UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re Stephen M. Silberstein,	)
Petitioner.	)

PETITION FOR WRIT OF MANDAMUS

Anne L. Weismann
D.C. Bar No. 298190
Campaign for Accountability
1201 Connecticut Avenue, N.W.,
Suite 300
Washington, D.C. 20036
(202) 780-5750
aweismann@campaignforaccountability.org

Counsel for Stephen M. Silberstein

Dated: February 8, 2016

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INTRODUCTION AND SUMMARY OF ARGUMENT

On May 8, 2014, investor Stephen Silberstein along with non-petitioner Citizens for Responsibility and Ethics in Washington ("CREW") filed a petition for rulemaking requesting that the Securities and Exchange Commission ("SEC") address a serious and persistent gap in the disclosure obligations the agency imposes on public corporations by requiring corporations to disclose to shareholders and the public alike their use of corporate funds for political activities. One year earlier, the SEC's Division of Corporate Finance had announced it would consider recommending the agency issue the rule petitioner's rulemaking petition requests. Despite this public commitment to consider this issue and overwhelming and unprecedented public support for the requested rulemaking, the SEC has refused to act in any way on Mr. Silberstein's petition. With its refusal to act, the SEC has ignored the more than one million public comments in support of the corporate disclosure rule Mr. Silberstein seeks. Not only has this inaction on the SEC's part kept the public in the dark about corporate political spending, it has allowed the flood of anonymous or "dark" corporate money pouring into our elections to continue at ever increasing levels, with no accountability to shareholders.

In this situation of a patently unreasonable agency delay, this Court should exercise its statutory authority to issue a writ of mandamus requiring the SEC to act on petitioner's rulemaking request. The agency has offered no justification whatsoever for its ongoing inaction on a matter its own Division of Corporate Finance has deemed worthy of consideration. Continued refusal by the SEC to fulfill its statutory duty to act on the petition will harm the public, investors, and our campaign finance system, while denying petitioner an opportunity for judicial review of the merits of his petition.

JURISDICTION

As the district court held in *Silberstein v. SEC*, No. 15-722 (RMC),[1] 2016 U.S. Dist. LEXIS 284 (D.D.C. Jan. 4, 2016), this Court possesses exclusive and original jurisdiction over this petition pursuant to the Securities Exchange Act of 1934, 15 U.S.C. § 78(a)(1) ("Exchange Act"), a provision interpreted by this Court in *Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984) ("*TRAC*"), as granting this Court jurisdiction over both final agency orders issued under the Exchange Act and unreasonable agency delay claims. This Court also has jurisdiction over the claim at issue pursuant to the Administrative Procedure Act ("APA"), 5

[1] A copy of this decision is included in the attached Appendix.

U.S.C. §§ 551, *et seq.*, which authorizes the Court to compel agency action unreasonably delayed; the All Writs Act, 28 U.S.C. § 1651, which authorizes the Court to issue all writs necessary or appropriate in aid of its jurisdiction; and Federal Rule of Appellate Procedure 21, which provides for writs of mandamus in cases like this of unreasonable agency delay.

ISSUE PRESENTED

Whether, given the SEC's unreasonable delay in addressing Mr. Silberstein's rulemaking petition, this Court should issue a writ of mandamus requiring the SEC to respond immediately to plaintiff's rulemaking petition.

RELIEF REQUESTED

Petitioner Stephen Silberstein respectfully requests that the Court require the SEC to act immediately on his rulemaking petition and issue an explanation of its decision to grant or deny the petition that will permit further judicial review.

BACKGROUND AND STATEMENT OF THE FACTS

The Supreme Court's 2010 decision in *Citizens United v. FEC*, 588 U.S. 310 (2010), freed companies to spend unlimited amounts of corporate funds on political activities on the theory such expenditures are protected political speech. At the same time, the Supreme Court recognized disclosure

of such spending would serve as a check on corporate political activities, as it would allow shareholders to "determine whether their corporation's political speech advances the corporation's interest in making profits," *id.* at 370, thereby permitting shareholders "to react to the speech of corporate entities in a proper way." *Id.* at 371.

Even before the Supreme Court's *Citizens United* decision, shareholders increasingly were demanding greater disclosure of corporate political spending. This demand has only increased as the amount of political spending has soared to extraordinary heights. According to the Center for Responsive Politics, in the 2012 presidential election cycle – the first since the *Citizens United* decision – total spending was nearly $6.3 billion, up from the nearly $5.3 billion spent in 2008.[2] This increased spending included $310.8 million by social welfare groups and trade associations, which do not disclose their donors. *Id.* Continuing this trend, political spending for the 2016 presidential race is anticipated to approach, if not to exceed, $10 billion.[3]

Contributions from public corporations have aided political spending by dark money groups. According to the Center for Political

[2] Historical Elections – The Money Behind the Elections, The Center for Responsive Politics, *available at* http://www.opensecrets.org/bigpicture/.

[3] *See, e.g.*, Albert R. Hunt, How Record Spending Will Affect 2016 Election, *Bloomberg* (April 26, 2015), *available at* http://www.bloombergview.com/articles/2015-04-26/how-record-spending-will-affect-2016-election.

Accountability's 2014 CPA-Zicklin Index, which ranks political spending disclosure policies of the top 299 companies of the S&P 500, only nine percent of the analyzed companies stated under their policies they did not contribute in 2014 to social welfare groups exempt under § 501(c)(4) of the Tax Code, while only six percent claimed to direct trade associations not to use their contributions on election-related activities.[4] Further, just 24 percent of the companies analyzed by the CPA-Zicklin Index disclosed information about their contributions to tax exempt social welfare groups in 2014, down from 26 percent in the 2013 CPA-Zicklin Index. *Id.* The 2015 CPA-Zicklin Index documents growing investor concern with corporate political spending. As of July 20, 2015, shareholders had voted on 33 corporate disclosure proposals, reflecting an average shareholder support of 35 percent.[5]

In the face of increased political spending by corporations to groups that do not disclose their donors, the Committee on Disclosure of Corporate Political Spending submitted a petition to the SEC on August 3, 2011, seeking regulations requiring public companies to disclose to shareholders the use of corporate resources for political activities, File No 4-637. This

[4] The 2014 CPS-Zicklin Index of Corporate Political Accountability and Disclosure, *Center for Political Accountability* (Sept. 24, 2014), *available at* http://files.politicalaccountability.net/2014_CPA-Zicklin_Index_PDF.pdf.

[5] CPA, Record Support in 2015 Proxy Season for CPA Political Disclosure Resolution, a*vailable at* http://www.politicalaccountability.net/index.php?ht=d/sp/i/1795/pid/1795.

petition has garnered an unprecedented level of public support – at least one million comments in support as of September 2, 2014, with current estimates of more than 1.2 million comments – the most comments on a rulemaking petition in the SEC's history.[6]

Also responding to the growing public interest in corporate political spending, the SEC's Division of Corporation Finance, as part of its 2013 regulatory agenda, announced it was considering "whether to recommend that the Commission issue a proposed rule to require that public companies provide disclosure to shareholders regarding the use of corporate resources for political activities." *Id.* at ¶ 28. This rule never materialized, however, and each Agency Rule List since issued by the SEC has omitted any reference to such a rule. *Id.* at ¶¶ 28, 34.

Given this inaction by the SEC, on May 8, 2014 – nearly four years since the submission of the 2011 Petition – and newly available data about the role of dark money in our political system plaintiff Stephen Silberstein and CREW submitted an amended petition for rulemaking on disclosure by public companies of corporate resources used for political activities. As an investor with a broad portfolio, Mr. Silberstein has a longstanding interest in

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[6] SEC, *Comments on Rulemaking Petition: Petition to require public corporations to disclose to shareholders the use of corporate resources for political activities*, File 4-637, *available at* http://www.sec.gov/comments/4-637/4-637.shtml.

issues pertaining to corporate governance and responsibility. In pursuit of that interest, he previously sued Aetna, Inc. under § 14(a) of the Securities Exchange Act of 1934, based on false and misleading statements in Aetna's proxy statements issued in opposition to shareholder proposals that would have required greater oversight of, and transparency in, Aetna's political contributions. He joined CREW's amended petition, which was filed to update the SEC on the ineffectiveness and limitations of political spending disclosure policies public companies have voluntarily adopted based on a study CREW had conducted, evidence not available at the time the 2011 Petition was filed.

Their petition explained this voluntary scheme has proven to be an ineffective substitute for a regulatory scheme that would impose a uniform disclosure regime on all public companies. Instead, leaving disclosure of corporate political spending to the discretion of individual companies has deprived investors, shareholders, and the public of information that would help them assess whether those contributions are in the best interest of these corporations and advance the interests of corporate democracy. A study by CREW revealed significant discrepancies in 25 of 60 companies between their voluntary disclosure reports and what the companies reported on tax forms to the IRS.

Mr. Silberstein and CREW also explained to the SEC their amended petition incorporated by reference the 2011 Petition, File No. 4-637, meaning that although neither Mr. Silberstein nor CREW signed the 2011 Petition, both endorsed the arguments made in that petition. For the convenience and ease of the SEC, they did not repeat verbatim the contents of the 2011 Petition, instead expressly incorporating its contents by reference. *Id.*

To date, the SEC has neither given any indication it still is considering whether to recommend the issuance of a proposed rule on disclosure of corporate political spending nor responded in any way to the two pending rulemaking petitions. *Id.* at ¶ 35. Given this abrogation of the agency's legal responsibility to respond to the petitions, on May 4, 2015, Mr. Silberstein filed a one-count complaint against the SEC alleging the agency's failure to respond in any way to plaintiff's rulemaking petition is arbitrary, capricious, and contrary to law. *Silberstein v. SEC*, No. 15-722 (RMC) (D.D.C.), Complaint ("Comp."), ¶¶ 39-41. Plaintiff requested declaratory and injunctive relief to compel the SEC immediately to initiate a rulemaking proceeding. *Id.* at ¶ 43.

On July 13, 2015, the SEC moved to dismiss the complaint for failure to state a claim and also moved to stay discovery. In response, plaintiff filed

a two-count amended complaint ("Am. Comp.") on July 16, 2015. Count One of the amended complaint alleges the SEC's failure to respond to plaintiff's rulemaking petition is arbitrary, capricious, and contrary to law in violation of 5 U.S.C. §§ 553 and 555. Am. Comp. at ¶ 40. Count Two alleges alternatively the SEC's failure to provide an explanation of any kind for its refusal to grant plaintiff's rulemaking petition constitutes an effective denial of the petition that is arbitrary, capricious, and contrary to law. *Id.* at ¶¶ 46-48. The SEC moved to dismiss the amended complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

On January 4, 2016, the district court granted the SEC's motion and dismissed the amended complaint in its entirety. As to Count One, the court concluded jurisdiction lies exclusively in this Court pursuant to the Exchange Act and this Court's decision in *TRAC*. *Silberstein v. SEC*, 2026 U.S. Dist. LEXIS at *7-9. In so ruling, the court rejected Mr. Silberstein's argument, which stemmed from this Court's ruling in *Am. Petroleum Institute v. SEC* ("*API*"), 741 F.3d 1329, 1333 (D.C. Cir. 2013), that § 25(b)(1) of the Exchange Act vests this Court with exclusive jurisdiction only over rules the SEC issues pursuant to the specific provisions referenced

in the Exchange Act. *Id.* at *10-11.[7] The district court reasoned Mr. Silberstein's challenge implicates only § 25(a) of the Exchange Act, rendering *API* inapplicable. *Id.* at 11.

As to Count Two, the district court rejected petitioner's characterization of the SEC's actions as an "effective denial" of his petition, concluding instead the agency had "merely failed to respond" to the petition. *Silberstei*n, 2016 U.S. Dist. LEXIS at *13. According to the district court, Count Two "fail[s] to state a valid APA claim" and the court accordingly dismissed the claim with prejudice. *Id.* at *14. Petitioner has not filed an appeal from the dismissal of Count Two.

Our nation is now in the midst of a hotly contested presidential election in which the role of dark money and the need for campaign finance reform have featured prominently. Further adding to the politicization of this issue, in mid-December 2015 – long after petitioner filed his rulemaking request with the SEC – House Republicans were able to include a last-minute rider in the spending bill for fiscal year 2016, section 707 of Division E, Title VII of the Consolidated Appropriations Act, preventing the SEC from using FY 2016 funds to

[7] Mr. Silberstein is not appealing this jurisdictional issue. A ruling by this Court that it lacked jurisdiction to entertain this petition obviously would call the district court's jurisdictional ruling into question.

> finalize, issue, or implement any rule, regulation, or order regarding the disclosure of political contributions, contributions to tax exempt organizations, or dues paid to trade associations.

This restriction, however, does not strip the SEC of its statutory authority to prepare for a corporate disclosure rulemaking procedure, including discussing, investigating, planning, and developing a draft proposal. Indeed, Harvard Professor John Coates has concluded the SEC retains authority to propose a corporate disclosure rule, given the plain and limited language of the budget bill and the "law, convention, and custom, [for] agencies such as the SEC [to] engage in rulemaking" in several stages, including "proposing" a rule "and then, after notice and opportunity for the public to comment, 'finalizing' or 'issuing' such rule[]." Letter from John C. Coates IV to Senator Robert Menendez, Dec. 27, 2015, *available at* http://www.commoncause.org/policy-and-litigation/letters-to-government-officials/letter-to-sen-menendez-on-sec-riders.pdf. Moreover, the ban on spending FY 2016 funds to finalize a corporate disclosure rule expires at the end of September 2016, the end of the fiscal year.

It appears the agency is no closer to resolving the issue of whether there should be a corporate disclosure rule than it was in 2013, when the agency itself affirmatively and publicly suggested such a rule should be considered.

ARGUMENT

While mandamus is "an extraordinary remedy reserved for extraordinary circumstances," an "agency's unreasonable delay presents such a circumstance because it signals the breakdown of regulatory processes." *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) (internal quotation marks omitted). In such circumstances, mandamus is "necessary to protect [the court'] prospective jurisdiction.' *TRAC*, 750 F.2d 76. As this Circuit explained in *TRAC*, summarizing the views of both the D.C. Circuit and the Supreme Court,

> Because the statutory obligation of a Court of Appeals to review on the merits may be defeated by an agency that fails to resolve disputes, a Circuit Court may resolve claims of unreasonable delay in order to protect its future jurisdiction.

Id. (quotation and citations omitted). Courts will therefore "interfere with the normal progression of agency proceedings to correct transparent violations of a clear duty to act." *In re Am. Rivers & Idaho Rivers United*, 372 F.3d at 418.

In assessing whether a particular agency delay is sufficiently egregious to warrant mandamus relief, courts apply a "rule of reason" that looks to whether Congress has dictated either a time by which the agency must act or given some "other indication of the speed by which it expects the

agency to proceed," such as the agency's enabling statute. *TRAC*, 750 F.2d at 80. Other factors courts consider include, *inter alia*, "the effect of expediting delayed action on agency activities of a higher or competing priority" as well as 'the nature and extent of the interests prejudiced by delay[.]" *Id.* Further, a court "need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed." *Id.*

Here, the SEC has committed a "transparent violation[] of [its] clear duty to act," warranting the mandamus relief petitioner is requesting.

I. The SEC's Ongoing Failure to Act on the Rulemaking Petitions Defies Any "Rule of Reason."

The Administrative Procedure Act grants to all interested persons "the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). The APA places a corresponding duty on agencies receiving such petitions to respond "within a reasonable time." 5 U.S.C. § 555(b). If an agency fails to respond to a petition, a reviewing court may "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(i). The legislative history of the APA confirms agencies in receipt of rulemaking petitions must "fully and promptly consider them, take such action as may be required, and . . . notify the petitioner in case the request is denied." S. Rep. No. 752, 79th Cong., 1st Sess. (1945). *See also WWHT,*

Inc. v. FCC, 656 F.2d 807, 813 n.10 (D.C. Cir. 1981) ("it is also evident, from both the legislative history of the APA and the text of the Act itself, that an agency is required to give "prompt notice," along with a brief explanation, whenever petitions for rulemaking are denied."). Failure to respond to a rulemaking petition is subject to judicial review. *Id.; Nat'l Parks Conservation Ass'n v. Dep't of Interior*, 794 F. Supp. 2d 39, 44-45 (D.D.C. 2011).

Here, petitioner challenges the SEC's failure to comply with this statutory mandate by refusing to respond "promptly," or at all, to the rulemaking petitions at issue. Without question the requested rulemaking is well within the SEC's power to promulgate "such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest for the protection of investors," section 14(a), 15 U.S.C. § 78n(a),[8] and it is this statutory authority petitioner sought to invoke through the rulemaking petition. Yet the SEC has steadfastly refused to act since August 2011, when the first rulemaking petition was submitted. Although petitioner was not a signatory to this petition, his August 2013 petition expressly incorporates it by reference and was submitted to update the SEC on the newly available evidence that had emerged since the original petition was

[8] The SEC's internal decision in 2013 to consider issuing the requested corporate disclosure rule further underscores this conclusion.

filed on the impact of anonymous corporate money on our electoral system and the ineffectiveness of voluntary corporate disclosure policies.

In the intervening years, public support for a corporate disclosure rule has mushroomed. Congressional support for such a rule also has grown, as reflected in a December 22, 2015 bicameral letter to the SEC expressing the expectation the SEC will move forward with "discussing, planning, investigating or developing plans or possible proposals for a rule or regulation relating to the disclosure or political contribution" notwithstanding the funding ban the budget bill imposes. Letter to Mary Jo White, Chair, SEC, Dec. 22, 2015 ("Dec. Bicameral Letter"), *available at* http://democrats.budget.house.gov/press-release/van-hollen-leads-bicameral-letter-urging-sec-action-corporate-political-spending. As outlined in that letter, "[t]he case for disclosure is clear and convincing – purely as a matter of corporate governance and investor protection[.]" *Id.* This letter follows a letter sent to the SEC on August 31, 2015, from 44 Senators expressing their support for the rulemaking petition.[9]

Yet in the face of this mounting "clear and convincing" evidence supporting the requested rule, the increasing role corporate funds are playing

[9] Letter from William Henry Donaldson, Arthur Levitt, and Bevis Longstreth to Mary Jo White, Chair, SEC, May 27, 2015, *available at* http://corpgov.law.harvard.edu/wp-content/uploads/2015/06/2015060-Comissioners-Letter.pdf.

in our electoral system, and the SEC's own recognition of the value of such a rule, the SEC has done nothing. Years have passed since the first petition was filed, with no response whatsoever from the agency. Political pressures from some of the SEC's congressional overseers, who have indicted quite strongly they oppose any such regulation,[10] may account for the SEC's reluctance to proceed. Attempting to avoid a politically uncomfortable decision, the SEC may be hoping "the issue will disappear by sheer frustration[.]" *British Airways Bd. v. Port Auth. of New York & New Jersey*, 564 F.2d 1002, 1010 (2d Cir. 1977) ("There comes a time when relegating the solution of an issue to the indefinite future can so sap petitioners of hope and resources that a failure to resolve the issue within a reasonable period is tantamount to refusing to address it at all."). Given this background, under any rational interpretation, the SEC's regulatory inertia defies any rule of reason.

II. The Nature and Extent of the Interests Prejudiced By Delay Justify the Requested Mandamus Relief.

The significance of the requested disclosure rule to our campaign finance system and the investors whose interests the SEC is charged with

[10] *See, e.g.*, Dina ElBoghdady, SEC Pressed to Abandon Corporate Political Spending Disclosures Petition, *Washington Post*, May 16, 2013, *available at* http://www.washingtonpost.com/business/economy/sec-pressed-to-abandon-corporate-political-spending-disclosures-petition/2013/05/16/d76b782e-be55-11e2-97d4-a479289a31f9_story.html.

protecting cannot be overstated. The December 22, 2015 congressional bicameral letter explains that

> [t]he ability of corporate executives to spend company resources for political purposes without shareholders' knowledge raises significant investor protection and corporate governance concerns. Without transparency or disclosure, executives are free to spend funds invested by shareholders without accountability or monitoring.

Dec. Bicameral Letter. As members explained, "[t]he case for disclosure is clear and convincing . . . This information is material to how shareholders decide where to invest their money and how to vote in corporate elections." *Id.* Public companies spending shareholder money "to influence elections and government policy," have created a situation where "investors will continue to be left in the dark with no way of knowing whether executives are spending funds on political causes or campaigns that may be directly adverse to shareholders' interests." *Id.*

In situations like this, the securities laws perform a vital public service[.]" *Clemente Global Growth Fund, Inc. v. Pickens*, 705 F. Supp. 958, 971 (S.D.N.Y. 1988) (citation omitted). Many of the statute's protections "'stemmed from a congressional belief that '[f]air corporate suffrage is an important right,'" *id.*, quoting H.R. Rep. No. 1383, 73rd Cong., 2d Sess., at 13 (1934), and through the Exchange Act Congress sought to "preserv[e] for all shareholders who are entitled to vote . . . the

right to make decisions based on information that is not false or misleading." *Id.* (quotation omitted).

Those rights are implicated directly by petitioner's rulemaking request, which seeks to provide investors with the information they need to make decisions that are in their best interests and the interests of the public companies in which they have invested. The SEC's refusal to act on the pending rulemaking petitions conflicts directly with the SEC's statutory responsibility to protect those interests. Given the prejudice to these important public interests, the requested mandamus relief clearly is warranted.

III. Other SEC Proceedings Do Not Justify the SEC's Extraordinary Delay.

Finally, there is no evidence the SEC has delayed acting on the pending rulemaking petitions because of other more pressing agency proceedings. The agency has addressed all of the mandatory rulemaking provisions imposed by the Dodd-Frank Act, leaving it free to address the issue of a corporate disclosure rule.[11] As discussed *supra*, the delay likely is due to the hostility some congressional overseers have expressed toward a corporate disclosure rule for political reasons that are divorced from the

[11] *See* SEC, "Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act," *available at* http://www.sec.gov/spotlight/dodd-frank.shmtl.

merits of the requested rule. That the SEC's chair has faced open hostility during congressional hearings does not justify the agency's years-long inaction.

CONCLUSION

For the foregoing reasons Stephen M. Silberstein respectfully requests that the Court grant his petition and compel the SEC to take all steps necessary to propose a corporate disclosure rule, including discussing, investigating, planning, and developing a draft proposal, within 30 days of the Court's decision.

Respectfully submitted,

Anne L. Weismann
D.C. Bar No. 298190
Campaign for Accountability
1201 Connecticut Avenue, N.W., Suite 300
Washington, D.C. 20036
(202) 780-5750
aweismann@campaignforaccountability.org

Counsel for Stephen M. Silberstein

Dated: February 8, 2016

APPENDIX

STEPHEN M. SILBERSTEIN, Plaintiff, v. U.S. SECURITIES AND EXCHANGE COMMISSION, Defendants.

Civil Action No. 15-722 (RMC)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

2016 U.S. Dist. LEXIS 284

January 4, 2016, Decided
January 4, 2016, Filed

COUNSEL: [*1] For STEPHEN SILBERSTEIN, Plaintiff: Anne L. Weismann, CAMPAIGN FOR ACOUNTABILITY, Washington, DC.

For U.S. SECURITIES AND EXCHANGE COMMISSION, Defendant: Paul G. Alvarez, Thomas Jeffrey Karr, LEAD ATTORNEYS, SECURITIES & EXCHANGE COMMISSION, Washington, DC; William K. Shirey, LEAD ATTORNEY, SECURITIES AND EXCHANGE COMMISSION, General Counsel's Office, Washington, DC.

JUDGES: ROSEMARY M. COLLYER, United States District Judge.

OPINION BY: ROSEMARY M. COLLYER

OPINION

Stephen M. Silberstein strongly believes that the Securities and Exchange Commission (SEC) should adopt a rule requiring publicly traded corporations to disclose to shareholders and the public their use of corporate funds for political activities. On May 8, 2014, Mr. Silberstein and Citizens for Responsibility and Ethics in Washington (CREW) submitted a petition for rulemaking to the SEC.[1] Since the SEC has not responded to this petition, Mr. Silberstein sued the SEC under the Administrative Procedure Act to challenge the agency's inaction as arbitrary, capricious, and contrary to law, as well as to compel the SEC to act on his petition. The SEC moves to dismiss the Complaint in its entirety. *See* Mot. to Dismiss [Dkt. 8] (MTD). Mr. Silberstein filed a timely [*2] opposition to the motion, to which the SEC replied. For the reasons that follow, the Court will grant the motion to dismiss.

1 CREW is not a party in the instant case.

I. FACTS

Mr. Silberstein, a shareholder in Aetna, Inc., "has a longstanding interest in issues pertaining to corporate governance and responsibility," particularly the promotion of greater oversight and transparency concerning the political contributions of Aetna and other publicly traded companies. Am. Compl. [Dkt. 7] ∂ 4. Mr. Silberstein claims that without regulation to require "greater transparency in the political contributions of Aetna and other publicly traded companies in which [he] owns stock," he cannot properly fulfill "his shareholder duties, as he cannot determine whether those contributions are in the best interests of the companies." *Id.* ∂ 5.

In 2013, the SEC's Division of Corporation Finance announced that it would consider "whether to recommend that the Commission issue a proposed rule" on this matter. *Id.* ∂ 4. No proposal was ever issued. Therefore, on May 8, 2014, Mr. Silberstein and CREW submitted an amended petition for rulemaking requesting SEC to create a rule establishing a disclosure requirement.[2] Despite [*3] the petition, "the SEC's Agency Rule List for the Fall of 2014, issued on November 21, 2014, continued to omit any reference to such [a] rule." *Id.* ∂ 34.

2 Mr. Silberstein's petition resembles a petition filed on August 3, 2011 by the Committee on Disclosure of Corporate Political Spending (CDCPS). This 2011 petition has garnered ample

public support. Neither Mr. Silberstein nor CREW were signatories to CDCPS's 2011 petition. Similarly, neither CDCPS nor any of its members joined the petition in the instant case.

On May 13, 2015, Mr. Silberstein filed a one-count complaint under the Administrative Procedure Act (APA), *5 U.S.C. ß 500 et seq.*, alleging that SEC'S failure to respond to Mr. Silberstein's petition was arbitrary, capricious, and contrary to law. First Compl. [Dkt. 1] ∂∂ 39-41. On July 13, 2015, SEC moved to dismiss the complaint for failure to state a claim and Mr. Silberstein, in turn, filed a two-count amended complaint on July 16, 2015. Count I incorporates the allegations and the single count of the First Complaint. Am. Compl. ∂ 40. Count II alleges that the SEC's inaction constitutes an "effective denial" of the rulemaking petition that was arbitrary, capricious, and contrary to law. *Id.* ∂∂ [*4] 47-48.

Specifically, Mr. Silberstein is seeking declaratory relief that the SEC's failure to respond to the petition (Count I) and failure to grant the petition (Count II) violated *ßß 553* and *555* of the APA.[3] He also seeks injunctive relief under *ß 706(1)* to compel the SEC to respond immediately to the petition (Count I) and to initiate a rulemaking proceeding (Count II).[4] *Id.* ∂∂ 42-43, 49-50. SEC now moves to dismiss the Amended Complaint under *Rules 12(b)(1)* and *12(b)(6) of the Federal Rules of Civil Procedure*.

3 The APA grants to all interested persons "the right to petition for the issuance . . . of a rule," *5 U.S.C. ß 555(e)*, and requires agencies to respond to such petitions "within a reasonable time," *5 U.S.C. ß 555(b)*.

4 The APA authorizes reviewing courts to "compel agency action unlawfully withheld or unreasonably delayed." *5 U.S.C. ß 706(1)*.

II. LEGAL STANDARDS

A. Motion to Dismiss Under *Rule 12(b)(1)*

Pursuant to *Federal Rule of Civil Procedure 12(b)(1)*, a defendant may move to dismiss a complaint, or any portion thereof, for lack of subject matter jurisdiction. *Fed. R. Civ. P. 12(b)(1)*. No action of the parties can confer subject matter jurisdiction on a federal court because subject matter jurisdiction is both a statutory requirement and an Article III requirement. *Akinseye v. District of Columbia, 339 F.3d 970, 971, 358 U.S. App. D.C. 56 (D.C. Cir. 2003)*. The party claiming subject matter jurisdiction bears the burden of demonstrating that such jurisdiction exists. [*5] *Khadr v. United States, 529 F.3d 1112, 1115, 381 U.S. App. D.C. 408 (D.C. Cir. 2008)*; *see Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)* (noting that federal courts are courts of limited jurisdiction and "[i]t is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction") (internal citations omitted).

When reviewing a motion to dismiss for lack of jurisdiction under *Rule 12(b)(1)*, a court should "assume the truth of all material factual allegations in the complaint and 'construe the complaint liberally, granting the plaintiff the benefit of all inferences that can be derived from the facts alleged.'" *Am. Nat'l Ins. Co. v. FDIC, 642 F.3d 1137, 1139, 395 U.S. App. D.C. 316 (D.C. Cir. 2011)* (quoting *Thomas v. Principi, 394 F.3d 970, 972, 364 U.S. App. D.C. 326 (D.C. Cir. 2005)*). Nevertheless, "the court need not accept factual inferences drawn by plaintiffs if those inferences are not supported by facts alleged in the complaint, nor must the Court accept plaintiff's legal conclusions." *Speelman v. United States, 461 F. Supp. 2d 71, 73 (D.D.C. 2006)*.

B. Motion to Dismiss Under *Rule 12(b)(6)*

A motion to dismiss for failure to state a claim pursuant to *Federal Rule of Civil Procedure 12(b)(6)* challenges the adequacy of a complaint on its face. *Fed. R. Civ. P. 12(b)(6)*. A complaint must be sufficient "to give a defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (internal citations omitted). Although a complaint does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of [*6] his entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* A court must treat the complaint's factual allegations as true, "even if doubtful in fact," *id.*, but a court need not accept as true legal conclusions set forth in a complaint, *see Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is "plausible on its face." *Twombly, 550 U.S. at 570*. A complaint must allege sufficient facts that would allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678-79*.

III. ANALYSIS

SEC argues that the Court lacks jurisdiction to consider Count I because exclusive jurisdiction is vested in the courts of appeals pursuant to the Securities Exchange Act of 1934 (Exchange Act), *15 U.S.C. ß 78a et seq.* It also argues that Count II should be dismissed because it seeks to compel the SEC to initiate a rulemaking proceeding that falls within the SEC's "broad discretionary

powers" under Section 14(a) of the Exchange Act, *15 U.S.C. ß 78n(a)*. Mr. Silberstein opposes both arguments.

A. Count I -- Failure to Respond

The Supreme Court has held that "absent a firm indication [*7] that Congress intended to locate initial APA review of agency action in the district courts, we will not presume that Congress intended to depart from the sound policy of placing initial APA review in the courts of appeals." *Florida Power & Light Co. Lorion, 470 U.S. 729, 745, 105 S. Ct. 1598, 84 L. Ed. 2d 643 (1985)*. It is also well-established in this Circuit that "where a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the exclusive review of the Court of Appeals." *Telecomm. Research and Action Center v. F.C.C., 750 F.2d 70, 75, 242 U.S. App. D.C. 222 (D.C. Cir. 1984) (TRAC)*. Moreover, "a statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute." *Id. at 77*.

In the instant case, *Section 25(a)(1)* of the Exchange Act provides:

> A person aggrieved by a final order of the [SEC] entered pursuant to this chapter may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit, by filing in such court, within sixty days after the entry of the order, a written petition requesting that the order be modified or set aside in whole or in part.

15 U.S.C. ß 78y(a)(1). Therefore, the Exchange Act makes clear that review of all [*8] "final order[s]" lies in the circuit courts of appeals -- not in the district courts. *See, e.g., Am. Petroleum Institute v. SEC, 714 F.3d 1329, 1333, 404 U.S. App. D.C. 407 (D.C. Cir. 2013) (API)* ("*Section 25(a)* gives us jurisdiction over challenges to all final orders . . . ."); *Watts v. SEC, 482 F.3d 501, 505, 375 U.S. App. D.C. 409 (D.C. Cir. 2007)* (holding that *Section 25(a)* is a direct-review provision that "specifically gives the courts of appeals subject-matter jurisdiction to directly review . . . SEC 'orders.'"); *Indep. Broker-Dealers' Trade Ass'n v. SEC, 442 F.2d 132, 142, 142 U.S. App. D.C. 384 (D.C. Cir. 1971)* (noting that *Section 25(a)* was "intended to provide direct review" in the courts of appeals of SEC orders).

In light of *Section 25(a)*, neither potential response to Mr. Silberstein's petition for rulemaking -- a final order denying or granting the petition -- would be reviewable by this Court. *Cf. FCC v. ITT World Commc'ns, Inc., 466 U.S. 463, 468, 104 S. Ct. 1936, 80 L. Ed. 2d 480 (1984)* ("Exclusive jurisdiction for review of final FCC orders, such as the FCC's denial of respondents' rulemaking petition, lies in the Court of Appeals . . . ."); *Action on Smok ing & Health v. Dep't of Labor, 28 F.3d 162, 165, 307 U.S. App. D.C. 295 (D.C. Cir. 1994)* (holding that issuance of a notice of proposed rulemaking is not subject to court review because it does not "impose[] an obligation, den[y] a right, or fix[] some legal relationship") (citation omitted). When the discrete agency action sought -- a final SEC order on a petition for rulemaking -- is itself reviewable exclusively by a circuit court, then an APA unreasonable delay claim is also reviewable exclusively by a circuit. [*9] *See TRAC, 750 F.2d at 76* ("Because the statutory obligation of a Court of Appeals to review on the merits may be defeated by an agency that fails to resolve disputes, a Circuit Court may resolve claims of unreasonable delay [pursuant to the All Writs Act] in order to protect its future jurisdiction.") (citations omitted). As the D.C. Circuit stated, "It would be anomalous to hold that this grant of authority only strips the District Court of general federal question jurisdiction under *28 U.S.C. ß 1331* when the Circuit Court has present jurisdiction under a special review statute, but not when the Circuit Court has immediate jurisdiction under the All Writs Act in aid of its future statutory review power." *Id. at 77*. Accordingly, *TRAC* makes clear that this Court does not have jurisdiction to hear Mr. Silberstein's unreasonable delay claim in Count I.

Mr. Silberstein argues that the Circuit's exclusive jurisdiction over final agency orders does not preclude this Court from hearing unreasonable delay claims under the APA. To support this proposition, Mr. Silberstein points out that *Section 25(b)(1)* of the Exchange Act vests exclusive jurisdiction in the courts of appeals over challenges to rules promulgated pursuant to certain specified sections [*10] of the Exchange Act -- namely, *ßß 78f, 78i(h)(2), 78k, 78k-1, 78o(c)(5)* or *(6), 78o-3, 78q-1*, or *78s. See 15 U.S.C. ß 78y(b)(1)*; *see also API, 714 F.3d at 1333* (holding that "*section 25(b)* not only expressly authorizes appellate review of agency rules, but it limits that review to rules issued pursuant to specific provisions of the Exchange Act, leaving all others to be challenged in the district court"). Mr. Silberstein points out that his challenge involves a petition for the SEC to promulgate a rule under *section 14(a)* of the Exchange Act, *15 U.S.C. ß 78n(a)* -- a provision that is not enumerated in *section 25(b)*. Mr. Silberstein contends that this fact alone means that his unreasonable delay claim is within the class of claims properly heard in district court. The Court disagrees.

Mr. Silberstein's reliance on *section 25(b)* is misplaced. It is true that *section 25(b)*'s jurisdictional grant is narrower than that conferred by *section 25(a)*. However, *section 25(b)(1)* involves challenges to final rules promulgated pursuant to specific enumerated provisions of the Exchange Act. *See 15 U.S.C. ß 78y(b)(1)*; *see also API, 714 F.3d at 1333* (noting that *section 25(a)* provides for direct court of appeals review of final orders and *section 25(b)* provides for such review of certain final rules). There is no final rule in the instant case. Therefore, *section 25(b)(1)* is inapplicable.

Unlike the plaintiff in *API*, Mr. Silberstein is not challenging a final or completed SEC *rule* [*11] . In Count I, Mr. Silberstein only challenges the SEC's failure to respond to his rulemaking petition. He also asks the Court to compel the SEC to respond to his petition and not to promulgate the rule itself. Only *section 25(a)* is implicated here and neither *section 25(b)(1)* nor *API* is relevant to Mr. Silberstein's claim.[5] Therefore, as discussed above, *section 25(a)* and *TRAC* preclude this Court from hearing Mr. Silberstein's unreasonable delay challenge and his claim to compel a response to his rulemaking petition. *See TRAC, 750 F.2d at 75-79*. For the foregoing reasons, Count I must be dismissed without prejudice for lack of jurisdiction.

> 5 The rule at issue in *API* was required by Congress in the Dodd-Frank Act and was promulgated under *section 13(q)* of the Exchange Act. *See API, 714 F.3d at 1330-1331*. Unlike the *section 14(a)* discretionary rulemaking sought in this case, a rule that is statutorily required -- such as the one in *API* -- would not implicate *section 25(a)*'s jurisdictional grant because SEC could not issue a final order refusing to undertake mandatory rulemaking. *See Oxfam Am. v. SEC, 14-cv-13648-DJC, 2015 U.S. Dist. LEXIS 116982 (D. Mass.)* (asking district court to compel SEC to promulgate a revised version of the rule at issue in *API*). On the other hand, since SEC could deny a petition for discretionary rulemaking, a challenge to compel a response to such petition is not reviewable by a district court as it would affect a circuit court's jurisdiction under *section 25(a)*. Accordingly, this Court lacks jurisdiction over the relief sought in Count I because Mr. Silberstein's action does not involve the [*12] promulgation of a statutorily required rule.

B. Count II -- Failure to Grant the Petition

An APA "claim under *ß 706(1)* can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 64, 124 S. Ct. 2373, 159 L. Ed. 2d 137 (2004)* (emphasis in original). "While courts are empowered 'to compel agency action unlawfully withheld or unreasonable delayed,' *5 U.S.C. ß 706(1)*, a court may only do so . . . when the agency has failed to act in response to a clear legal duty." *Citizens for Responsibility and Ethics in Washington v. SEC, 916 F. Supp. 2d 141, 148 (D.D.C. 2013)* (*CREW*) (citing *Norton, 542 U.S. at 63-64*).

In the instant case, Mr. Silberstein seeks the promulgation of a rule pursuant to SEC's "broad discretionary powers" under *section 14(a)* of the Exchange Act. Am. Compl. ∂∂ 7-8. *Section 14(a)* recognizes SEC's discretion to promulgate rules and regulations governing the disclosures that companies must make during the proxy selection process. *15 U.S.C. ß 78n(a)* (providing that SEC "*may* prescribe" rules and regulations) (emphasis added). As the D.C. Circuit has stated, "the [SEC] has been vested by Congress with broad discretionary powers to promulgate (or not to promulgate) rules requiring disclosure of information beyond that specifically required by statute." *Natural Res. Def. Council, Inc. v. SEC, 606 F.2d 1031, 1045, 196 U.S. App. D.C. 124 (D.C. Cir. 1979)*. Congress did not cast "disclosure rules in stone," but rather "opted to rely on the discretion and [*13] expertise of the SEC for a determination of what types of additional disclosure would be desirable." *Id.*

Mr. Silberstein does not dispute any of this. *See* Opp'n 13-15. Instead, he characterizes SEC's failure to act as an "effective denial" of his petition for rulemaking. *Id.* at 15. Mr. Silberstein claims that SEC was required to provide a sufficient explanation to support its denial of the petition. Since SEC failed to provide such explanation, Mr. Silberstein contends that Count II should proceed.[6]

> 6 Mr. Silberstein fails to cite any cases in support of the proposition that SEC's failure to act is tantamount to a denial. Mr. Silberstein also fails to recognize that, even if Count II were construed as a challenge to SEC's denial of his rulemaking petition, the D.C. Circuit would have exclusive jurisdiction over such challenge pursuant to *TRAC* and *section 25(a)(1)* of the Exchange Act. *See supra* analysis of Count I.

The problem is that SEC did not deny the petition; it merely failed to respond to it. In *Norton*, the Supreme Court distinguished a "failure to act" from a "denial" and stated that "[t]he latter is the agency's act of saying no to a request; the former is simply the omission of an action without formally rejecting a [*14] request -- for example, the failure to promulgate a rule or take some decision by a statutory deadline." *Norton, 542 U.S. at 63*. Since the SEC has not denied the petition and Mr. Silberstein has not asserted that the SEC "failed to act in re-

sponse to a clear legal duty," it follows that he failed to state a valid APA claim upon which relief can be granted. *CREW, 916 F. Supp. 2d at 148*. Count II must be dismissed with prejudice.

IV. CONCLUSION

For the foregoing reasons, the Court will grant the SEC's Motion to Dismiss, Dkt. 8, and dismiss the Amended Complaint in its entirety, Dkt. 7. Count I will be dismissed without prejudice for lack of jurisdiction and Count II will be dismissed with prejudice for failure to state a claim. A memorializing Order accompanies this Memorandum Opinion.

Date: January 4, 2016

/s/ ROSEMARY M. COLLYER

United States District Judge

ORDER

For the reasons set forth in the Opinion issued simultaneously with this Order, it is hereby

ORDERED that the U.S. Securities and Exchange Commission's Motion to Dismiss, Dkt. 8, is **GRANTED**; and it is

FURTHER ORDERED that this case is **DISMISSED** as follows: (1) Count I is **DISMISSED** without prejudice for lack of jurisdiction; (2) Count II is **DISMISSED** with prejudice for failure to state [*15] claim upon which relief can be granted.

This is a final appealable Order. *See Fed. R. App. 4(a)*. This case is closed.

Date: January 4, 2016

/s/ ROSEMARY M. COLLYER

United States District Judge

In this situation of a patently unreasonably agency delay, this Court should exercise its statutory authority to issue a writ of mandamus requiring the SEC to act on petitioner's rulemaking request. The agency has offered no justification whatsoever for its ongoing inaction on a matter its own Division of Corporate Finance has deemed worthy of consideration. Continued refusal by the SEC to fulfill its statutory duty to act on the petition will harm the public, investors, and our campaign finance system, while denying petitioner an opportunity for judicial review of the merits of his petition.

JURISDICTION

As the district court held in *Silberstein v. SEC*, No. 15-722 (RMC),[1] 2016 U.S. Dist. LEXIS 284 (D.D.C. Jan. 4, 2016), this Court possesses exclusive and original jurisdiction over this petition pursuant to the Securities Exchange Act of 1934, 15 U.S.C. § 78(a)(1) ("Exchange Act"), a provision interpreted by this Court in *Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984) ("*TRAC*"), as granting this Court jurisdiction over both final agency orders issued under the Exchange Act and unreasonable agency delay claims. This Court also has jurisdiction over the claim at issue pursuant to the Administrative Procedure Act ("APA"), 5

[1] A copy of this decision is included in the attached Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

On May 8, 2014, investor Stephen Silberstein along with non-petitioner Citizens for Responsibility and Ethics in Washington ("CREW") filed a petition for rulemaking requesting that the Securities and Exchange Commission ("SEC") address a serious and persistent gap in the disclosure obligations the agency imposes on public corporations by requiring corporations to disclose to shareholders and the public alike their use of corporate funds for political activities. One year earlier, the SEC's Division of Corporate Finance had announced it would consider recommending the agency issue the rule petitioner's rulemaking petition requests. Despite this public commitment to consider this issue and overwhelming and unprecedented public support for the requested rulemaking, the SEC has refused to act in any way on Mr. Silberstein's petition. With its refusal to act, the SEC has ignored the more than one million public comments in support of the corporate disclosure rule Mr. Silberstein seeks. Not only has this inaction on the SEC's part kept the public in the dark about corporate political spending, it has allowed the flood of anonymous or "dark" corporate money pouring into our elections to continue at ever increasing levels, with no accountability to shareholders.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

Stephen M. Silberstein

Securities and Exchange Commission

B. Rulings Under Review

The petitioner challenges the SEC's unreasonable failure to respond to his petition for rulemaking, submitted on May 8, 2014,[1] requesting that the SEC act on its publicly stated intention to consider a rule requiring publicly traded companies to disclose publicly their use of corporate funds for political activities.

C. Related Cases

There are no related cases.

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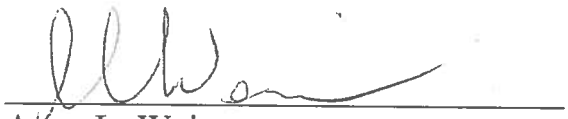
[1] Petitioner submitted the rulemaking petition along with Citizens for Responsibility and Ethics in Washington ("CREW"). CREW is not a party to this petition.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February, 2016, a copy of the foregoing Petition for Writ of Mandamus was served by first-class mail, postage prepaid, on the following:

Thomas J. Karr
William K. Shirey
Paul G. Alvarez
Office of the General Counsel
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549



Anne L. Weismann