. That Adams deemed the proposal unacceptable or that a court could find the proposal less than ideal is of no moment; the specifics of the parties' proposals are not subject to judicial review. *See* 2 U.S.C. § 437g(a)(4)(B)(i) (confidentiality provision regarding substance of conciliation efforts). All that matters is that the Commission made the attempt.

2. Even If Conciliation Efforts Had Been Inadequate, Defendant's Remedy Would Not Be A Dismissal

Even if the FEC's attempts to conciliate were reviewed substantively and found to be inadequate, that would not be a defense to this action. In another case addressing the adequacy of the FEC's attempts to conciliate, the court stated that absent a "total failure" to conciliate, a court may "stay the action pending cure by the FEC" instead of "dismiss[ing] the suit for want of subject matter jurisdiction." *FEC v. Nat'l Rifle Ass'n of Am.*, 553 F. Supp. 1331, 1333 (D.D.C. 1983) ("*NRA I*"). Indeed, the court observed that dismissal would be particularly inappropriate where, as here, a defendant has not presented any evidence of prejudice or harm. *Id*. at 1339. Because there has been no adjudication of the defendant's liability, and he can now defend himself against the Commission's allegations in this *de novo* enforcement lawsuit, Adams has suffered no prejudice. *See FTC v. Standard Oil Co. of California*, 449 U.S. 232, 241-42 (1980). Adams does not

allege anything to the contrary, and he can make settlement proposals to the Commission at any time.

In the analogous EEOC enforcement context, courts have also found that failure to conciliate is not a jurisdictional bar.[11] *See EEOC v. California Teachers' Ass'n*, 534 F. Supp. 209, 213 n.3 (N.D. Cal. 1982) ("Even if we were to decide that further conciliation attempts were in order, we would simply stay the proceedings for that purpose. We would not dismiss for lack of jurisdiction…"); *see also EEOC v. Grimmway Enterprises, Inc.*, 2007 WL 1725660, at *6 (E.D. Cal. Jun 12, 2007) ("The sufficiency of a conciliation effort by the EEOC does not present a jurisdictional question, so long as a conciliation attempt has been made").

For the foregoing reasons, this Court should enter judgment on the pleadings in favor of the FEC as to Adams' First and Second Affirmative Defenses.

III. CONCLUSION

For the reasons stated above, the Commission's motion for partial judgment on the pleadings should be granted, and the Court should enter judgment for the Commission as to defendant's First, Second, Third, Fourth,

Fifth, and Eighth Affirmative Defenses.

Respectfully submitted,

_____
Thomasenia P. Duncan
General Counsel

[11] The civil suit provision in 42 U.S.C. § 2000e-5(f) provides that "[i]f … the [EEOC] has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action[.]" *Cf.* 2 U.S.C. § 437g(a)(6) ("If the [FEC] is unable to correct or prevent any violation…, the Commission may … institute a civil action for relief[.]"). Because these provisions are analogous, EEOC case law is "instructive" in determining whether the statutory prerequisites to suit have been satisfied under the FECA. *NRA I*, 553 F. Supp. at 1344.

Fifth, and Eighth Affirmative Defenses.

Respectfully submitted,

Thomasenia P. Duncan
General Counsel

David Kolker
Associate General Counsel

Harry J. Summers
Assistant General Counsel
(CA Bar #147929)

Claire N. Rajan
Attorney
(CA Bar #238785)

FOR THE PLAINTIFF
FEDERAL ELECTION
COMMISSION
999 E Street, NW
Washington, D.C. 20463
(202) 694-1650
(202) 219-0260 (fax)

January 14, 2008