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May 16, 2012

Anthony Herman
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463
VIA FED-EX # 7935 7223 5672

Re: **MUR 6542 (Mullin For Congress)**

Dear Mr. Herman,

By and through the undersigned counsel, this Response to the Complaint designated as Matter Under Review 6542 is submitted on behalf of Mullin for Congress, Debbie Dooley in her capacity as Treasurer of Mullin for Congress, and Markwayne Mullin. 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 Complaintt erroneously contends that Mullin for Congress violated three categories of regulations. First, that Mullin for Congress unlawfully used Mullin Plumbing, Inc.'s facilities and eniplyees to promote the candidacy of Mullin Plumbing's president, CEO and sole shareholder, Markwayne Mullin. Second, that Mullin for Congress reattributed and/or redesignated too many contributions. Third, Mullin for Congress accepted corporate contributions.

I. MULLIN PLUMBING IS A FAMILY OWNED BUSINESS.

Jim Mullin, Markwayne Mullin's father, started Mullin Plumbing, Inc., in 1973 and was its president for the next 24 years. In 1997, Markwayne Mullin, then only 20 years of age, became president of Mullin Plumbing.

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For approximately the next 15 years, Markwayne Mullin successfully shepherded the company from a primarily local store to a statewide company. Mullin Plumbing now services the metropolitan areas of both Tulsa and Oklahoma City. To maintain Mullin Plumbing's success in Oklahoma, Mullin Plumbing has consistently spent approximately 5% of annual revenues on advertisements. In 2003, Mullin Plumbing began purchasing airtime on local radio stations to broadcast a weekly Saturday morning radio program discussing home improvement topics. In appearing in Mullin Plumbing's television advertisements and using his voice in both radio advertisements and the radio program "House Talk", Mr. Mullin has engaged in branding his family's name onto the company.

Markwayne Mullin then chose to enter politics and campaign for the United States House of Representatives representing Oklahoma's Second Congressional District. Mr. Mullin announced his candidacy on September 6, 2011.

As Mr. Mullin is a successful small businessman, successful small businessmen account for some of Mr. Mullin's supporters. Some of these individuals have elected to contribute to Mullin for Congress from their LLC and sole proprietorship accounts. Other successful small businessmen have elected to contribute funds from their personal accounts. These individuals often contribute jointly with their spouses. Many of these contributions are, therefore, both reattributed and redesignated. Finally, Mr. Mullin has successfully served at the helm of Mullin Plumbing for nearly fifteen years. During that time, he has earned the respect and admiration of his fellow employees. It is therefore no surprise that Mr. Mullin's fellow employees have assisted Mr. Mullin's maiden voyage into politics by happily volunteering their time.

II. THE USE OF MULLIN PLUMBING EMPLOYEES AND FACILITIES IN MULLIN FOR CONGRESS'S ADVERTISEMENTS DOES NOT VIOLATE THE FECA.

The Complaint contends that Mullin for Congress violates the FECA when it uses Mullin Plumbing employees and facilities in Mullin for Congress's television advertisements. The Complaint also alleges that Mullin for Congress violates the FECA when it uses Mullin Plumbing vehicles in its campaign brochure. Mullin for Congress has in fact engaged in these activities, and has done so because these activities are explicitly permitted under the regulations when conducted in compliance with the FECA.

A. THE USE OF MULLIN PLUMBING FACILITIES AND THE APPEARANCE OF MULLIN PLUMBING EMPLOYEES IN TELEVISION ADVERTISEMENTS IS PERMISSIBLE IF THE ACTIVITY IS *DE MINIMIS* OR IF THE ACTIVITY IS REIMBURSED.

Markwayne Mullin's use of Mullin Plumbing's facilities in Mullin for Congress's campaign brochure and in television advertisements as well as the appearance of Mullin Plumbing employees in television advertisements, did not interfere with either corporate or employee work schedules. Therefore, the activity was *de minimis*. Even if the *de minimis* safe harbor does not apply to this situation, Mr. Mullin used his own personal funds to reimburse Mullin Plumbing for the time its facilities were used to film and photograph the television

advertisements and the campaign brochure, and these in-kind contributions from Mr. Mullin were properly reported.

i. **The Use Of Mullin Plumbing's Facilities And Appearance of Mullin Plumbing Employees In Television Advertisements Is Permissible Because The Activity Is *De Minimis*.**

Stockholders and employees are permitted to make incidental use of corporate facilities for individual volunteer activity in connection with a Federal election. 11 C.F.R. § 114.9(a)(1). Incidental use is defined as any amount of time "[t]hat does not prevent the employee from completing the normal amount of work which that employee" or the corporation usually generates, 11 C.F.R. § 114.9(a)(1)(i-ii). The Commission promulgated a safe harbor which views any volunteer activity that does not exceed one hour per week or four hours per month as incidental. 11 C.F.R. § 114.9(a)(2)(i). Additionally, to consider the activity *de minimis*, the activity cannot interfere with the employee or corporation in the commission of its duties; the activity cannot increase overhead costs; and the activity is done freely, willfully, and devoid of coercion. 11 C.F.R. § 114.9(a)(2)(ii)(A-C). See also MUR 5965 (Fischer for U.S. Senate, *et al.*) at 5.

If the stockholder makes more than an incidental use of corporate facilities, then the stockholder is required to reimburse the corporation within a commercially reasonable time for the fair market rental value of the facilities. 11 C.F.R. § 114.9(a)(3).

In MUR 5965, Fischer for U.S. Senate, *et al.*, the respondent, Gregory E. Fischer was a candidate for the U.S. Senate. MUR 5965 at 1. Prior to becoming a candidate, the respondent served as CEO of Dant Clayton Corporation. *Id.* Just prior to his announcement, Mr. Fischer used his corporate email account at 12:52 A.M. to communicate with potential supporters about his campaign staff needs. *Id.* at 2, 6. In the email, Mr. Fischer designated a corporate employee as the individual to receive resumes for campaign employee positions. *Id.* at 2. The respondent told potential applicants to email the employee at the employee's corporate email address. *Id.* This potentially could have forced the employee to review resumes during work hours thus interfering with the employee's corporate responsibilities. The Commission, however, unanimously found reason to believe that no violation occurred because the Complaint did not allege that the activity was outside the safe harbor exemption and because the email was sent at 12:52 A.M., clearly not during normal work hours. *Id.* at 4. The Commission concluded that the above activity fell within the safe harbor exemption of 11 C.F.R. 114.9(a)(2). *Id.*

Mullin Plumbing is a family owned company with Markwayne Mullin as the president, CEO and sole shareholder. In that capacity, Mr. Mullin, like Mr. Fischer, is permitted to use corporate facilities in connection with a Federal election. Furthermore, since Mr. Mullin has served at the helm of Mullin Plumbing for nearly fifteen years, he has earned the respect and admiration of his fellow employees. These employees who appeared in the television advertisements were more than happy to volunteer their time. The employees who participated in the television advertisements did so freely, were not coerced, and their daily work duties were not disrupted. Mullin Plumbing employees and vehicles spent less than four hours total on these advertisements. Additionally, the advertisements, like the email in MUR 5965, were filmed in the morning prior to work as Mr. Mullin insisted that everyone start work punctually.

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Additionally, Mullin Plumbing's overhead costs were not increased. Mr. Mullin and the employees who participated in the advertisements, therefore, acted within the Commission's safe harbor.

Likewise, the use of Mullin Plumbing vehicles falls within the exemption. None of the vehicles used in any of the advertisements or in the campaign's brochure, were out of commission for more than four hours for all the campaign activity involving Mullin Plumbing. The use of Mullin Plumbing facilities, therefore, falls within the safe harbor exemption.

Finally, the Complaint, like the complaint in MUR 5965, does not allege that any of this activity is outside the safe harbor exemption. Just as in MUR 5965 where the absence of such an allegation led to the dismissal of the complaint there, so should the Commission dismiss this Complaint.

ii. **Even If The *De Minimis* Safe Harbor Does Not Apply To This Situation, The Activity Is Still Permissible Because Mr. Mullin Reimbursed Mullin Plumbing For The Use Of Its Facilities.**

Even if the *de minimis* exception does not apply, the use of Mullin Plumbing facilities in both television advertisements and in the campaign brochure is still permissible because Mr. Mullin personally reimbursed Mullin Plumbing for its time.

All persons may use corporate facilities for volunteer activity in connection with a Federal election so long as those persons reimburse the corporation within a commercially reasonable time and for the fair market rental value of the facilities used. 11 C.F.R. § 114.9(d). Reason to believe a violation does not occur can be found, in part, if the complaint does not allege that the reimbursement was not made within a commercially reasonable time. See MUR 5479 (Wortman for Congress, *et al.*) at 5.

Mr. Mullin has reimbursed his company for the use of its facilities. The television advertisements began in January of 2012, at the beginning of the first quarter reporting period. The brochure to which the complainant refers was first printed in September of 2011 and contained one photograph of Mr. Mullin standing in front of Mullin Plumbing trucks. No employees appeared in the brochure. Mullin Plumbing employees and vehicles have spent less than four hours *total* on these advertisements. On the first quarter 2012 report, Mullin for Congress reported that Mr. Mullin gave an in-kind contribution to the campaign from his own personal funds. This in-kind contribution was to reimburse Mullin Plumbing for the use of Mullin Plumbing's facilities. The total reimbursement cost was \$1,425.

Therefore, even if the *de minimis* safe harbor exemption does not capture the activity described above, because Mr. Mullin reimbursed Mullin Plumbing, the use of Mullin Plumbing facilities in campaign advertisements is permissible.

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III. REDESIGNATIONS AND REATTRIBUTIONS ARE LEGITIMATE IRRESPECTIVE OF THE PRESENCE OR ABSENCE OF RECURRENCES; THE COMPLAINT UTTERLY FAILS TO STATE A CLAIM OF VIOLATIONS FOR REDESIGNATIONS AND REATTRIBUTIONS.

Redesignations and reattributions are permissible no matter how few or how many times they occur. There is no statute or regulation limiting the number of times a campaign may reattribute or redesignate contributions during a campaign.

The Complaint does not specify or allege which reattributions or redesignations were in violation of law. Rather, the Complaint generally asserts that redesignations and reattributions, when done in high frequency compared to the other campaigns, are impermissible. There is simply no statute or regulation, however, limiting the number of reattributions or redesignations a campaign may authorize per election.

The Complaint's closest approximation to a concrete allegation on this point is that Mullin for Congress accepted more than one contribution in excess of \$10,000. The Complaint notes that even if the \$10,000 were "redistributed" between the primary, run-off, and general elections at the maximum contribution limit per election, there would still be an excessive contribution of \$2,500. What the Complaint does not factor, however, is that contributions can be both reattributed *and* redesignated. Thus a contribution of up to \$15,000 is still not excessive in Oklahoma because Oklahoma has a primary, a run-off, and a general election. A contribution of this size could first be reattributed evenly between spouses at \$7,500 each. Then, each spouse could redesignate up to \$2,500 for each election. Therefore, contributions of \$10,000—or even \$15,000—are not excessive and are therefore permissible.

IV. THE COMPLAINT'S ACCUSATIONS OF ACCEPTING CORPORATE CONTRIBUTIONS ARE FALSE.

The Complaint alleges that Mullin for Congress accepted illegal contributions from the following contributors:

- Superior Wood Floors, Incorporated;
- Branchcemb, Inc.;
- Mother Nature's, Inc.;
- Reco Electric, Co.

First, the campaign never received one of these alleged contributions. Second, the other three contributions were accepted temporarily, while the campaign determined the contribution's legality. Once the campaign determined that a contribution came from a corporation, the contribution was refunded within three days or less.

A. CAMPAIGNS ARE PERMITTED TO TEMPORARILY ACCEPT QUESTIONABLE CONTRIBUTIONS FOR THIRTY DAYS TO DETERMINE THE CONTRIBUTION'S LEGALITY.

Campaigns are prohibited from accepting corporate contributions when the contributions come from a corporation's general treasury fund. 11 C.F.R. § 114.2(a). When a campaign committee receives a contribution, the contribution must be deposited within 10 days of receipt. 11 C.F.R. § 103.3(a). If a treasurer receives a contribution of questionable legality, the treasurer may still—within ten days—deposit the contribution. 11 C.F.R. § 103.3(b)(1). The treasurer, then, however, has thirty days to determine the legality of the contribution. *Id.* If at the expiration of the thirty days the treasurer cannot determine the legality of a contribution, the contribution must be refunded. *Id.* Finally, contributions from unincorporated sole proprietorships are permissible.¹

B. THE COMPLAINT DOES NOT IDENTIFY A SINGLE IMPERMISSIBLE RECEIPT OF A CORPORATE CONTRIBUTION.

The first corporate contribution listed in the Complaint is the \$1,000 contribution received from Superior Wood Floors, Incorporated. The contribution was received on June 27, 2011 and was reported on page 18 of Mullin for Congress's June 30th report. Three days later—well within the ten/thirty day window—Mullin for Congress refunded the contribution. This was reported on page 36 of the same report.

The second corporate contribution listed in the Complaint is the \$500 contribution from Branchcomb Inc. Mullin for Congress, however, has never received—much less accepted—a contribution from Branchcomb Inc. Rather, Mullin for Congress received and accepted a \$500 contribution from Branchcomb Asphalt. The contribution was received on June 30, 2011 and reported on page 26 of the June 30th report. The two entities, Branchcomb Inc., and Branchcomb Asphalt, are separate and distinct entities. Branchcomb Inc., is a corporation and is thus barred from contributing to a federal candidate. Branchcomb Asphalt, however, is an unincorporated sole proprietorship and is therefore permitted to make contributions.

The third corporate contribution listed in the Complaint is the \$1,000 contribution received from Mother Nature's, Inc. The contribution was received on July 15, 2011 and reported on page 6 of the September 30th report. On the very same day, Mullin for Congress refunded the contribution. This was reported on page 60 of the same report.

Finally, the fourth corporate contribution listed in the Complaint is the \$2,500 contribution from Reco Electric, Co. The contribution was received on June 29, 2011 and reported on page 22 of the June 30th report. On the very next day—well within the ten/thirty day window—Mullin for Congress refunded the contribution. This was reported on page 33 of the same report.

The Complaint's accusations here, therefore, are false. Of the three corporate contributions, the refunds were listed in the same report and made within three days or less. Of the one contribution from a sole proprietor, not only were the names different, but the actual

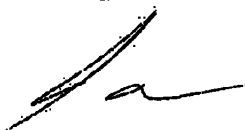
¹ See also Fed. Election Comm'n Campaign Guide, *Congressional Candidates and Committees*, 17, 110 (2011).

contributor, Branchcomb Asphalt, contained no indicia of corporate form in its name. The Commission should therefore find no reason to believe that Mullin for Congress violated the FECA.

CONCLUSION

For the foregoing reasons, the Complaint in this matter should be dismissed. The involvement of Mullin Plumbing's employees and facilities was *de minimis*. Even still, Mr. Mullin exceeded the requirements and reimbursed Mullin Plumbing for its time using his own personal funds. Additionally, the Commission has not limited the number of redesignations and reattributions a campaign may make during an election cycle. Finally, the Complaint cannot identify a single impermissible receipt of a corporate contribution. The Complaint, therefore, should be dismissed and the Commission should find no reason to believe that a violation has occurred.

Sincerely,



Jason Torchinsky
Shawn Sheehy
Counsel to Respondents