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Jeff S. Jordan, Assistant General Counsel
Federal Election Commission
Office of Complainants Examination and Legal Administration
Attn: Frankie Hampton, Paralegal
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VIA EMAIL

Re: **MUR 6888: Response of Carly for President, Inc., Carly Fiorina, and Joseph R. Schmuckler to the Complaint of American Democracy Legal Fund**

Dear Mr. Jordan:

I am writing on behalf of Carly Fiorina, Carly for President, Inc., and Joseph R. Schmuckler (collectively, "CFP") in response to the original Complaint, the Supplemental Complaint, and the Second Supplemental Complaint filed with the Commission by American Democracy Legal Fund against CFP and some 58 other respondents (collectively, the "Complaint")[1] in the above-referenced matter. The gravamen of the Complaint is that CFP allegedly received excessive and/or prohibited contributions in the form of coordinated communications facilitated through the exchange of voter data through a common vendor.

As a preliminary matter, the Complaint is replete with generalities and lacks any specific factual averments that could sustain a coordination claim with respect to CFP. Further, even if the Complaint's allegations did bear the requisite degree of specificity and detail, they do not, and intrinsically cannot, delineate a viable *prima facie* claim of coordination by CFP. Accordingly, the Commission should dismiss the Complaint in its entirety as to CFP without further action.

I. The Complaint's Vague and Unsubstantiated Allegations Are Legally Insufficient

To merit referral for further investigation, a complaint must proffer an articulable "reason to believe that a respondent has violated a statute or regulation over which the Commission has jurisdiction."[2] Importantly, a complaint's declaratory say-so that campaign finance infractions occurred is an inadequate predicate for an investigation. Rather, "[t]he Commission may find 'reason to believe' only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the [Federal Election Campaign Act]."[3] In this vein, "[u]nwarranted legal conclusions from asserted facts or mere speculation,

[1] CFP is named as a respondent to the Second Supplemental Complaint only.

[2] 11 C.F.R. § 111.9; *see also* 52 U.S.C. § 30109(a)(2).

[3] MUR 4960 (In re Hillary Rodham Clinton, *et al.*), Statement of Reasons of Commissioners Mason, Sandstrom, Smith, and Thomas, at 1.

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will not be accepted as true."[4] While the obligation to adduce specific facts and sufficient corroboration attaches to all complaints filed with the Commission, it assumes particular salience in the context of alleged coordination. As the governing regulations make clear and as the Commission has consistently affirmed, a coordination claim constructed on generalized assertions of interactions between federal candidates and third parties sponsoring independent expenditures is inherently deficient. Not only is "coordination" a legal term of art that encompasses only certain delimited categories of conduct,[5] but any such "coordination" must of necessity be tethered to a specific "public communication."[6] Indeed, that the locus of any coordination analysis is expenditure-specific imparts symmetry to the regulatory scheme; the legal significance of a coordinated expenditure is that its particular fair value is imputed as a contribution to the particular candidate with whom it was coordinated.[7] Accordingly, the viability of a coordination claim is dependent upon the complaint's provision of specific facts identifying the public communications that were allegedly coordinated, and explicitly evidencing the particular conduct that purportedly constituted "coordination."[8]

The Complaint's failure to comply with even rudimentary standards of definiteness and specificity compels its summary dismissal. To be sure, the Complaint weaves an extended narrative of alleged data sharing arrangements between the GOP Data Trust, LLC; i360, LLC; various candidate campaigns; and other organizations, to which it appends a lengthy litany of respondents who allegedly participated in the transmission of voter data. Crucially, however, the Complaint is entirely devoid of *any* evidence or even specific factual averments indicating a nexus between CFP and *any* identifiable coordinated "public communication."[9] Nowhere does it proffer any allegations concerning the identity of the vendor with whom CFP purportedly coordinated, the particular material, non-public information that CFP ostensibly transmitted, or the third party sponsoring any resultant public communications on CFP's behalf. More fundamentally, the inescapable insufficiency of the Complaint is most strikingly illuminated by the complete absence of any express mention of CFP. The only discernible factual predicate for CFP's inclusion as a respondent is an oblique reference in footnote 11 of the Complaint, which cites a *Bloomberg Politics* article that reported the names of four Republican presidential candidates who had not entered into data sharing agreements with the GOP Data Trust; the Complaint, in turn, apparently rests on the inference that CFP is among the campaigns that have executed such an agreement with GOP Data Trust. As the Commission has repeatedly emphasized, however, reliance on speculative suppositions and arrant conjecture about

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4 *Id.* at 2.

5 *See* 11 C.F.R. § 109.21(c).

6 *See* 11 C.F.R. §§ 109.21, 100.26.

7 *See* 52 U.S.C. § 30116(a)(7)(B); 11 C.F.R. § 109.21(b).

8 *See, e.g.*, MUR 5869 (In re Montana Education Association-Montana Federation of Teachers) Factual & Legal Analysis at 6 (dismissing complaint, noting that despite generalized allegations of coordination, "[t]he complaint neither provides nor identifies any communications made by [labor union] that would meet one or more of the content standards" for a coordinated communication); MUR 6540 (In re Rick Santorum), Statement of Reasons of Commissioners McGahn and Hunter at 22-23 (supporting dismissal of complaint that presented generalized suspicion of coordination but "fail[ed] to identify any of these alleged in-kind contributions with any specificity").

9 As discussed in greater detail *infra* Section II(A), to the extent the Complaint itemizes particular public communications, such communications necessarily could not satisfy the content element of a valid coordination claim with respect to CFP.

relationships that might exist or about communications or conduct that may have occurred does not furnish "reason to believe" that campaign finance violations occurred.[10]

II. <u>The Complaint Does Not State A Valid Coordination Claim Against CFP</u>

Even if the factual predicates of the Complaint's coordination allegations are deemed sufficiently detailed, they necessarily cannot engender a *prima facie* claim of coordination. A valid coordination claim can be distilled into three constituent elements, namely, the existence of a "public communication" that:

> (1) was paid for by someone other than a candidate, an authorized committee, or a political party committee;
> (2) contains content that satisfies at least one of the criteria set forth in 11 C.F.R. § 109.21(c); and
> (3) entailed conduct that satisfies at least one of the criteria set forth in 11 C.F.R. § 109.21(d).[11]

To the extent the Complaint identifies specific public communications, however, they do not – indeed could not – contain any of the requisite content with respect to CFP. The "conduct" facet of the Complaint's coordination theory – which relies entirely on CFP's alleged retention of a "common vendor" also apparently utilized by certain politically active organizations – is similarly defective. As an initial matter, CFP has never engaged any commercial vendor in connection with the procurement of voter data. Furthermore, CFP has never conveyed to any vendor or other third party any information concerning its plans, projects, activities or needs. Because the Complaint does not and cannot supply any evidence to the contrary, it proffers no reason to be believe CFP ever accepted unlawful in-kind contributions in the form of coordinated expenditures, and accordingly must be dismissed.

A. None of the Public Communications Identified by the Complaint Satisfies the "Content" Element of a Coordination Claim

To be actionable as a coordinated expenditure, a public communication must either (1) constitute an "electioneering communication," (2) expressly advocate the election or defeat of a clearly identified candidate for federal office, (3) republish campaign materials prepared by a federal candidate or her authorized committee, or (4) reference a clearly identified presidential candidate or political party and be publicly distributed in a jurisdiction that will hold a presidential primary, caucus or nominating convention

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[10] *See, e.g.*, MUR 5963 (In re Club for Growth Political Action Committee, *et al.*), Factual & Legal Analysis at 6 (dismissing coordination allegations based on similarities between candidate's advertisements and those of third party, noting "the speculative nature of the complaint, and the absence of any other evidence of coordination"); *see also* MUR 6059 (In re Sean Parnell for Congress, *et al.*), Factual & Legal Analysis at 8 (dismissing complaint after finding that it "does not contain specific allegations as to" coordination, but rather rested solely on the assumption that coordination occurred because candidate had met with the independent expenditure committee); MUR 5754 (In re MoveOn.org Voter Fund), Factual & Legal Analysis at 3 (concluding that independent expenditure committee's alleged meetings with Democratic Party officials and the candidate's attendance at events sponsored by the committee do "not provide a connection" between those contacts and actual coordination, particularly given the submission of affidavits specifically denying that coordination had occurred).

[11] *See generally* MUR 6059 (In re Sean Parnell for Congress, *et al.*), Factual & Legal Analysis at 4-5 (describing three-part test).

within 120 days.[12] None of the public communications enumerated in the Complaint, however, are alleged to contain any of the aforementioned content in connection with Mrs. Fiorina's candidacy for the office of President of the United States.

1. Electioneering Communications

An "electioneering communication" is defined in relevant part as "any broadcast, cable, or satellite communication which (I) refers to a clearly identified candidate for Federal office; [and] (II) is made within…30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate."[13] It is an indisputable matter of public record that the first primary, convention or caucus of the 2016 presidential election contest will be Iowa's precinct caucuses, which are scheduled to occur on February 1, 2016. Because any broadcast, cable or satellite communication that is made prior to January 2, 2016 (*i.e.*, 30 days before Iowa caucuses) is by definition not an "electioneering communication" in connection with the 2016 presidential primary election, the Complaint necessarily cannot state a cognizable coordination claim under this subset of the "content" prong.[14]

2. Express Advocacy

The Complaint neither explicitly alleges nor even indirectly intimates that any of the public communications it identifies contained express advocacy in support of Mrs. Fiorina or in opposition to one of her opponents for the Republican presidential nomination. As discussed in Section I above, this dearth of descriptive factual averments or substantiating evidence of the relevant public communications' actual content is necessarily fatal to the Complaint.[15] Furthermore, even if one or more of the putative public communications itemized in Exhibits I and II of the Complaint do include express advocacy, such content necessarily could not have been in connection with Mrs. Fiorina's candidacy. Specifically, to implicate actionable coordination, a public communication must have been coordinated with a "candidate,"[16] and, to the extent the Complaint relies upon the "express advocacy" content criterion, the public communication must have expressly advocated either the election of that candidate or the defeat of that candidate's opponent.[17] Crucially, however, all of the "independent expenditures" identified in Exhibits I and II allegedly were made between August 2014 and November 2014 – *i.e.*, at least six months **before** Mrs. Fiorina became a candidate for federal office on May 4, 2015. Further, to the extent any indicia of their

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12 *See* 11 C.F.R. § 109.21(c)(1) through (c)(4).

13 52 U.S.C. § 30104(F)(3)(A); *see also* 11 C.F.R. § 100.29(a).

14 Furthermore, the communications identified in Exhibit I appear to be Internet advertisements and thus could not be "electioneering communications" regardless of when they were disseminated. *See* MUR 6244 (In re Charlie Crist for Senate, *et al.*), Factual & Legal Analysis at 3 n.1 (noting that even if allegedly coordinated website communication could qualify as a "public communication," it was distributed more than 30 days before primary election, and thus could not constitute an "electioneering communication" in any event).

15 *See, e.g.*, MUR 6164 (In re Mike Sodrel, *et al.*), Factual & Legal Analysis at 5-6 (dismissing coordination claim that described existence but not contents of allegedly coordinated billboards, noting that "the allegations are not sufficient to warrant an investigation into whether the conduct and content standards…of the coordinated communications test have been met").

16 *See* 11 C.F.R. § 109.20(a).

17 *See* 11 C.F.R. § 109.21(c)(3).

contents can be gleaned from Exhibit 1, it appears that the advertisements at issue all pertained to candidates for the United States Senate or the United States House of Representatives, offices for which Mrs. Fiorina was not a candidate in 2014.[18]

3. Republication of Campaign Materials

Even if the public communications underlying the Complaint did republish campaign materials – and there is no allegation that they did – they still could not permit an inference of unlawful coordination with respect to CFP. As noted above, all of the "independent expenditures" catalogued in the Complaint were made on or before November 2014, long before CFP came into existence or Mrs. Fiorina became a candidate for president. Because such public communications necessarily could not have republished materials generated by a non-existent campaign, any theory of coordination premised on a republication allegation is categorically precluded as to CFP.

4. 120 Day Pre-Election Period

Just as any public communications identified by the Complaint necessarily cannot be "electioneering communications" with respect to the 2016 presidential election, so too does any coordination claim premised on the 120 day "blackout period"[19] present a temporal impossibility. As noted above, the first nominating primary election, caucus or convention in connection with the 2016 Republican presidential nominating contest is the Iowa precinct caucuses that will be held on February 1, 2016. Because both the Complaint and the alleged public communications it identifies long predate the commencement of the 120 day window on October 4, 2015, the Complaint cannot state a valid coordination claim under this prong of the "content" rubric.[20]

B. The Complaint Does Not State A Valid Claim Under the "Common Vendor" Theory of Coordination

The "conduct" dimension of the Complaint's coordination claim postulates that the respondent candidates and candidate committees (to include CFP) utilized voter data vendors (namely, GOP Data Trust and i360) as conduits to transmit nonpublic material information to third parties who then sponsored public communications for the benefit of those candidates.[21]

It is worth pausing again to recount the pervasive factual deficiencies and legal *non sequiturs* that permeate the Complaint as it relates to CFP. As discussed above, it nowhere identifies even one public

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[18] Similarly, Exhibits D and E of the original Complaint itemize independent expenditures that predate Mrs. Fiorina's candidacy and indeed indicate on their face that they supported or opposed candidates other than Mrs. Fiorina or her opponents for the 2016 Republican presidential nomination, respectively.

[19] *See* 11 C.F.R. 109.21(c)(4).

[20] *See* MUR 5952 (In re Warren Hellman), Factual & Legal Analysis at 7 n.5 (dismissing coordination allegations in part because advertisement at issue aired more than 120 days before the first primary election of the 2008 election cycle).

[21] *See* Second Supplemental Complaint at 10-12.

communication that was improperly coordinated by CFP specifically.[22] Further, every one of the public communications enumerated in the Complaint predates CFP's formation and Mrs. Fiorina's candidacy for president, a temporal discrepancy that decisively forecloses any possibility of coordination. The regulatory prerequisite that coordination must entail the involvement of a "candidate" (or her agent or authorized committee)[23] is not a semantic technicality but an integral conceptual component of coordination; because their legal significance derives from their status as in-kind contributions, coordinated communications impart nothing "of value" for the "purpose of influencing"[24] the election of an individual who is not seeking federal office in the first place.

While this foundational flaw alone disposes of the Complaint, its allegations also do not forge a plausible "common vendor" theory of coordination for at least four reasons, each of which is addressed below.

1. CFP Has Not Retained a Commercial Vendor for Obtaining Voter Data

The Complaint relies on the crucial – and wholly false – presupposition that CFP has retained the services of a "commercial vendor" from which it procured voter data.[25] While CFP acknowledges that it has entered into a voter data exchange agreement, its counterparty to the contract is the Republican National Committee (the "RNC"), a political party committee organized under section 527 of the Internal Revenue Code.[26] CFP has no contractual right to control or influence from whom and in what manner the RNC acquires the voter data it has supplied to CFP. Importantly, the qualification that the alleged common vendor be of a commercial character is not an accident of draftsmanship; the Commission has expressly emphasized that "the common vendor rule is carefully tailored" and "only applies to a vendor whose usual and normal business includes the creation, production, or distribution of communications, and does not apply to the activities of persons who do not create, produce, or distribute communications as a commercial venture."[27] At no time has CFP ever engaged in a formal or informal data sharing arrangement with either the GOP Data Trust, LLC or i360, LLC. Indeed, CFP nowhere appears on Exhibits I, II, and III of the Second Supplemental Complaint, which proffer a list of entities and committees that have remitted "independent expenditures" and "operating expenditures" to i360.

2. The Alleged Common Vendor Did Not "Create, Produce Or Distribute" A Public Communication Benefitting CFP

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22 *See* MUR 6010 (In re Partnership for America), Factual & Legal Analysis at 3 (dismissing complaint, noting that was "no information suggesting that [third party organization] aired communications related to this race").

23 *See* 11 C.F.R. § 109.20.

24 *See* 11 C.F.R. § 100.52(a).

25 *See* 11 C.F.R. § 109.21(d)(4)(ii).

26 The Commission has long countenanced list sharing agreements, concluding that when an organization "provides names to another political committee in exchange for its own future use of a corresponding number of names which are of equal value…this constitutes an arms-length business transaction between the committees and is not a reportable contribution." Advisory Opinion 1981-46.

27 Final Rules: Coordinated and Independent Expenditures, 68 Fed. Reg. 421-01, -23 (Jan. 3, 2003); *see also* 11 C.F.R. § 116.1(c).

Even if the RNC were a "commercial vendor" utilized by both CFP and third parties sponsoring public communications, the Complaint furnishes no factual nexus between CFP, the RNC, and corresponding public communications benefitting CFP. As discussed above, the Complaint is reducible to merely a speculative inference of coordination contrived from a constellation of various isolated actors and public communications. The governing regulations and Commission precedents are clear, however, that overlapping relationships between a candidate, a commercial vendor, and third party organizations do not *ipso facto* beget reason to believe coordination has occurred. To the contrary, the law "does not presume coordination from the mere presence of a common vendor."[28] Rather, it is incumbent upon a complainant to not only identify a commercial vendor that has provided certain services to a candidate, but also establish that the same vendor contracted with a third party "to create, produce or distribute" a public communication that benefitted the candidate within 120 days of the vendor's provision of services to the candidate.[29] "[I]t is not sufficient for the entities involved to have merely hired the same commercial vendor for different work at various points in the past."[30] While the Complaint rattles off a litany of third parties who engaged in public communications, it is entirely devoid of any averments relating to (1) which among those organizations sponsored public communications benefitting CFP; (2) the identity of the alleged common vendor retained by both CFP and the third party (*i.e.*, the GOP Data Trust, i360, or some other data management firm); (3) any description of the ostensible public communication(s) benefitting CFP that the third party allegedly sponsored; or (4) whether the unnamed third party retained the unnamed common vendor's services within 120 days **after** the vendor rendered services to CFP. To the contrary, all of the public communications identified in Exhibits I and II long **predate** CFP's agreement with the RNC (or even CFP's existence), and thus cannot constitute the basis for a coordination claim premised on a common vendor theory.

3. CFP Has Never Provided Material Information to the RNC or to any Commercial Vendor

Additionally, even if a third party had sponsored a public communication benefitting CFP that was created, produced or distributed by a commercial vendor that had provided services to CFP within the preceding 120 days, such public communications could constitute an unlawful in-kind contribution only if they were predicated on nonpublic information concerning CFP's plans, projects, activities, or needs (or those of its opponents) that was transmitted through the shared vendor.[31]

Importantly, CFP has never communicated any information concerning its plans, projects, activities, or needs (or those of its opponents) to the RNC. Under the terms of its agreement with the RNC, CFP is entitled to a one-time transfer of voter data amassed by the RNC; CFP, in turn, will not transmit any voter data to the RNC until after Mrs. Fiorina's presidential campaign is suspended or another Republican

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[28] 68 Fed. Reg. at 421-24; *cf.* N.Y. *Progress and Protection PAC v. Walsh*, 17 F. Supp. 3d 319, 322 (S.D.N.Y. 2014) (the fact that "candidate's close friends, former employees, and other allies" operated PAC did not affect its status as an independent committee, noting that such "tenuous connections hardly rise to the level of coordination—and certainly not to the level of quid pro quo corruption," and reflects a reality "inherent in politics").

[29] 11 C.F.R. § 109.21(d)(4)(i)-(ii).

[30] *See* MUR 6077 (In re Larson), Factual & Legal Analysis at 6.

[31] 11 C.F.R. § 109.21(d)(4)(iii).

candidate has secured a sufficient number of delegates to win the Republican presidential nomination in 2016. The Commission's prior adjudications – fortified by common sense -- dictate that the absence of any articulable evidence or specific allegations pertaining to the nature of the particular information allegedly communicated through a common vendor intermediary compels summary dismissal of a complaint.[32] Because the RNC is not – and, under the terms of its agreement with CFP, cannot be – a conduit of nonpublic material information from CFP to third parties engaged in independent expenditures, the Complaint's common vendor theory of coordination is irretrievably defective.

4. Sharing of Voter Data is Not *Per Se* Coordination

To be clear, CFP's agreement with the RNC does not contemplate that it will provide the latter with any voter data whatsoever until the 2016 presidential primary election has concluded or CFP suspends its operations. In addition, CFP has never provided to the RNC (or to any of the other Respondents) any information concerning its plans, projects, activities or needs, and the Complaint proffers no evidence whatsoever to the contrary.

It should be noted, however, that even if CFP did convey voter information data to the RNC or to other third parties (and it did not), the transmission of such information could not, standing alone, sustain a colorable *prima facie* claim of coordination. Both the regulatory text and the Commission's consequent adjudicatory determinations confirm that the mere transfer of general information, unaccompanied by any request or suggestion that a public communication be sponsored or any substantive interactions concerning the attributes or timing of specific public communications, does not give rise to actionable coordination.[33] In MUR 6038 (In re Lamborn for Congress, *et al.*), the Commission considered a complaint alleging that an independent expenditure organization had acquired from a commercial vendor a voter list that originated from the candidate campaign on whose behalf the organization sponsored public communications. The Commission first noted as a preliminary matter that, to the extent the data received from the vendor was a "commoditized list containing information about Republican primary voters" drawn from public records, the safe harbor applicable to public communications derived from publicly available information would preclude a finding of wrongdoing.[34] Even if the exemption were not applicable (because, e.g., the voter list incorporated unique information not in the public domain), the Commission emphasized the absence of any allegation that the independent expenditure group specifically requested the same voter list used by the campaign, or that the list was "specially packaged" or that its transfer was facilitated with the knowledge or involvement of the campaign. In this vein, the Commission noted that the campaign "was not informed of the reason for requesting the voter list" and "did not discuss the plans, projects, activities, or needs of the Lamborn campaign....brief and vague discussions about a voter list do not constitute 'substantial

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[32] *See, e.g.*, MUR 6120 (In re Republican Campaign Committee of New Mexico, *et al.*), Factual & Legal Analysis at 11-12 ("The complaint only states the use of a mutual vendor 'further suggests' information sharing, but does not indicate what information...was actually shared."); MUR 6570 (In re Berman for Congress, *et al.*), First General Counsel's Report at 12-13 (reasoning that "the Complaint does not present any allegation of specific conduct...Given the conclusory nature of the Complaint's allegations regarding the conveyance of information by a common vendor, the Complaint is essentially relying on a presumption of coordination, precisely the inferential leap the [Commission's guidance] disfavors").

[33] *See* 11 C.F.R. § 109.21(d)(1)-(d)(4).

[34] MUR 6038 (In re Lamborn, *et al.*), Factual & Legal Analysis at 8.

discussions' about [the campaign's] plans, projects, activities or needs or establish that the [independent expenditure group]'s flyers were created, produced or distributed after such discussions."[35]

Similarly, in MUR 5879 (In re Democratic Congressional Campaign Committee, *et al.*), the Commission concluded that a candidate's provision of footage to the Democratic Campaign Congressional Committee, which subsequently used the video in an advertisement supporting the candidate, did not constitute coordination, explaining that "there is no specific information suggesting that any communications relating to the request were substantive in nature or related to any 'decision' regarding the advertisement including content, intended audience, means or mode of the communication, specific media outlet used, timing, frequency, or duration."[36]

The Complaint here likewise is devoid of any allegation that CFP – either directly or through a common vendor – transmitted specific information concerning its plans, projects, activities, or needs, or interacted with a third party payer in connection with the timing, content or targeting of any particular public communication. Thus, even if CFP had provided voter data to the RNC or to another Respondent (and it did not), such passive transmittals of general information untethered from any specific public communication or identifiable third party payer, does not give rise to a cognizable claim of coordination.

For the reasons discussed above, CFP respectfully requests that the Commission find that there is no reason to believe CFP has violated any provision of the FECA or the Commission's regulations promulgated thereunder, and accordingly dismiss the Complaint in its entirety as to CFP without further action.

Respectfully,

Jory Langhofer

[35] *Id.* at 9.

[36] *See* MUR 5879 (In re Democratic Congressional Campaign Committee, *et al.*), Factual & Legal Analysis at 7.