

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

PHILIP J. BERG,	:
	:
Plaintiff	:
	:
v.	: Civ. Action No. 2:08-cv-04083-RBS
	:
BARACK OBAMA, et al.,	:
	:
Defendants	:
_____	:

ORDER

AND NOW, this ____ day of _____, 2008, upon consideration of the Motion of Defendants Democratic National Committee and Senator Barack Obama to Dismiss First Amended Complaint, and of the submissions of the parties relating thereto, it is hereby ORDERED that said Motion is GRANTED.

BY THE COURT:

Surrick, J.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

PHILIP J. BERG,	:	
	:	
Plaintiff	:	
	:	
v.	:	Civ. Action No. 2:08-cv-04083-RBS
	:	
BARACK OBAMA, et al.,	:	
	:	
Defendants	:	
	:	

**MOTION OF DEFENDANTS DEMOCRATIC NATIONAL COMMITTEE
AND SENATOR BARACK OBAMA TO DISMISS
FIRST AMENDED COMPLAINT**

Pursuant to Fed. R. Civ. P. 12(b)(1), and 12(b)(6), defendants Democratic National Committee and Senator Barack Obama respectfully move the Court for an order dismissing plaintiff’s First Amended Complaint on the grounds that this Court lacks subject-matter jurisdiction over the claim asserted and that the First Amended Complaint fails to state a claim upon which relief can be granted.

Pursuant to Local Rule 7.1, accompanying this Motion is a Memorandum of Law in Support of Motion to Dismiss and a proposed Order.

Respectfully submitted,

Dated: October 20, 2008

/s/ John P. Lavelle, Jr.
 John P. Lavelle, Jr.
 Attorney I.D. PA 54279
 BALLARD SPAHR ANDREWS & INGERSOLL,
 LLP
 1735 Market Street, 51st Floor
 Philadelphia, PA 19103
 (215) 864-8603
 (215) 864-9125 (Fax)
lavellej@ballardspahr.com

Of counsel:

Joseph E. Sandler
General Counsel, Democratic National Committee
SANDLER, REIFF & YOUNG, P.C.
300 M Street, S.E. #1102
Washington, D.C. 20003
Telephone: (202) 479-1111
Fax: (202) 479-1115

Robert F. Bauer
General Counsel, Obama for America
PERKINS COIE
607 Fourteenth Street, N.W.
Washington, D.C. 20005-2003
Telephone: (202) 628-6600
Facsimile: (202) 434-1690
RBauer@perkinscoie.com

Attorneys for Defendants
Senator Barack Obama and
Democratic National Committee

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

PHILIP J. BERG,	:	
	:	
Plaintiff	:	
	:	
v.	:	Civil Action No. 2:08-cv-04083-RBS
	:	
BARACK OBAMA, et al.,	:	
	:	
Defendants.	:	
	:	

**MEMORANDUM OF LAW OF DEFENDANT DEMOCRATIC NATIONAL
COMMITTEE AND DEFENDANT SENATOR BARACK OBAMA
IN SUPPORT OF DEFENDANTS’ MOTION TO DISMISS
FIRST AMENDED COMPLAINT**

On September 24, 2008, Defendants Democratic National Committee (“DNC”) and Senator Barack Obama filed a motion to dismiss the original Complaint filed in this case, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), on the grounds that the Court lacks subject matter jurisdiction over the claims asserted and that the Complaint fails to state a claim upon which relief can be granted. On October 6, 2008, plaintiff Philip Berg filed a Motion for Leave to File a First Amended Complaint, together with a First Amended Complaint for Declaratory and Injunctive Relief (“Amended Complaint”). Assuming that no leave to amend is required under Fed. R. Civ. P. 15(a) because defendants have not filed a responsive pleading,¹ the First Amended Complaint should

¹ A motion to dismiss does not constitute a responsive pleading for purposes of Rule 15(a). *E.g., Shane v. Fauver*, 213 F.3d 113, 115 (3d Cir. 2000). Plaintiff has nevertheless filed a Motion for Leave to File a First Amended Complaint rather than simply filing his proposed First Amended Complaint. Regardless of the procedural posture, Plaintiff’s First Amended Complaint fails to state a claim, and must be

nevertheless be dismissed, on the same grounds. No amendment to the Complaint can possibly cure its fundamental defects. Not only are the allegations patently false, but plaintiff lacks standing and there is no federal cause of action for enforcement of Article II of the Constitution. Nor has plaintiff set forth, in the Amended Complaint, any other viable federal cause of action.

I. The Amended Complaint

The basis of plaintiff's Amended Complaint is the same as that of his original complaint: the entirely false and baseless allegation that Senator Barack Obama, the Democratic Party's nominee for President of the United States is not a natural born citizen and is therefore ineligible to run for President. Amended Complaint ¶ 6, *passim*.

Plaintiff has added four new defendants: the Pennsylvania Bureau of Commissions, Elections and Legislation; Pedro Cortes, the Secretary of the Commonwealth of Pennsylvania; the United States Senate Committee on Rules and Administration; and Senator Diane Feinstein (D-CA), Chair of the U.S. Senate Commission on Rules and Administration. Amended Complaint ¶¶ 21 – 24. In addition to the causes of action included in the original complaint, the Amended Complaint purports to assert new causes of action under the Civil Rights Act, 42 U.S.C. §§1983, 1985 and 1986; the Federal Election Campaign Act of 1971 as amended, 2 U.S.C. §§431 *et seq.*; the Freedom of Information Act, 5 U.S.C. §552; and the Immigration and Nationality Act, 8 U.S.C. §1481.

dismissed. *See Lorenz v. CSX Corp.*, 1 F.3d 1406, 1414 (3d Cir. 1993) (denial of leave to amend may be based on “futility of amendment”); *Jablonski v. Pan American World Airways*, 863 F.2d 289, 292 (3d Cir. 1988) (amendment is considered futile “if the amendment will not cure the deficiency in the original complaint or if the amended complaint cannot withstand a motion to dismiss”) citing *Massarsky v. General Motors Corp.*, 706 F.2d 111, 125 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983).

II. Discussion

Plaintiff's Amended Complaint should be dismissed because the Court lacks subject matter jurisdiction and the Amended Complaint fails to state a claim upon which relief can be granted. *First*, no amendment can cure the fundamental jurisdictional deficiency in the original complaint: plaintiff's lack of standing to challenge the qualifications of a candidate for President of the United States. Regardless of what cause of action plaintiff might attempt to assert, plaintiff cannot possibly show any actual particularized injury to himself by reason of the alleged lack of qualifications of a candidate for President. *Hollander v. McCain*, 2008 U.S. Dist. LEXIS 56729 (D.N.H. 2008); *Jones v. Bush*, 122 F. Supp.2d 713 (N.D. Tex.), *aff'd w/o opinion*, 244 F.3d 134 (5th Cir. 2000).

Second, for the reasons stated in defendants' Motion to Dismiss the original complaint, the Amended Complaint fails to state a cause of action under Article II of the Constitution or the Declaratory Judgment Act.

Third, none of the additional counts contained in the Amended Complaint sets forth any viable federal cause of action. With respect to Counts Two, Three and Four, invoking the Civil Rights Acts, it is clear that the Amended Complaint does not set out factual allegations sufficient to state a claim under sections 1983, 1985 or 1986. "To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *Harvey v. Plains Township Police Dep't*, 421 F.3d 185 (3d cir. 2005), *quoting West v. Atkins*, 487 U.S. 42, 48 (1988). The Amended Complaint does not set forth any specific allegations that would show any

deprivation of plaintiff's constitutional or statutory rights by virtue of the DNC or Senator Obama exercising any state governmental authority. *See* Amended Complaint ¶¶91-108. The Complaint lacks any allegations of conspiracy sufficient to establish a cause of action under section 1985. *See, e.g., Conroy v. City of Philadelphia*, 421 F. Supp. 2d 879, 888 (E.D. Pa. 2006)(§1985 conspiracy claims "must be pled with some degree of specificity"). And section 1986 requires a predicate violation of section 1985. *Id.*

As to Count Five of the Amended Complaint, there is no private right of action to enforce the Federal Election Campaign Act unless and until an administrative complaint has been filed with the Federal Election Commission and the FEC has disposed of or failed to act on that complaint. *E.g., Perot v. Federal Election Comm'n*, 97 F.3d 553, 557-58 (D.C. Cir. 1996), *cert. denied sub nom Hagelin v. FEC*, 520 U.S. 1210 (1997). Plaintiff does not allege that he has filed any administrative complaint with the FEC.

As to Count Six, no cause of action can be asserted against the DNC or Senator Obama under the Freedom of Information Act, 5 U.S.C. §552, as neither is a federal agency subject to the provisions of FOIA. And finally, with respect to Count Seven, there is no private right of action under the Immigration and Nationality Act or any other statute to have a federal court make a determination under that Act about a third person.

For these reasons, the First Amended Complaint does not state a cause of action upon which relief can be granted.

CONCLUSION

For the reasons set forth above, plaintiff's First Amended Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

Respectfully submitted,

Dated: October 20, 2008

/s/ John P. Lavelle, Jr.
John P. Lavelle, Jr.
Attorney I.D. PA 54279
BALLARD SPAHR ANDREWS & INGERSOLL,
LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
(215) 864-8603
(215) 864-9125 (Fax)
lavellej@ballardspahr.com

Of counsel:

Joseph E. Sandler
General Counsel, Democratic National Committee
SANDLER, REIFF & YOUNG, P.C.
300 M Street, S.E. #1102
Washington, D.C. 20003
Telephone: (202) 479-1111
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607 Fourteenth Street, N.W.
Washington, D.C. 20005-2003
Telephone: (202) 628-6600
Facsimile: (202) 434-1690
RBauer@perkinscoie.com

Attorneys for Defendants
Senator Barack Obama and
Democratic National Committee

CERTIFICATE OF SERVICE

I hereby certify that on this day, a true and correct copy of the foregoing
**Motion of Defendants Democratic National Committee and Senator Barack Obama
to Dismiss First Amended Complaint and Memorandum of Law in Support thereof**
was served by First Class U.S. Mail, postage prepaid, upon the following:

Philip J. Berg, Esquire
555 Andorra Glen Court, Suite 12
Lafayette Hill, PA 19444-2531

Plaintiff

Dated: October 20, 2008

/s/ John P. Lavelle, Jr.

John P. Lavelle, Jr.