FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

APR - 4 2007

Neil P. Reiff, Esq.
Stephen E. Hershkowitz, Esq.
Sandler, Reiff & Young, PC
50 E Street, SE, Suite 300
Washington, D.C. 20003

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RE: MUR 5732
Maine Democratic State Party and Betty I. Johnson, in her official capacity as Treasurer;
Democratic Party of Hawaii and Yuriko I. Sugimura, in her official capacity as Treasurer

Dear Messrs. Reiff and Hershkowitz:

On April 24, 2006, the Federal Election Commission notified your clients of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). On March 20, 2007, the Commission found, on the basis of the information in the complaint, and information provided by your clients, that there is no reason to believe the Maine Democratic State Party and Betty I. Johnson, in her official capacity as Treasurer; and the Democratic Party of Hawaii and Yuriko I. Sugimura, in her official capacity as Treasurer, violated 2 U.S.C. §§ 441a(a)(8) and 441f, provisions of the Act, and 11 C.F.R. § 110.6. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which more fully explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Camilla Jackson Jones, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

Thomasenia P. Duncan
Acting General Counsel

RJV by

BY: Rhonda J. Vosdingh
Associate General Counsel
for Enforcement

Enclosure
Factual and Legal Analysis

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FACTUAL AND LEGAL ANALYSIS: MUR 5732

I. INTRODUCTION

This matter, which has been designated as Matter Under Review 5732, concerns the relationship between $25,000 in contributions to Matt Brown for U.S. Senate and James Vincent, in his official capacity as Treasurer (the "Brown Committee") from the Democratic State Parties of Hawaii, Maine and Massachusetts (collectively, "the State Parties" or "the state party committees") in December 2005, and individual contributions to the State Parties, totaling approximately the same amount, that were solicited by the Brown Committee in January 2006.

The Complaint from the Hawaii Republican Party and the Rhode Island Republican Party alleges that the Brown Committee arranged for its donors to contribute to these State Parties in January 2006 as part of an effort to circumvent the contribution limits set forth in the Federal Election Campaign Act ("FECA" or "the Act") by either (1) earmarking their contributions for the Brown Committee under 2 U.S.C. § 441a(a)(8) and 11 C.F.R. § 110.6; (2) making their contributions with the knowledge that the State Parties would use the funds to support the Brown Committee under 2 U.S.C. § 441a and 11 C.F.R. § 110.1(h); or (3) making contributions in the name of another under 2 U.S.C. § 441f.[1]

The Brown Committee, the State Parties and the one individual contributor who responded to the Complaint maintain that: (1) the individual contributions to the State

[1] Although Richard L. Bready and John M. Connors were both individual contributors named in the Complaint, only Richard Bready filed a response. The Brown Committee's Response identified two other individual contributors who gave to both the State Parties and the Brown Committee -- David Messer and Jeannie Lavine. However, these donors were never notified of the Complaint.

Parties were not earmarked with an encumbrances, designation or instruction; (2) the individual contributors had no knowledge or control over how the State Parties might use their contributions; and (3) the individual donors did not make contributions to the Brown Committee in the name of another through the State Parties.

For the reasons forth below, the Commission finds no reason to believe that the Respondents violated the Act.

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II. FACTUAL BACKGROUND

Matthew A. Brown was a candidate in the 2006 election for the Democratic nomination for United States Senate for the State of Rhode Island. The Brown Committee solicited and received contributions from individuals and Democratic state party committees inside and outside of Rhode Island. Declaration of Matthew Brown ("Brown Dec.") at ¶¶ 2-3. During the last week of December 2005, the Brown Committee received $25,000 in primary and general election contributions from the Democratic State Parties of Hawaii ($5,000), Massachusetts ($10,000) and Maine ($10,000).

Initial Contribution Date	State Party Contributor	Amount	Recipient Account	Refund Date/ Amount
12/29/05	Massachusetts Dem. State Committee	$5,000	Brown Committee – Primary	3/06/06 $5,000
12/29/05	Massachusetts Dem. State Committee	$5,000	Brown Committee – General election acct	3/23/06 $5,000
12/30/05	Democratic Party of Hawaii	$5,000	Brown Committee – General election acct	3/30/06 $5,000
12/31/05	Maine Democratic State Party	$5,000	Brown Committee – Primary election acct	3/15/06 $5,000
12/31/05	Maine Democratic State Party	$5,000	Brown Committee – General election acct	3/24/06 $5,000

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The Brown Committee asserts that it approached these particular state party committees for contributions in late 2005, because its staff had preexisting relationships with staff of these State Parties. *Id.* Brown contends that in soliciting the State Parties, he never promised to solicit any particular amount of money for the State Parties from his Committee's maxed-out individual donors, or ever suggested how any funds he might solicit for the State Parties should be used. Brown Dec. at ¶¶ 4-6. Upon receiving support from the three State Parties in December 2005, the Brown Committee's field director suggested that Brown reciprocate by encouraging his individual contributors to support these state party committees. *Id.*

Between sometime in late December 2005 and early January 2006, Brown and his staff contacted three individuals who had already contributed to the Brown Committee – namely, Richard Bready, David Messer and Jonathan Lavine -- and encouraged them to contribute to the three State Parties. Brown Dec. at ¶¶ 4-6. In January 2006, the three State Parties received contributions from two of these donors and the third's spouse.[2]

Date	Contributors Solicited by Brown Committee	Amount	Recipient/Account	Refunded?
1/05/06	Richard Bready	$5,000	Massachusetts Dem. State Committee	Yes; $5,000
1/12/06	Richard Bready	$6,000	Maine Democratic State Party – non-federal acct	Yes; $6,000
1/17/06	Richard Bready	$6,000	Democratic Party of Hawaii – federal acct	Yes; $6,000
1/17/06	Jeanne Lavine	$6,000	Maine Democratic State Party – non-federal acct	Yes; $6,000
1/06	David Messer	$5,000	Massachusetts Dem. State Committee – non-federal acct	Yes; $5,000

[2] Jonathan Lavine declined to contribute to the state party committees when asked, but promised to inquire if his wife, Jeanne Lavine, were interested in making a contribution. Brown Dec. at ¶ 6.

Another Brown Committee donor, John Connor, who lives in Massachusetts, already had contributed $10,000 to the Massachusetts State Party in November 2005 without ever being solicited by Brown. *Id.* at ¶¶ 6-7. As noted above, Connor did not respond to the Complaint.

Brown states that when soliciting potential donors, neither he nor his staff mentioned that the Brown Committee had solicited contributions from the State Parties or that they might solicit contributions from the State Parties in the future. Brown Dec. at ¶¶ 4-6. Brown contends that he made no suggestion that the donors designate or earmark contributions to the State Parties for the Brown Committee, and that neither he nor his staff had any contact with the donors after their initial solicitations and never discussed with the donors how their potential contributions might be used. *Id.*

Richard L. Bready, the only donor to respond to the Complaint, states he "had no understanding with the Brown Committee or any of the state parties regarding the intended use of his specific contributions." Response of Richard L. Bready ("Bready Resp.") at 1.

The State Parties assert that none of the contributions received from Individual Donors were accompanied by any oral or written designation, instructions or encumbrance indicating how contributions should be used, or that there was any other contact with those donors. Joint Response of the Democratic Party of Hawaii and the Maine Democratic State Party ("Hawaii and Maine Resp.") at 2; Massachusetts Democratic State Committee ("Massachusetts Resp.") at 7. Brown and the State Parties all contend that they never discussed the fact that the Brown Committee had solicited

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donations on the State Parties' behalf or suggested how any resulting contributions might be distributed. Brown Dec. at ¶ 6; Hawaii/Maine Resp. at 2; Massachusetts Resp. at 6-7.[3]

III. ANALYSIS

During the 2006 election cycle, an individual donor could contribute a maximum of $2,100 per election to a federal candidate and $10,000 per year to a party committee's federal account. *See* 2 U.S.C. § 441a(a)(1)(A) and (D). The federal account of a state party committee may contribute up to $5,000 per election to the authorized committee of a federal candidate. 2 U.S.C. § 441a(a)(2)(A). Finally, a federal candidate, and his or her agents, may solicit an individual to contribute up to $10,000 per year to the federal account of a state party committee and (consistent with state law) up to $10,000 per year to a state party's non-federal account. 2 U.S.C. § 441i(e)(1).

Although the Complaint alleges that the Individual Donors attempted to circumvent the limitations described above, it does not appear that their contributions were earmarked per 11 C.F.R. § 110.6, made with the knowledge that the contributions would be used to support the Brown Committee per 11 C.F.R. § 110.1(h), or were part of a scheme to make contributions in the name of another, as prohibited by 2 U.S.C. § 441f.

A. Earmarked Contributions

The Act provides, "all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate shall be treated as contributions from such person to such candidate." 2 U.S.C. § 441a(a)(8). The term "earmarked" includes any "designation, instruction, or

[3] In March 2006, following newspaper reports focusing on the facts described above, and notwithstanding their positions as to the lack of any illegality, the Brown Committee refunded the State Party contributions and the State Parties refunded contributions from donors solicited by the Brown Committee.

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encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to or expended on behalf of, a clearly identified candidate or a candidate's authorized committee." 11 C.F.R. § 110.6(b)(1).

In recent enforcement matters, the Commission has determined that funds are considered "earmarked" only when there is clear documented evidence of acts by donors that resulted in their funds being used by the recipient committee for expenditures on behalf of a particular campaign. For example, in MUR 4831/5274 (Nixon), the Commission found reason to believe that funds donated to the Missouri Democratic State Committee were "earmarked" for the U.S. Senate campaign of Jeremiah Nixon where contributors' checks had memo lines that stated "Nixon," "Nixon-Win," "J. Nixon Fund," and "Jay Nixon Campaign Contribution." However, earmarking did not occur where the contributions only resulted from party solicitations suggesting support for Nixon or merely coinciding with support provided to the Nixon campaign. Similarly, in MUR 5520 (Republican Party of Louisiana/Tauzin) the Commission concluded that a newspaper article asserting that the Party acknowledged having a "wink and a nod" arrangement with donors, with no other designation or instruction by the donor, was insufficient to find reason to believe earmarking had occurred.[4]

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[4] The Commission has routinely rejected allegations of earmarking where the circumstances are purely circumstantial, and there is no clear designation or instruction given by the donor. *See, e.g.,* MUR 5445 (Davis) (finding no earmarking occurred where donor who had maximized contributions to Davis made contributions to six non-candidate committees, each of which then made donations to Davis within nine days because there was no designation or instruction); MUR 5125 (Perry) (finding no earmarking because the complaint contained only bare allegations of earmarking, but showed no designation, instruction or encumbrance); MUR 4643 (Democratic Party of New Mexico) finding no earmarking based only on correlation in timing and amounts of contributions, without other evidence of instruction, designation or encumbrance).

There is no support for finding reason to believe that the donors here made the "designations, instructions and encumbrances" required for a violation of 2 U.S.C. § 441a(a)(8) and 11 C.F.R. § 110.6(b)(1). The State Parties have all attested that there were no cover letters or other instructions accompanying the checks, or in the case of Mrs. Lavine the credit card transaction, indicating how the contributions should be used. *See* Hawaii/Maine Resp. at 2; Massachusetts Resp. at 6-7. Further, copies of the cancelled checks they received from the Individual Donors indicate that there were no designations, instructions or encumbrances on the checks themselves. *See* Declarations of Yuriko J. Sugimura, Maggie Allen, and Thomson.

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Brown avers that when speaking to contributors on the State Parties' behalf, he never suggested that a donor's contributions be earmarked or designate how such contributions might be used. Brown Dec. at ¶¶ 4–6. Brown denies making any promises of reciprocity or reimbursement to the State Parties.[5] *See* Complaint, Attachment at 11, 18-20. The strongest support presented by Complainant is a media report by the Associated Press, which was repeated in several newspaper articles, asserting that the treasurer of the Hawaii Democratic Party first admitted to having "struck a deal in which the party would give money to Brown and in exchange would get money back from Brown supporters. [But,] [l]ater she said there was no deal." *Id.* at 1.

This newspaper report called into question the reason out-of-state party committees would contribute to the primary and general election campaigns of a

[5] Reportedly, Brown stated, "'Rich[ard Bready] came to me after these parties had agreed to support the campaign. And he said, 'I think it would be great to encourage our supporters to support them.'" When reporters asked if Pelletier had made any "tit-for-tat" deals with out-of-state political parties, Brown is quoted as having said, "No, that is not my understanding." *Complaint*, Attachment at 11.

candidate in Rhode Island.[6] Brown denied the allegation of any "tit-for-tat" deals, and stated that his campaign had solicited and received contributions from these committees because of personal relationships and the Brown Committee's national strategy. *Id.* at 1, 11-14. He also stated that they had simply encouraged donors to give to state party committees that had given to his campaign.

Complainants' media reports assert that the timing of the contributions is significant, particularly because the Individual Donors contributed to State Parties several weeks after those parties had made contributions to the Brown Committee. Complaint at 3. The Commission, however, has determined that timing alone is insufficient to support an earmarking claim, where there is no clear designation or instruction by the donors. *See* MURs 5445 and 4643.

Since the contributions at issue here lack the requisite indicia of earmarking, there is no basis to proceed on an earmarking theory, the Commission finds no reason to believe Richard Bready or John Connors violated 2 U.S.C. § 441a(a)(8). The Commission also find no reason to believe that the Democratic Party of Hawaii and Yuriko J. Sugimura, in her official capacity as Treasurer, the Maine Democratic State Committee and Belly I. Johnson, in her official capacity as Treasurer, the Massachusetts Democratic State Committee-Federal and Mary Jane Powell, in her official capacity as Treasurer, violated 2 U.S.C. § 441a(a)(8) and 11 C.F.R. § 110.6(b)(1) by failing to report earmarked contributions, or that Matt Brown for U.S. Senate and James Vincent, in his official capacity as Treasurer, violated 2 U.S.C. § 441a(f).

[6] There were no comparable specific factual allegations of "behind the scenes" deals regarding the Maine or Massachusetts state party committees.

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B. Alleged Violation of Section 110.1(h)

Complainants also argue that the contributions made by the Individual Donors to the State Party Committees should count against the donors' contribution limits to the Brown Committee if: (1) the donors gave to the State Parties with the knowledge that all or a substantial portion of their donations would be contributed to the Brown Committee, or (2) the donors retained control over the funds. Complaint at 2. Respondents deny this claim and assert that the contributions made by those Individual Donors did not exceed the contribution limits set forth in the Act.

The Commission's regulations permit an individual to contribute to both a candidate and another political committee, "so long as [t]he contributor does not give with the knowledge that a substantial portion will be contributed to, or expended on behalf of, that candidate for the same election," and the contributor "does not retain control over the funds." *See* 11 C.F.R. § 110.1(h)(2)-(3).

In January 2006, Matthew Brown asked Bready and Messer to consider making contributions to one or all of the Democratic State Parties of Massachusetts, Maine and Hawaii.[7] Brown Dec. at ¶ 4-5. Within a few weeks, Bready contributed to all three committees and Messer contributed to the Massachusetts state committee. *See* Charts A and B. Brown states that when speaking with Bready and Messer, he did not indicate that his campaign had previously solicited contributions from the State Parties or that he might solicit contributions from the State Parties in the future. *Id.* He also states that there was no understanding with the donors or State Parties regarding how the funds might be used, and that he had no contact with the donors after the initial solicitation.

[7] Brown's Declaration does not indicate whether the March 2005 contributions he had received from Bready were the result of any direct solicitation.

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Id.; see also Affidavit of Richard L. Bready at ¶¶ 3-4 ("Bready Aff."). Bready avers that he maintained no control over his contributions to the State Parties, and that he had no contact with any officer or agent of the State Parties after he made his donations. *Id.*

Also, during January 2006, the Brown Committee's National Finance Director, Ashley Flanagan, solicited contributions on behalf of the Massachusetts or Maine state party from Jonathan Lavine, another supporter of the Brown Committee and Jeanine Lavine's husband. *Id.* at ¶ 6. Brown states that Mr. Lavine declined to contribute but stated that he would ask his wife Janine if she would be interested in making a contribution. *Id.* Later that month, Mrs. Lavine contributed $6,000 via credit card transaction to the Maine Democratic State Party. Brown asserts that neither he nor his staff ever spoke directly with Mrs. Lavine and that he has never met Mrs. Lavine. *Id.* He further contends that no one on his staff, including Ms. Flanagan, sought to influence how Lavine's contribution to the Maine Democratic State Party should be used. *Id.* Similarly, Brown contends that neither he nor his staff has ever spoken with John M. Connors regarding his contribution to the Massachusetts Democratic State Committee.[8] Brown Dec. at ¶ 5; Massachusetts Resp. at ¶¶ 6-7; Thomson Dec. at ¶ 5.

Thus, the individual donors solicited by the Brown Committee gave to the state party committees after the State Party Committees had contributed to Brown, and apparently without any knowledge as to how the State Parties would use their funds.[9] While Brown Committee donor John Connors contributed to a State Party prior to that State Party's contribution to the Brown Committee, the record demonstrates that the

[8] The state committees of Hawaii, Maine and Massachusetts were the only Democratic state parties to contribute to the Brown Committee.

[9] As previously noted, the Brown Committee did not speak directly to Jeanne Lavine, but a staff member did personally solicit Jeanne's husband, Jonathan Lavine.

Brown Committee did not solicit his contribution, and there is no basis to infer that he had knowledge of how the State Party would use his funds.

The Commission has determined that the contributor must have "actual knowledge" of the committee's plans to contribute to the candidate to meet the requirements of Section 110.1(h)(2). *See* MUR 5445 (Nesbitt); MUR 5019 (Keystone Federal PAC) (although contributors were likely aware that the PAC would contemporaneously contribute to the candidates committees, it does not appear the contributors knew that a portion of *their own contributions* would be given to a specific candidate) (italics in original). Though it may be reasonable to infer that the individual donors solicited by Brown gave to the State Parties under the assumption that some portion of their contribution might then be donated to the Brown Committee, such an inference alone is insufficient to find reason to believe 11 C.F.R. § 110.1(h) has been violated in this matter.

All of the State Parties, the Brown Committee and Richard Bready declare that there was no discussion between the donors, the Brown Committee or the State Parties regarding how the contributions should or might be used. Moreover, there is no indication that the State Parties would not have contributed to the Brown Committee, but for the Individual Donors' contributions, or that the Individual Donors knew precisely what the State Parties would do with their contributions. Thus, there is no basis for concluding that the donors were seeking to circumvent contribution limits set forth in 2 U.S.C. § 441a(a).

Finally, there is no clear indication that the Individual Donors retained control over their contributions once they were in the state party committees' possession. The

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Commission regulations set forth in Section 110.1(h) require "knowledge" or "control." There are no indicia that the individual donors retained control of the contributions once the State Parties received them. The State Parties all declare that no instructions or designations were submitted with the contributions, and there was no contact between the contributors and the state committees after the contributions were made.

It does not appear that the individual donors' contributions to the State Parties were made with the requisite knowledge or control, as set forth in 11 C.F.R. § 110.1(h), to trigger a violation of 2 U.S.C. § 441a. Accordingly, the Commission finds no reason to believe that Richard Bready or John Connors violated 2 U.S.C. § 441a(a)(1) or 11 C.F.R. § 110.1(h), or that Matt Brown for U.S. Senate and James Vincent, in his official capacity as Treasurer, violated 2 U.S.C. § 441a(f).

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C. Alleged Violation of 2 U.S.C. § 441f

Section 441f of the Act provides that "No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution and no person shall knowingly accept a contribution made by one person in the name of another person." 2 U.S.C. § 441f.

In addition to the lacking any instructions, designations or encumbrances discussed herein, as well as the denials of any "pass through" arrangement by Brown, the state party committees and the one responsive donor, the contributions at issue present an additional challenge to finding reason to believe Section 441f has been violated. The contributions from the State Parties were made to the Brown Committee two to four weeks before the Brown Committee even solicited the contributions and before the donors made their contributions to the state committees. In addition, the dollar amounts

received by the Brown Committee do not correlate to the amounts contributed by the individual donors to the state committees. *Id.* Moreover, the Individual Donors were not the only out-of-state donors to contribute to these state party committees. In fact, these state parties frequently received contributions from donors living in different states.

Finally, there is no allegation that any of the Individual Donors had knowledge of the alleged *quid pro quo* arrangements by which their contributions would reimburse a State Party for its contribution to the Brown Committee. Section 441f specifically states, "no person shall make a contribution in the name of another person or *knowingly* permit his name to be used to effect such a contribution." 2 U.S.C. § 441f (emphasis added). Given the Respondents' lack of knowledge regarding the State Party contributions to the Brown Committee, they lacked the knowledge required to violate 2 U.S.C. § 441f.

Accordingly, the Commission finds no reason to believe Richard L. Bready, John M. Connors, the Democratic Party of Hawaii and Yuriko J. Sugimura, in her official capacity as Treasurer, the Maine Democratic State Committee and Belly I. Johnson, in her official capacity as Treasurer, the Massachusetts Democratic State Committee-Federal and Mary Jane Powell, in her official capacity as Treasurer, or Matt Brown for U.S. Senate and James Vincent, in his official capacity as Treasurer, violated 2 U.S.C. § 441f.

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