

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division



JULIEN MODICA and JULIEN)
MODICA FOR U.S. SENATE,)
Plaintiffs,)
)
v.)
)
ASSOCIATED PRESS, VIRGINIA)
CAPITOL CORRESPONDENTS)
ASSOCIATION, and BOB LEWIS,)
Defendants.)
)

Case No. 1:11cv1250

ORDER

The matter is before the Court on the motion to dismiss for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1), Fed. R. Civ. P., and for failure to state a claim pursuant to Rule 12(b)(6), Fed. R. Civ. P., of defendants Associated Press (“AP”), Virginia Capitol Correspondents Association (“VCCA”), and Bob Lewis (“Lewis”). In essence, plaintiffs Julien Modica and Modica for U.S. Senate (collectively “Modica”) allege that defendants’ decision to exclude Modica from a forthcoming debate organized by defendants violates federal law in several respects. The motion has been fully briefed and argued, and the matter is now ripe for disposition.

I.

Modica is a candidate for one of Virginia’s two U.S. Senate seats, an election for which will be held in November 2012. He seeks the nomination of the Democratic Party for this position. Defendant AP is a non-profit news dissemination service. Defendant VCCA is a non-profit association of Virginia journalists who cover state politics. Defendant Lewis is a political reporter for AP.

The instant dispute arises from Modica's exclusion from a forthcoming debate organized by the AP and VCCA that will include only U.S. Senate candidates from Virginia who satisfy the following criteria: (i) the candidate "must average 15 percent or better in established and published non-candidate primary polls by Nov. 15, 2011," and (ii) the candidate "needs to have raised at least one-fifth as much money as the front runner . . . in the race for the Virginia U.S. Senate seat by Nov. 15, 2011." Lewis Decl. ¶ 6. Although Modica contends that he satisfies the financial condition, nowhere in his pleadings does Modica demonstrate or otherwise allege that he satisfies the polling condition. Apparently, former Virginia governors Tim Kaine (Democrat) and George Allen (Republican) are the only two candidates who satisfy both criteria and thus are the only two candidates who will appear at the debate, which is currently scheduled for December 7, 2011.

Invoking federal-question jurisdiction pursuant to 28 U.S.C. § 1331, Modica filed the instant complaint on November 15, 2011. Specifically, Modica claims that defendants violated numerous federal constitutional and statutory guarantees, namely, the First Amendment of the U.S. Constitution (via 42 U.S.C. § 1983), the Federal Communications Act, 47 U.S.C. §§ 309, 315 ("FCA"), the Administrative Procedure Act, 5 U.S.C. §§ 701-06 ("APA"), the Paperwork Reduction Act, 44 U.S.C. §§ 3501 *et seq.* ("PRA"), and the Information Quality Act, 44 U.S.C. § 3516 note ("IQA"). In addition to seeking money damages for the expenses that the Modica campaign has incurred as of September 30, 2011, Modica also seeks an order requiring defendants to allow his participation in the December 7 debate or alternatively, if Modica is not so allowed, prohibiting the debate from being held altogether. Defendants have moved to dismiss on the ground that, *inter alia*, Modica has failed to state a claim upon which relief can be granted under Rule 12(b)(6), Fed. R. Civ. P.

II.

Dismissal pursuant to Rule 12(b)(6), Fed. R. Civ. P., is appropriate where the complaint does not “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 129 S. Ct. at 1949. And, in this respect, it is also true that “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to *legal* conclusions.” *Id.* (emphasis added). *Accord Eastern Shore Markets v. J.D. Assocs. Ltd. P’ship*, 213 F.3d 175, 180 (4th Cir. 2000). Thus, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 129 S. Ct. at 1949. Instead, the complaint must allege facts that, if true, plausibly satisfy each element of the claims for which relief is sought. *Id.* at 1950. Accordingly, a motion to dismiss must be granted if the complaint does not allege a sufficient factual basis to create a plausible inference that plaintiff is entitled to relief.

III.

The question presented is whether Modica has stated any plausible claims for relief under any of the provisions of federal law upon which he relies. Analysis of the legal sufficiency of Modica’s claims points persuasively to the conclusion that all of his claims lack merit. As a result, defendants’ motion to dismiss must be granted. The legal deficiency of each set of claims is addressed in turn.

Modica argues that defendants’ decision to exclude him from participating in the December 7 debate violates his free-speech rights under the First Amendment. He seeks a

judicial remedy of the alleged First Amendment violation through 42 U.S.C. § 1983. This claim lacks merit because defendants—two non-profit news organizations and an employee of one of those organizations—are clearly not state actors and thus do not act “under color of state law.” *West v. Atkins*, 487 U.S. 42, 48 (1988). *Accord DeBauche v. Trani*, 191 F.3d 499, 506–07 (4th Cir. 1999) (concluding that news organizations co-sponsoring gubernatorial debate were not state actors). In any event, even if defendants were state actors, the Supreme Court’s decision in *Arkansas Educational Television Commission v. Forbes* squarely forecloses the relief that Modica seeks because the criteria defendants have set forth for participating in the December 7 debate are plainly (i) reasonable, and (ii) neutral as to the content of speeches and viewpoints of the candidates. 523 U.S. 666 (1998). Because Modica’s claim under the First Amendment and § 1983 lack merit, defendants’ motion to dismiss must be granted as to this claim.

Modica also argues that defendants’ decision to exclude him from the December 7 debate has violated the Federal Communications Act in two respects: (i) defendants have not acted in accordance with the “public interest” provision of 47 U.S.C. § 309, and (ii) defendants failed to comply with the “equal time” and fairness requirements of 47 U.S.C. § 315. Both claims lack merit because defendants are beyond the reach of both statutes. These provisions of the FCA apply only to over-the-airwaves broadcasters whom the statute requires to be licensed. *See* 47 U.S.C. § 309 (listing “the public interest” as a consideration for deciding an application for a broadcasting license); 47 U.S.C. § 315 (imposing equal-time requirements only upon a “licensee” or “broadcast station”). It plainly appears from the record that defendants are not broadcasters subject to licensing and regulation by the Federal Communications Commission. *See Maher v. Sun Publ’ns, Inc.*, 459 F. Supp. 353, 355 (D. Kan. 1978). Moreover, even if defendants were subject to the FCA, the only entity that can remedy an FCA violation is the

FCC. In this respect, it is well-settled that because neither § 309 nor § 315 confers a private right of action, a private plaintiff such as Modica cannot sue a defendant for violating either statute. *See, e.g., Schnapper v. Foley*, 667 F.2d 102, 116–17 (D.C. Cir. 1981); *Belluso v. Turner Commc'ns Corp.*, 633 F.2d 393, 397 (5th Cir. 1980). Thus, inasmuch as the FCA does not apply to defendants and does not vest any private rights in Modica, defendants' motion to dismiss must be granted as to these FCA claims.

Finally, Modica argues that defendants have failed to comply with the Administrative Procedure Act, the Paperwork Reduction Act, and the Information Quality Act. All three claims lack merit because, just as defendants are beyond the reach of the FCA, so too are they beyond the reach of these administrative-law statutes. Modica fails to allege that any defendant is a federal agency. The APA's "judicial review provisions apply only to action by a federal agency[.]" *Reg'l Mgmt. Corp., Inc. v. Legal Servs. Corp.*, 186 F.3d 457, 462 (4th Cir. 1999) (citing 5 U.S.C. §§ 702 & 704). Similarly, by their plain language, the PRA and IQA impose requirements only on federal agencies. *See, e.g.*, 44 U.S.C. § 3501 (describing purposes of PRA as improving information collection and use by the "Federal Government"); Treasury and General Government Appropriations Act for FY 2001, Pub. L. No. 106-554, § 1(a)(3), 114 Stat. 2763 (Dec. 21, 2000) (directing promulgation of regulations that "provide policy and procedural guidance to Federal agencies" related to "information . . . disseminated by Federal agencies"). Furthermore, neither the PRA nor the IQA confers a private right of action. *See Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 844 (9th Cir. 1999); *Salt Inst. v. Thompson*, 345 F. Supp. 2d 589, 601 (E.D. Va. 2004), *aff'd sub nom. Salt Inst. v. Leavitt*, 440 F.3d 156, 159 (4th Cir. 2006). For these reasons, defendants' motion to dismiss must be granted as to these administrative-law claims.

IV.

As defendants rightly argue, no provision of federal law entitles Modica to the remedies he seeks. Modica's complaint therefore fails to state a claim in its entirety. Furthermore, it is apparent from this record that any attempt to re-plead would ultimately be futile. *See Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006) (en banc). Thus, Modica's complaint is appropriately dismissed with prejudice.

For these reasons, and for good cause,

It is hereby **ORDERED** that defendants' motion to dismiss (Docs. 8 & 12) is **GRANTED**. It is further **ORDERED** that plaintiffs' complaint is **DISMISSED WITH PREJUDICE**. Plaintiffs are advised that this Order is immediately appealable pursuant to 28 U.S.C. § 1291.

The Clerk is directed to send a copy of this Order to all counsel of record.

Alexandria, Virginia
December 2, 2011



T. S. Ellis, III
United States District Judge