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October 1, 2015

CONFIDENTIAL

VIA E-MAIL

Federal Election Commission
Office of Complaints Examination
and Legal Administration
Attn: Kim Collins, Paralegal
999 E Street, NW
Washington, DC 20436

2015 OCT -2 AM 9:49
CELA
RECEIVED
FEDERAL ELECTION
COMMISSION

Re: MUR# 6955, *American Democracy Legal Fund v. John R. Kasich, et al.*

Dear Ms. Collins:

I have been retained as counsel for New Day For America and J. Matthew Yuskewich, Treasurer, New Day For America (collectively "New Day For America") in the above-referenced matter. In its Complaint, American Democracy Legal Fund and Hillary Clinton advisor Brad Woodhouse (collectively "ADLF") allege that New Day For America violated the Federal Election Campaign Act of 1971 (the "Act") by (1) failing to timely register with the Federal Election Commission (the "Commission") and (2) making an excessive, in-kind contribution to Kasich For America and Governor John Kasich. In addition, the Complaint alleges that Governor Kasich violated the Act by failing to timely register with the Commission,

Atlanta Chicago Cincinnati Cleveland Columbus Costa Mesa Denver
Houston Los Angeles New York Orlando Philadelphia Seattle Washington, DC

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by soliciting contributions outside the prohibitions and limitations of the Act, and by accepting an excessive, in-kind contribution from New Day For America.¹

The Commission should promptly dismiss this matter. All of the allegations rely upon an internet news article to incorrectly assume that Governor Kasich was a candidate for the Presidency prior to July 21, 2015, which is simply not true. Moreover, if the Commission adopted the interpretation promoted by the ADLF, every Presidential candidate in the field could potentially be in violation of the Commission's rules and regulations. Because the ADLF's Complaint fails to allege facts showing specific violations, the matter should be dismissed without further action.

I. Background

On April 14, 2015, New Day For America was incorporated as a non-profit corporation in the State of Ohio. *See* Declaration of Matthew J. Carle at ¶ 2, attached as Exhibit A. New Day For America is organized primarily for directly or indirectly accepting contributions or making expenditures, or both, for exempt function activities within the meaning of Section 527 of the Internal Revenue Code of 1986 and to engage in other activities as may be necessary and proper to accomplish the foregoing objects and purposes. *Id.* at ¶ 3. New Day For America then registered with the Internal Revenue Service as a political committee as defined by Internal Revenue Code § 527. *Id.* at ¶ 4. Once New Day For America registered with the IRS, it discussed issues of general public importance and made non-candidate related expenditures. *Id.*

¹ A response to the allegations against Governor Kasich, Kasich For America, and Suzanne Marshall, Treasurer, Kasich For America, is outside the scope of this response, and will be addressed in a separate response by them.

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at ¶ 5. It did not support or oppose any candidate for federal office, and it disclosed all expenditures and contributions to the IRS. *Id.* at ¶ 6.

On June 28, 2015, Politico published an article entitled, “John Kasich to Announce Presidential Bid July 21.” *Id.* at ¶ 7. This article contained the following sentence, “Ohio Gov. John Kasich will jump into the crowded Republican presidential field on July 21 at the student union at his alma mater, The Ohio State University, in Columbus, advisers tell POLITICO.”² *Id.* at ¶ 8. The article neither quoted Governor Kasich nor a specific advisor of Governor Kasich as making this statement. New Day For America was not aware Governor Kasich would run for President at that time.

On July 8, 2015, a third-party media buyer purchased air time for a commercial produced by New Day For America. *Id.* at ¶ 12. This commercial, and subsequent commercials, used footage from interviews with Governor Kasich filmed prior to July 8, 2015, and the stations categorized these ad buys as “Non-Candidate Issue Ads.” *Id.* at ¶ 12, 14; *see also, e.g.* Complaint, at n. 10.

On July 21, 2015, Governor Kasich announced for the first time his intention to run for President. Carle Decl. at ¶ 16. On that same date, New Day For America determined that it would make, and only make, independent expenditures supporting or opposing candidates for federal office, including Governor Kasich. *Id.* at ¶ 17. Consequently, on July 23, 2015, New Day For America timely registered with the Federal Election Commission. *Id.* at ¶ 18.

² Mike Allen, John Kasich to Announce Presidential Bid July 21, Politico, June 28, 2015, available at: <http://www.politico.com/story/2015/06/john-kasich-2016-presidential-bid-119517#ixzz3mt27BS9c>.

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II. Argument

A. **Governor Kasich Did Not Become a Candidate on June 28, 2015.**

The lynchpin of this Complaint revolves around one factual allegation: On June 28, 2015, Governor Kasich became a candidate for President of the United States when Politico published an article on the Internet entitled, “John Kasich to Announce Presidential Bid July 21.” Specifically, the ADLF’s Complaint is based on the title and first sentence of that article, “Ohio Gov. John Kasich will jump into the crowded Republican presidential field on July 21 at the student union at his alma mater, The Ohio State University, in Columbus, advisers tell POLITICO.”³ Neither Governor Kasich nor his advisers are quoted in the article as saying Governor Kasich will announce a Presidential bid on July 21. Instead, the ADLF’s Complaint is based entirely on a statement conceived and written by a news reporter.

Importantly, New Day For America did not inform Mr. Allen that Governor Kasich would announce his candidacy for President of the United States on July 21, 2015. *Id.* at ¶ 9. As Mr. Carle explains, no individual with New Day For America spoke with Mr. Allen about the article. *Id.* at ¶ 10. In any event, New Day For America did not know that Governor Kasich was going to run for President at that time. *Id.* at ¶ 11.

Moreover, as will likely further be demonstrated by Governor Kasich’s response to this Complaint, Governor Kasich did not become a candidate for federal office before July 21, 2015 under the Act and the Code of Federal Regulations. Pursuant to 11 C.F.R. 100.72(b), an individual becomes a candidate when:

“(1) The individual uses general public political advertising to publicize his or her intention to campaign for Federal office. (2) The individual raises funds in excess

³ Mike Allen, John Kasich to Announce Presidential Bid July 21, Politico, June 28, 2015, available at: <http://www.politico.com/story/2015/06/john-kasich-2016-presidential-bid-119517#ixzz3mt27BS9c>.

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of what could reasonably be expected to be used for exploratory activities or undertakes activities designed to amass campaign funds that would be spent after he or she becomes a candidate. (3) The individual makes or authorizes written or oral statements that refer to him or her as a candidate for a particular office. (4) The individual conducts activities in close proximity to the election or over a protracted period of time. (5) The individual has taken action to qualify for the ballot under State law.”

The ADLF’s Complaint does not provide any evidence for any of the above factors other than citing an internet news article from June 28, 2015 and incorrectly characterizing certain advertisements purchased by New Day For America prior to Governor Kasich’s statement of candidacy on July 21, 2015.

Before July 21, 2015, Governor Kasich did not conduct or authorize any activities that triggered his candidacy for President of the United States. On July 21, 2015, however, Governor Kasich unambiguously stated, for the first time, “I am here to ask you for your prayers, for your support, for your efforts, because I have decided to run for President of the United States.” *See* Governor John R. Kasich, Announcement of Candidacy for President of the United States, The Ohio State University (July 21, 2015). At this moment, Governor Kasich became a candidate in accordance with the Act. No evidence supports the ADLF’s position that he became a candidate for President at any point prior to this date.

The Commission has never determined that an individual has become a candidate for President of the United States based on anonymous information by an alleged advisor in a news article. In fact, even when confronted with a direct comment by a named advisor stating that a potential candidate “has made up his mind,” the Commission determined that this statement did not amount to a statement of candidacy. *See* Complaint, Matter Under Review 5934; *see also* Statement of Vice Chairman Petersen and Commissioners Hunter, McGahn, and Weintraub,

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MUR 5934. The ADLF does not, and cannot, cite to a single advisory opinion, matter under review, statute, or regulation that finds that a reporter's written interpretation of an anonymous source amounts to a statement of an individual's candidacy. As such, Governor Kasich did not become a candidate for President until July 21, 2015.

B. New Day For America Timely Registered With the FEC.

The ADLF alleges that New Day For America failed to timely register with the FEC, but New Day For America timely filed FEC Form 1 on July 23, 2015. Under the Act, any "committee, club, association, or other group of persons" that receives more than \$1,000 in "contributions" or makes more than \$1,000 in "expenditures" in a calendar year is a "political committee." 52 U.S.C. § 30101(4)(1); 11 C.F.R. § 100.5(a). The Act limits the terms "contribution" and "expenditure" to only those made "for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A)(i), (9)(A)(i). New Day For America did not meet the definition of a political committee until *after* Governor Kasich declared his candidacy for President of the United States on July 21, 2015.

As Mr. Carle makes clear, New Day For America was not aware that Governor Kasich would be a candidate for President of the United States of America until July 21, 2015, when Governor Kasich made a special announcement at a public ceremony at The Ohio State University in Columbus, Ohio. Carle Decl. at ¶ 11, 16. At that time, Mr. Carle, as Executive Director of New Day For America, determined that New Day For America would support Governor Kasich's candidacy for President of the United States. *Id.* at ¶ 17. On July 23, 2015, New Day For America registered with the Commission as an independent expenditure only political committee eligible to receive unlimited contributions in accordance with 52 U.S.C. §

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3101 and 11 C.F.R. § 1005. *Id.* at ¶ 18. Consequently, New Day For America timely registered with the FEC as required under the Act.

The ADLF makes a number of allegations and assertions regarding a standard form used by radio stations to purchase advertising time that was incorrectly filled out by a third-party media buyer who has since been terminated. Carle Decl. at ¶ 12. Regardless of how that third-party buyer may have filled out the form, the advertisements were categorized by the stations and the FCC as a form related to a Non-Candidate Issue Ad. Carle Decl. at ¶ 12-14.⁴ This fact was readily apparent to the ADLF when it filed the Complaint. Indeed, this categorization is included in footnotes 29, 30, and 33 of the Complaint, all of which clearly include the fact that the New Day For America advertisements were Non-Candidate Issue Ads. The FCC and the local stations recognized these advertisements as Non-Candidate Issue Ads rather than independent expenditures as defined by the Act. Consequently, these purchases were not made on behalf of any candidate for federal office. Indeed, as demonstrated above, Governor Kasich was not a candidate for President until July 21, 2015.

Thus, the earliest New Day For America would have had to register as a “political committee” under the Act would have been 10 days after Governor Kasich declared his candidacy for President. New Day For America would timely meet even that earliest of deadlines by completing such registration on July 23, 2015. This claim should be dismissed without further action.

⁴ See also <https://stations.fcc.gov/station-profile/wmur-tv/political-files/browse-%3e2015> and <https://stations.fcc.gov/station-profile/wcvb-tv/political-files/browse-%3e2015>

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C. Governor Kasich Has Never Solicited Contributions to New Day For America Outside the Prohibitions and Limitations of the Act.

The ADLF asserts that Governor Kasich solicited contributions to New Day For America outside the prohibitions and limitations of the Act. Governor Kasich has only solicited funds for New Day For America in accordance with the prohibitions and contribution limitations of the Act. Specifically, Governor Kasich filmed the video, that is no longer on New Day For America's website, well before he decided to become a candidate for President of the United States on July 21, 2015. Carle Decl. at ¶ 15. Mr. Kasich made no solicitation or other request for contributions to New Day For America as that term is defined by the Act or otherwise in that video. Moreover, this video was not made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate for federal office because Mr. Kasich did not become a candidate for federal office until July 21, 2015. Consequently, Governor Kasich did not solicit contributions for New Day For America in violation of the Act. This claim should be dismissed without further action.

D. New Day For America Has Not Made any In-Kind Contribution in the Form of a Coordinated Communication.

The ADLF alleges that New Day For America has made an in-kind contribution by making expenditures on behalf of Governor Kasich's candidacy for President in violation of 52 U.S.C. § 30116(a)(7)(B)(i). Specifically, the ADLF's Complaint again refers to advertisements that were paid for by New Day For America on July 8, 2015 – before Governor Kasich became a candidate for President. Complaint at 9. Moreover, any video footage that aired in those commercials was likewise shot of Governor Kasich *before* he announced his candidacy for

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President. Carle Decl. at ¶ 14. As such, these expenditures could not have been an expenditure “in cooperation, consultation or concert, with . . . a candidate . . .”

Additionally, the interviews of Governor Kasich in those advertisements only discussed issues of national importance, and they did not promote any potential candidacy for President of the United States. Any advertisement using this B-roll footage of Governor Kasich does not constitute an expenditure “made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or a political party committee.” See 11 C.F.R. §§ 109.20 and 109.21. Consequently, the advertisements mentioned by the ADLF fall outside the Commission’s definition of a coordinated communication. This claim should be dismissed without further action.

III. Conclusion

For the foregoing reasons, the ADLF’s Complaint should be dismissed and the Commission should take no further action.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Tucker", with a stylized flourish at the end.

Robert J. Tucker

Attachment

**BEFORE THE
FEDERAL ELECTION COMMISSION**

American Democracy Legal Fund

Complainant,

vs.

John R. Kasich, et al.

Respondents.

MUR# 6955

CELA

2015 OCT -2 AM 9:49

COMMISSION

Declaration of Matthew J. Carle

I, Matthew J. Carle, declare under penalty of perjury that the following is true and accurate.

1. I am the Executive Director of New Day For America. My business address is 150 E. Mound Street, Suite 103, Columbus, Ohio 43215. The statements in this declaration are based upon my personal knowledge.
2. On April 14, 2015, New Day For America was incorporated as a non-profit corporation in the State of Ohio.
3. The Corporation is organized primarily for directly or indirectly accepting contributions or making expenditures, or both, for exempt function activities within the meaning of Section 527 of the Internal Revenue Code of 1986, and to engage in other activities as may be necessary and proper to accomplish the foregoing objects and purposes.
4. New Day For America registered with the Internal Revenue Service as a political committee as defined by Internal Revenue Code § 527.
5. Once New Day For America registered with the IRS, it discussed issues of general public importance and made non-candidate related expenditures.
6. It did not support or oppose any candidate for federal office, and it disclosed all expenditures and contributions to the IRS.
7. On June 28, 2015, Politico writer Mike Allen published an article entitled, "John Kasich to Announce Presidential Bid July 21."

8. This article contained the following sentence, "Ohio Gov. John Kasich will jump into the crowded Republican presidential field on July 21 at the student union at his alma mater, The Ohio State University, in Columbus, advisers tell POLITICO." See <http://www.politico.com/story/2015/06/john-kasich-2016-presidential-bid-119517> (last visited October 1, 2015).
9. New Day For America did not inform Mr. Allen that Governor Kasich would announce his candidacy for President of the United States on July 21, 2015.
10. It is my understanding that no individual at New Day For America spoke with Mr. Allen.
11. On June 28, 2015, New Day For America did not know whether Governor Kasich would declare his candidacy for President of the United States.
12. On July 8, 2015, a third-party media buyer purchased air time for a commercial produced by New Day For America. The form for that purchase was incorrectly filled out by the third-party media buyer, and the third-party media buyer has since been terminated. This third-party media buyer did not know whether Governor Kasich would declare his candidacy for President of the United States at the time of the purchase.
13. The above referenced purchases were not made on behalf of any candidate for federal office, including Governor Kasich.
14. The video footage included in the commercials described in the Complaint was pulled from interviews of Governor Kasich recorded by New Day For America before Governor Kasich announced his candidacy for President of the United States on July 21, 2015.
15. The video found on New Day For America's website including a message from Governor Kasich was also filmed before he announced his candidacy for President of the United States on July 21, 2015. See <https://newdayforamerica.com/mission/> (last visited October 1, 2015). This video has since been removed from the "Donate" page.
16. On July 21, 2015, Governor Kasich announced his intention to run for President of the United States in a public ceremony at The Ohio State University. This was the first time that New Day For America became aware the Governor Kasich would run for President.
17. On that same date, I determined, in my role as Executive Director of New Day For America, that New Day For America would make, and only make, independent expenditures supporting or opposing candidates for federal office, including Governor Kasich.
18. On July 23, 2015, New Day For America registered with the Federal Election Commission (the "FEC").

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

By:



Matthew J. Carle
Executive Director
New Day For America

Date: October 1, 2015