BEFORE THE FEDERAL ELECTION COMMISSION

In the matter of	)	
	)	
The Honorable David Vitter,	)	**MUR 6798**
David Vitter for U.S. Senate,	)	
And William Vanderbrook, as Treasurer	)	

RESPONSE OF SENATOR DAVID VITTER AND DAVID VITTER US SENATE TO THE COMPLAINT

The Honorable David Vitter, David Vitter for U.S. Senate and William Vanderbrook, as Treasurer (the "Campaign") (collectively "Respondents"), through counsel, hereby respond to the notification from the Federal Election Commission ("Commission") that a complaint was filed against them in the above-captioned matter. The complaint, filed by liberal special interest groups that solicit soft money donations and have a history of attacking conservative candidates and causes, must be dismissed for failing to allege facts that constitute a violation of the Federal Election Campaign Act of 1971, as amended (the "Act") and Commission regulations.

The complaint is internally inconsistent since it describes permissible activities while attempting to mischaracterize them as violations using misguided legal theories that have already been rejected by the Commission. Specifically, the complaint suffers from the following factual and legal deficiencies:

- Contrary to the complaint's assertions, Exhibit B, which is a "save the date" flyer for an event to be held by the Fund for Louisiana's Future, does not amount to a violation of the Act and Commission regulations. To the contrary, the flyer is permissible, since it merely lists Senator Vitter as a "special guest" and not in any fundraising capacity. Accordingly, the flyer cannot be misconstrued as a solicitation of money by Senator Vitter in excess of the Act's contribution limitations.

- The complaint misstates the law regarding agency, and erroneously claims that independent contractor fundraisers, utilized by a Federal campaign, are somehow

prohibited from working as contract fundraisers for others. The complaint claims that once hired by a campaign, a fundraiser becomes an "agent" of that campaign for all purposes, without any sort of limitation. The Commission has already rejected this erroneous legal theory, both in rulemakings and in advisory opinions, and has made clear that agency turns on actual authority, not on the sort of apparent authority again pushed by the reformers, and already rejected by the Commission.

- Complainants' allegations regarding the FLF website are meritless. There is nothing wrong with a Super PAC supporting one candidate, using publicly available pictures of the candidate, or having a common independent contractor fundraiser.

Accordingly, there is no factual or legal basis for the Commission to find reason to believe in this matter, and the Commission must dismiss the complaint, close the file and take no further action against the Respondents.

Factual Background

David Vitter currently serves as a U.S. Senator for Louisiana, and is not up for reelection until 2016. Senator Vitter is not on the federal ballot in the 2014 election. However, he is a candidate for Governor of Louisiana for the 2015 election. His Senate campaign employs or otherwise hires numerous persons, including a number of independent contractor fundraisers. Senator Vitter and his campaign have employed a number of different fundraising consultants over the years and each has limited authority to raise funds. For example, one contract fundraiser, Courtney Guastella, is authorized to raise funds for David Vitter for US Senate within Louisiana. Another contract fundraiser, Lisa Spies, is authorized to raise funds for David Vitter for US Senate in the Washington, DC area and other locations outside of Louisiana. Neither has general authority to ubiquitously raise funds on behalf of the campaign; instead, their authority is limited and circumscribed to raising contributions for the Campaign that comply with the contribution limits and source prohibitions from their assigned geographic areas. Upon information and belief, Respondents understand that each independent contractor fundraiser has other clients. Any

fundraising services provided by each independent contractor fundraising consultant to any other clients are separate and apart from and not in connection with the services provided to David Vitter for US Senate.

According to the complaint, the Fund for Louisiana's Future ("FLF") is a political committee that is registered with and reporting to the Commission as an independent expenditure-only committee and that has publicly stated that it supports the electoral efforts of Senator Vitter. With respect to Exhibit A to the complaint, that material was not paid for by David Vitter for US Senate, or authorized by Senator Vitter or his agents. The disclaimer makes this clear, as it states that it was "Paid for by the Fund for Louisiana's Future," and that it was "[n]ot authorized by any candidate or candidate's committee," and that FLF does not "coordinate" its activities with any candidate. Exhibit B to the complaint speaks for itself. It is a "save the date" flyer for a FLF event, and lists Senator Vitter as a "special guest." It limits the donation amount to attend the event to $5,000.

Analysis

The complaint fails to carry its burden and does not establish that there is reason to believe that a violation of the Act has occurred. The Commission has already made clear that simple speculation by a complainant is insufficient, and has held that the burden does not shift to a respondent in an enforcement action merely because a complaint has been filed and accusations made, especially such as here where the complaint fails to allege facts that constitute a violation under the Act and Commission regulations. *See* MUR 4850 (Deloitte & Touche, LLP, *et al.*), Statement of Reasons of Commissioners Darryl R. Wold, David M. Mason, and Scott E. Thomas at 2 ("The burden of proof does not shift to a respondent merely because a complaint is filed.").

Moreover, a reason to believe finding is warranted only if a complaint sets forth specific credible facts, which if true, would constitute a violation of the Act. *See* MUR 6554 (Friends of Weiner), Factual & Legal Analysis at 5 ("The Complaint and other available information in the record do not provide information sufficient to establish [a violation]."). Unwarranted legal conclusions from asserted facts, or mere speculation will not be accepted as true, and cannot support a finding of reason to believe. *See* MUR 4960 (Hillary Rodham Clinton for US Senate Exploratory Committee, Inc.), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas at 2 ("Unwarranted legal conclusions from asserted facts will not be accepted as true.") (internal citation omitted); MUR 4869 (American Postal Workers Union), Statement of Reasons of Chairman Darryl R. Wold, Vice Chairman Danny L. McDonald, and Commissioners David M. Mason, Karl J. Sandstrom and Scott E. Thomas at 2 (complaint failed to alleged violation of the Act); MUR 4850 (Fossella), Statement of Reasons of Chairman Darryl R. Wold and Commissioners David M. Mason and Scott E. Thomas at 2 (rejecting the Office of General Counsel's recommendation to find reason to believe because the respondent did not specifically deny conclusory allegations, holding that "[a] mere conclusory allegation without any supporting evidence does not shift the burden of proof to respondents."); MUR 5467 (Michael Moore) First General Counsel Report at 5 ("Purely speculative charges, especially when accompanied by a direct refutation, do not form an adequate basis to find reason to believe that a violation of [the Act] has occurred.") (*quoting* MUR 4960, Statement of Reasons of Statement of Reasons of Commissioners Mason, Sandstrom, Smith and Thomas).

A lack of information, or inadequate information, does not support a finding of reason to believe, and cuts against the complaint. MUR 4545 (Clinton/Gore '96 Primary

Committee, Inc.), First General Counsel Report at 17 (since "the available evidence is inadequate to determine whether the costs . . . were properly paid, the complaint's allegations are not sufficient to support a finding of reason to believe . . . ."); *see generally* MUR 5878, Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Petersen (discussing reason to believe standard).

These precedents apply with particular force here, where pro-regulation groups are seeking to use the enforcement process to change the law by asserting the same legal theories that were rejected by the Commission during the rulemaking process concerning the applicable provisions. Indeed, the misguided legal theories propounded by complainants are contradicted by the very legal authorities upon which they claim to rely.

1. Senator Vitter is listed on the Fund for Louisiana's Future's "Save the Date" Flyer as a "Special Guest," and not in a position related to fundraising.

Complainants breathlessly allege that a FLF flyer constitutes an impermissible solicitation by Senator Vitter because it includes a reference to Senator Vitter and lists a legal disclaimer informing recipients about the contributions limits under Louisiana campaign finance law in effect at the time the flyer was distributed. This allegation is without merit for the following reasons:

- *First*, the flyer lists Senator Vitter as a "special guest," and does not identify him in any sort of fundraising capacity. Thus, even assuming *arguendo* that Senator Vitter approved of the use of his name on the flyer (which he did not), this is specifically permitted by Commission regulation. *See* 11 CFR 300.64(b) (permitting Federal officeholders and candidates to be identified as "special guest"). The Commission has already made clear that "merely identifying a Federal candidate or officeholder as holding a position not specifically related to fundraising [such as special guest] does not constitute a solicitation of funds." 75 Fed. Reg. 24381 (May 5, 2010). As a "special guest," Senator Vitter did not occupy a fundraising position at the event or with the organization and, therefore, did not make a solicitation.

- *Second*, the save the date portion of the flyer does not ask for funds beyond the limitations or prohibitions of Federal law. In fact, it requests $5,000, the contribution limit for political action committees under the Act and Commission regulations. 2 U.S.C. § 441a(a)(1)(C); AO 2011-12 (Majority PAC and House Majority PAC) ("The Act limits contributions by any person to 'any other political committee' (other than authorized candidate committees, and national and state party committees) to $5000 per calendar year."). Even if someone were to misconstrue the flyer as a solicitation by Senator Vitter -- a conclusion that is not supported by the flyer's language -- the amount requested complies with the amount that may be solicited by federal candidates and officeholders for a super PAC. AO 2011-12 (Majority PAC and House Majority PAC) ("However, Federal officeholders and candidates, and officers of national party committees, may solicit up to $5000 from individuals (and any other source not prohibited by the Act from making a contribution to a political committee) on behalf of an IEOPC, because those funds are subject to the ct's amount limitations and source prohibitions.").

- *Third*, in the legal disclaimer cluster located at the bottom of the flyer, FLF included a voluntary legal disclaimer providing information about the $100,000 contribution limit under Louisiana campaign finance law in effect at the time the flyer was distributed. A legal disclaimer seeking to promote compliance with applicable law cannot possibly be misconstrued as a solicitation by the Commission or anyone else. Likewise, FLF's decision to include a state law compliance statement in its legal disclaimer cluster at the bottom of the flyer cannot be construed as a solicitation by Senator Vitter.

- *Fourth*, the Fund for Louisiana's Future is the one making the invitation to attend the event and to donate to the organization in the flyer, not Senator Vitter. Nowhere in the flyer does it state or imply that Senator Vitter is the one extending the invitation to attend the event or making the solicitation to the recipient to contribute to the organization. Complainants cannot import a meaning into the flyer that is not supported by plain language of the flyer. Nor can their speculation regarding Senator Vitter's involvement support a reason to believe finding.

Accordingly, there is no factual or legal basis for construing the save-the-date flyer as a solicitation by Senator Vitter or by anyone else on behalf of the Campaign.

2. Complainants' theory of agency is wrongheaded and contrary to Commission precedents.

Under the Act and Commission regulations, an individual is an "agent" of a federal candidate or campaign committee if he or she has actual authority, either express or implied. 2 U.S.C. § 441i(e)(1); 11 C.F.R. 300.2(b)(3); *see also* 67 Fed. Reg. 49082 ("The final rules make

clear that the definition of "agent" is limited to those individuals who have actual authority, express or implied, to act on behalf of their principals and does not apply to individuals who do not have actual authority to act on their behalf, but only have "apparent authority" to do so."). Here, the authority of the fundraising professionals in question to raise funds on behalf of Senator Vitter is limited, and did not include raising funds for others.

a. The Commission has already rejected Complainants Preferred Legal Theory

The Commission has already expressly rejected Complainants' claim that "agent" includes any person deemed to be an "agent" broadly defined under the common law. *See* Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 F.R. 49064, 49082 (July 29, 2002) ("[T]he Supreme Court has made it equally clear that not every nuance of agency law should be incorporated into Federal statutes where full incorporation is not necessary to effect the statute's underlying purpose."). Instead, the Commission recognized that "Title I of BCRA refers to 'agents' in order to implement specific prohibitions and limitations with regard to particular, enumerated activities on behalf of specific principals." *Id.*, 67 F.R. at 49083 (emphasis added).

The Commission specifically rejected using an apparent authority standard of the sort pushed by Complainants for the definition of "agent." *See id.* ("[T]he definition of "agent" in the final regulation does not incorporate apparent authority."); *see also* 71 Fed Reg. 4976 (January 31, 2006). In fact, during the Commission's rulemaking process, both Complainants argued for a broad agency rule, which was rejected and not adopted by the Commission. *See* Comments of Common Cause & Democracy 21 at 15-18 (May 29, 2002) (arguing for a broad "apparent authority" agency rule); Comments of the Campaign and Media Legal Center at 5-6 (May 29, 2002) (arguing for a broad "apparent authority" agency

rule, arguing that persons "held out to the world" as a fundraiser "such that a reasonable person would believe that had authority to act for the principal.").

By incorporating actual authority into the definition of "agent," the Commission has determined that a principal can be held liable for the actions of an agent only in limited circumstances. Specifically, a principal is liable for the actions of an agent only when the agent is "acting on behalf of the principal, and not when the agent is acting on behalf of other organizations or individuals." 67 Fed. Reg. 49083. "BCRA does not prohibit individuals who are agents of [federal candidates] from also raising non-federal funds for other political parties or outside groups." 71 Fed. Reg. 4979 (emphasis added). As the Commission stated in the 2006 E & J:

> The Commission notes that regardless of whether it includes apparent authority in the definition of "agent," for the candidate to be liable in this scenario under existing Commission regulations prohibiting soft money solicitations, the fundraising chair must be "acting on behalf" of the candidate when he or she makes the soft money solicitation. . . . As the Commission noted in the Soft Money Final Rules, "a principal can only be held liable for the actions of an agent when the agent is acting on behalf of the principal, and not when acting on behalf other organizations or individuals. Specifically, it is not enough that there is some relationship or contact between the principal and agent; rather, the agent must be acting on behalf of the principal to create potential liability for the principal.

71 Fed. Reg. 4978 n. 6 (emphasis added). As the Commission also notes, the Restatement -- a leading treatise on the law of agency -- states that "merely acting in a manner that benefits another is not necessarily acting on behalf of that person." *Id.* at 4979.

The reason for limiting the definition of "agent" to actual authority, express or implied, is to prevent the type of meritless complaint filed in this matter. The Commission expressed its concern about complaints that seek to harass individuals and organizations that are engaged in permissible fundraising activities. *Id.* ("An apparent authority standard would potentially subject individuals conducting permissible fundraising activities to Commission complaints and investigations. Such a result would unduly burden participating in

permissible political activity.); *see also* 67 Fed. Reg. 49083 ("This additional requirement ensures that liability will not attach due solely to the agency relationship, but only to the agent's performance of prohibited acts for the principal."). Accordingly, a federal candidate cannot be held liable for the actions of an agent unless the agent has actual authority, is acting on behalf of his or her principal, and is engaged in an activity covered by Commission regulations. *Id.*; *see also* 67 Fed. Reg. 49083 ("Implied authority should not be confused with apparent authority which is a distinct concept.").

Against this backdrop, Complainants resort to factual misstatements and naked speculation to support their erroneous legal theories. For example, they assert that the two independent contractor fundraisers in question are exclusively "employed" by Senator Vitter's campaign, and that all their efforts must be on behalf of Senator Vitter. This allegation is without merit and the complaint contains no evidence to support this unwarranted assertion. Complainants also purposely refuse to admit that an independent contractor providing fundraising services to another organization does so on behalf of that organization and not the Campaign. Both fundraisers referenced in the complaint are independent contractors who Respondents understand to have several other clients. As professional fundraisers, their scope of work, and thus their authority, is limited to raising permissible funds for the Campaign. The scope of work does not include authority to raise funds for any other organization on behalf of Senator Vitter or the Campaign. There are also geographical limitations for each independent contractor. One independent contractor is responsible for raising funds for David Vitter for US Senate in Louisiana. The other does not raise funds in Louisiana, but focuses on her fundraising efforts for the Campaign in Washington, DC.

This is precisely the situation considered and answered favorably by the Commission in its relevant rulemaking. A federal candidate can only be held liable when the agent is "acting on behalf of the principal, and not when the agent is acting on behalf of other organizations or individuals." 67 Fed. Reg. 49083. "BCRA does not prohibit individuals who are agents of [federal candidates] from also raising non-federal funds for other political parties or outside groups." 71 Fed. Reg. 4979.

b. The Advisory Opinions Cited by Complainants Contradict Their Legal Theory

Commission precedent provides further support for a finding of no reason to believe. Although twisted beyond recognition by Complainants, AOs 2003-10 and 2007-05 support Respondents. In AO 2003-10, the Commission considered whether or not Senator Harry Reid's son, Rory, could raise non-federal funds, even though Rory Reid raised money for Senator Reid's reelection efforts. The Commission unequivocally said he could, and contemplated "two explicit agency relationships":

> As long as [Rory] Reid solicits non-federal funds in his own capacity as a state official of Nevada and exclusively on behalf of the State Party, and not on the authority of any Federal candidate or officeholder, including Senator Reid, the fundraising activities will not be attributed to any Federal candidate or officeholder.

The Commission confirmed that Rory Reid "may at different times act in his capacity as an agent on behalf of the State Party and act as an agent on behalf of Senator Reid." The Commission ultimately concluded that, despite being an agent of Senator Reid, Rory Reid "may raise non-federal funds for the State Party." Complainants ignore the central thrust of the AO, and misread it be claiming it turned on the fact that the non-Federal funds raised by Rory Reid could not "benefit" his father's campaign. That was not the issue; the issue was agency, and the Commission expressly endorsed the notion of raising funds for several separate efforts and the wearing of multiple hats by fundraisers. The material aspects of AO

2003-10 are identical to the present situation, and thus demonstrate that the complaint in this matter is without merit and mandate its dismissal.

AO 2007-05 provides further protection for Respondents. There, a Congressman's Chief of Staff and part-time fundraiser for his re-election campaign was permitted to serve as Chairman of the state party, and raise non-federal funds for same. Complainants attempt to put the same misguided gloss on AO 2007-05 as they did with 2003-10, but to no avail. What is clear from AO 2007-05 is that even a Congressman's Chief of Staff and campaign fundraiser was permitted to raise non-Federal funds for the state party in the Congressman's state, again confirming that fundraisers are permitted to wear multiple hats. As the Commission stated, the Chief of Staff could:

> [S]olicit, direct, and spend non-Federal funds on behalf of the State Committee, even if he becomes an agent of [the] Congressman . . . for fundraising purposes, as long as [the Chief of Staff] solicits non-federal funds in his own capacity and exclusively on behalf of the State Committee, and not on the authority of any Federal candidate or officeholder. . . ."

In reaching this conclusion, the Commission again explained the validity of fundraisers wearing multiple hats:

> The Commission has explained that the purpose of the requirement that an agent act of behalf of an officeholder or candidate to be subject to the Act's prohibitions . . . was "to preserve an individual's ability to raise funds for multiple organizations." While the Act restricts the ability of Federal officeholders, candidates, and national party committees to raise non-Federal funds, it "does not prohibit" individuals who are agents of the foregoing from also raising non-Federal funds for other political parties or outside groups."

These Advisory Opinions establish that no legal violation occurred here. One contract fundraiser, Courtney Guastella, is authorized to raise funds for David Vitter for US Senate within Louisiana. Another contract fundraiser, Lisa Spies, is authorized to raise funds for David Vitter for US Senate in the Washington, DC area and other locations outside of Louisiana. Neither has general authority to ubiquitously raise funds on behalf of the

campaign; instead, their authority is limited and circumscribed to raising contributions for the Campaign that comply with the contribution limits and source prohibitions from their assigned geographic areas. Respondents understand that each independent contractor fundraiser has other clients. Any fundraising services provided by each independent contractor fundraising consultant to any other clients are separate and apart from and not in connection with the services provided to David Vitter for US Senate. Accordingly, there is no factual or legal basis for determining that the independent contractors to the Campaign were making solicitations on behalf of Senator Vitter and the Campaign while they were performing services for a separate, independent organization.

3. Allegations Concerning FLF's Website Are Meritless

Complainants' assertions regarding FLF's website are equally misguided. Complainants claim that since FLF (1) supports Senator Vitter, (2) has a photograph of him, and (3) has common fundraisers, there must be something legally amiss. Complainants ignore that (1) single-candidate Super PACs are perfectly legal, and have been recognized by the Supreme Court, (2) Commissioners have already sanctioned the use of candidate photos in connection with independent speech, even if obtained from a candidate's publicly-available website, and (3) as discussed above, the Commission has already said that fundraisers can raise funds for multiple entities without running afoul of the law:

- There is nothing suspicious about a so-called "Super PAC" that supports a single candidate. In fact, the Supreme Court recently put to rest any speculation that "Super PACs" are anything other than legal. *See McCutcheon v. FEC*, 572 U.S. __, n. 2 (expressly acknowledging so-called "Super PACs").

- A majority of the Commission has already ruled that the use of candidate photographs does not otherwise taint independent speech. *See* MUR 5743 (Betty Sutton for Congress/EMILY'S List) (Commission dismissed matter where respondent used candidate photographs obtained directly from the candidate's website), Statement of Reasons of Commissioners Hans A. von Spakovsky and Ellen L. Weintraub (permitting use a candidate photos); MUR

5996 (Education Finance Reform Group/Tim Bee) (dismissing matter where respondent used pictures of candidate obtained from candidate's website), Statement of Reasons of Vice Chairman Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn) (use of photographs obtained from candidate's website is permissible).

- The Commission has already made clear that fundraisers can wear so-called "multiple hats," and raise funds for different entities, without running afoul of the law. As the Commission noted in its Soft Money Final Rules, "a principal can only be held liable for the actions of an agent when the agent is acting on behalf of the principal, and not when acting on behalf other organizations or individuals. Specifically, it is not enough that there is some relationship or contact between the principal and agent; rather, the agent must be acting on behalf of the principal to create potential liability for the principal. 71 Fed. Reg. 4978 n. 6 (emphasis added).

In fact, the Commission has already confronted a more difficult yet related issue directly, and ruled in a manner favorable to Respondents. In MUR 5711 (Angelides), the Commission found no reason to believe that two Democratic Senators and a Democratic Representative violated the Act by consenting to the use of their photos on a website that solicited funds in amounts that exceeded the Federal limits and source prohibitions. In that MUR, photos of the federal officials appeared on the homepage of their preferred state gubernatorial candidate, right next to a prominent "contribute" link. The Commission determined that, notwithstanding the "contribute" link right next to photos of Federal officials, which in turn linked to a page that expressly solicited funds beyond the limits and prohibitions of the Act, the page was not a solicitation by the federal officials.

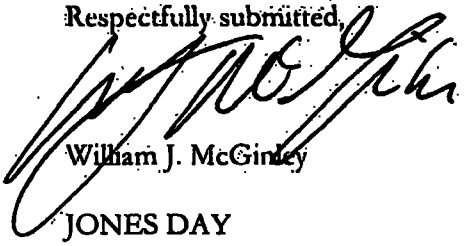
The reasoning and conclusion of MUR 5711 makes a finding of no reason to believe inevitable here. Simply because FLF used a picture of Senator Vitter does not render the entire FLF effort suspect. On the contrary, given that the Democrats involved in MUR 5711 consented to the use of their picture, the current case becomes even easier, since neither Senator Vitter not his campaign approved, authorized, agreed to or otherwise consented to the use of the picture. Moreover, even if he had (as the Democrats in MUR

5711 did), the use of such a photo does not constitute a solicitation by Senator Vitter. Commission regulations are clear that to "solicit" means "to ask, request, or recommend, explicitly or implicitly, that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value," and that this requires "some affirmative verbalization, whether oral or in writing." Both are absent from the present matter and the allegations concerning the website are baseless and must be dismissed.

Conclusion

For all of the reasons stated above, there is no factual or legal basis for finding reason to believe a violation occurred in this matter. Accordingly, we respectfully request that the Commission dismiss the complaint, close the file, and take no further action.

Respectfully submitted,



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