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June 17, 2010

BY HAND

Jeff S. Jordan
Supervisory Attorney
Complaints Examination & Legal Administration
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 6280
Representative Howard Berman, Berman for Congress, and Bruce Corwin, as
treasurer

Dear Mr. Jordan:

On behalf of Representative Howard Berman, Berman for Congress (the "Committee") and Bruce Corwin, as treasurer (collectively referred to as the "Respondents"), we write in response to the Complaint filed in the above-referenced matter by Charles T. Munger, Jr. (the "Complainant"), alleging violations of the Federal Election Campaign Act (the "Act"). For the reasons set forth below, the Complaint is without merit and should be dismissed.

The Complaint alleges that Respondents have violated the Act by establishing, financing, maintaining and controlling a California ballot initiative committee ("Yes on FAIR") that is raising funds outside federal limits and source restrictions. Yet the Complaint presents no credible, specific allegation to contradict the true facts – which are that Respondents have not "established, financed, maintained, or controlled" Yes on FAIR.

The Commission "may find 'reason to believe' only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation" of the Act. See MUR 4960, Statement of Reasons of Commissioners Hinson, Sandstrom, Smith, and Thomas at 1; see also 11 C.F.R. § 111.4(a), (d). Here, where the Complaint presents no credible evidence to suggest that

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Respondents "established, financed, maintained, or controlled" Yes on FAIR, the Commission may not find "reason to believe," and must dismiss the Complaint immediately.

Factual Background

Yes on FAIR is a registered nonfederal political committee in the state of California. Its purpose is to support the qualification and passage of the Financial Accountability In Redistricting "FAIR" Act, a proposed ballot measure for the November 2010 California statewide general election ballot. According to the Statement of Organization filed with the California Secretary of State, Yes on FAIR's sole officers and directors are Fredric D. Woocher and Daniel Lawenstein.

Like many other California political figures, Representative Berman publicly supports the FAIR ballot initiative. But that he supports the initiative does not mean that he has established, financed, maintained or controlled the initiative committee – as the Complaint would have the Commission believe. Representative Berman is not an officer or director of Yes on FAIR. Neither he nor his agents formed Yes on FAIR or participate in the control of its activities. His activities in support of the FAIR Act have been undertaken as a private supporter of the initiative; he does not hold himself out as responsible for Yes on FAIR's activities, or as specially involved in its decisionmaking. His principal campaign committee, Berman for Congress, has made a single contribution of \$10,000 to Yes on FAIR, placing him among several Members of Congress who have given to the Committee through their campaigns. But neither the Committee nor Representative Berman has paid for Yes on FAIR's administrative costs or provided any ongoing funding to Yes on FAIR.

The Complaint refers to Michael Berman, Representative Berman's brother. Michael Berman is a prominent California political strategist in his own right -- with a reputation independent of his brother's -- who has managed political campaigns for more than 40 years. He has managed campaigns for candidates whom Representative Berman has not endorsed, and Representative Berman has been involved in numerous campaigns in which his brother had no role. Michael Berman is recognized independently as an expert in California redistricting issues and has been involved in such issues since 1971, before Representative Berman was ever elected to political office. Although Representative Berman is aware of his brother's involvement with Yes on FAIR, Michael Berman has no actual authority to act on Representative Berman's behalf, and his actions in connection with Yes on FAIR have not been made under the Congressman's direction or control.

Legal Analysis

Because Respondents did not establish, maintain, finance, or control Yes on FAIR, the Complaint fails to present any reason to believe that Respondents committed any violation of

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Commission regulations.

Entities that are "directly or indirectly established, financed, maintained, or controlled by, or acting on behalf of" a federal officeholder may only solicit, receive, or disburse federally permissible funds in connection with any non-Federal election. See 11 C.F.R. § 300.62. In determining whether an entity has been established, maintained, financed or controlled by a Federal officeholder, the Commission will consider a number of factors in the context of the overall relationship between the Federal officeholder and the entity. None of these factors supports the Complainant's allegation that Yes on FAIR is established, financed, maintained, or controlled by Respondents.

First, neither Representative Berman nor any of his agents had an active or significant role in the formation of Yes on FAIR. See 11 C.F.R. § 300.2(c)(2)(ix). Although Representative Berman publicly supports the FAIR ballot initiative, his support for the initiative is not evidence of any role in the organization or formation of the California committee. Representative Berman's name is not listed in the organizational documents filed by Yes on FAIR with the California Secretary of State or the Internal Revenue Service, and the Complaint submits no additional evidence to suggest that Respondents played any role in the formation of Yes on FAIR. Representative Berman understands that the committee was formed by others with an interest and expertise in the subject matter.

Second, neither Representative Berman nor any of his agents participates in Yes on FAIR's governance, personnel decisions, or general operations. See 11 C.F.R. § 300.2(c)(2)(ii), (iii). Representative Berman is not an officer of Yes on FAIR, he plays no role in the day-to-day operations of Yes on FAIR, and he has no decisionmaking authority with respect to Yes on FAIR's proposed activities. Neither Representative Berman nor any of his agents has the authority to hire, appoint, delegate, or otherwise control Yes on FAIR's officers or employees.

The Complainant cites a single, purported conversation between Representative Berman and the Complainant as "evidence" of Representative Berman's control of Yes on FAIR. See Compl. at 2. Notably, the Complainant publicly opposes the Yes on FAIR initiative, is the author and principal sponsor of a competing redistricting initiative ("Voters FIRST Act for Congress"), and actively seeks to curtail any support for Yes on FAIR. Representative Berman does not share the Complainant's recollection of the conversation. Yet even if that recollection were accurate, it is not evidence of any special relationship between Representative Berman and Yes on FAIR. If anything, it is evidence only of how the Complainant misperceives Representative Berman's involvement.

The Complaint affirms Michael Berman's involvement in Yes on FAIR, and how that involvement has been characterized in news articles, as evidence of a more extensive role on the

part of his brother. But the Commission has faced similar situations before. The Commission's regulations define an agent as "any person who has actual authority, either express or implied," to "solicit, receive, direct, transfer, or spend funds in connection with any election." See 11 C.F.R. § 300.2(b). A federal officeholder may not be held liable for the actions of an agent unless "the agent has actual authority" and "the agent is acting on [the officeholder's] behalf." See Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, Explanation and Justifications, 67 Fed. Reg. 49,064, 49,083 (July 29, 2002).

It has long been settled that a family relationship does not equal agency. In an Advisory Opinion issued to Rory Reid, the Commission held that Reid's relationship to his father, U.S. Senator Harry Reid, did not preclude him from soliciting funds outside federal limits and source restrictions for the Nevada State Democratic Party. See FEC Adv. Op. 2003-10. As long as he was not acting as his father's agent and did not have actual authority to act on his father's behalf, Reid could solicit non-federal funds for the State Party. Furthermore, the fact that he may, at times, act as an agent on behalf of Senator Reid did not mean that he could not raise non-federal funds when acting exclusively as an agent on behalf of the State Party. See *id.*; see also FEC Adv. Op. 2007-05 (Iverson) (permitting Member's chief of staff to solicit non-federal funds in his capacity as chair of the state party committee as long as he did not solicit non-federal funds on the authority of any federal candidate or officeholder).

Here, the Complaint presents no actual evidence that Michael Berman is acting as his brother's agent or has actual authority to act on his brother's behalf. To the contrary, like Rory Reid and Erik Iverson, Michael Berman is a political figure in his own right, with a reputation and history of involvement in campaigns and redistricting issues that precedes his brother's election to public office. He has managed numerous campaigns for over 40 years, both for candidates and initiatives. Representative Berman has not asked his brother to act as his agent in connection with Yes on FAIR or suggested that his brother may have actual authority to act on his behalf when participating in the control of Yes on FAIR. To make the Complaint's improper assumption at face value would tell the family members and spouses of federal officeholders that they cannot be safely involved in otherwise permissible political activities.

Third, the Respondents and Yes on FAIR do not have common or overlapping officers or employees. See 11 C.F.R. § 300.2(c)(2)(iv), (v). None of the Respondents' officers or employees is also a current or former officer or employee of Yes on FAIR.

Fourth, none of the Respondents to this Complaint has provided funds or arranged for funds to be provided to Yes on FAIR in a significant or ongoing basis. See 11 C.F.R. § 300.2(c)(vii), (viii). Although the Committee made a single contribution of \$10,000 to Yes on FAIR, neither the Committee nor Representative Berman has paid for Yes on FAIR's administrative costs or provided any ongoing funding to Yes on FAIR.

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In sum, the Complaint offers no evidence to support its scurrilous allegation that Respondents have established, financed, maintained, or controlled Yes on FAIR. It takes Representative Berman's acknowledged public support for the FAIR Initiative, and speculates without basis that he runs the committee that supports it. Yet "unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true," and provide no independent basis for investigation. See Commissioners Mason, Sandstrom, Smith and Thomas, Statement of Reasons, MUR 4960 (Dec. 21, 2001) (citations omitted); see also Commissioners Paterson, Hunter and McGinn, Statement of Reasons, MUR 5977 and 6005 (May 1, 2009). To proceed with such an unwarranted investigation would improperly deter appropriate and protested support for local ballot initiatives.

For the foregoing reasons, Respondents respectfully request that the Commission dismiss the Complaint and take no further action.

Very truly yours,



Brian G. Svoboda
Kate Sawyer Keane
Counsel to Respondents