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SANDLER, REIFF & YOUNG, P.C. OF GENERAL
COUNSEL

September 2, 2010

Jeff S. Jordan, Esq.
Office of the General Counsel
Federal Election Commission
999 E. Street, NW
Washington, DC 20463

Re: MUR 6322: John P. Heisserer, Treasurer, and Tommy Sowers for Congress

Dear Mr. Jordan:

The undersigned represent John Heisserer and Tommy Sowers for Congress ("SC" or "Respondents," collectively), Square, Inc. ("Square") and Jack Dorsey. By this letter, Sowers for Congress, Jack Dorsey and Square, Inc. respond to a complaint filed by Floyd Ferrell. In his complaint, Mr. Ferrell alleges that Respondents violated 11 C.F.R. § 114.2 (a) and (d); 11 C.F.R. § 113.2(e) and 11 C.F.R. § 114.2(f)(1) when SC held a fundraising event that was also styled a "launch party" for Square.

The Respondents do not dispute the underlying facts in this matter, that Mr. Sowers's campaign committee, Sowers for Congress, hosted an event at which it received contributions via its vendor, Square Inc.'s, technology. Respondents dispute, however, the characterization of this event as a corporate contribution to Sowers for Congress, that SC used Square's name in order to solicit contributions, that Sowers for Congress converted any contributions to personal use, that Square made any in-kind contributions to Sowers for Congress, and that Square's CEO Jack Dorsey endorsed Tommy Sowers. Respondents further contend that even if Dorsey's comments were interpreted by some as an endorsement, that those comments were made in his personal capacity unrelated to his relationship with Square, Inc. Finally, assuming *arguendo* that there were violations of federal campaign finance law, Respondents contend that the amount involved is *de minimis* and that the Federal Election Commission ("Commission") should therefore exercise its prosecutorial discretion and take no further action on this matter.

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FACTS AND ANALYSIS

Sowers for Congress ("SC") is a candidate committee registered with the Commission as the principal campaign committee for Tommy Sowers's candidacy for the 8th Congressional District of Missouri. SC is subject to the prohibitions, limitations and reporting requirements of Federal law.

On June 8, 2010, SC hosted a fundraiser in Washington D.C. at which it raised \$5,574 for the campaign. The event secondarily served as one of a number of launch parties for Square's service. Square is a company that provides free devices to any individual or campaign who signs up for their service, which is receiving and processing credit card payments via mobile phones.

The complaint sets forth two essential allegations. First, that SC accepted and Square made corporate facilitated contributions in contravention of 11 C.F.R. § 114.2 (a) and (d) through the use of the Square name, a photograph of its product, a written description of the product and an endorsement by Square's CEO, Jack Dorsey. Complaint at 3. Second, the complaint alleges that either the cost of the fundraiser constituted an illegal corporate contribution to SC from Square, or that payment by the Committee violates the prohibition on the personal use of campaign funds. 11 C.F.R. § 113.2(e) and (g). Neither of these accusations is meritorious¹.

First, Respondents maintain that at no time did Square Inc. pay for any portion of the cost of the fundraiser. Nor did they ever approve or comment on any invitation or promotional materials for the event. Nor did they solicit or facilitate contributions on behalf of the Sowers Campaign. In fact, Square's involvement in this event was limited to their provision of services, for their usual and normal per-transaction fee, to the Sowers campaign, as they would to any other campaign that sought to avail itself of Square's services. Square's CEO, Jack Dorsey, was involved in the event as a personal supporter of Tommy Sowers. He was never identified as the CEO of Square Inc., but even if he was, it would not make any difference.² As such, his involvement is similar to the involvement of John Walsh of the "America's Most Wanted," television program in the campaign of Patty Wetterling. See *In re Patty Wetterling for Congress*, Matter Under Review 5578, First General Counsel's Report at 7 (F.E.C. February 15, 2006). As in that matter, SC paid for all expenses of the event, no promotional materials for the event suggested that Square was endorsing SC ("The Tommy Sowers campaign is using Square,...," Exhibit 1), and Jack Dorsey appeared in his personal capacity.

In addition, the only degree to which the Sowers Campaign used Square's name was as that of a commercial vendor. The FEC has exempted commercial vendors from the strictures of the corporate facilitation restrictions. 11 C.F.R. § 114.2(f)(1). Commercial vendor is defined as "any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease or provision of those goods or services." 11

¹ The complaint's alternative allegation that the costs of the fundraiser constitute "personal use" under 2 U.S.C. § 439(a) is also without merit. Neither Tommy Sowers, nor any member of his family own stock in or in any way are financially connected to Square Inc. They did not benefit personally in any way from this event.

² He was described in reference to a previous project with which he was affiliated.

C.F.R. § 116.1(c). Square's normal business operations include the sale of its services as a credit card processor via mobile phones. It was in this capacity that it was associated with SC. To say that federal campaign finance law or regulations prohibit the use of a corporate name in *any* fashion would be akin to saying that a campaign advertising that it accepts contributions via Visa, MasterCard, or AmEx, would constitute corporate facilitation of contributions because those names are trademarks. Square is merely a conduit for contributions, albeit one less well known to the general public at this time. Any mention of Square was incidental to its role in the campaign as a vendor the campaign was using so that attendees could contribute to the Sowers campaign utilizing its new vendor and its device. Complaint at 1-2., The Sowers Campaign avers that it paid the full market value for the use of Square's services at the event in question. Any name recognition benefit received by Square was equivalent to the benefit received by any vendor that deals with the public for any campaign. The advertising of the event was designed to alert potential attendees of an event that was headlined by well-known entities in Democratic Party circles, i.e. former Democratic Party Chairman and Presidential Candidate Howard Dean, Presidential Advisor Paul Begala, Presidential Candidate Gen. Wesley Clark, Congressman Patrick Murphy, White House Senior Staffer Karen Finney and Jonathan Powers. These Democratic leaders were much more of the draw to contributors to the event, not Square's services to the campaign.

Second, the Complaint attempts to apply the ruling that the Commission issued in AO 2007-10 in order to allege that SC and Square violated federal campaign finance law. However, the comparison is inapposite for several reasons. First, in AO 2007-10, the Reyes Committee was soliciting contributions from employees of corporations – the “hook” was publicly displaying a sign that the employees of a named corporation was sponsoring a hole in a golf tournament designed to raise additional contributions to the committee. Nothing of the sort occurred in SC's fundraiser. Square was only a vendor to the committee. Second, the Commission's reasoned in AO 2007-10 that, because the Reyes Committee's “stated reason for including corporate employer's names, trademarks, or service marks is to encourage contributions” to it, such use would constitute corporate facilitation of contributions. AO 2007-10 at 2-3 (F.E.C. August 21, 2007). Conversely, the Sowers campaign did not utilize Square's name for the purpose of encouraging contributions. The Committee was merely attempting to draw attention to an innovative technology that it had utilized in its fundraising operations, as other candidates had done. To be sure, SC had been using Square technology throughout the campaign and had utilized Square's processing system for prior fundraising events. While the Reyes Committee sought to obtain contributions from employees by the “use of the corporation's resources,” such a characterization does not apply in this case. *Id.* Square is a vendor for SC; it provides a service to the committee in exchange for set fees and SC paid Square the full market value of its services. While the campaign may have wanted to alert event attendees that they could utilize a unique new technology to contribute, such a signal is a far cry from posting the corporate affiliation of employees who had contributed to the Reyes Committee in an attempt to induce donors to sponsor a hole at a golf tournament because it would benefit both the individual and its employer. Because no employees of Square were advertised as invitees to attend the event, there is no way in which the incidental utilization of the Square name could be seen to induce such individuals to contribute to and attend the event. This was the precise issue to which the Reyes AO 2007-10 spoke, but is inapplicable to the present case.

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Lastly, the total amount raised at the Sowers event related to this Complaint's is only \$5,574. We believe that this amount is far below the threshold the Commission has used in the past in which the Commission has utilized its prosecutorial discretion to take no action. Thus, even assuming *arguendo* that the Commission finds that there may be reason to believe a violation has occurred, Respondents urge the Commission to take no action because the amount involved is *de minimis*. The Federal Election Commission has prosecutorial discretion to determine whether to take action in an individual case or dismiss the case. See *Heckler v. Chaney*, 470 U.S. 821 (1985). In the past, Commissioners have indicated that the amount raised in connection with this event, \$5574, is below the threshold under which the Commission will exercise its prosecutorial discretion to dismiss claims. See *In re Joseph Gallagher*, MUR 5651, Statement of Reasons of Chairman Michael E. Toner and Commissioners Mason and von Spakovsky (F.E.C. September 21, 2006); *In re Republican Party of Arkansas*, MUR 5235, First General Counsel's Report at 13 (F.E.C. September 26, 2001); *In re Wu for Congress*, AR 00-03/MUR 5176, First General Counsel's Report at 3 (F.E.C. Feb. 15, 2001); *In re McCormick for Congress*, AR 99-20/MUR 5055, First General Counsel's Report at 2 (F.E.C. July 18, 2000). Therefore, Respondents urge the Commission to take no action on this matter at this time in an exercise of its prosecutorial discretion and in furtherance of the Commission's priorities and resources because the amount involved is *de minimis*.

For the reasons stated above, the Respondents did not make or knowingly accept corporate facilitated contributions, nor did Square make corporate contributions to the Sowers campaign, nor was there any conversion of campaign funds for personal use. We respectfully request that the Commission find no reason to believe that any violation of the Act occurred and close the file.

Sincerely,



Neil Reiff
Counsel for Respondents