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February 17, 2004

Ms. Ruth Heilizer  
Attorney  
Federal Election Commission  
999 E Street, N.W.  
Washington, DC 20463

RE: MUR 5391

Dear Ms. Heilizer:

By this letter, the Democratic Party of Virginia ("DPV") supplements its response to the Commission's reason to believe finding in the above referenced MUR.

In its letter to the DPV, the Commission requested clarification of the events that led to Wachovia bank in sending an erroneous wire transfer to Applied Political Technologies ("APT"), in the amount of \$710,000. At the time of our initial response, the DPV was unable to locate the staff responsible for effectuating the wire transfers from its Alexandria office. Subsequent to the filing of that document, the DPV has been able to discuss this matter with Kendra-Sue Derby, the director of the DPV's Alexandria office during the 2000 general election campaign. Ms. Derby was a temporary employee of the DPV who was hired to direct a temporary Alexandria office of the DPV from which its general election get-out-the-vote operation was managed. Ms. Derby had an excellent recollection of the events that led to the bank's error, as well as first hand knowledge as to why the DPV did not disclose the initial bank error. Ms. Derby has provided an affidavit that is attached to this letter that provides the full details as to the events of September 29, 2000 in which Wachovia bank erroneously wire \$710,000 to APT.

Specifically, on September 29, 2000, Ms. Derby made a written request to Wachovia bank to wire \$710,000 to Greer, Margolis, Mitchell, Burns & Associates ("Greer Margolis"), and \$3,750 to APT. A copy of the written requests are attached to Ms. Derby's affidavit. While the bank made both transfers, inexplicably, the bank wired both transfers to APT instead of wiring the \$710,000 to Greer Margolis, as intended. As

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2004 FEB 18 P 3:09

clearly demonstrated by the written requests, the \$710,000 was intended for Greer Margolis and not APT. Clearly, the bank erroneously transferred both requests to APT.

Ms. Derby was not aware of the bank error until the next day when Jeff Ely, President of APT called her and notified her that he had received two wires on the preceding day. According to Ms. Derby's affidavit, when a staff member from Ms. Derby's Alexandria office called the bank to discuss the matter, the staff member was told that the bank would not reverse the transfer even though the bank was not able to locate any written request to make such a transfer to APT. Ultimately, at the request of APT, APT's bank reversed the transfer several days later even though APT had requested immediate correction of the error.

The failure of the DPV to disclose the bank's erroneous transfer was based upon the internal financial reporting structure that was in place at the DPV at this time. During the 2000 general election, the Alexandria office of the DPV would provide a report of its transactions to the Richmond office where the FEC report was prepared. First, it should be noted that the transactions that are the basis of this matter occurred on September 29<sup>th</sup> and 30<sup>th</sup>, the closing days of the October Quarterly report within one month of the November general election, and generally, a very frantic and busy time for a state party committee. The correction to the erroneous wire occurred in October, a new calendar month, and activity for which a bank statement would not likely be available for the preparation of the Pre-election report.

At the close of the reporting period on September 30<sup>th</sup>, the Alexandria office prepared a schedule of transactions for the Richmond office preparation of the FEC report. According to Ms. Derby, the Alexandria office did not notify the Richmond office of the erroneous transaction because it did not believe that the bank's erroneous act was required to be disclosed on the upcoming FEC report. Rather, the report submitted to the Richmond office showed the transactions as they had been intended. Therefore, the Richmond office, where the FEC report was prepared, was not even aware that the erroneous bank transaction had occurred when the October Quarterly FEC report was prepared. A review of the September bank statement for the bank account from which the transfers were made would not disclose any type of problem since the statement merely showed two transfers out on September 29<sup>th</sup>, presumably to their intended recipients. It wouldn't have been until early November, upon review of the October statement by the Richmond office, that it would have been clear that a bank error had been made. By that time, the general election would have just been concluded and staff transition would have begun to occur.

Ultimately, Ms. Derby's affidavit and attachments provide the documentation requested in points 1 and 3 of the Commission's request for more information. Also attached to this letter is a copy of the bank statements for September and October of 2000 that show the erroneous transfer and subsequent correction.

I would like to reiterate that, immediately after the election, the temporary and permanent staff of the DPV underwent several significant changes that slowed the

process of understanding and correcting the failure to disclose the erroneous transactions on the original report. First, as is standard, Ms. Derby's employment with the DPV ended immediately upon the conclusion of the 2000 general election. Furthermore, all staff that was responsible for preparation of the FEC reports at the DPV left the committee shortly after the 2000 general election. Ultimately, this immediate staff turnover led to significant confusion over the true nature of these transactions. Upon the arrival of the new DPV administration, it was determined to conduct a comprehensive audit of the DPV's finances before filing any further amendments. This explains why comprehensive amendments were not filed until several months later, upon the conclusion of this audit by the DPV independent, outside auditor, Karen Nuckols. Unfortunately, due to Ms. Nuckols' serious illness, the DPV was unable to learn the nature and timetable of this audit.

It should be further noted that Alan Moore, the person that signed the letter in January 2002 that states that the APT transaction was a bank error was not an employee of the party during the 2000 general election and has no firsthand knowledge of the events that are the basis of this matter. Furthermore, personal discussions by counsel with Mr. Moore reveal that Mr. Moore has no specific recollection as to the circumstances surrounding the preparation of his January 2002 letter.

Finally, the DPV has approached Wachovia bank for assistance in this matter. Due to several problems, which is exemplified by this matter, the DPV no longer maintains any accounts at Wachovia bank. Wachovia bank stated that, unless the DPV could provide it with some type of "wire number," it could be of no assistance in this matter. The DPV was unable to provide such a number to the bank. Therefore, Wachovia bank could not provide any documents that would assist the DPV in responding to question number 2 in the Commission's letter. Wachovia was able to provide copies of the relevant bank statements, which were not located until today, which are attached to this letter. The statements appear to contain reference numbers and may permit the bank to conduct further research. If the Commission wishes the DPV to pursue such a course of action with the bank, please let me know.

Based upon the above facts, the DPV continues to believe that the proposed civil penalty in this matter is excessive. In fact, the DPV believes that the Commission should not have initiated this action at all. This case involves a set of confusing events that was set off by an error by the DPV's bank. Due to the proximity of the error to the November election, as well as a reasonable good faith belief by one of its staff members that such an error was not required to be disclosed on its reports filed with the FEC, the DPV disclosed the transactions as intended rather than as they occurred.

While the DPV determined to voluntarily correct its report as soon as its financial staff discovered the error, circumstances required that such a process take several months to complete. Changes in staff, as well as the desire to properly correct the reports led to inadvertent errors in amendments. By August 2001, all reports were substantially complete and accurate. Inexplicably, over two years later, the Commission chose to initiate this action, which was received over three years after the initial bank and

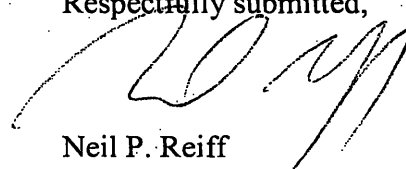
reporting errors occurred. Understandably, due to this time lapse, the DPV has been unable to fully investigate the circumstances behind the reporting errors and the efforts to correct those errors. However, the cooperation of Ms. Derby in this matter has provided significant information regarding the circumstances surrounding the erroneous wire transfer made by Wachovia Bank.

The DPV believes that the Commission's approach in this matter sends the wrong message to the regulated community. Rather than conceal what was truly an error by its bank, the DPV set out to voluntarily correct its reports in what the DPV believes is a reasonable time frame. Furthermore, the DPV determined to conduct a full audit of its finances as part of the amendment process to ensure accurate and complete disclosure. In the future, a committee faced with the need to voluntarily disclose errors made by its bank in amended reports will think twice before voluntarily disclosing such errors.

The Committee's MUR records are replete with matters where committees have accepted excessive contributions, transferred non-federal funds to its federal account, accepted prohibited contributions. In many cases, those committees were not even required to disgorge funds but rather pay a civil penalty in amounts lower than the proposed civil penalty in this matter. In this matter, the DPV failed to disclose that its bank erroneously transferred a requested wire to the wrong vendor and the subsequent correction of that error. The Commission's approach makes little sense and does little to vindicate the campaign finance disclosure system. See FEC v. Friends of Jane Harman, 59 F. Supp.2d 1046 (C.D. Cal. 1999) (finding that despite the fact that violations of the FECA occurred, no civil penalty was warranted). Thus, it is our belief that, should this case go to litigation, a federal court, applying the factors laid out in the Harman case, would decline to levy any civil penalty against the DPV.

To the extent that the Commission believes that Advisory Opinion 2001-11 is relevant to this matter, it is only relevant to the extent that Ms. Derby's testimony demonstrates that the DPV was indeed the victim of erroneous acts by Wachovia bank in more than one instance. Of course, the DPV no longer maintains a banking relationship with Wachovia.

Respectfully submitted,



Neil P. Reiff

**BEFORE THE  
FEDERAL ELECTION COMMISSION**

|  |   |                 |
|--|---|-----------------|
| <b>IN RE</b>   | ) |                 |
| <b>Democratic Party of Virginia-Federal Campaign</b> | ) |                 |
| <b>Committee</b>                                     | ) |                 |
| <b>and</b>   | ) | <b>MUR 5391</b> |
| <b>Abbi G. Easter as Treasurer</b>                   | ) |                 |
|  | ) |                 |

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**DECLARATION OF KENDRA SUE DERBY**

1. In the Summer and Fall of 2000 I was the Director of the "Virginia Coordinated Campaign" ("Coordinated Campaign") a project of the Democratic Party of Virginia ("DPV"). I left the employment of the DPV immediately after the 2000 general election. I make this Declaration in support of the Response filed on behalf of the DPV in the above-referenced MUR.

2. The Coordinated Campaign maintained its offices in Alexandria, Virginia, approximately 100 miles from the DPV's headquarters in Richmond, Virginia. The Coordinated Campaign maintained separate bank accounts at the DPV's depository, Wachovia bank ("the Bank"). The Coordinated Campaign staff had the authority to initiate financial transactions directly from its Alexandria office.

3. Generally, all bank transactions and accounting for the Coordinated Campaign account were undertaken at the Alexandria office. Before each report filed with the Federal Election Commission, our office would transmit a list of receipts and expenditures to the Richmond office for inclusion in the appropriate disclosure report.

4. On September 29, 2000, I submitted two written requests to the Bank to wire funds to DPV vendors. First, a request was made to wire \$710,000 to the Greer, Margolis, Mitchell, Burns & Associates ("Greer Margolis"), and \$3,750 to Applied Political Technologies ("APT") (A copy of the wire transfer requests are attached to this affidavit as Exhibit A). No other wire transfer requests were made on that date.

5. On September 29, 2000, the Bank effectuated the requested transfers. However, the Bank erroneously transferred the \$710,000 requested to be transferred to Greer Margolis to APT. This error was brought to my attention on September 30, 2000 by Jeff Ely, President of APT.

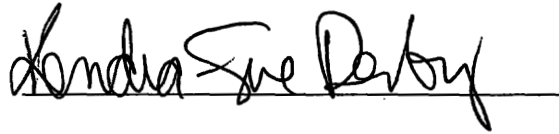
6. On September 30, 2000, my assistant, Elena Pangilinan, contacted Wachovia Bank to request a reversal of the erroneous wire. The bank refused to comply with the request.

7. On September 30, 2000, Jeff Ely requested that his bank, SunTrust Bank reverse the erroneous wire. This transfer was not effectuated until October 5, 2000, subsequent to the closing date of the 2000 October Quarterly Report.

8. On October 4, 2000 the DPV issued a check from the Alexandria office in the amount of \$710,000 to Greer Margolis to replace the intended wire of September 29, 2000.

9. In early October 2000, our office prepared financial data to be provided to the Richmond office for inclusion in the 2000 October Quarterly FEC report. When the financial data was transmitted, the erroneous transfer was not included in the financial data.

I declare under penalties of perjury that the foregoing is true and correct to the best of my present knowledge, information and belief. Dated this 17<sup>th</sup> day of February, 2004.

A handwritten signature in black ink, reading "Kendra Sue Derby", written over a horizontal line.

Kendra Sue Derby

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Date: 29-Sep-00

Amount to Wire Transfer \$710,000.00

**SENDING BANK:**

Bank Name: Wachovia Bank

Account Name: Coordinated Campaign Federal Account

Account Number: 1850267731

**RECEIVING BANK:**

Bank Name: Bank Of America

ABA Number: 54001204

Account Name: Greer,Margolis,Mitchell,Burns & Associates, Inc.

Account Number:



|                         |                   |
|-------------------------|-------------------|
| Amount to Wire Transfer | <u>\$3,750.00</u> |
|-------------------------|-------------------|

|                 |                                      |
|-----------------|--------------------------------------|
| Bank Name:      | Wachovia Bank                        |
| Account Name:   | Coordinated Campaign Federal Account |
| Account Number: | 1850267731                           |

|                 |   |
|-----------------|---|
| Bank Name:      | <u>SunTrust Bank</u>                        |
| ABA Number:     | <u>0510-00020</u>                           |
| Account Name:   | <u>Applied Political Technologies, Inc.</u> |
| Account Number: | <u></u>                                     |