



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

APR 12 2013

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

RE: MURs 6474 & 6534

Charles R. Spies  
Clark Hill PLC  
1250 Eye St, NW  
Washington, DC 20005

Dear Mr. Spies:

On June 16, 2011, and February 28, 2012, the Federal Election Commission notified your clients, Josh Mandel, Citizens for Josh Mandel (Federal) Committee and Kathryn D. Kessler in her official capacity as treasurer, and Citizens for Josh Mandel (State) Committee of a complaint alleging violations of 2 U.S.C. §§ 441a(f) and 441i(e) of the Federal Election Campaign Act of 1971, as amended.

On March 12, 2013, the Commission found, on the basis of the information in the complaint, and the response filed by the Respondents that there is no reason to believe that: (1) Josh Mandel, Citizens for Josh Mandel (Federal) Committee, and Kathryn D. Kessler in her official capacity as treasurer, and Citizens for Josh Mandel (State) Committee, and Kathryn D. Kessler in her official capacity as treasurer, violated 2 U.S.C. § 441i(e) as a result of the federal committee's use of a website domain name obtained from the state committee; (2) Josh Mandel and Citizens for Josh Mandel (Federal) Committee and Kathryn D. Kessler in her official capacity as treasurer violated 2 U.S.C. § 441a(f) and 441i(e) by accepting an excessive contribution as a result of the state committee's payment of Mandel's as a result of out-of-state trips; and (3) that Josh Mandel (State) Committee, and Kathryn D. Kessler in her official capacity as treasurer, violated 2 U.S.C. §§ 441a(a)(1)(A) and 441i(e) as a result of the state committee's payment of Mandel's out-of-state trips.

The Commission voted to dismiss the allegation that Josh Mandel, Citizens for Josh Mandel (Federal) Committee and Kathryn D. Kessler in her official capacity as treasurer, violated 2 U.S.C. § 441a(f) by accepting an excessive in-kind contribution from the State of Ohio in connection with the use of state resources to create a newsletter published on the federal committee's website.

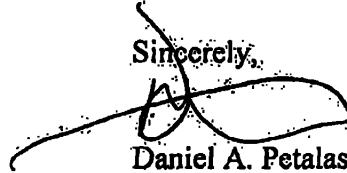
The Commission considered the allegation in the complaint that Josh Mandel (Federal) Committee accepted an improper transfer from the Josh Mandel (State) Committee as a result of the federal committee's use of an e-mail list obtained from the state committee but there were an insufficient number of votes for any finding on this issue.

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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); Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact me at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel A. Petalas", is written over the word "Sincerely,".

Daniel A. Petalas  
Associate General Counsel

Enclosure  
Factual and Legal Analysis

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## **FEDERAL ELECTION COMMISSION**

### **FACTUAL AND LEGAL ANALYSIS**

**RESPONDENTS:** Josh Mandel, Citizens for Josh Mandel (State) Committee  
Citizens for Josh Mandel (Federal) Committee, and  
Kathryn D. Kessler in her official capacity as treasurer

**MURs:** 6474 & 6534

#### **I. INTRODUCTION**

These matters were generated by two complaints filed with the Federal Election Commission (the "Commission") by the Ohio Democratic Party and Chris Redfern, the Chairman of the Ohio Democratic Party ("ODP"). *See* 2 U.S.C. § 437g(a)(1). The Complaint in MUR 6474 alleges that Josh Mandel and Citizens for Josh Mandel and Kathryn D. Kessler in her official capacity as treasurer (the "Federal Committee") used funds of Citizens for Josh Mandel State Committee (the "State Committee") to purchase assets that were transferred to the Federal Committee and used state government assets under Mandel's control as State Treasurer to benefit the Federal Committee in violation of 2 U.S.C. §§ 441a(f) and 441i(e) and 11 C.F.R. § 110.3(d). The complaint further alleges in MUR 6534 that the State Committee improperly paid for Mandel's three trips outside Ohio, during which he allegedly engaged in testing the waters or direct fund-raising efforts for his subsequent federal campaign, in violation of 2 U.S.C. § 441a and 11 C.F.R. § 110.3(d).

#### **II. FACTUAL AND LEGAL ANALYSIS**

##### **A. Factual Background**

Josh Mandel is the State Treasurer of Ohio and was an unsuccessful candidate for the U.S. Senate in the November 2012 general election. In these two matters, the

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complainant alleges that the Federal Committee and Mandel violated the Federal Election Campaign Act of 1971 as amended (the "Act") and Commission regulations by impermissibly using resources of the State Committee and the State of Ohio to support Mandel's Federal Committee. The complainant alleges that the Federal Committee accepted a prohibited transfer from the State Committee in three different ways.

First, the complainant alleges that the Federal Committee obtained an e-mail list from the State Committee "presumably . . . without cost," Compl. at 2, MUR 6474, and "appears to be utilizing the email list . . . without paying for its use." *Id.* at 4.

Second, the complainant claims that the Federal Committee has been using the State Committee's website, [www.joshmandel.com](http://www.joshmandel.com), and "has taken over the domain name at no apparent cost." *Id.* at 2. The Complaint argues that while the State Committee paid for the creation and development of the website, as soon as Mandel announced his federal candidacy, the Federal Committee used the website to promote his federal campaign without paying for the asset. *Id.* at 4.

Third, the complainant claims that the Federal Committee used funds from the State Committee to pay for trips that were part of Mandel's testing the waters activities or direct fundraising efforts for his Senate campaign. Compl. at 2, MUR 6534. As support for its claim, the complainant argues that after one month into his four-year term as Treasurer, Mandel began emptying his State Committee account, spending over \$25,000, in a six month period from December 2010 to June 2011. *Id.* The complainant further argues that Mandel spent much of this amount immediately before he established the Federal Committee in April 2011. *Id.* In particular, the complaint claims that Mandel spent over \$8,000 on trips to Utah, New York, and Washington, D.C. for "political

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meetings," which the complainant contends supported Mandel's Senate campaign because Mandel received over \$200,000 in contributions from contributors in those states within days of registering with the Commission. *Id.* at 3. According to the Complaint, Mandel took a total of ten trips in the weeks immediately before he filed his Statement of Candidacy for the Senate race on April 6, 2011. *Id.* According to the complainant, since declaring his federal candidacy, Mandel has made no expenditures from the State Committee's account for the remainder of the year. *Id.* at 2.

The Respondents deny the State Committee improperly transferred funds to the Federal Committee. They contend that the Federal Committee engaged in arm's length transactions with the State Committee and paid appropriate compensation for the use of the State Committee's e-mail list and the Federal Committee's website. Citizens for Josh Mandel Resp. at 2-3, MUR 6474. Respondents further argue that the trips to New York, Washington, D.C., and Utah were wholly unrelated to Mandel's later decision to run for a seat in the U.S. Senate. Response of State Committee Resp. ("State Committee Resp.") at 2-4, MUR 6534;<sup>1</sup> Response of Josh Mandel and Federal Committee ("Federal Committee Resp.") at 2-4, MUR 6534. Respondents contend that the mere fact that the Federal Committee accepted contributions from contributors in those states does not prove that Mandel engaged in fundraising for his federal campaign during those trips. State Committee Resp. at 4-5, MUR 6534; Citizens for Josh Mandel Resp. at 4, MUR 6474.

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<sup>1</sup> The State Committee further asserts that it was not specifically identified in the Complaint as a Respondent in MUR 6534 and should therefore be dismissed from the matter. *Id.* at 1. Because the Complaint alleges conduct of the State Committee that could constitute a violation of the Act, 2 U.S.C. § 441a, the State Committee was appropriately named as a Respondent and provided notice and an opportunity to respond.

In addition to the allegations relating to the improper transfer of non-federal funds and assets, the complainant alleges that the Federal Committee accepted a prohibited or excessive in-kind contribution from the State of Ohio by using resources of the Office of State Treasurer. Compl. at 5, MUR 6474. The complainant specifically claims that Mandel, as State Treasurer, used his office to conduct research and draft releases concerning his accomplishments, which were posted on the Federal Committee's website and Mandel's Facebook page and e-mailed to the State Committee's e-mail list. Compl. at 2.

The Respondents deny that the Federal Committee accepted a prohibited contribution from the State of Ohio. See Citizens for Josh Mandel Resp. at 3, MUR 6474. Mandel and the Federal Committee assert that the material from the Office of the State Treasurer posted on Mandel's campaign website was not created using state government resources but by individuals on their own personal time and, in any event, the materials posted were not political. Citizens for Josh Mandel Resp. at 3-5, MUR 6474.

## **B. Legal Analysis**

### **1. Use of Website Domain Name**

The Complainant alleges that the Federal Committee "has taken over the domain name www.joshmandel.com [from the State Committee] at no apparent cost." Compl. at 2, MUR 6474. The Respondents assert that when Mandel decided to run for U.S. Senate, the Federal Committee hired Emotive, a web-hosting company, to coordinate an arm's length deal to take over the hosting and development of www.joshmandel.com from New Media Campaigns, which was used by the State Committee to host and design the State

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Committee's website. The Response asserts that the deal was "done for fair market value and in accordance with industry standards." Citizens for Josh Mandel Resp. at 3, MUR 6474. The Response states that payments to EMotive were intended to address the costs necessary "to host, design, and regularly update content" for the Federal Committee's website. *Id.* The Federal Committee's July 2011 Quarterly Report shows disbursements to EMotive on April 27 for \$4,087.50 and May 28 for \$3,322.50 for "website development." Citizen's for Josh Mandel, July 2011 Quarterly Report.

Federal candidates and officeholders, or entities directly or indirectly established, financed, maintained, or controlled by them, are prohibited from soliciting, receiving, directing, transferring, or spending funds that do not comply with the limitations and prohibitions of the Act. 2 U.S.C. § 441i(e)(1)(A). In addition, section 110.3(d) of the Commission's regulations provides, in material part, that transfers of funds or assets from a candidate's campaign account for a non-federal election to his or her principal campaign committee for a federal election are prohibited. 11 C.F.R. § 110.3(d). The Commission, however, has permitted the transfer of a non-federal committee's assets to the campaign account of a candidate for federal office where "those assets are sold at fair market value." Transfer of Funds from State to Federal Campaigns, 58 Fed. Reg. 3474, 3475 (Jan. 8, 1993); see Statement of Reasons at 5, Comm'rs Petersen, Bauerly, Hunter, McGahn, and Weintraub, MUR 6216 (Coakley for Senate) (Sept. 8, 2010).

Respondents claim that the Federal Committee retained a third-party to negotiate the transfer from the State Committee and paid fair market value to host, design, and maintain content on [www.joshmandel.com](http://www.joshmandel.com). The disclosure reports filed with the Commission reflect that the Federal Committee made payments to EMotive, and there is

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no information on which to conclude that the transfer of the website was provided for less than its fair market value. Therefore, the Commission finds no reason to believe that Josh Mandel, the Federal Committee, and the State Committee violated 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d) as a result of the Federal Committee's use of a website domain name obtained from the State Committee.

## 2. Use of State Committee Funds for Federal Campaign Travel

The Complaint in MUR 6534 alleges that the State Committee made an excessive contribution and improper transfer to the Federal Committee by paying for trips that Mandel took outside of Ohio for the purpose of "testing the waters and drumming up support for his Senate campaign." Compl. at 1-2, MUR 6534.<sup>2</sup> The complainant alleges that, based upon the manner in which Mandel virtually emptied his State Committee account before declaring his federal candidacy and the subsequent receipt of contributions from certain out-of-state locations, Mandel used State Committee funds for trips to further his federal candidacy. *Id.*

For the 2012 election cycle, the Act prohibits a person from making a contribution to any candidate or his authorized political committee with respect to a federal election that in the aggregate exceeds \$2,500. See 2 U.S.C. § 441a(a)(1)(A). Moreover, no candidate or political committee shall knowingly accept an excessive contribution. 2 U.S.C. § 441a(f). Although funds received solely for the purpose of determining whether

<sup>2</sup> An individual who has not yet decided to run for office may "test the waters" in advance of candidacy by raising and spending funds while making that decision. 11 C.F.R. §§ 100.72; 100.131. These funds may be raised and used for the limited purpose of determining whether an individual should become a candidate. *Id.* So long as the individual is "testing the waters," he or she is not required to file a statement of candidacy pursuant to 2 U.S.C. § 432(e)(1). The "testing the waters" exception does not apply, however, when an individual raises or spends more than \$5,000 for "activities indicating that an individual has decided to become a candidate for a particular office or for activities relevant to conducting a campaign." 11 C.F.R. §§ 100.72(b); 100.131(b).



an individual should become a candidate are not contributions, only funds permissible under the Act may be used for testing the water activities, and once an individual subsequently becomes a candidate, such funds received are treated as contributions and must be reported. 11 C.F.R. § 100.72(a).

The Respondents deny that Mandel's out-of-state trips involved testing the waters for his future Senate campaign. The Respondents assert that the trips were part of Mandel's official travel as State Treasurer and involved official business meetings to discuss Treasurer-related issues. Federal Committee Resp. at 2-3, MUR 6534; State Committee Resp. at 3-4, MUR 6534. The Respondents specifically identify the purpose of each trip and describe generally the activities that Mandel engaged in during each trip. Specifically, the trips involved (1) a National Association of State Treasurers meeting in Washington, D.C.; (2) a pension policy meeting in New York; and (3) a non-partisan leadership retreat in Utah. *Id.*<sup>3</sup>

The State Committee's disclosure reports filed with the Ohio Secretary of State reflect that the State Committee spent \$25,877.69 from December 10, 2010, through June 30, 2011, leaving a balance of \$218.92. See Ohio Secretary of State, Citizens for Josh Mandel Semiannual Report (July 2011). Of those disbursements, \$20,291.67 was spent from February 1, 2011, to April 6, 2011, the day that Mandel announced his federal candidacy. *Id.* Between February 2011 and March 2011, Mandel booked nine flights, but state records do not indicate the date of travel. *Id.* With respect to contributions, the

<sup>3</sup> The Respondents admit that the State Committee used its funds to pay the cost of the trips, and that the travel, though predominantly for official state business, was not funded by the state. Respondents contend that, in an abundance of caution and consistent with Ohio law, Mandel regularly used State Committee funds to pay costs associated with any activities that arguably might be construed as involving state-related political activities. Federal Committee Resp. at 3-4, MUR 6534; State Committee Resp. at 3, MUR 6534. We do not here consider the application of Ohio state law to these facts.

State Committee raised \$4,895.00 from December 10, 2010 through March 18, 2011, *id.*, and has not raised any funds since March 2011. *Id.*; Annual Report (Jan. 2012); Semiannual Report (July 2012).

The Complaint relies on the timing of these activities to support its assertion that, in violation of the Act, the State Committee funded testing the waters activity or direct federal campaign activity during the travel. The mere temporal proximity of Mandel's travel to states from which he later received federal contributions is inadequate, without something more, to draw a reasonable inference that during the trips he engaged in testing the waters or federal campaign activity. The Respondents specifically deny it and provide details concerning the purpose of each trip, none of which appears to have included federal campaign or testing the waters activity.

The Commission therefore finds no reason to believe that the State Committee violated 2 U.S.C. § 441a(a)(1) by making an excessive contribution. In addition, the Commission finds no reason to believe that Josh Mandel and the Federal Committee violated 2 U.S.C. § 441a(f) and 11 C.F.R. § 100.72 by accepting an excessive contribution while testing the waters for Mandel's U.S. Senate campaign. Finally, the Commission finds no reason to believe that Mandel, the State Committee, and the Federal Committee violated 2 U.S.C. § 441i(e) and 11 C.F.R. § 110.3(d) as a result of the State Committee's payment of Mandel's out-of-state trips.

### 3. Use of Ohio State Treasurer's Materials

The Complaint in MUR 6474 alleges that the Federal Committee has published on its website materials prepared by the Ohio State Treasurer's Office, constituting excessive or prohibited in-kind contributions from the State of Ohio to the Federal

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Committee. Compl. at 5-6, MUR 6474. In particular, the Complainant identifies a document entitled "Treasurer's Office Update" on the Federal Committee's website and the virtually identical "E-Newsletter Update from Treasurer Mandel" on the State Treasurer's Office official website. *See id.*

The Act defines a person to include "an individual, partnership, committee, association, corporation, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government." 2 U.S.C. § 431(11). The Commission has determined that a State government is a "person" under the Act. *See, e.g.,* Advisory Op. 1999-7 (State of Minnesota) at 2 n.3. Accordingly, if the Federal Committee used resources of the Ohio Treasurer's Office without payment, Mandel and the Federal Committee may have accepted an excessive in-kind contribution from the State of Ohio in violation of 2 U.S.C. § 441a(f).

The assertion in the Complaint that state employees created and developed content to benefit the Federal Committee is premised on the fact that the E-Newsletter Update displayed on the website of the Office of the State Treasurer was also displayed on the website of the Federal Committee. Respondents contend that the E-Newsletter Update referenced in the Complaint was created without using any state government resources. *Citizens for Josh Mandel Resp. at 4, MUR 6474.* They represent that the information on the Federal Committee's website was created "by individuals on their personal time, and outside the official duties of the Treasurer's office, and merely posted on both the official Treasurer's website and the U.S. Senate Campaign's website." *Id.*

The newsletter in question is very short — a mere two pages — and would not have required much time on the part of the drafter. Due to the *de minimis* nature of the

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alleged violations, the Commission exercises its prosecutorial discretion to dismiss the allegation that Mandel and the Federal Committee accepted an excessive in-kind contribution from the State of Ohio in violation of 2 U.S.C. § 441a(f). *See Heckler v. Chaney*, 470 U.S. 821 (1985).

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