FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Robert F. Bauer, Esq.
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607 Fourteenth Street, N.W.
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NOV 25 2009

RE: MUR 6127
Obama for America
Martin Nesbitt, in his official capacity as Treasurer
President Barack Obama

Dear Mr. Bauer and Ms. Gordon:

On November 10, 2008, the Federal Election Commission notified your clients, Obama for America and Martin Nesbitt, in his official capacity as Treasurer ("Obama for America"), and President Barack Obama, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint, and information supplied by you, as well as publicly available information, the Commission, on November 17, 2009, voted to find no reason to believe that Obama for America violated 2 U.S.C. §§ 441a(f), 441b(a), and 434(b) and 11 C.F.R. § 104.3. In addition, the Commission voted to dismiss the allegations that Obama for America violated 2 U.S.C. § 441b(a) and that Obama for America and President Obama violated 2 U.S.C. § 439a(b). 2 U.S.C. § 439(a) provides that contributions or donations shall not be converted for personal use. The Commission cautions your clients to take steps to ensure that their conduct is in compliance with the Act and the Commission's Regulations. The Factual and Legal Analysis, which more fully explains the Commission's decision, is enclosed for your information.

You are advised that the confidentiality provisions of 2 U.S.C. § 437g(a)(12)(A) remain in effect, and that this matter is still open with respect to other respondents. The Commission will notify you when the entire file has been closed.

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

Sincerely,

Julie Kara McConnell
Assistant General Counsel

Enclosure
Factual and Legal Analysis

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Obama For America MUR: 6127
Barack Obama

I. INTRODUCTION

The Complaint in this matter makes several allegations that Respondents violated provisions of the Federal Election Campaign Act, as amended ("Act"). First, the Complaint alleges that Obama for America and Martin H. Nesbitt, in his official capacity as Treasurer, ("OFA") converted campaign funds to President Barack Obama's personal use by paying his personal travel expenses during the 2008 presidential election in violation of 2 U.S.C. § 439a(b). Specifically, the Complaint claims that OFA and President Obama violated the Act's prohibition on personal use of campaign contributions when OFA used campaign contributions to pay for the President's trip to Hawaii to visit his sick grandmother on October 23 and 24, 2008.

Second, the Complaint alleges that VIDA Fitness ("VIDA"), a health club based in Washington, D.C., violated 2 U.S.C. § 441b(a) and 11 C.F.R. §§ 114.2(b), (d) and (f) by facilitating the making of contributions and making prohibited contributions to the Obama Victory Fund ("OVF"), a joint fundraising committee comprised of OFA and the Democratic National Committee ("DNC"). The Complaint claims that VIDA facilitated the making of contributions by using a corporate email list to distribute OVF fundraising solicitations and allowing OVF to use VIDA's facilities for a fundraiser. Because VIDA allegedly never charged OVF for the use of the email list or the use of the space, the Complaint argues that VIDA made, and OVF knowingly accepted, prohibited corporate contributions.

Third, the Complaint alleges that OFA failed to disclose a transfer of a donor list to Project Vote, an affiliate of the non-profit community organization, ACORN, in violation of 2

U.S.C. § 434(b) and 11 C.F.R. § 104.3. Fourth, the Complaint alleges that OFA intended to accept, and Saul Ewing LLP intended to make, an excessive contribution in the form of pro bono legal services provided by Saul Ewing lawyers to OFA in violation of 2 U.S.C. § 441a.

Based on the discussion below, the Commission: 1) dismisses the allegation that OFA and President Obama violated 2 U.S.C. § 439a(b) by converting campaign funds for President Obama's personal use; 2) dismisses the allegation that OFA violated 2 U.S.C. § 441b(a) by knowingly accepting a prohibited contribution; 3) finds no reason to believe OFA violated 2 U.S.C. § 434(b) and 11 C.F.R. § 104.3 by failing to report an alleged transfer of a donor list; and 4) finds no reason to believe that OFA knowingly accepted an excessive contribution in violation of 2 U.S.C. § 441a.

II. FACTUAL AND LEGAL ANALYSIS

A. Alleged Conversion of Campaign Funds to Personal Use

1. Facts

OFA was the principal campaign committee for President Barack Obama during the 2008 election for U.S. President. On or about October 21, 2008, President Obama's campaign reportedly announced that the President would suspend his campaign to visit his ailing grandmother in Hawaii.[1] According to the Response submitted by OFA, on October 23 and 24, 2008, President Obama traveled to Hawaii on his campaign plane, and "the purpose of the trip was to visit his dying grandmother." OFA Response at 2. The Response, however, notes that because the trip occurred two weeks before the general election, the President had no choice but to travel on an aircraft "equipped with the space and capacity to address security and working requirements." *Id.* In fact, the Secret Service required the President to use the campaign plane.

[1] *See* Scott Hellman, *Obama Suspends Campaign to Visit Ailing Grandmother in Hawaii*, THE BOSTON GLOBE, Oct. 21, 2008; Michael Powell, *Obama Briefly Leaving Trail to See Ill Grandmother*, THE NEW YORK TIMES, Oct. 21, 2008.

Id. In addition, the Response states that campaign aides traveled with the President to Hawaii, and he participated in numerous campaign-related phone calls and meetings while in Hawaii. The Response further notes that the "trip was reported on extensively by the national media." *Id.*

The Complaint estimates that OFA may have paid over $100,000 to fly the President on the campaign plane without obtaining reimbursement from the President. Complaint at 4 (*citing* T.W. Farnam, *Campaigns Take Different Stances on Using Private Jets*, WALL ST. J., Oct 29, 2008). The Response does not indicate what the airfare to and from Hawaii actually cost, and we have not been able to obtain any such information through publicly available sources.[2]

2. Legal Analysis

Under 2 U.S.C. § 439a(b)(1), a contribution cannot be converted to personal use by any person. *Id.* Such conversion occurs "if the contribution or amount is used to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office." 2 U.S.C. § 439a(b)(2); *see also* 11 C.F.R. § 113.1(g). In other words, "expenses that would be incurred even if the candidate was not a candidate or officeholder are treated as personal rather than campaign or officeholder related." *Final Rule and Explanation and Justification, Personal Use of Campaign Funds*, 60 Fed. Reg. 7861, 7863 (Feb. 9, 1995) (hereinafter "1995 Personal Use E&J").[3]

[2] The article cited in the Complaint estimates that a flight to Hawaii on the Obama campaign charter plan, a Boeing 757, would likely cost about $10,000 per flight hour, and assuming that the flight was 10 hours in duration, OFA probably paid at least $100,000 for the trip. OFA reported a payment of $180,101.25 to Executive Jet Management on October 31, 2008, on its 2008 Post-General Report. However, we do not know if this disbursement covered the President's trip to Hawaii. Even if this disbursement did include the trip, the disbursement likely included other air travel besides the flight to and from Hawaii.

[3] In the Bipartisan Campaign Reform Act of 2002, Congress codified the "irrespective" test for personal use set forth in 11 C.F.R. § 113.1(g)(1) by amending the pre-BCRA version of 2 U.S.C. § 439a(b). *See Final Rule and Explanation and Justification, Personal Use of Campaign Funds*, 67 Fed. Reg. 76962, 76970 (Dec. 13, 2002). The Commission announced that it would therefore not revise the "irrespective" test. *Id.*

The Response claims that OFA's use of campaign funds to pay for the trip was not a violation of section 439a because the expenses for the Hawaii trip "would not have been incurred irrespective of President-Elect Obama's candidacy." Response at 2. While the Response states that the purpose of the trip was to visit his dying grandmother, it maintains that security concerns and working requirements rendered it "impossible" for the President not to fly on the campaign plane. *Id.* Furthermore, the Response argues that during the trip, the President engaged in campaign activities that were more than incidental, and thus the expense of this travel should be considered a campaign expense under 11 C.F.R. § 106.3(b)(3), which requires that a candidate report travel expenditures where the candidate conducts any non-incidental, campaign-related activity in a travel stop.

In cases where travel involves both personal and campaign-related activities, 11 C.F.R. § 113.1(g)(1)(ii)(C) provides that "the incremental expenses that result from personal activities are personal use, unless the person(s) benefiting from this use reimburse(s) the campaign account within thirty days for the amount of the incremental expenses." *Id; see also* 11 C.F.R. § 113.1(g)(1)(ii)(D) (requiring candidate to reimburse campaign account within 30 days where vehicle is used for both personal and campaign-related activities, unless personal activities are a *de minimis* amount); 1995 Personal Use E&J at 7869 (stating if committee uses campaign funds to pay for mixed travel expenses, the candidate or officeholder is required to reimburse committee for incremental expenses that resulted from personal activities); MUR 5218 (Russ Francis), First General Counsel's Report at 7-8 (stating that candidate should have reimbursed committee where some travel expenses paid by committee appeared to be for personal use). While the Commission has required candidates or office holders to reimburse incremental travel expenses that are personal, (i.e., additional expenses attributable to personal use in a mixed travel

context), the Commission historically has considered airfare as a defined expense that is not apportioned as both a personal and campaign expense and thus applied the irrespective test to determine whether personal or campaign funds should be used to pay for the airfare. *See* AO 2002-05 (Hutchinson) (citing 1995 Personal Use E&J at 7869).

The Response relies on 11 C.F.R. § 106.3(b)(3)—which provides that where campaign-related activity is more than incidental in a stop, that entire stop will be treated as a campaign-related stop—in support of its assertion that OFA's use of campaign funds for the trip to Hawaii was permissible. Section 106.3(b)(3) predates BCRA's statutory prohibition against personal use in 2 U.S.C. § 439a(b) and the definition of personal use in 11 C.F.R. § 113.1(g), which apply the "irrespective test" to prohibit campaign funds from being used for non-campaign-related activity. Thus, section 106.3 must be read in conjunction with 2 U.S.C. § 439a(b), and the Commission must apply the statutory provision to analyze whether the expense would have occurred irrespective of a candidate's campaign or duties as a Federal officeholder.[4]

This approach is consistent with the Commission's approach in AO 2002-05 (Hutchinson). In this opinion, the Commission considered the interplay of the personal use provisions and section 106.3 where a City Mayor traveled to Washington, D.C. to conduct city business but also conducted some federal campaign activity and took some time for personal travel. Because the Mayor spent two out of eight days on federal campaign activity, the Commission concluded that the federal activity was more than incidental. Rather than treating the whole trip as a campaign-related expense under section 106.3(b), however, the Commission stated that the Mayor must apply the incremental approach under section 113.1(g) and ensure that her federal committee did not pay for the non-campaign related portion of the trip. In this

[4] In AO 2002-05, the Commission specifically declared that past advisory opinions, including AO 1992-34 and 1994-37, which applied section 106.3(b)(3) and were inconsistent with the approach in section 113.1(g)(1)(ii)(C), were superseded. *See* AO 2002-05 at fn. 7.

matter, applying section 106.3(b)(3) to transform a trip, which was for the purpose of meeting a personal obligation, into a campaign-related trip would be inconsistent with section 439a(b)'s prohibition against personal use established by Congress. While the prohibition on personal use recognizes that candidates have wide discretion over the use of campaign funds, candidates must reasonably show that the expenses at issue resulted from campaign activities. *See* 1995 Personal Use E&J at 7867. OFA does not state whether President Obama was scheduled to appear for any events that were specifically scheduled in Hawaii, nor does it contend that the campaign activity, which included conducting some meetings and making phone calls, was required to be conducted in Hawaii or was otherwise related to his trip to Hawaii.

Although OFA states that the President engaged in "more than incidental" campaign activity while he was in Hawaii, it does not alter the fact that the travel to Hawaii was for a non-campaign purpose.[5] Accordingly, based upon the submissions, it appears that the travel to Hawaii would have occurred irrespective of the campaign and that President Obama should have reimbursed his campaign for airfare for the trip to Hawaii under section 439a(b). The security and working needs that required the use of the campaign plane, however, would not have existed irrespective of his campaign and therefore the increased costs associated with traveling on the campaign plane are not personal use. Thus, reimbursement for the approximate commercial first class rate, rather than the charter rate, would be more appropriate given that the Secret Service required the President to use the campaign plane for security reasons.[6] When obtaining pricing information for a hypothetical flight from Indianapolis, Indiana to Honolulu, Hawaii, we found

[5] The Commission has not previously addressed whether meetings and phone calls are sufficient to be considered more than "incidental" and does not reach that question here.

[6] In the Honest Leadership and Open Government Act of 2007 ("HLOGA"), Congress amended 2 U.S.C. § 439a to require that federal candidates pay the fair market value of a flight based upon "the normal and usual charter fare or rental charge for a comparable plane . . ." when making an expenditure for a flight on an aircraft. *See* 2 U.S.C. § 439a(c)(1). Because it appears that President Obama's use of the campaign plane constituted personal use and not an expenditure, reimbursement based on a charter rate would not apply in this case.

prices ranging from $1,248-$1,338.[7] Accordingly, it appears that President Obama should have reimbursed the campaign with funds in this range in order to comply with section 439a(b).

Given the small amount at issue, however, we do not believe that it would be a prudent use of the Commission's limited resources to pursue this matter further. Furthermore, this case appears to present unique circumstances, as President Obama was the first Presidential candidate to forego public financing in the general election, and most federal candidates are not required to travel with the Secret Service and a large press corps and to use a private charter equipped to address certain work and security requirements. Based upon the small amount in violation and the relatively novel facts and issues presented in this matter, the Commission exercises its prosecutorial discretion and dismisses the allegation that OFA and President Obama violated 2 U.S.C. § 439a(b). *See Heckler v. Chaney*, 470 U.S. 821 (1985).

B. Alleged Facilitation and Making of Prohibited Contributions

1. Facts

VIDA, a Subchapter S corporation, is a fitness club with three locations in Washington, D.C.[8] Response of VIDA Fitness ("VIDA Response"), Declaration of David von Storch ("von Storch Dec.") at ¶ 1. David von Storch is VIDA's sole shareholder and has been an active member of the Democratic Party. von Storch Dec. at ¶¶ 1-2. According to the VIDA Response, in mid-September 2008, Mr. von Storch and Tom Petrillo, a fundraiser for the DNC, spoke about holding a fundraising event on September 26, 2008 to benefit OVF. *Id.* at ¶ 3. Mr. von Storch

[7] According to press reports, President Obama was leaving for Honolulu after a campaign event in Indianapolis on Thursday, October 24, 2008. *See* Helman, *supra* note 1. Thus, based on this information, we used a common on-line travel website to determine what a hypothetical first class, commercial rate would be from Indianapolis to Honolulu on a Thursday within the same week. *See* Travelocity Search Results. We only researched a one way ticket because the flight departing Honolulu to where President Obama would resume his campaigning would be considered a campaign stop and campaign funds would be used for that particular trip. *See* 1995 Personal Use E&J at 7869.

[8] *See* VIDA Fitness website, www.vidafitness.com.

told Mr. Petrillo about empty space at VIDA's newest location, and they agreed to hold the event at this location. *Id.* The VIDA Response and the Response of DNC and OVF ("DNC/OVF Response") indicate that Mr. Petrillo informed Mr. von Storch that OVF would have to be invoiced for the rental of the space as well as any food or beverages served at the event. *Id.*; DNC/OVF Response, Declaration of Thomas Petrillo ("Petrillo Dec.") at ¶ 4.

Prior to September 19, 2008, Mr. Petrillo emailed Mr. von Storch an invitation to the fundraiser. *See* OVF Invitation, attached as Exhibit A to DNC/OVF Response; von Storch Dec. at ¶ 7. Mr. Petrillo also emailed this invitation to approximately 500 donors in the D.C. metropolitan area. Petrillo Dec. at ¶ 5. According to Mr. von Storch, he revised the invitation, without Mr. Petrillo's knowledge or approval, adding a special disclaimer stating, "VIDA and Bang[9] do not endorse nor support any political candidate, but do encourage their members and friends to get involved and participate in the electoral process." *See* VIDA Invitation, attached as Exhibit B of VIDA Response; von Storch Dec. at ¶ 7. On his own accord and without the knowledge or approval of Mr. Petrillo, Mr. von Storch then emailed this invitation to approximately 20,000 individuals who were on a list, prepared by Mr. von Storch, of customers and friends of VIDA and Bang. von Storch Dec. at ¶¶ 9, 10; Petrillo Dec. at ¶¶ 7-8. Mr. von Storch states that he subsequently paid Vida $3,000 as a "personal in-kind contribution" to the OVF for the use and rental of the email list, calculated as "$150[0].00 [sic] per 10,000 names." von Storch Dec. at ¶ 10. The Commission's disclosure database indicates that Mr. von Storch made a $3,000 contribution to OVF on December 4, 2008.[10]

[9] Bang refers to Bang Salon and Spa, which is a salon owned by Mr. von Storch.

[10] Although the contribution limit for individuals to a candidate committee during the 2008 election cycle was $2,300, individuals could give a maximum contribution of $28,500 to national party committees. *See* 2 U.S.C. § 441a(a). Because OVF was a joint fundraising committee in which OVF and the DNC were participants, an individual could make a contribution up to $30,800. See 11 C.F.R. § 102.17(c)(5) (providing that a contributor

On September 26, the day of the fundraiser, OVF brought in, at its own expense, the equipment and volunteers to manage the event and guests, von Storch Dec. at ¶ 11, but it had not received an invoice from VIDA for the use of the space and beverages. According to press reports, more than 400 attended this event and tickets were "almost sold out" at $250 to $2,500.[11] In addition, there were a limited number of tickets available at $100. *See* VIDA Invitation. Given that the gym was to open on the following Monday, von Storch reportedly promoted this event a "sneak peak" into the new location.[12] At this time, we do not have information as to how much was raised or how much of the amount raised resulted from Mr. von Sotrch's invitations.

After the event, Mr. Petrillo claims that he asked Mr. von Storch for an invoice but did not receive one immediately. Petrillo Dec. at ¶ 9. According to Mr. von Storch, because the main celebrity attraction cancelled her appearance at the last minute, "[f]rustration and confusion reigned, and invoicing for the rental space and beverages got lost in the shuffle." von Storch Dec. at ¶ 11. Furthermore, Mr. von Storch became occupied with the grand opening of the new VIDA location and did not realize that he forgot to submit the invoice to Mr. Petrillo. von Storch Dec. at ¶ 12. Mr. Petrillo also was deployed to Ohio to conduct campaign work and did not realize that he had not yet received an invoice. Petrillo Dec. at ¶ 12. When Mr. Petrillo learned of the Complaint in this matter, he again asked Mr. von Storch for the invoice. Petrillo Dec. at ¶ 11.

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could make a contribution to the joint fundraising effort in an amount that represents the total of the allowable contribution limits for all participants).

[11] Ann Schroeder Mullins, *Sarah Jessica Parker in Town Tonight for Obama*, POLITICO, Sept. 26, 2008, http://www.politico.com/blogs/annschroeder/0908/Sarah_Jessica_in_town_tonight. . . .

[12] *Id.*; *see also*, Victor Maldonado, *Sarah Jessica Parker to Headline Obama Fundraiser in Washington*, Sept. 22, 2008, http://www.namshouseblend.com/showDiary.do?diaryId=7130&view=print (stating that the event would also celebrate the opening of VIDA's Metropole location).

On December 4, 2008, Mr. Petrillo received an invoice, dated November 26, 2008, from Mr. von Storch for $2,725.00. Petrillo Dec. at ¶ 12; VIDA invoice, attached as Exhibit C to VIDA Response. Mr. von Storch stated that he charged $2,500 for the space rental based upon what he estimated a hotel would charge for the same amount of space used, given that the space was new, and "there was no history of customary use, or usual and normal rental charge for, the venue." VIDA Response at 4. In addition, Mr. von Storch charged $225 for beverages that were served at the event. von Storch Dec. at ¶ 12. OVF subsequently paid the invoice. *See* Check No. 5560, attached as Exhibit D to VIDA Response.

2. Legal Analysis

A corporation is prohibited from making a contribution in connection with a federal election under the Act. *See* 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(b). In addition, neither a federal candidate nor a political committee may knowingly accept a contribution from a corporation. *See* 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(d). The Commission's regulations further provide that a corporation may not facilitate the making of a contribution by using its corporate resources to engage in fundraising activities for any federal election. *See* 11 C.F.R. § 114.2(f)(1). The regulations provide examples of conduct that constitute corporate facilitation, including the use of a corporate customer list, to send invitations to individuals not within the restricted class to fundraisers without advance payment; the use of meeting rooms that are not customarily available to civic or community organizations; and the provision of catering or other food services without advance payment. *See* 11 C.F.R. § 114.2(f)(2).

a. Use of VIDA's Customer List

Corporations such as VIDA, which do not have separate segregated funds, are permitted to solicit contributions to be sent directly to candidates, but those solicitations are limited solely

to its restricted class, consisting of its stockholders and executive or administrative personnel, and their families. 2 U.S.C. § 441b(b)(2)(A); 11 C.F.R. §§ 114.1(j) and 114.2(f). Moreover, corporate facilitation may result if the corporation uses its list of customers, who are not within the restricted class, to solicit contributions or distribute invitations to fundraisers without advance payment for the fair market value of the list. *See* 11 C.F.R. § 114.2(f)(2)(i)(C).

Thus, when Mr. von Storch, the President of VIDA, emailed a list of 20,000 VIDA customers and friends to distribute the September 26 fundraiser invitation without making an advance payment, VIDA solicited outside of its restricted class and facilitated the making of contributions to OVF. While Mr. von Storch reimbursed VIDA after the complaint was filed, such reimbursement may mitigate but not vitiate a violation.

b. Space Rental

Corporate facilitation includes "using meeting rooms that are not customarily available to clubs, civic or community organizations or other groups." 11 C.F.R. § 114.2(f)(2)(i)(D). For example, facilitation would occur if a corporation makes its meeting room available for a candidate's fundraiser, but not for community or civic groups. *See Explanation and Justification, Facilitating the Making of Contributions*, 60 Fed. Reg. 64259, 64264 (Dec. 14, 1995). The permissibility of using such rooms when a corporation receives payment is governed by 11 C.F.R. § 114.9(a), (b), or (d). *Id.* Section 114.9(d), which pertains to "use or rental" of corporate facilities, provides that persons may make use of corporate facilities in connection with a federal election so long as they reimburse the corporation "within a commercially reasonable time in the amount of the normal and usual rental charge." *Id.*

In this matter, despite the purported agreement between Mr. von Storch and Mr. Petrillo, VIDA failed to provide an invoice to the DNC until after the filing of the Complaint and 61 days

after the fundraising event. In a recent matter, MUR 5998 (John McCain for President), the Commission determined that it was commercially reasonable for a vendor to invoice a committee 45 days after a campaign event and 6 days after the complaint had been filed, given that the delay was relatively short and was due to a tax concern that was under review by the vendor. Furthermore, the Commission has determined billing a committee approximately 90 days from the event is commercially reasonable. *See, e.g.*, MUR 6034 (Worth & Company, Inc.). While the reason for the delay in this matter appears to have been an oversight by the parties, it appears that VIDA obtained payment for the space within a commercially reasonable time, given that VIDA billed OVF within 61 days of the event and received payment shortly thereafter.

c. Beverages

Under 11 C.F.R. § 114.2(f)(2)(i)(E), corporate facilitation includes "providing catering or other food services operated or obtained by the corporation or labor organization, unless the corporation or labor organization receives advance payment for the fair market value of the services." Because VIDA did not receive advance payment for the beverages, VIDA appears to have facilitated the making of a contribution.

d. OVF

In their Responses, the joint fundraising participants of OVF, the DNC and OFA largely reiterate the facts and arguments presented in the VIDA Response. Both the DNC and OFA state that Mr. von Storch acted on his own without consultation or knowledge from the DNC or OFA when he mailed the OVF invitation to the VIDA customer list. *See* OFA Response at 3-4; DNC/OVF Response at 2-3. We have no information suggesting otherwise. Thus, neither the OVF nor OFA "knowingly" accepted a prohibited contribution in violation of 2 U.S.C. § 441b through the use of the customer list.

Assuming that the valuation for the space is correct, OVF does not appear to have accepted a prohibited contribution by renting VIDA's space because OVF paid for the space within a commercially reasonable time. With respect to the beverages, OVF appears to have accepted a prohibited contribution given that OVF failed to make an advance payment to VIDA for these expenses in violation 11 C.F.R. § 114.2(f). However, the Commission exercises its prosecutorial discretion and dismisses this allegation as to OFA in light of the relatively small amount of money involved and OVF's ultimate payment for the beverages. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

C. Alleged Failure to Disclose Transfer of Donor List

1. Facts

The Association of Community Organizations for Reform Now or "ACORN" describes itself as a "non-profit, non-partisan social justice organization."[13] Project Vote describes itself as a "national nonpartisan, nonprofit 501(c)(3)" organization and has partnered with ACORN, to conduct voter registration drives.[14] According to the complaint and publicly available information, an ACORN whistleblower reportedly testified in a Pennsylvania court case that OFA provided its donor lists to the Development Director of Project Vote.[15]

2. Legal Analysis

2 U.S.C. § 434(b)(4) requires a political committee to disclose its disbursements, and 11 C.F.R. § 104.3(b)(4)(vi) requires that an authorized committee must itemize a disbursement of which the aggregate amount or value exceeds $200. The Complaint alleges that OFA violated

[13] *See* ACORN Website, http://www.acorn.org/index.php?id=12342.

[14] *See* Project Vote Website, http://www.projectvote.org/our-mission.html.

[15] *See* Complaint at 2 (citing *Meyer v. Cortes*, Commonwealth Court of Pennsylvania (Civ. No. 497 MD 2008) (filed Oct. 17, 2008); John Fund, *An ACORN Whistleblower Testifies in Court*, WALL ST. J., Oct. 30, 2008 (describing testimony of former employee of ACORN stating that a Project Vote development director told her that Project Vote had obtained donor lists from the Obama campaign).

2 U.S.C. § 434(b) and 11 C.F.R. § 104.3 by failing to disclose the transfer of its donor list to Project Vote. *See* Complaint at 2. The Complaint claims that according to past advisory opinions, the Commission has determined that donor or mailing lists have value, and therefore OFA should have disclosed the transfer of the donor lists as a disbursement pursuant to § 434(b). *See, e.g.*, AO 2002-14 (Libertarian National Committee) (rental payments from leased mailing lists are reportable).[16]

OFA's Response states that it "never gave its donor lists to Project Vote, ACORN, or any other organization." OFA Response at 1. The Response notes that while its Privacy Policy may permit it to transfer its donor lists to other organizations for a fee pursuant to a rental agreement, OFA never gave or rented its list to Project Vote. In addition, the Response attaches the Declaration of Michael Dykes, the former Finance Chief of Staff for OFA. The Declaration states that OFA "never gave its donor lists to Project Vote, ACORN, or any other organization" and "whenever [OFA] did transfer its donor lists to other organizations, it did so for a fee pursuant to a rental agreement and reported the transactions accordingly." Declaration of Michael Dykes, Exhibit A of OFA Response. Because the Committee did not transfer the lists to Project Vote, the Response claims that there was no transaction to disclose and no violation of the FECA. OFA Response at 2.

Recently, this allegation has received increased media attention amid claims that the *New York Times* refused to cover a story that the Obama campaign had given ACORN a list of "so-called maxed-out donors."[17] While a former ACORN employee gave a *New York Times* reporter a donor list, the reporter was unable to verify that the list came from the Obama campaign and

[16] MUR 5396 (Bauer for President 2000), Conciliation Agreement (determining that donor list had value and finding that respondent received an excessive in-kind contribution in the form of a donor list at less than the usual and normal charge).

[17] Clark Hoyt, *The Tip That Didn't Pan Out*, THE NEW YORK TIMES, May 17, 2009.

ultimately did not pursue the story.[18] However, this former ACORN employee, who may be the ACORN whistleblower referenced in the Complaint, has subsequently made public statements that the Obama campaign gave a donor list to ACORN.[19]

Although there appears to be some speculation in the press that the Obama campaign gave a donor list to ACORN, the Response has flatly denied that OFA gave any donor list for free to any outside organization, including ACORN, and no specific information has been presented to the contrary. Given that the Response appears to adequately rebut the allegations, the Commission finds no reason to believe that OFA violated 2 U.S.C. § 434(b) and 11 C.F.R. § 104.3.

D. Alleged Excessive Contributions

1. Facts

Saul Ewing, LLP, ("Saul Ewing") is a law firm organized as a Delaware limited liability partnership.[20] It has offices throughout the Mid-Atlantic region of the United States. On October 28, 2008, an article published in the *New York Times* reported that thousands of lawyers were assisting President Barack Obama's campaign by monitoring the polls on Election Day.[21] The article described how Saul Ewing allowed attorneys employed by the firm to receive pro bono credit for voter protection work and quoted a Saul Ewing partner, Orlan Johnson, who stated, "Our lawyers are willing to go mano-a-mano."[22] The article then identified Mr. Johnson as "a member of the Obama national finance committee," and in the immediately following

[18] *Id.*

[19] *See O'Reilly Nails New York Times Over Obama-ACORN Lie*, May 19, 2009, available at http://www.foxnews.com/story/0,2933,520701,00.html.

[20] *See* Saul Ewing Website, http://www.saul.com/about_us/aboutus.aspx.

[21] *See* Leslie Wayne, *Party Lawyers Ready to Keep an Eye on the Polls*, NEW YORK TIMES, Oct. 28, 2008.

[22] *Id.*

sentence, stated, "All volunteers must undergo a training session either in person or online with the Obama campaign."[23]

2. Legal Analysis

During the 2008 general election, no person could make a contribution, which exceeded $2,300, to any federal candidate and his authorized committee. 2 U.S.C. § 441(a)(1)(A); 11 C.F.R. § 110.1(b). 2 U.S.C. § 431(11) defines "person" to include a partnership. *Id.* Under Commission regulations, a contribution by a partnership must be attributed to the partnership and to each partner either in direct proportion to his or her share of the partnership profits or by agreement of the partners. 11 C.F.R. § 110.1(e)(1), (2). Because Saul Ewing is a partnership, it was subject to the Act's contribution limits.

Citing the October 28, 2008 *New York Times* article, the Complaint alleges that OFA intended to knowingly accept, and Saul Ewing, LLP intended to make, excessive contributions through pro bono legal services rendered by Saul Ewing to OFA in violation of 2 U.S.C. § 441a. Barring some exceptions, the provision of free legal services to a political committee becomes a contribution under 2 U.S.C. § 431(8)(A)(ii), which states that a contribution includes, "the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose." *Id.*; *see also* 11 C.F.R. § 100.54; AO 2006-22 (Jenkins & Gilchrist) (law firm's preparation of amicus brief on behalf of political committee free of charge would constitute a contribution). Thus, if Saul Ewing did provide pro bono legal services to OFA, it would have made a contribution to OFA.

OFA and Saul Ewing both contend, however, that Saul Ewing never provided pro bono services to OFA. *See* OFA Response at 2-3; Saul Ewing Response at 2. OFA states that it has no knowledge of Saul Ewing providing any pro bono legal services to OFA. OFA Response at

[23] *Id.*

2-3. In addition, Saul Ewing indicates that the article did not accurately report the voter protection activities of its lawyers. *Id.* Although some of its attorneys participated in such activities for pro bono credit, the attorneys participated in a nonpartisan voter protection effort led by the Lawyers' Committee for Civil Rights Under Law, not the Obama campaign. Saul Ewing Response at 2. According to Saul Ewing, while the *New York Times* reporter did speak with Mr. Johnson, Mr. Johnson believed that her questions concerned his personal role in the Obama campaign and not the law firm. *See id.* at 2.

Given the specific information provided by OFA and Saul Ewing, we believe that the Responses adequately rebut the allegations contained in the Complaint. Accordingly, the Commission finds no reason to believe that OFA knowingly accepted excessive in-kind contributions in violation of 2 U.S.C. § 441a(f).

III. CONCLUSION

In conclusion, the Commission takes the following actions: 1) dismisses the allegation that OFA and President Barack Obama violated 2 U.S.C. § 439a(b); 2) dismisses the allegation that OFA violated 2 U.S.C. § 441b(a); 4) finds no reason to believe OFA violated 2 U.S.C. § 434(b) and 11 C.F.R. § 104.3; and 5) finds no reason to believe that OFA violated of 2 U.S.C. § 441a.