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November 28, 2011

Anthony Herman  
General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

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OFFICE OF GENERAL  
COUNSEL

Re: MUR 6501 (Brunner For Senate)

Dear Mr. Herman,

By and through the undersigned counsel, this Response to the Complaint designated as Matter Under Review No. 6501 is submitted on behalf of Brunner For Senate, Larry Legrand, in his capacity as Treasurer of Brunner For Senate, and John Brunner. For the reasons set forth below, the Commission should find no reason to believe that any respondent violated the Federal Election Campaign Act of 1971, as amended (the "Act" or "FECA"), and the Commission should dismiss the Complaint.

The Complainant alleges that John Brunner "has conducted an active campaign while making none of his required filings with the Federal Election Commission," in violation of FECA's provisions requiring candidates for federal office to register and report with the Commission. The Complainant acknowledges the testing the waters regulations at 11 C.F.R. §§ 100.72 and 100.131, but erroneously concludes that those regulations do not apply here.

**I. Factual Background**

The Complainant, the Missouri Democratic State Committee, filed this complaint on September 29, 2011, and immediately issued a press release. They appear to have done so based on a statement made on September 28 by John Hancock that Mr. Brunner "will be making a major announcement Monday morning about his political future." Media reports of the Complaint appeared the same day the Missouri Democratic State Committee claimed to have filed it (September 29, 2011).<sup>1</sup> The Complaint was not received by the Commission until

<sup>1</sup> Eli Yokley, *Mo. Democrats to FEC: Brunner "skirting" campaign law*, PoliticMO, (Sept. 29, 2011), <http://politicmo.com/2011/09/29/mo-democrats-to-fec-brunner-skirting-campaign-law/>.

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October 6, well after the Missouri Democratic State Committee had achieved its intended purpose of generating media coverage. Nevertheless, the Respondents are left with no choice but to take seriously this press fodder masquerading as a formal complaint and file a response.

John Brunner announced his candidacy for the U.S. Senate on October 3, 2011. Mr. Brunner and his campaign filed a Statement of Organization (Form 1) and Statement of Candidacy (Form 2) on the same date (October 3, 2011). As required by Commission regulations, Respondents will disclose all of Mr. Brunner's pre-candidacy financial activity on the committee's first disclosure report. That report will show that Mr. Brunner did not engage in any fundraising efforts for a potential candidacy, and all testing the waters expenses were paid from Mr. Brunner's personal funds.

## II. Applicable Legal Standard

Three recent enforcement matters interpreted and applied the testing the waters regulations. As the Commission explained,

Under the Act, an individual becomes a candidate for federal office when the individual has received or made contributions or expenditures in excess of \$5,000, 2 U.S.C. § 431(2), and then has fifteen days to file a Statement of Candidacy with the Commission, 2 U.S.C. § 432(e)(1). An individual who has not yet decided to run as a federal candidate may "test the waters" prior to declaring candidacy. 11 C.F.R. §§ 100.72 and 100.131. While testing the waters, the individual need not file reports with the Commission disclosing money received and spent, although all such activity is subject to the Act's limits and prohibitions. *Id.* If the individual becomes a candidate, all such financial activity must be reported. *Id.*

During the "testing the waters" period, an individual may, among other things, conduct polls, make telephone calls, and travel to determine the viability of the potential candidacy. *Id.* Commission regulations provide that certain activities may indicate that an individual has decided to become a federal candidate and is no longer testing the waters, such as: running general political advertising; raising funds in excess of that which would be reasonably required for exploratory activities; making or authorizing written or oral statements referring to the individual as a candidate; conducting activities in close proximity to the election; and taking action to qualify for the ballot under state law. 11 C.F.R. §§ 100.72(b) and 100.131(b).

MUR 5934 (Thompson), Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter, McGahn, and Weintraub at 1-2. *See also* MUR 5930 (Schuring), Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter, McGahn, and Weintraub at 1-2.

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In MUR 5945 (Lalor), five Commissioners appear to have employed the same basic test for determining whether an individual is "testing the waters" or has actually decided to become a candidate, although not all five Commissioners came to the same result. Commissioners Petersen, Hunter, and McGahn indicated that "a definitive declaration of present intent to seek federal office" was necessary to legally remove an individual from the ambit of the testing the waters provisions. MUR 5945 (Lalor), Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter and McGahn at 3. Commissioner Weintraub, writing separately, considered whether the statements in the record amounted to "an unambiguous statement" that the individual "had made up his mind to run."<sup>2</sup> MUR 5945 (Lalor), Statement of Reasons of Commissioner Weintraub at 2. Commissioner Bauerly indicated her agreement with Commissioner Weintraub's analysis. See MUR 5945 (Lalor), Statement of Reasons of Commissioner Bauerly ("I supported the General Counsel's recommendation in MUR 5945 for the same reasons articulated in Commissioner Weintraub's Statement of Reasons.").

The Complainant does not set forth facts that demonstrate that Respondent issued either "a definitive declaration of present intent to seek federal office" or "an unambiguous statement" indicating that he "had made up his mind to run." Complainant concludes, in an apparent reference to 11 C.F.R. § 100.72(b)(3), that "[t]he facts clearly show that Brunner has authorized statements referring to him as a candidate, and hence long ago triggered actual candidacy under FEC rules." Complainant, however, does not provide a single example of an "authorized statement" referring to Mr. Brunner as a "candidate."

### III. Legal Analysis

#### A. Travel

Much of Complainant's so-called "evidence" is simply unsourced speculation. For example, Complainant asserts: "Media accounts show that he traveled for more than five months promoting his nascent candidacy. . . . He traveled to Washington to confer with national Republicans about his candidacy." Complaint at 2. This passage from the Complaint includes no citations or sourcing. While unclear which "media accounts show that he traveled for more than five months promoting his nascent candidacy," Commission regulations make perfectly clear that travel is an appropriate testing the waters activity if "conducted to determine whether an individual should become a candidate." 11 C.F.R. §§ 100.72 and 100.131. Complainant's speculative assertion that Mr. Brunner's travel was for the purpose of "promoting his nascent candidacy" is nothing more than Complainant's conclusory statement. No actual evidence supports the claim. Furthermore, there is absolutely nothing improper or unusual about "travel[ing] to Washington to confer with national Republicans" to discuss a potential candidacy.

<sup>2</sup> These two standards are both generally consistent with the "statements that unequivocally refer to himself as a candidate" standard referenced in MUR 5363 (Sharpton), Factual and Legal Analysis at 4.

Doing so in no way suggests that the Respondent had made a determination to run for office. Furthermore, some of Mr. Brunner's travel to Washington, D.C., was family-related. Several family members live in the Washington area, and during the time period at issue, a grandchild was born in Bethesda, Maryland.

## **B. Use of Advisers**

Complainant also alleges that the Respondent "hired a prominent Missouri political consultant, John Hancock, to advise and advocate for him." Retaining advisers does not, by itself, remove a potential candidate from the testing the waters regulations. Materials submitted by the Respondent in MUR 5934 (Thompson) include numerous statements made by individuals identified as advisers to, or spokesmen for, Senator Thompson. See, e.g., Response of Friends of Fred Thompson, Inc. (Oct. 5, 2007), Exhibit 7 (*Politico* article stating "Said Mark Corallo, a spokesman for Thompson....").

Mr. Hancock is an established political consultant based in Missouri who is well-known in political circles. It is readily apparent that someone such as Mr. Hancock would be a valuable source of information to someone considering running for office in Missouri. As noted above, Senator Thompson relied on advisers and spokesmen during his "testing the waters" period in 2007, at least some of whom were paid. For example, Senator Thompson made a "payment to New Media Strategies, which tracks blogs and provides strategic advice for dealing with online media." MUR 5934 (Thompson), Response of Friends of Fred Thompson, Inc. at 6 (Oct. 5, 2007). Senator Thompson also hired field staff during his "testing the waters" stage. See Thomas Beaumont, *Hire puts run clan for Fred Thompson*, Des Moines Register, June 26, 2007 ("Thompson has signed Andrew Dorr to serve as his Midwest political director should the actor and Tennessee Republican run for the Republican presidential nomination in 2008.") and attached as Exhibit 18 in MUR 5934 (Thompson), Response of Friends of Fred Thompson, Inc. (Oct. 5, 2007).

In Advisory Opinion 1982-19 (Cranston Presidential Advisory Committee), the Commission concluded that a presidential exploratory committee could organize advisory groups to "analyze, research, discuss and brief Senator Cranston on important public issues such as foreign policy, national defense, and domestic economic policy," and generally "provide information of importance to Senator Cranston in his possible presidential campaign," and that such activity fall "within the 'testing the waters' exception." A retained political consultant serves a substantially similar purpose. We are aware of no Commission precedent that suggests that hiring a political consultant, in and of itself, is evidence that an individual is no longer testing the waters.

**C. Mr. Brunner's Statements**

Complainant also references news reports indicating that Mr. Brunner said he was "very serious" (Complaint, Exhibit B), and ~~would do something~~, it is not clear what, "very soon" (Complaint, Exhibit A) and "~~soon~~" (Complaint, Exhibit D). These statements are similar to statements made by Senator Fred Thompson in 2007 when he stated, "we're going to be making a statement shortly that will cure all of that." MUR 5934 (Thompson), Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter, McGahn, and Weintraub at 2.

Complainant asserts that in July, "without recorded dissent, [Mr. Brunner] was introduced as a candidate for U.S. Senate at the Target BBQ in Springfield." Complainant provides no evidence that this occurred; no such introduction is mentioned in Complainant's Exhibit D, which supposedly serves as the substantiation for the allegation. Even if this did occur, Mr. Brunner is not responsible for the word choices and characterizations of others. Commission regulations indicate that only statements made or authorized by the individual are relevant to testing the waiver considerations. 11 C.F.R. §§ 100.72(b)(3) and 100.131(b)(3).

Complainant's Exhibit D includes the transcript of an interview with *Politico* for which Mr. Brunner sat. The Complaint focuses on a single short quote: "I'm ready to jump right in." The transcript, however, reveals that the interviewer did not understand this statement to mean that Mr. Brunner had made a decision to run for office. Immediately after Mr. Brunner said, "I'm ready to jump right in," the interviewer asked him, "What's going to seal the deal?" Thus, the person to whom Mr. Brunner was actually speaking did not understand his words to be an unambiguous statement of present intent to seek federal office. The interviewer followed this question with, "Is that going to be in the next month, next couple months, any idea?" Claiming to be "ready to jump right in" is similar in nature to Fred Thompson's statement that he was "leaving the door open." See Eric Pfeiffer, *Actor Thompson panders '08 run*, Washington Times, March 12, 2007 attached as Exhibit 2 in MUR 5934 (Thompson), Response of Friends of Fred Thompson, Inc. (Oct. 5, 2007). Both statements are ambiguous, and neither comes close to being a definitive declaration of candidacy.

Contrary to Complainant's assertions, Respondent did not "repeatedly declare[] his intent to use his large personal fortune to fund his campaign." Complaint at 2. Complainant's Exhibit B consists of an AP article that includes the following sentence: "Brunner told the AP that he would be willing to put some of his own financial fortune into a Senate bid, although he declined to say how much. 'If I believe in myself, I'd make a contribution and hope that others feel the same way,' Brunner said." Neither the reporter's characterization of Brunner's statement, nor Brunner's actual statement, support Complainant's assertion that Respondent "would use his large personal fortune to fund the campaign." Complaint at 2, 3. The reporter's characterization

is conditional ("would be willing") and Mr. Brunner's statement is in the future tense ("I'd make a contribution"). Neither indicates that a statement of present intent had been made.

Complainant also asserts that "[i]n August, Brunner again was quoted as saying that he would make a 'sizeable' donation from his large personal fortune to his campaign." Complaint at 4. This is false. The *St. Louis Post-Dispatch* article that Complainant references does not quote Mr. Brunner making any such statement. Rather, the author paraphrases what Mr. Brunner apparently said: "Brunner declined to say how much of his personal wealth he would invest in his campaign but suggested his contribution would be sizable." See Complaint, Exhibit F. What Complainant falsely characterizes as Mr. Brunner's quote is actually the reporter's characterization, and it is in the future tense ("but suggested his contribution would be sizable"). The aforementioned sentence is then followed in the article by this statement attributed to Mr. Brunner: "We're not going to run out of gas on this campaign." This statement can be interpreted a number of different ways, the most reasonable of which is that Mr. Brunner was indicating that he would not run for office unless he judged that any campaign he undertook would have sufficient funding and support. He did not want to begin a campaign only to "run out of gas" before the end.

Complainant includes an article from *The Hill* that claims anonymous "sources close to" Mr. Brunner said that his announcement was "imminent." The article then informatively adds, "Brunner's announcement is likely to come sometime after this week." Complaint, Exhibit E. Apparently even the author of the article had doubts that an announcement was actually "imminent." Anonymous sources are certainly not reliable evidence in a Commission enforcement matter, and in any event, the "sources close to" Mr. Brunner appear to have been incorrect. *The Hill* article was published August 10, 2011. Mr. Brunner's formal announcement was hardly "imminent" — it came nearly two months later.

Mr. Hancock's reported statements are similar in nature to Mr. Brunner's. Mr. Hancock indicated in July to a reporter that Mr. Brunner would be making an announcement regarding his intentions "very soon." See Complaint, Exhibit A. Complainant also draws attention to Mr. Hancock's comments about Todd Akin, although this statement says absolutely nothing about Mr. Brunner's state of mind with respect to the status of his decision whether to become a candidate. Complaint at 3 and Exhibit C. Mr. Hancock's other statement ("I wouldn't be talking to you if he wasn't.") is completely devoid of context. The *Kansas City Star* article makes it appear that this response was given to the question, *Is he definitely running?*, but that question does not appear in quotation marks, and the author does not indicate whether he actually asked that specific question. Mr. Hancock could very easily have meant that he would not be talking to the reporter unless Mr. Brunner was seriously considering becoming a candidate. The article itself makes it impossible to determine. Regardless of whatever question was actually asked and Mr. Hancock's response, past enforcement matters have all focused on the potential candidate's

own statements, or statements made in the potential candidate's committee materials (such as brochures, books, or websites). The decision to run for office was Mr. Brunner's to make, not Mr. Hancock's.

During the time period in question, relatively few statements attributed to the Respondent actually appeared in the media. In fact, the Complaint compiles virtually all of the scant public record. On September 9, 2011, another article, not included in Complainant's submission, appeared in the *Riverfront Times*. This article presents a far different, and far more accurate, picture of Mr. Brunner's activities. The *Riverfront Times* reporter wrote:

It seems like Brunner has been on the verge of entering the race for months now. And yet, throughout those months he's kept a steady low profile, his political existence seemingly kept alive by Hancock's statements and reporters (such as this one) speculating on his candidacy.

Despite relative distance from the press, a lack of public campaigning, and the fact that nobody's really sure where he stands on key issues, Brunner has emerged as a viable Republican candidate.

Albert Samaha, (*Unofficial*) *Senate Candidate John Brunner Could Shake Up GOP Primary*, *Riverfront Times* (Sept. 9, 2011), [http://blogs.riverfronttimes.com/dailyrft/2011/09/john\\_brunner\\_democratic\\_press\\_release.php](http://blogs.riverfronttimes.com/dailyrft/2011/09/john_brunner_democratic_press_release.php).

#### **D. Planning and Preparation**

During a July 23 interview, Mr. Brunner reportedly stated:

Here's the real key – this is going to be one of the biggest, toughest campaigns in Missouri history. Claire [McCaskill] is a brilliant politician, she has great staff and resources, she's getting money in from Spielberg, Kevin Klein, you've got to look at that and say, this is something that is going to require great organization, a great team, a lot of dedicated people, and that's what we've been doing here for the last 90 days is putting together the very best team, the best resources, best organization we can find. We've just about got it together now. Now we're looking at the launch plan, and that's where we are right now.

Complaint, Exhibit D.

Nothing in this statement is inconsistent with the testing the waters regulation. Mr. Brunner acknowledged that a campaign against Senator McCaskill would "be one of the biggest,

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toughest campaigns in Missouri history." As a result, a "great organization, a great team, ... the best resources" would be needed to win. A central factor in deciding whether to become a candidate is the determination as to whether one can *actually* assemble an organization that has the resources needed to win. Another important consideration, especially for political newcomers, is how to introduce yourself to the public should you decide to become a candidate (i.e., the "launch plan"). All of these considerations are consistent with the concept of testing the waters to determine whether to become a candidate.

Preparatory organization building, to be subsequently deployed if the individual decides to become a candidate, is fully consistent with Commission precedent regarding the testing the waters regulations. For example, in MUR 5934 (Thompson), four Commissioners concluded that "sign[ing] a long-term lease on a building in Nashville, Tennessee to serve as national headquarters ... does not demonstrate that an individual has decided to ~~run~~ for office." MUR 5934 (Thompson), Statement of Reasons of Vice Chairman Paterlini and Commissioners Hunter, McGinn, and Weintraub at 3.

The record in MUR 5934 (Thompson) also contains an article from *Politico* which includes the following description of Senator Thompson's activities:

Advisers to Fred Thompson have begun exploring a range of staffing options – including talking to potential campaign managers – as the actor and former Tennessee senator firms up his plans to enter the Republican presidential contest, according to people involved in the conversations. Thompson has not made a final decision but is on track to be ready to announce his candidacy in June or July, his advisers say.

[\*\*\*]

On Friday, he'll have his political coming out (but won't announce) at the annual dinner of the Lincoln Club of Orange County, Calif., a booking in the heart of Reagan country that declared GOP presidential aspirants sought aggressively.

Mike Allen, *F. Thompson mulling summer decision*, *Politico* (May 1, 2007), <http://www.politico.com/news/stories/0407/3753.html>. attached as Exhibit 7 in MUR 5934 (Thompson), *Resume of Friends of Fred Thompson, Inc.* (Oct. 5, 2007).

A subsequent article noted that "[f]ormer U.S. Sen. Fred Thompson will take a major step toward a 2008 run for the White House by 'testing the waters' – beginning to raise money and hire campaign staff as early as Friday, several sources close to Thompson told CNN." *Sources: Thompson to take big step toward White House Run*, *CNN*, May 30, 2007,



[http://articles.cnn.com/2007-05-30/politics/thompson.2008\\_1\\_thompson-gop-candidates-full-fledged-candidate?\\_s=PM:POLITICS](http://articles.cnn.com/2007-05-30/politics/thompson.2008_1_thompson-gop-candidates-full-fledged-candidate?_s=PM:POLITICS)

(emphasis added) attached as Exhibit 13 in MUR 5934 (Thompson), Response of Friends of Fred Thompson, Inc. (Oct. 5, 2007).

As noted above, another news article reported that "Thompson has signed Andrew Dorr to serve as his Midwest political director should the actor and Tennessee Republican run for the Republican presidential nomination in 2008." Thomas Benumont, *Hire puts run closer for Fred Thompson*, Des Moines Register, June 26, 2007, and attached as Exhibit 18 in MUR 5934 (Thompson), Response of Friends of Fred Thompson, Inc. (Oct. 5, 2007). In the same article, "Thompson spokesman Mark Corallo said, 'It means Senator Thompson will be ready, should he decide to run, and will have the right team in place to be successful when it's time to the go to the caucuses.'" *Id.*

In other words, virtually all of the activities cited in the Complaint as evidence that Mr. Brunner was in violation of the testing the waters regulations (preparatory organizational planning, hiring and relying on advisers, traveling to Washington, DC, to consult with party leaders, appearing at local party events) were previously found by the Commission, in MUR 5934, to be appropriate and permissible testing the waters activities.

#### IV. Conclusion

For the foregoing reasons, the Commission should find no reason to believe a violation occurred and dismiss this Complaint.

Sincerely,



Jason Torchinsky

Michael Bayes

Counsel to Brunner for Senate