UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TU NGUYEN,	)	
Plaintiff,	)	Civ. No. 17-mc-1048 (RBW)
v.	)	
FEDERAL ELECTION COMMISSION,	)	MOTION TO DISMISS
Defendant.	)	

FEDERAL ELECTION COMMISSION'S MOTION TO DISMISS

Pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(5), and 12(b)(6), defendant Federal Election Commission ("Commission" or "FEC") hereby moves to dismiss plaintiff's Complaint challenging, under 52 U.S.C. § 30109(a)(8), the Commission's dismissal of his administrative complaint. This Court lacks jurisdiction because plaintiff's suit is time-barred, he does not have Article III standing, and he has failed to perfect service as required by Rule 4. In addition, plaintiff has failed to state a claim, because it was not contrary to law for the Commission to dismiss his inadequate administrative complaint, under the highly deferential standard of review.

A supporting memorandum of points and authorities and a proposed order accompany this motion.

Respectfully submitted,

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August 30, 2017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TU NGUYEN, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	)	Civ. No. 17-mc-1048 (RBW) MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

FEDERAL ELECTION COMMISSION'S MEMORANDUM
IN SUPPORT OF ITS MOTION TO DISMISS

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Plaintiff Tu Nguyen's *pro se* action challenging the Federal Election Commission's ("Commission" or "FEC") handling of his administrative complaint should be dismissed under Federal Rules of Civil Procedure 12(b)(1), 12(b)(5), and 12(b)(6). The Court lacks jurisdiction, both because plaintiff failed to meet the sixty-day filing deadline and because he lacks Article III standing to compel the FEC to pursue his allegations. In any event, the FEC's dismissal of plaintiff's complaint was not contrary to law under the highly deferential standard of review.[1]

Plaintiff filed his administrative complaint with the FEC on June 11, 2016. In that complaint, Nguyen alleged that the Human Rights for Vietnam Political Action Committee ("HRV PAC") had violated the Federal Election Campaign Act ("FECA" or "Act") in connection with dealings with the Vietnam Reform Party ("Viet Tan"), the Saigon Broadcasting Television Network ("SBTN"), and Loretta Sanchez for Senate, the authorized candidate committee of then-Congresswoman Loretta Sanchez ("Sanchez Committee"). On February 22, 2017, the FEC found no reason to believe that the Act had been violated, and the agency dismissed Nguyen's administrative complaint. On April 25, sixty-two days later, Nguyen filed this action. Plaintiff now alleges that the dismissal of his complaint was contrary to law because of the existence of "potential" unlawful foreign and corporate contributions to the Sanchez campaign, as well as "potential" reporting violations. (Compl. for Injunctive and Declaratory Relief (Docket No. 1) ("Compl.") at 1.)

Plaintiff's Complaint must be dismissed with prejudice. First, Nguyen has failed to comply with the jurisdictional time limit for filing his Complaint. The D.C. Circuit has recognized that 52 U.S.C. § 30109(a)(8)(B) requires such suits to be brought within sixty days of

[1] Because the paragraph numbering in plaintiff's court Complaint (including its attachments) is not consistent, this brief will cite the pagination contained in the ECF version of the Complaint (Docket No. 1) when necessary.

the dismissal of an administrative complaint. This Nguyen failed to do. In addition, Nguyen has failed to establish Article III standing to pursue this suit because he has demonstrated no concrete and particularized injury and relies instead upon a broad desire to see federal law enforced, *i.e.*, to have the FEC "get the bad guys." Nor, as a Texas voter complaining about past political activities in California, can he show any deprivation of information that would be useful to him in voting. Plaintiff's Complaint also purports to include a challenge to 11 C.F.R. § 109.10(e)(1)(vi), an FEC regulation governing disclosure of independent expenditures, but Nguyen fails to explain this claim. (Compl. at 1-2.) In any event, he has no standing to pursue it because there was no allegation regarding independent expenditures in the administrative matter.

Nguyen has also failed to perfect service in this case, in violation of Federal Rules of Civil Procedure 4(c)(2), 4(i), and 4(m). Despite this failure, plaintiff filed on August 23, 2017 a Motion for Entry of Default (Docket No. 4) asking that the clerk enter default, as well as a Motion for Default Judgment (Docket No. 5) the next day wrongly asserting that the clerk had actually entered default. Plaintiff's motions are baseless because the FEC has yet to be properly served, and in any event his motions are now moot in light of the FEC's motion to dismiss.

Even if there was jurisdiction in this case, plaintiff's complaint would fail to state a claim because review of the FEC's enforcement decisions is highly deferential and the agency's action here was not contrary to law. The Commission permissibly determined that there was no reason to believe HRV PAC had violated FECA and no reason to pursue any of the other entities the Commission chose to designate as respondents in the matter. Plaintiff also purports to bring this action under the Administrative Procedure Act ("APA"), but no such action is available where a statute like FECA provides an adequate review mechanism.

I. STATUTORY AND REGULATORY BACKGROUND

A. The Federal Election Commission

The FEC is a six-member independent agency of the United States government with exclusive jurisdiction to administer, interpret, and civilly enforce FECA. *See generally* 52 U.S.C. §§ 30106-07. Congress authorized the Commission to "formulate policy" with respect to FECA, *id.* § 30106(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [FECA]," *id.* §§ 30107(a)(8), 30111(a)(8); and to investigate possible violations of the Act, *id.* § 30109(a)(1)-(2). The Commission has exclusive jurisdiction to initiate civil enforcement actions for violations of FECA in the United States district courts. *Id.* §§ 30106(b)(1), 30109(a)(6).

B. FECA's Reporting Requirements and Prohibitions Against Contributions by Corporations and Foreign Nationals

Entities meeting FECA's definition of "political committee" are subject to rules regarding the making and reporting of contributions and expenditures in federal elections. FECA defines "political committee" as "any committee, club, association, or other group of persons which receives" more than $1,000 in "contributions" or "which makes" more than $1,000 in "expenditures" in any given calendar year. 52 U.S.C. § 30101(4)(A). The Act further defines contributions and expenditures to cover those contributions and expenditures that are made "for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A)(i), (9)(B). In addition, the Supreme Court has held that only organizations whose major purpose is federal campaign activity may be deemed political committees. *See Buckley v. Valeo*, 424 U.S., 1, 79 (1976); *see also* Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5597, 5601 (Feb. 7, 2007). A group that qualifies as a political committee under FECA is subject to recordkeeping and disclosure requirements; it must register with the FEC,

appoint a treasurer, and file periodic financial disclosure reports with the Commission that include lists of contributions, expenditures, and donor information. 52 U.S.C. §§ 30102, 30103, & 30104.

The Act prohibits corporations from contributing their treasury funds to candidate committees. 52 U.S.C. § 30118(a). Corporations are, however, permitted to form separate segregated funds (commonly known as "PACs"), which may make contributions using funds raised from certain persons affiliated with the corporation. 52 U.S.C. § 30118(b)(2)(C), (b)(3).

"Independent expenditure[s]" are expenditures expressly advocating the election or defeat of a clearly identified candidate and not made in concert, cooperation with, or at the request of a candidate or political party. 52 U.S.C. § 30101(17). Although it is prohibited by FECA, corporate treasury funds may now permissibly be used to finance independent expenditures after the Supreme Court struck down the prohibition on corporations financing independent expenditures. *See Citizens United v. FEC*, 558 U.S. 310 (2010).

FECA also requires any person who makes an independent expenditure in excess of $250 to file a statement disclosing certain information. 52 U.S.C. § 30104(c)(1), (c)(2). Among other things, the Act requires the identification of "each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure." 52 U.S.C. § 30104(c)(2)(C). Accordingly, an FEC regulation requires identification of "each person who made a contribution in excess of $200 to the person filing such report, which contribution was made for the purpose of furthering the reported independent expenditure." *See* 11 C.F.R. § 109.10(e)(1)(vi).

FECA also prohibits the making of a contribution by a foreign national. 52 U.S.C. § 30121(a)(1) ("It shall be unlawful for a foreign national, directly or indirectly, to make … a

contribution or donation of money or other thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a Federal, State or local election."). Foreign nationals are defined as persons who are not citizens, nationals, or permanent residents of the United States. *Id.* § 30121(b).

C. FECA's Administrative Enforcement Process and Judicial Review

FECA permits any person to file an administrative complaint with the Commission alleging a violation of the Act. 52 U.S.C. § 30109(a)(1); *see also* 11 C.F.R. § 111.4. After reviewing the complaint and any response filed by the respondent whose conduct is at issue, the Commission considers whether there is "reason to believe" that FECA has been violated. 52 U.S.C. § 30109(a)(2). If at least four of the FEC's six Commissioners vote to find such reason to believe, the Commission may investigate the alleged violation; otherwise, the Commission dismisses the administrative complaint. *Id.* §§ 30106(c), 30109(a)(2).

If an investigation is conducted, afterwards the FEC must determine whether there is "probable cause" to believe that FECA has been violated. 52 U.S.C. § 30109(a)(4)(A)(i). If the Commission votes to find that there is probable cause, the agency is statutorily required to attempt to remedy the apparent violation informally and attempt to reach a conciliation agreement with the respondent. *Id.* If the Commission is unable to reach a conciliation agreement, FECA authorizes the agency to institute a *de novo* civil enforcement action in federal district court. *Id.* § 30109(a)(6)(A).

If the FEC determines that no violation has occurred or decides to dismiss the administrative complaint for some other reason, FECA provides the complainant with a narrow cause of action for judicial review of the dismissal decision. 52 U.S.C. § 30109(a)(8)(A). "Any petition" seeking such review "shall be filed, in the case of the dismissal of a complaint by the Commission, within 60 days after the date of that dismissal." 52 U.S.C. § 30109(a)(8)(B).

In challenges to FEC dismissals, the judicial task "is limited." *Common Cause v. FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988) (describing judicial review under section 30109(a)(8)). The Commission "has the 'sole discretionary power' to determine in the first instance whether or not a civil violation of the Act has occurred," and "Congress wisely provided that the Commission's dismissal of a complaint should be reversed only if 'contrary to law.'" *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) (citations omitted). FECA also expressly limits the scope of relief available to a plaintiff challenging an FEC dismissal decision. The reviewing court may (a) declare that the Commission's dismissal was "contrary to law" and (b) order the Commission to "conform with" the court's declaration within 30 days. 52 U.S.C. § 30109(a)(8)(C); *see Perot v. FEC*, 97 F.3d 553, 557-59 (D.C. Cir. 1996). A judicial order to "conform with" a contrary-to-law declaration cannot mandate a different outcome on remand; the Commission remains free to reach the same outcome based on a different rationale. *FEC v. Akins*, 524 U.S. 11, 25 (1998) (explaining that the Commission "(like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason" (citing *SEC v. Chenery Corp.*, 318 U.S. 80 (1943))).

D. The Administrative Complaint and Commission Action in This Matter

On June 20, 2016, Tu Nguyen filed his administrative complaint, which was designated FEC Matter Under Review ("MUR") 7059 for administrative purposes. The administrative complaint alleged FECA violations by HRV PAC in 2015 and 2016. The Commission also named as respondents in the matter Don Le in his official capacity as HRV PAC's treasurer, SBTN, former Congresswoman Sanchez, the Sanchez Committee, and Ashleigh Aitken in her official capacity as the Sanchez Committee's treasurer. The complaint's allegations stemmed from HRV PAC's alleged dealings with the political party Viet Tan.

Using the information contained in the administrative complaint, responses provided by respondents, and publicly available information, the Office of General Counsel identified three areas of allegations potentially involving FECA: potential corporate contributions from SBTN to Sanchez and HRV PAC, alleged contributions to the Sanchez committee by foreign nationals, and alleged reporting violations by HRV PAC. (*See* Compl. (Docket No. 1) Exh. 1, FEC Factual & Legal Analysis ("F&LA"), ECF p. 35.) The Office of General Counsel recommended that the Commission find no reason to believe that any respondent had committed any of these alleged violations of the Act, and on February 22, 2017, the Commission unanimously approved the General Counsel's recommendation and dismissed the administrative complaint. The FEC letter informing Nguyen of this action was dated March 3, 2017, and sent to him by certified mail. (Compl. at 33.) Plaintiff filed this action on April 25, 2017, sixty-two (62) days after the FEC's dismissal.

II. THIS CASE SHOULD BE DISMISSED PURSUANT TO RULE 12(b)(1) BECAUSE PLAINTIFF'S COMPLAINT IS UNTIMELY AND HE LACKS STANDING

A. The Complaint Is Untimely, Warranting Dismissal with Prejudice

The Commission dismissed plaintiff's administrative complaint on February 22, 2017. The FEC informed plaintiff of this decision in a letter dated March 3, 2017 and sent to plaintiff by certified mail, along with a detailed Factual and Legal Analysis explaining the reasons for the decision. (Compl. at 33-41.) The deadline in 52 U.S.C. § 30109(a)(8)(B) for filing challenges to FEC dismissals is 60 days. Plaintiff's Complaint was filed on April 25, 2017, 62 days after the Commission's February 22 dismissal. As a result, Plaintiff failed to file his Complaint on a timely basis.

The Court of Appeals has held that the deadline in section 30109(a)(8)(B) is "jurisdictional and unalterable." *Carter/Mondale Presidential Comm. v. FEC*, 711 F.2d 279, 283 (D.C. Cir. 1983), *cited in NRA v. FEC*, 854 F.2d 1330, 1334 (D.C. Cir. 1988). Thus, the failure to file complaints in the district court within the sixty-day period "divests the district court of jurisdiction." *Jordan v. FEC*, 68 F.3d 518, 519 (D.C. Cir. 1995); *see Spannaus v. FEC*, 990 F.2d. 643, 644 (D.C. Cir. 1993) ("[T]his court has declared mandatory, i.e., 'jurisdictional and unalterable,' statutes that fix time for seeking judicial review."). Moreover, although plaintiff appears to believe that the operative dismissal date is the date of the FEC staff's notice to him or his receipt of that notice (*see* Compl. at 10 (alleging that the dismissal occurred on March 3 or 7, 2017)), it is well-established that the time period begins on the date of the Commission's vote to dismiss, not the date the notification is sent by the FEC or received by the complainant. The Court of Appeals has specifically noted that "[Plaintiff] cannot save his case on the ground that the 'date of dismissal' in [52 U.S.C. § 30109(a)(8)(B)] is the date of the letter from the Commission's general counsel informing him of the Commission's vote, rather than the date of the vote." *Jordan*, 68 F.3d at 519. As the court concluded, "the 'date of dismissal' is the date of the Commission's vote." *Id*. Here, that dismissal occurred on February 22, 2017.

Plaintiff failed to meet the "jurisdictional and unalterable" sixty-day deadline to file his Complaint. Because the untimeliness of the filing divests this Court of subject matter jurisdiction, this case must be dismissed with prejudice.

B. Plaintiff Lacks Article III Standing to Bring This Suit

1. Standing Requires a Concrete and Particularized Injury

Plaintiff bears the burden of establishing this Court's subject matter jurisdiction, including showing that he has standing. *See Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015),

cert. denied, 136 S. Ct. 900 (2016). To survive the FEC's motion to dismiss, Nguyen's complaint "must contain sufficient factual matter, accepted as true, to 'state a claim [of standing] that is plausible on its face.'" *Id.*, 797 F.3d at 19 (alteration in original) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "[I]t is the burden of the party who seeks the exercise of jurisdiction in his favor … clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (citations and internal quotation marks omitted). A plaintiff "must allege in his pleading the facts essential to show jurisdiction," *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936), and "'the necessary factual predicate may not be gleaned from the briefs and arguments,'" *FW/PBS*, 493 U.S. at 235 (citation omitted). However, this Court "may look beyond the allegations contained in the complaint" to "materials outside the pleadings" to determine whether plaintiffs can carry their burden of proving they have standing. *Flores ex rel. J.F. v. District of Columbia*, 437 F. Supp. 2d 22, 28-29 (D.D.C. 2006) (internal quotation marks omitted).

In general, to demonstrate Article III standing a plaintiff must establish that: "(1) [he] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-181 (2000) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-561 (1992)). Particularized means that "the injury must affect the plaintiff in a personal and individual way." *Lujan v. Defenders of Wildlife*, 504 U.S. at 560 n.1. In addition, when, as here, "the plaintiff is not himself the object of the government action or inaction he challenges, standing is not

precluded, but it is ordinarily 'substantially more difficult' to establish." *Id*. at 562 (citation omitted). *Accord Common Cause v. FEC*, 108 F.3d 413, 417 (D.C. Cir. 1997). Thus, courts "may not entertain suits alleging generalized grievances that agencies have failed to adhere to the law." *Freedom Republicans, Inc. v. FEC*, 13 F.3d 412, 415 (D.C. Cir. 1994).

2. Nguyen's Desire to Compel the FEC to "Get the Bad Guys" Is Not a Legally Cognizable Injury

This Court lacks jurisdiction over plaintiff's claims because Nguyen cannot demonstrate that he has Article III standing. Nguyen's Complaint shows that he disagrees with the Commission's finding of no reason to believe that the respondents violated FECA and its decision not to proceed with an investigation. But the FEC's dismissal caused no "concrete and particularized" injury to Nguyen. *Friends of the Earth*, 528 U.S. at 180-181.

Plaintiff seeks, in essence, to compel the FEC to enforce the law against respondents. But "[w]hile 'Congress can create a legal right . . . the interference with which will create an Article III injury,' . . . Congress cannot . . . create standing by conferring 'upon *all* persons . . . an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law.'" *Common Cause*, 108 F.3d at 418 (citations omitted) (quoting *Lujan*, 504 U.S. at 573). And the D.C. Circuit has explicitly refused "[t]o hold that a plaintiff can establish injury in fact merely by alleging that he has been deprived of the knowledge as to whether a violation of [FECA] has occurred." *Id.* at 418; *see id*. (explaining that such a holding "would be tantamount to recognizing a justiciable interest in the enforcement of the law"). Courts have repeatedly emphasized that "an injury that occurs when a person is deprived of information that a law has been violated" is *not* legally cognizable. *Judicial Watch, Inc. v. FEC*, 293 F. Supp. 2d 41, 46 (D.D.C. 2003); *see Wertheimer v. FEC*, 268 F.3d 1070, 1075 (D.D.C. 2001) (holding that plaintiffs lacked standing to seek a legal determination that certain transactions constitute

coordinated expenditures); *Vroom v. FEC*, 951 F. Supp. 2d 175, 178-79 (D.D.C. 2013) (holding that plaintiff lacked standing to seek a legal determination that certain political committees were affiliated). As this Court explained in *Alliance for Democracy v. FEC*, 362 F. Supp. 2d 138, 148 (D.D.C. 2005), "[n]othing in the FECA requires that information concerning a violation of the Act as such be disclosed to the public." In sum, what plaintiff "desires is for the Commission to 'get the bad guys,' rather than disclose information. [Plaintiff] has no standing to sue for such relief." *Common Cause*, 108 F.3d at 418.

In this case, Nguyen makes many claims regarding alleged unlawful acts by HRV PAC, Viet Tan, and others (Compl. at 10-31), but these allegations are insufficient to give Nguyen standing to pursue FECA claims because none show concrete and particularized harm to him. Nguyen has demonstrated no cognizable legal injury from a lack of law enforcement against the respondent entities. What he seeks, in essence, is merely "a legal conclusion that carries certain law enforcement consequences" for others. *Wertheimer*, 268 F.3d at 1075.

Courts have in limited circumstances found informational standing to challenge FEC dismissals under 52 U.S.C. § 30109(a)(8), but plaintiff's conclusory allegations are insufficient to make the required showing. An injury for purposes of Article III standing can arise from a statute that has "'explicitly created a right to information.'" *Am. Farm Bureau v. EPA*, 121 F. Supp. 2d 84, 97 (D.D.C. 2000) (quoting *Animal Legal Def. Fund, Inc. v. Espy*, 23 F.3d 496, 502 (D.C. Cir. 1994)). "For a plaintiff to successfully claim standing based on an informational injury, he must allege that he is directly deprived of information that must be disclosed under a statute." *Citizens for Responsibility and Ethics in Wash.* ("*CREW*") *v. U.S. Dep't of the Treasury, IRS*, 21 F. Supp. 3d 25, 32 (D.D.C. 2014). Moreover, the Supreme Court has explained that to constitute a legally cognizable injury for an action seeking review of an FEC

dismissal, the information of which plaintiff claims to have been deprived must be "directly related to voting." *Akins*, 524 U.S. at 24-25. The D.C. Circuit has similarly noted that an alleged informational injury is sufficiently particularized to create standing where plaintiffs have alleged that "voter[s] [were deprived of useful [political] information at the time" of voting, *and* the denied information is "useful in voting and required by Congress to be disclosed." *Common Cause*, 108 F.3d at 418 (internal quotation marks and citation omitted). In addition, courts in this District have recognized that the sought-after information must "have a concrete effect on [*plaintiff's*] voting," *i.e.*, that plaintiff must be a participant in political elections and campaigns. *All. for Democracy v. FEC*, 335 F. Supp. 2d 39, 48 (D.D.C. 2004) (emphasis added).

Nguyen cannot meet these standards. Nguyen's court Complaint contains broad assertions that appear designed to support a showing of informational injury, but he supplies no factual basis for those claims. (*See* Compl. at 3-5.) Nguyen asserts that "exercising his right to an informed vote" is harmed when contributions or independent expenditures are not properly reported, that he is a blogger who seeks to disseminate information publically about persons who violate FECA, and that his "core programmatic activities" are harmed when the FEC refuses to "properly administer" the Act. (*Id*. at 3-4). He also claims to pursue a wide range of policy goals related to the electoral process and government integrity. (*Id*.) However, Nguyen provides no evidentiary support for these conclusory claims about his *own* informational injury, and he never explains specifically how *his* right to cast an informed vote or *his* alleged blogging activities are currently hindered by the Commission's dismissal of his administrative complaint. He makes no effort to show how the California-based HRV PAC's alleged past activities could affect him or his future voting where he is registered in Texas. (*Id*. at 3.) He also never explains how he has any informational interests as a voter regarding former California candidate Sanchez,

who has now left federal office and is no longer a federal candidate. Nguyen did allege potential reporting omissions by HRV PAC (*id*. at 40-41), but again there is no showing of how this affects him in any tangible or specific way. Nguyen clearly has a strong desire for law enforcement action against dealings of the Viet Tan, but that "generalized" desire to see the law enforced, even as to disclosure rules, is not sufficient to constitute an informational injury. He fails to show how any of the alleged deprivations of information harmed his own ability to vote, and his effort to have the Commission "get the bad guys" does not provide a basis for standing. *Common Cause***,** 108 F.3d at 418 (internal quotation marks and citation omitted); *All. for Democracy*, 362 F. Supp. 2d at 148.

In addition, Nguyen plainly has no standing to pursue the challenge he purports to include as to the FEC's regulation regarding disclosure of independent expenditures. Plaintiff's complaint states that "[t]his action further challenges a regulation promulgated by the FEC, 11 C.F.R. §109.10(e)(1)(vi), as FEC's response is arbitrary, capricious, and in violation of 52 U.S.C. § 30109(a)(8)(C) and 5 U.S.C. §706(2) because it is inconsistent with a provision of the FECA, 52 U.S.C. § 30104(c)." (Compl. at 2.) But Nguyen fails to provide any elaboration of this apparent challenge to an FEC regulation governing disclosure of independent expenditures. In any event, he has no standing to pursue such a challenge because there was no allegation of a violation of any restrictions relating to independent expenditures in his administrative complaint, nor was any considered by the FEC in its evaluation of the matter. Nguyen can show no injury.

In sum, Nguyen has failed to meet his burden to allege a threat of harm stemming from a violation of FECA that is "concrete and particularized." *Lujan*, 504 U.S. at 560. This case should therefore be dismissed for a lack of Article III standing.

III. THE COMPLAINT SHOULD BE DISMISSED PURSUANT TO RULE 12(b)(5) BECAUSE PLAINTIFF FAILED TO PERFECT SERVICE

The Commission also moves to dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(5) because of plaintiff's multiple failures to perfect service of the summons and complaint. Specifically, plaintiff failed to comply with Rule 4(i)'s requirement that he serve the United States Attorney and the U.S. Attorney General, Rule 4(c)'s requirement that service be made by a person who is not a party to the litigation, and Rule 4(m)'s requirement that proper service occur within ninety days of the filing of the complaint. Despite these failures, plaintiff has filed misguided motions for Entry of Default and for Default Judgment. *See supra* p. 2.

Whenever questions are raised regarding the service of process, "the plaintiff has the burden of establishing the validity of service of process; to do so [a plaintiff] must demonstrate that the procedure employed satisfied the requirements of the relevant portions of Rule 4 and any other applicable provision of law." *Salmeron v. District of Columbia*, 113 F. Supp. 3d 263, 267 (D.D.C. 2015) (alteration in original and internal quotations omitted); *Candido v. District of Columbia*, 242 F.R.D. 151, 159 (D.D.C. 2007). Indeed, "'federal courts lack the power to assert personal jurisdiction over a defendant 'unless the procedural requirements of effective service of process are satisfied.'" *Salmeron,* 113 F. Supp. 3d at 266 (citation omitted). In fact, insufficient service of process imposes no obligation on the government to respond to a complaint. *Darby v. McDonald, Secretary, U.S. Dept. of Veterans Affairs*, 307 F.R.D. 254, 257 (D.D.C. 2014) (entry of default vacated because of improper service). "Service is therefore not only a means of notifying a defendant of the commencement of an action against him, but a ritual that marks the court's assertion of jurisdiction over the lawsuit." *Mann v. Castiel*, 681 F.3d 368, 372 (D.C. Cir. 2012) (internal quotations omitted).

Plaintiff failed to comply with Rule 4(i)(1) by neglecting to serve a copy of the summons and complaint on the United States Attorney for the District of Columbia or the Attorney General of the United States. Under this Rule, "service on the United States requires service on the Attorney General, the U.S. Attorney, and the agency whose action is at issue … and the United States is 'not served' until *and* unless all three entities are served." *Koerner v. United States,* 246 F.R.D. 45, 48 (D.D.C. 2007) (citation omitted) (emphasis added). Here, Nguyen has not even requested that a summons be issued to either of the two Department of Justice entities. (*See* Docket No. 2.) And no return of service for either entity appeared on the docket within the prescribed ninety days following the filing of the Complaint.

Moreover, Nguyen violated Rule 4(c)(2), which requires that service of the summons to be made by a person who is "not a party" to the case. This rule is not limited to personal service of a summons; "a plaintiff may not effect service by *mailing* a copy of the summons and complaint herself." *Ojelade v. Unity Health Care Inc.*, 962 F. Supp. 2d 258, 262 (D.D.C. 2013) (emphasis added); *see Judd v. FCC*, 276 F.R.D. 1, 6 (D.D.C. 2011); *Olson v. FEC*, 256 F.R.D. 8, 10 (D.D.C. 2009). Although Nguyen failed to file a Proof of Service affidavit pursuant to Rule 4(l)(1), he did file a Notice of Summons Served (Docket No. 3), which attached the signed certified mail card and U.S.P.S. tracking material for the attempted service on the FEC. He attached these same materials to his improper Motion for Entry of Default (Docket No. 4). These filings indicate that Nguyen himself mailed the summons, since only his name appears on the tracking material. In addition, only his return address appears on the envelope received by the FEC. Because Nguyen tried to serve the FEC himself, he violated Rule 4(c)(2).

Finally, plaintiff failed to perfect service within the 90-day period required by Rule 4(m) because he failed to serve all the required entities within that period, which ended on July 14,

2017. Rule 4(m) does provide the Court with discretion to lengthen that time period, but plaintiff has the burden of showing good cause for a failure serve within the required time, and "[m]istake of counsel or ignorance of the rules of procedure usually does not suffice to establish good cause." *U.S. ex rel Cody v. Comput. Servs. Corp*., 246 F.R.D. 22, 26 (D.D.C. 2007); *Candido*, 242 F.R.D. at 160. Rather, plaintiff must offer something more than his own inaction, because good cause exists when "'some outside factor … rather than inadvertence or negligence, prevented service.'" *Mann*, 681 F.3d at 374 (citation omitted). In this case, there is no indication that plaintiff's failure to effect proper service was the result of any outside factor. The case should be dismissed and Nguyen's premature motion for default should be denied.

IV. THE COMPLAINT MUST BE DISMISSED UNDER RULE 12(b)(6) BECAUSE IT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

A. The Commission's Dismissal of Plaintiff's Administrative Complaint Was Reasonable Under the Highly Deferential Standard of Review

In the context of judicial review of final agency action, "[t]he entire case on review is a question of law, and only a question of law[,] [a]nd because a court can fully resolve any purely legal question on a motion to dismiss, there is no inherent barrier to reaching the merits at the 12(b)(6) stage." *Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993). "[T]he sufficiency of the complaint is the question on the merits, and there is no real distinction in this context between the question presented on a 12(b)(6) motion and a motion for summary judgment." *Marshall Cty. Health Care Auth.*, 988 F.2d at 1226. The party challenging the agency action bears the burden of proof to show that it is entitled to relief. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 884-85 (1990).

Under FECA, a court may set aside a Commission order dismissing an enforcement complaint only if it is "contrary to law." 52 U.S.C. § 30109(a)(8)(C). This means that the

Commission's decision to dismiss cannot be disturbed unless it was based on "an impermissible interpretation of the Act" or was otherwise "arbitrary or capricious, or an abuse of discretion." *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986). In other words, the Commission's decision need only be "sufficiently reasonable to be accepted by a reviewing court." *Democratic Senatorial Campaign Comm.*, 454 U.S. at 39 (internal quotation marks omitted). The contrary to law standard is "[h]ighly deferential" to the Commission's decision, and it "permits reversal only if the agency's decision is not supported by substantial evidence, or the agency has made a clear error in judgment." *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005) (internal quotation marks omitted); *see CREW* v. *FEC*, 475 F.3d 337, 340 (D.C. Cir. 2007) ("[J]udicial review of the Commission's refusal to act on complaints is limited to correcting errors of law.").

Nguyen's court Complaint alleges generally that the Commission's dismissal of his administrative complaint was "based on unwarranted assumptions instead of thorough investigation" and that the agency "misconstrued the facts." (Compl. at 10-11.) In support of these claims, he alleges past and present Viet Tan misdeeds (*id*. at 12-15), a resemblance between names appearing on Sanchez disclosure reports and the purported membership of Viet Tan (*id*. at 15-24), and a Sanchez fundraiser held on the SBTN premises (*id.* at 24-30). As explained below, none of these allegations establishes that the FEC's dismissal was contrary to law.

The Commission's Factual and Legal Analysis in the administrative matter (Compl. at 34-41) demonstrates that each of Nguyen's main claims was carefully considered and unanimously rejected as lacking a sufficient factual basis to support a finding of reason to believe any FECA violation had taken place. Specifically, the Commission evaluated "(1) potential corporate contributions from [SBTN] to the Sanchez Committee and HRV PAC, (2)

potential foreign national contributions to the Sanchez Committee, and (3) potential reporting omissions by HRV PAC." (*Id*. at 35.)

The Commission's analysis addressed each of these issues in turn. With respect to the alleged corporate contributions from SBTN, the Commission evaluated the material provided by Nguyen and the respondents. It concluded that there was insufficient evidence that SBTN was even involved in a 2016 fundraising event Nguyen identified, and that as to a 2015 event he cited, available evidence indicated that HRV PAC had paid Saigon Broadcasting for the use of its facilities and air time, which does not constitute an unlawful in-kind contribution. (*See* Compl. at 35-38.) The FEC also evaluated allegations that SBTN had unlawfully established and funded HRV PAC, but the agency found no evidence to support that conclusion. (*Id*. at 38.) With respect to the alleged foreign national contributions to the Sanchez Committee, the FEC found no facts to support the allegations; it noted that Nguyen had failed to submit any evidence showing that the persons he named were actually foreign nationals, and that all the contributors he referenced had U.S. addresses. (*Id*. at 39-40.) Finally, with respect to Nguyen's allegations that HRV PAC had failed to report all cash contributions, the FEC evaluated materials he provided but it found them "mostly incomprehensible." (*Id*. at 40-41.) Regarding a supplemental submission from Nguyen making similar claims as to a 2013 HRV PAC fundraising event, the FEC evaluated the response from HRV PAC and even conducted a sample review, comparing the contributors Nguyen identified with HRV PAC's FEC reports, but that analysis showed that the contributions were reported in accordance with FECA. (*Id.*)

Nguyen's Complaint provides no basis to conclude that any of these determinations were contrary to law under section 30109(a)(8). Nguyen essentially restates his allegations and supporting evidence, but he makes no showing that the Commission's decisions regarding the

alleged corporation contributions, foreign national contributions, or alleged unreported cash contributions were erroneous based on the materials it had before it at the time. Nguyen disagrees with the Commission's conclusions, but that is not enough. He identifies no "clear error in judgment," nor does he show that the agency's factual determinations were unsupported or an abuse of its broad discretion, based on the deferential standard of judicial review applicable to such determinations. *Hagelin*, 411 F.3d at 242; *see Democratic Senatorial Campaign Comm.*, 454 U.S. at 37; *CREW*, 475 F.3d at 340. In sum, the FEC had a reasonable basis for its unanimous decision in light of plaintiff's inadequate factual allegations.

To the extent Nguyen contends that the FEC identified as a respondent an entity that was not the "Viet Tan" he meant in his administrative complaint, specifically Viet Tan North America Corporation (Compl. at 11), he cannot show the Commission acted unreasonably because he only asked that the agency investigate HRV PAC.[2] *See* 52 U.S.C. § 30109(a)(1) (requiring the FEC to notify only those "alleged in the complaint to have committed [] a violation"). Nguyen can hardly be heard to complain that the agency acted contrary to law because it failed to locate an entity that he had not even asked the agency to investigate. The agency's choice to name additional respondents as part of its review of the matter fails to provide grounds for a complainant to challenge the efficacy of any notice provided to respondents identified by the Commission. And even if any error was identified, it would be a harmless one that would not justify overturning the FEC's decision in this matter. *See Nader v. FEC*, 823 F.

[2] *See* Admin. Compl. at 1, 16, *Human Rights for Vietnam Political Action Comm.*, FEC MUR 7059, https://www.fec.gov/files/legal/murs/current/118033.pdf (requesting investigation of "alleged improprieties by" HRV PAC and of various "allegations *against* HRVN PAC") (emphasis added). This Court may consider the administrative complaint in evaluating this motion to dismiss because it is a document to which plaintiff's court complaint refers. "In determining whether a complaint states a claim, the court may consider the facts alleged in the complaint, documents attached thereto or incorporated therein, and matters of which it may take judicial notice." *Bank of N.Y. Mellon Trust Co. v. Henderson*, 862 F.3d 29, 33 (D.C. Cir. 2017).

Supp. 2d 53, 67 (D.D.C. 2011); *FEC v. Club for Growth*, 432 F. Supp. 2d 87, 91 (D.D.C. 2006). In *Nader*, the Commission did not name as respondents all of the more than 50 entities that an administrative complaint had alleged violated FECA. The district court found that the failure to do so was a violation of section's 30109(a)(1)'s notification requirement, but the court found it to be harmless error: "The Court finds no reason to believe that had the FEC properly notified all alleged 'respondents,' it would have reached a different decision in this case." *Nader,* 823 F. Supp. 2d at 67-68. The same would be true here, even if the FEC had any obligation to name a different "Viet Tan" entity. Nguyen provides no reason to conclude that obtaining a response from a different Viet Tan entity would have changed the agency's decision to dismiss his complaint based on inadequate evidence of FECA violations. Thus, any mistake would be at most harmless error.

The Commission's decision to dismiss plaintiff's administrative complaint was reasonable and well within its discretion, so plaintiff has failed to state a claim.

B. The Administrative Procedure Act Provides No Basis for Review Here, Where FECA Provides an Adequate Judicial Review Mechanism

Dismissal of a court complaint is appropriate where, accepting the factual allegations in the complaint as true and drawing all reasonable inferences in the plaintiff's favor, the complaint fails as a matter of law to state a claim on which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Ashcroft v. Iqbal*, 556 U.S. at 678 . A claim must be dismissed "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007).

Nguyen purports to rely on the Administrative Procedure Act ("APA") as a separate and independent basis for challenging the Commission's dismissal of his administrative complaint. He asserts that the "FEC's dismissal is arbitrary, capricious, and contrary to law, in violation of

52 U.S.C. § 30109(a)(8)(c)(C) and 5 U.S.C. § 706(2)." (Compl. at 30.) However, no separate APA claim exists where a statute like FECA provides an adequate judicial review mechanism.

52 U.S.C. § 30109(a)(8) provides the exclusive mechanism for judicial review of any FEC dismissal of an administrative complaint. In addressing such issues, courts examine the relevant statute's language, structure, and legislative history. *See Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984) (explaining that a "detailed mechanism for judicial consideration of particular issues at the behest of particular persons" may demonstrate that other forms of judicial review are "impliedly precluded"); *Klayman v. Obama*, 957 F. Supp. 2d 1, 20 (D.D.C. 2013) (considering the express language, structure, objectives, and legislative history of the Foreign Intelligence Surveillance Act and concluding that the statute precluded plaintiffs' claim for judicial review pursuant to the APA).

In section 30109(a)(8), Congress delineated the scope of judicial review available in an action challenging an FEC dismissal of an administrative complaint. The statute specifies that (a) the statutory cause of action is available only to a complainant who is "aggrieved by an order of the Commission dismissing a complaint filed by such party," (b) any petition for judicial review of an FEC dismissal must be filed (i) in the United States District Court for the District of Columbia and (ii) "within 60 days after the date of the dismissal," and (c) the available relief is a judicial declaration that "the dismissal of the complaint . . . is contrary to law" and an order "direct[ing] the Commission to conform with such declaration." 52 U.S.C. § 30109(a)(8). FECA's "detailed mechanism for judicial consideration of particular issues at the behest of particular persons" clearly precludes other forms of judicial review, including review under the APA. *See Block*, 467 U.S. at 349. Where, as here, Congress has "fashion[ed] . . . an explicit provision for judicial review" of certain agency action and has "limit[ed] the time to raise such a

challenge," the Court of Appeals for the D.C. Circuit has found that "it is 'fairly discernible' that Congress intended that particular review provision to be exclusive." *Coal River Energy, LLC v. Jewell*, 751 F.3d 659, 664 (D.C. Cir. 2014); *see Garcia v. Vilsack*, 563 F.3d 519, 523 (D.C. Cir. 2009) ("'Congress did not intend to permit a litigant challenging an administrative denial . . . to utilize simultaneously both [the review provision] and the APA.'") (alteration in original). Judicial review of agency action under the APA is available only where there is "no other adequate remedy." 5 U.S.C. § 704. "Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988)). Thus, the APA "'does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures.'" *Id.* (footnote omitted).

Every court that has considered the nature of the judicial-review procedures in section 30109(a)(8), including the Court of Appeals for the D.C. Circuit, has found that those FECA procedures are exclusive. In fact, the D.C. Circuit stated that section 30109(a)(8) was "as specific a mandate as one can imagine" and accordingly concluded that "the procedures it sets forth — procedures purposely designed to ensure fairness not only to complainants but also to respondents — must be followed before a court may intervene." *Perot v. FEC*, 97 F.3d at 559. The Court of Appeals for the Fifth Circuit similarly found "substantial evidence that Congress set forth the exclusive means for judicial review under [FECA]" in section 30109(a)(8). *Stockman v. FEC*, 138 F.3d 144, 156 (5th Cir. 1998). More recently, courts in this District have reaffirmed that the review procedure in section 30109(a)(8) precludes an APA claim for dismissal of an administrative complaint. *See CREW v. FEC*, No. 16-259, 2017 WL 1080920 *8 (D.D.C. March 3, 2017) (FECA provides an adequate remedy so there is no parallel claim for

relief under the APA); *CREW v. FEC*, 164 F. Supp. 3d 113, 120 (D.D.C. 2015) ("This [section 30109(a)(8) judicial review] precludes review of FEC enforcement decisions under the APA.").[3]

Because section 30109(a)(8) provides the exclusive mechanism for challenging the Commission's dismissal of plaintiff's administrative complaint, the portions of his court Complaint that purport to rely on the APA fail to state a claim and should be dismissed.

V. CONCLUSION

For all the foregoing reasons, the Court should dismiss plaintiff's Complaint.

Respectfully submitted,

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[3] By contrast, FECA does not provide a mechanism for judicial review of the FEC's formal rulemaking actions, 52 U.S.C. § 30107(a)(8), and such rulemaking actions, unlike FEC administrative dismissals, are subject to APA review. *See*, *e.g.*, *Shays v. FEC*, 414 F.3d 76, 96 (D.C. Cir. 2005) (reviewing FEC regulations promulgated pursuant to statutory authority). Here, although the Complaint purports to include a challenge to an FEC regulation regarding independent expenditures, Nguyen lacks standing to pursue it. *See supra* p. 13.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TU NGUYEN. Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	)	Civ. No. 17-mc-1048 (RBW) **[PROPOSED] ORDER**

[PROPOSED] ORDER

Upon consideration of the defendant Federal Election Commission's Motion to Dismiss and any opposition filed by plaintiff Tu Nguyen, it is hereby

ORDERED that the Federal Election Commission's Motion to Dismiss is GRANTED. Nguyen's complaint petitioning for review is **DISMISSED WITH PREJUDICE.**

Dated: _____, 2017

_____
The Honorable Reggie B. Walton
United States District Judge