

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

LEVEL THE PLAYING FIELD, PETER
ACKERMAN, GREEN PARTY OF THE
UNITED STATES, and LIBERTARIAN
NATIONAL COMMITTEE, INC.,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

Civil Action No.: 15-cv-1397 (TSC)

**MOTION FOR LEAVE TO FILE
SECOND AMENDED COMPLAINT**

Pursuant to Federal Rule of Civil Procedure 15(a)(2) and (d), Plaintiffs Level the Playing Field, Dr. Peter Ackerman, the Green Party of the United States, and the Libertarian National Committee, Inc. respectfully submit this Motion for Leave to File their Second Amended Complaint.¹

BACKGROUND

This action arises out of the FEC's dismissals of two essentially identical administrative complaints and a related petition for rulemaking. On September 11, 2014, Plaintiffs Level the Playing Field ("LPF") and Dr. Peter Ackerman filed an administrative complaint with the FEC. The complaint alleged that the Commission on Presidential Debates ("CPD")—an organization created by the Democratic and Republican parties and tasked with sponsoring the general election presidential and vice presidential debates—violated FECA and the FEC's regulations governing debate staging organizations because (1) the CPD is a bipartisan, not non-partisan,

¹ Plaintiffs' proposed Second Amended Complaint is attached as Exhibit A to this motion, and a blackline comparison of the Second Amended Complaint to Plaintiffs' first Amended Complaint is attached as Exhibit B.

organization, and (2) the CPD's use of public opinion polling as a requirement for selecting candidates is not an objective criterion, as required by the FEC's rules.

The FEC acknowledged receipt of the administrative complaint on September 17, 2014 and designated it Matter Under Review ("MUR") number 6869. In June 2015, while the complaint in MUR 6869 was still pending, Plaintiffs the Green Party of the United States and the Libertarian National Committee, Inc. submitted requests to join that complaint or alternatively to file a new complaint. These requests raised no new allegations, and instead incorporated wholesale the allegations of the complaint in MUR 6869. The FEC acknowledged receipt of the requests, and assigned them a single matter number, MUR 6942 but did not explicitly indicate whether it had accepted or denied the requests to join the administrative complaint.

On July 14, 2015, the FEC dismissed the administrative complaint in MUR 6869, and sent LPF and Dr. Ackerman a "Factual and Legal Analysis" setting forth the FEC's reasons for dismissal. The analysis did not specify whether or not it applied to MUR 6942. Operating with the understanding that the FEC's dismissal in MUR 6869 necessarily covered the identical allegations raised in MUR 6942, Plaintiffs commenced this action on August 27, 2015, challenging, *inter alia*, the dismissal of the administrative complaint as arbitrary, capricious, or otherwise contrary to law. (*See* Dkt. No. 1). On October 22, 2015, Plaintiffs amended their complaint to clarify that, in the event that the FEC's dismissal in MUR 6869 did not address the administrative complaint in MUR 6942, the FEC's failure to act on MUR 6942 within 120 days of its filing was arbitrary, capricious, or otherwise contrary to law. *See* 52 U.S.C. § 30109(a)(8)(A) (creating a cause of action for "[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"); (Dkt. No. 17).

Plaintiffs first learned that the FEC had denied the requests to join the administrative complaint in MUR 6869 in the FEC's answer to Plaintiffs' first Amended Complaint. (*See* Dkt. No. 19 ¶ 89). Consequently, the parties proposed, and the Court's December 2, 2015 scheduling order included, a provision for Plaintiffs to move to amend or supplement the first Amended Complaint in the event that the FEC took final action on MUR 6942. (*See* Dkt. No. 21, ¶4) (requiring Plaintiffs to file any such motion within ten business days of notice of any final action on MUR 6942).

On December 10, 2015, the FEC dismissed the administrative complaint in MUR 6942, citing the exact same grounds for dismissal as its dismissal in MUR 6869. Indeed, the "Factual and Legal Analysis" provided to Plaintiffs for the dismissal in MUR 6942 is *identical* to the "Factual and Legal Analysis" issued in connection with MUR 6869, save for the addition of a single footnote and the deletion of a clause in a single sentence of a separate footnote.

Plaintiffs now seek leave to amend and supplement their complaint in this action to reflect the FEC's dismissal of the administrative complaint in MUR 6942, and to withdraw their alternative claim challenging the FEC's failure to act on MUR 6942.

LEGAL STANDARD

Federal Rule of Civil Procedure 15 governs the amending and supplementing of complaints. Rule 15(d) provides that a party may, with leave of the court, "serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Rule 15(a) permits a party to amend a pleading "with the opposing party's written consent or the court's leave." "Motions to amend under Rule 15(a) and motions to supplement under Rule 15(d) are subject to the same standard." *See, e.g., Wildearth Guardians v. Kempthorne*, 592 F. Supp. 2d 18, 23 (D.D.C. 2008).

“The court should freely give leave [to amend or supplement] when justice so requires.” Fed. R. Civ. P. 15(a)(2); *see also Wildearth Guardians*, 592 F. Supp. 2d at 23 (“The decision whether to grant leave to amend or supplement a complaint is within the discretion of the district court, but leave ‘should be freely given unless there is good reason . . . to the contrary’” (quoting *Willoughby v. Potomac Elec. Power Co.*, 100 F.3d 999, 1003 (D.C. Cir. 1996)). “[T]he non-movant bears the burden of persuasion that a motion to amend should be denied,” and absent a “sufficient reason,” “it is an abuse of . . . discretion to deny a motion to amend.” *Nichols v. Greater Se. Cmty. Hosp.*, No. 03-cv-2081 (JDB), 2005 WL 975643, at *1 (D.D.C. Apr. 22, 2005). “In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be ‘freely given.’ *Foman v. Davis*, 371 U.S. 178, 182 (1962); *accord Armstrong v. Bush*, 807 F. Supp. 816, 818-19 (D.D.C. 1992) (Rule 15 “has been liberally construed to allow amendments in the absence of undue delay or undue prejudice to the opposing party”).

No sufficient reason to deny leave is present here. Plaintiffs were notified of the dismissal in MUR 6942 only on December 15, 2015, and they timely moved for leave pursuant to the Court’s scheduling order. (*See* Dkt. No. 21 ¶ 4).

Moreover, there is plainly no prejudice to the FEC. The allegations of the two administrative complaints and the FEC’s stated reasons for dismissing them are, for all material purposes, identical. Plaintiffs’ proposed Second Amended Complaint does not in any way expand the scope of the dispute or raise issues not squarely raised in the first Amended Complaint. Indeed, the amendment will make the litigation more efficient, in several respects.

First, it would streamline the existing case, as Plaintiffs intend to withdraw their claim that the FEC's failure to act on the administrative complaint in MUR 6942 within 120 days after it was filed was arbitrary and capricious. Second, it will ensure that the case can remain on the current schedule and that Plaintiffs' legal challenges to the dismissals of MUR 6869, 6942, and the petition for rulemaking can be litigated together in a single proceeding. On the other hand, if leave to amend and supplement is denied, Plaintiffs the Green Party of the United States and the Libertarian National Committee, Inc. would have to file a separate complaint challenging the FEC's dismissal of MUR 6942, which would unnecessarily complicate and delay the resolution of the issues raised by all Plaintiffs, which are common to both MUR 6869 and MUR 6942.

Finally, Plaintiffs have consulted with counsel for the Commission about this Motion, and the Commission does not oppose the filing of Plaintiffs' Second Amended Complaint.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' leave to file their proposed Second Amended Complaint.

Dated: December 30, 2015

Respectfully submitted,

/s/ Alexandra A.E. Shapiro
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