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May 25, 2004

BY MESSENGER

Federal Election Commission
Office of General Counsel
999 E Street, NW
Washington, D.C. 20463

Re: MUR 5441; Response to Complaint

Dear Sir or Madam:

This letter responds to the complaint filed in the above-captioned matter by Mr. Thay J. Humes, President of Humes McCoy Aviation ("Complainant"), accusing Clark for President, Inc. ("Respondent") of failing to pay certain broker's fees and other unspecified expenses he believes are owed to his air charter company.

Overview

The complaint is replete with factual errors and other inaccuracies, each addressed herein, but it suffers from a more fundamental flaw. It requires a determination by the Federal Election Commission ("FEC" or "Commission") as to the existence of a financial obligation by Respondent to Complainant. To make this determination, the Commission must judge whether or not Complainant performed the services for which he was engaged. The Commission has long recognized that it is not within its jurisdiction to determine the obligations and rights arising under a contract. *See* FEC Advisory Opinion No. 1981-42 (Oct. 13, 1981). State law governs whether an alleged debt in fact exists, what the amount of a debt is, and which persons or entities are responsible for paying a debt. *See* FEC Advisory Opinion Nos. 1989-2 (April 25, 1990) and 1995-7 (Apr. 6, 1995). If Complainant believes his company has a legitimate claim against Respondent (and in our view none exists), an action in the appropriate court of jurisdiction or an arbitration proceeding should be initiated by him for the purpose of making this determination.

As explained below, Complainant failed to provide the air charter services he was engaged to provide. This failure caused Respondent to incur considerable additional costs and, equally important, caused major disruption to Respondent's itinerary during a particularly intense time of the presidential primary campaign. Respondent paid the

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aircraft operator in full for use of its aircraft, and has only refused to pay Complainant the broker's fee he is demanding because he failed to perform the services for which he was engaged and therefore is not entitled to or deserving of any fee.

Factual Background

On or immediately prior to January 28, 2004, Ms. Holly Johnson, Director of Scheduling and Advance for Respondent, contacted Complainant to inquire about arranging air charter services for the campaign starting on January 30, 2004. Complainant was asked and agreed to provide air charter service for General Wesley K. Clark, campaign staff and media representatives to fly from Columbia, South Carolina to Tulsa, Oklahoma, and later that same day to fly them from Tulsa to Santa Fe, New Mexico and then on to Tucson, Arizona. Early the next morning (January 31), the trip was to continue from Tucson to Sierra Vista, Arizona then on to Mesilla, New Mexico, Norman, Oklahoma, McAlester, Oklahoma and finally to Oklahoma City, Oklahoma. Each stop involved campaign events and activities.

Ms. Johnson informed Complainant that the aircraft must be large enough to accommodate a traveling party of between 30-40 passengers and explained to him other requirements, notably that the aircraft satisfy certain Transportation Security Agency ("TSA") security requirements in order to facilitate boarding procedures. Complainant was informed also that the traveling party's stop in Tulsa was for just a few hours and that, in order to arrive in time for subsequent campaign stops that day (in Santa Fe and Tucson), a timely departure from Tulsa that necessary.

Complainant acknowledged he could accommodate Respondent, and boasted of his experience as well as the ability to charge lower rates because he owned some of his aircraft. However, the aircraft that Complainant provided on January 30 was not his own. The aircraft operator was SportsFlight Air, Inc ("Sportsflight Air"). The aircraft Complainant had arranged for the trip did not have the correct TSA security certification to facilitate boarding. Consequently, departure from Columbia was delayed by at least two hours, as passengers and their baggage were subject to screening and other security procedures that would have been unnecessary if an aircraft with the correct security certification had been provided.

Much worse, however, Complainant was unable to provide an aircraft for the entire trip, and Respondent was not made aware of this until it was too late. The aircraft that picked-up the traveling party in Columbia took them to Tulsa, but it was not available to continue the trip on to Santa Fe. Complainant did not alert Respondent of his failure to secure an aircraft for the entire trip until after the traveling party had arrived in Tulsa. With the traveling party now stranded, Respondent was forced to engage another air charter service at the last minute and to pay a premium. It did so with no assistance from Complainant.

Because of the sizeable traveling party, an aircraft of sufficient size (a 727-sized plane was to have been provided) was not available on such short notice, so Respondent

was forced to pay for two aircraft, and traveling plans had to be revised because one of the planes was not available until later in the day. These revisions necessitated breaking the traveling party into two groups. One group proceeded to Santa Fe with General Clark, while the other group (comprised largely of media representatives) had to take the later plane and was forced to miss the Santa Fe stop and proceed on to Tucson.

On the day the trip was commenced (January 30), Respondent paid \$115,000 to the aircraft operator, SportsFlight Air. This amount represented the aircraft operator's charge for travel to Tulsa and Santa Fe.¹ The payment was made by wire transfer, as is common practice for charter service. Respondent also attempted to pay Complainant his broker's fee that day by wire transfer, using routing instructions Complainant had supplied, but the transfer could not be executed successfully because Complainant apparently had only very recently opened his bank account and it was not yet active.

Because SportsFlight Air was unable to provide air service to Santa Fe, it refunded Respondent's payment for that portion of the trip. Yet Complainant, not demonstrating any responsibility for his failure, demanded his broker's fee, including an additional amount for certain unspecified out-of-pocket charges he claimed to have incurred in making arrangements for the trip. Complainant was informed that, given his failure to secure an aircraft for the entire trip, the increased costs to Respondent caused thereby, and the serious disruptions to the campaign schedule his failures had caused, it was Respondent's view that he was not entitled to *any* broker's fee. Complainant was advised, however, to substantiate with appropriate documentation any out-of-pocket expenses he had incurred in connection with arranging air service for the first leg of the trip and forward them to Respondent for further consideration. Respondent heard no more from Complainant until it was notified by the FEC that this complaint had been filed.

Factual Inaccuracies and Misstatements

The complaint includes several factual errors and misstatements. Complainant states that he was contacted first by a representative of Kerry for President and was told that an aircraft was needed for presidential candidate Wesley Clark. Respondent is not aware of any communication by Kerry for President to Complainant on its behalf. As Respondent and Kerry for President were political competitors at the time, this claim does not make sense and seems highly improbable.

Complainant contends that the invoice he attached to his complaint is an "invoice and agreement." In our view, this document is *not* an agreement, and we do not concede it is an accurate invoice. Indeed, the Commission will please note that the invoice is dated January 2, 2004, almost a full month before the date the charter services were to be provided. We have determined that Holly Johnson contacted Complainant as early as January 28 (possibly a day or two earlier to collect some background information), but neither she nor any staff member or other agent of Respondent had any contact or

¹ The total charge for the charter from Columbia to Tulsa was \$49,000, and the charge for travel from Tulsa to Santa Fe came to \$66,000

communication with Complainant before that time and certainly not as early as January 2, 2004. A presidential primary event would not be scheduled this far in advance.

Complainant claims that he was told by Holly Johnson and other Respondent staff members that, because the campaign was ending and all Clark campaign resources would be used for John Kerry, he should in-kind his fee. This claim is false. Neither Holly Johnson nor any other staff member or agent of Respondent made this statement or any similar statement to Complainant. In addition, as a matter of law, Clark for President funds and resources may not be provided to Kerry for President, so asking a possible creditor to waive or in-kind his fee to benefit the Kerry campaign simply makes no sense.

Complainant incorrectly implies that Holly Johnson is now working for Kerry for President. While some Respondent staff members have joined Kerry for President, Ms. Johnson has not. She currently works for Wesley K. Clark & Associates, LLC, as General Clark's executive assistant. This is the position she held prior to the General's presidential candidacy. She is not working for any other presidential campaign.

Finally, Complainant closes with a claim that he "incurred a great expense to provide them [Respondent] with an aircraft. I need the entire invoice due." What Complainant really seeks are not his expenses, but a "profit," despite the fact that he failed to perform his end of the bargain to Respondent's financial and political detriment. As previously explained, Respondent has paid the aircraft operator, SportsFlight Air, in full for use of its aircraft. Furthermore, Complainant was asked to submit an invoice with supporting documentation for any "out-of-pocket" expenses he actually incurred, and he failed to do so.

Conclusion

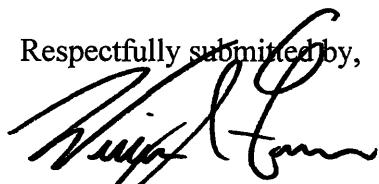
The complaint is predicated on the assumption that Respondent owes Complainant certain fees and expenses. This is incorrect. As explained above, Respondent owes Complainant nothing, because he failed to perform the services he was engaged to provide. Complainant is essentially asking the Commission to arbitrate a commercial dispute. Consistent with its long-standing policy in such cases, the Commission should refuse.

To enhance his complaint, Complainant has made a number of inaccurate representations. Some are demonstrably false (e.g., that Ms. Holly Johnson works for Kerry for President), while others are inconsistent with common sense (e.g., that the Kerry campaign contacted Complainant initially about securing aircraft for Respondent). Still others call into question Complainant's veracity (e.g., an invoice dated January 2, 2004, for air charter services provided on January 30, 2004).

All of this suggests that Complainant is looking for a way to circumvent conventional legal avenues, which would subject his claims for payment to more exacting scrutiny and the rule of law, for obtaining his underserved fees. Under the circumstances,

the Commission should dismiss his complaint and find no reason to believe Respondent has violated federal election law.

Respectfully submitted by,



William C. Oldaker
N. Bradley Litchfield
William J. Farah