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BEFORE THE
FEDERAL ELECTION COMMISSION

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American Democracy Legal Fund
455 Massachusetts Avenue NW
Washington, DC 20001

MUR # 6983

Complainant,

SENSITIVE

v.

John R. Kasich
P.O. Box 1344
Columbus, OH, 43216

Kasich for America and Suzanne E. Marshall, Treasurer
P.O. Box 1344
Columbus, OH, 43216

New Day for America and J. Matthew Yuskewich, Treasurer
4679 Winterset Drive
Columbus, OH 43220

Respondents.

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COUNSEL

SUPPLEMENTAL INFORMATION

Complainant files this supplemental information in support of its Complaint filed on July 3, 2015, pursuant to 52 U.S.C. § 30109(a)(1), against John R. Kasich; Kasich for America and Suzanne E. Marshall, Treasurer, in her official capacity; and New Day for America and J. Matthew Yuskewich, Treasurer, in his official capacity, for violating the Federal Election Campaign Act of 1971, as amended (“the Act”) and Federal Election Commission (“FEC”) regulations. The Commission’s decision in Advisory Opinion 2015-09 (Senate Majority PAC and House Majority PAC) shows that New Day for America and Mr. Kasich violated the Act when New Day for America paid for “testing-the-waters” and candidate activities with soft money.

A. FACTS

On July 21, 2015, Ohio Governor John R. Kasich announced his candidacy for President of the United States.¹ His announcement did not come as a surprise; on May 17, 2015, CNN reported that a source close to Governor Kasich told the media outlet that he is “very likely” to run for President,² and on June 28, 2015, Kasich’s advisers told the media that Mr. Kasich would be announcing his candidacy on July 21.³ Mr. Kasich did not file his Statement of Candidacy with the FEC within 15 days of making his decision to run; rather, his Statement of Candidacy was filed on July 23, 2015.

New Day for America is an independent expenditure-only political organization organized under Internal Revenue Code Section 527 and registered with the Internal Revenue Service.⁴ As early as April 2015, Governor Kasich and New Day for America launched a committee to “start getting around the country more, meeting and talking with more people,” and posted a web video featuring Governor Kasich speaking directly to camera, announcing the creation of New Day for America.⁵ New Day for America’s website⁶ features Mr. Kasich’s picture, his biography,⁷ and a video of Mr. Kasich explaining why “we created the New Day for America Committee.”⁸ The video appears on New Day for America’s donation page, which

¹ Sheryl Gay Stolberg, *John Kasich Enters 2016 Race, Hoping Centrist Appeal Sets Him Apart*, N.Y. Times (July 21, 2015), <http://www.nytimes.com/2015/07/22/us/politics/john-kasich-election-2016-presidential-race.html>.

² Gloria Borger and Brian Rokus, *Source: John Kasich ‘very likely’ to run in 2016*, CNN, May 17, 2015, <http://www.cnn.com/2015/05/17/politics/john-kasich-election-2016-running-announcement/>.

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.html>.

⁴ New Day For America, Political Organization Notice of Section 527 Status, Form 8871, available at http://forms.irs.gov/app/pod/basicSearch/search?_eventId_displayForm=true&formId=80871&formtype=e8871&execution=e1s3.

⁵ Henry Gomez, *Ohio Gov. John Kasich begins raising money to test the waters for a 2016 presidential run*, Northeast Ohio Media Group, Apr. 20, 2015, http://www.cleveland.com/open/index.ssf/2015/04/ohio_gov_john_kasich_begins_ra.html.

⁶ New Day For America, <https://newdayforamerica.com/> (last visited July 29, 2015) [<https://web.archive.org/web/20150729205858/https://newdayforamerica.com/>].

⁷ New Day For America, *Mission*, <https://newdayforamerica.com/mission/> (last visited July 29, 2015) [<https://web.archive.org/web/20150729210144/https://newdayforamerica.com/mission/>].

contains text that reads, “New Day For America may accept unlimited contributions from individuals, corporations, and other organizations.”⁹ New Day For America filed a Statement of Organization with the FEC on July 23, 2015.¹⁰ Weeks earlier, on July 8, 2015, New Day for America entered into an advertising contract with WCVB for \$58,400 worth of advertising time in the New Hampshire media market.¹¹ New Day for America completed a form documenting two separate ad buys on July 8, 2015. Each form listed “John Kasich for the Republican Presidential Primary” as the “name of the legally qualified candidate(s) the programming refers to.”¹² The form for the WMUR New Hampshire ad buy specified that the ad included a “candidate (Republican) discussing his values/beliefs.”¹³

Public reports indicate that the ad that New Day for America ran in New Hampshire on July 8, titled “Us,” featured Mr. Kasich speaking directly to the camera about his qualifications to be President.¹⁴ The advertisement includes a “paid-for” box and oral disclaimer explaining that New Day for America paid for the advertisement. The advertisement does not include a

⁸ *Id.*; New Day For America, *Donate*, <https://newdayforamerica.com/donate/> (last visited July 29, 2015)

[<https://web.archive.org/web/20150729210304/https://newdayforamerica.com/donate/>].

⁹ New Day For America, *Donate*, <https://newdayforamerica.com/donate/> (last visited July 29, 2015)

[<https://web.archive.org/web/20150729210304/https://newdayforamerica.com/donate/>].

¹⁰ See New Day For America, FEC Form 1 Statement of Organization, July 23, 2015, available at <http://docquery.fec.gov/pdf/003/201507230300013003/201507230300013003.pdf>.

¹¹ Contract Agreement between WCVB and New Day For America, July 8, 2015,

[https://stations.fcc.gov/collect/files/65684/Political%20File/2015/Non-Candidate%20Issue%20Ads/NEW%20DAY%20FOR%20AMERICA/NEW%20DAY%20FOR%20AMERICA%201359129%20\(14363795488829\).pdf](https://stations.fcc.gov/collect/files/65684/Political%20File/2015/Non-Candidate%20Issue%20Ads/NEW%20DAY%20FOR%20AMERICA/NEW%20DAY%20FOR%20AMERICA%201359129%20(14363795488829).pdf).

¹² New Day For America, NAB Form PB-18 Issues, WCVB - Needham, MA, July 8, 2015,

[https://stations.fcc.gov/collect/files/65684/Political%20File/2015/Non-Candidate%20Issue%20Ads/NEW%20DAY%20FOR%20AMERICA/NEW%20DAY%20FOR%20AMERICA%201359129%20NAB%20\(14363796165133\).pdf](https://stations.fcc.gov/collect/files/65684/Political%20File/2015/Non-Candidate%20Issue%20Ads/NEW%20DAY%20FOR%20AMERICA/NEW%20DAY%20FOR%20AMERICA%201359129%20NAB%20(14363796165133).pdf);

New Day For America, NAB Form PB-18 Issues, WMUR New Hampshire, July 8, 2015, [https://stations.fcc.gov/collect/files/73292/Political%20File/2015/Non-Candidate%20Issue%20Ads/New%20Day%20for%20America/7.8.15%20New%20Day%20for%20America%201359053%20NAB%20\(14363829161397\).pdf](https://stations.fcc.gov/collect/files/73292/Political%20File/2015/Non-Candidate%20Issue%20Ads/New%20Day%20for%20America/7.8.15%20New%20Day%20for%20America%201359053%20NAB%20(14363829161397).pdf). The National Association of Broadcasters has issued Broadcast Agreement Forms that are designed to serve as an actual contract for the sale of political broadcast time. http://www.nab.org/xert/2011Emails/Legal/NABPB_17_Forms.pdf.

¹³ *Id.*

¹⁴ Dan Tuohy, *Kasich to air first major ad buy in NH*, New Hampshire Union Leader (July 8, 2015),

<http://www.unionleader.com/article/20150708/NEWS0605/150709332#>. The ad is also available on YouTube. New Day For America, *Us*, YouTube (July 8, 2015), https://www.youtube.com/watch?v=Dg9Liwfs_tI.

“stand-by-your-ad” disclaimer from Mr. Kasich. On July 26, 2015, at 9:43 AM, New Day for America aired a second advertisement on WCVB-BOS (ABC) that features Mr. Kasich speaking directly to the camera about his qualifications to be President.¹⁵ That ad also includes a “paid-for” box explaining that New Day for America paid for the advertisement and does not include a “stand-by-your-ad” disclaimer from Mr. Kasich.

In a July 21, 2015, interview with Bloomberg Politics, a media strategist for New Day for America (Fred Davis) discussed the nature of the relationship between the 527 organization and Governor Kasich.¹⁶ Mr. Davis acknowledged that he had shot multiple ads of Governor Kasich paid for by New Day for America that were airing in New Hampshire and had worked with Governor Kasich for about two months.¹⁷ He clearly signaled that New Day for America and Governor Kasich had been coordinating up until the moment Governor Kasich publicly announced his candidacy; Mr. Davis told the interviewers “it was actually, I swear to you, sad” when “at noon today, when [Governor Kasich] said I’m running for President, I told him the last time I saw him right before he walked on stage, I said I won’t get to talk to you until [you’re] in the Oval Office.”¹⁸

B. LEGAL ARGUMENT

I. Impermissible Testing-the-Waters Expenditures

As the FEC explained in Advisory Opinion 2015-09 (Senate Majority PAC and House Majority PAC), New Day for America made, and Mr. Kasich accepted, an impermissible expenditure in support of Mr. Kasich’s “testing-the-waters” activities. In that Advisory Opinion,

¹⁵ See TVEyes, Inc., Media Monitoring Suite, WCVB 7/26/2015 9:43:07 AM, available at <http://mms.tveyes.com/transcript.asp?StationID=919&DateTime=7/26/2015%209:43:07%20AM&playclip=true>.

¹⁶ Mark Halperin and John Heileman. *Why Fred Davis Is Going to Miss John Kasich*, Bloomberg News, July 21, 2015, <http://www.bloomberg.com/politics/videos/2015-07-21/why-fred-davis-is-going-to-miss-john-kasich>.

¹⁷ *Id.*

¹⁸ *Id.*

the Commission stated that pre-candidacy “testing-the-waters” activities may only be paid for “with funds permissible under the Act.”¹⁹ As a result, “527 organizations’ use of funds raised outside of the Act’s limitations and prohibitions to pay for individuals’ testing-the-waters activities would violate Commission regulations if those individuals decide to become candidates.”²⁰

Funds spent by a 527 organization that were raised outside of the Act’s limits and prohibitions supported Mr. Kasich’s “testing-the-waters” activities. As described above, New Day for America is organized under Section 527 of the Internal Revenue Code.²¹ The organization raises funds outside of the limits and from prohibited sources; its donation page states that New Day for America “may accept unlimited contributions from individuals, corporations, and other organizations.”²² And, New Day for America paid for Mr. Kasich’s activities prior to his filing a Statement of Candidacy or announcing his candidacy. New Day for America’s April 2015 video suggested that Mr. Kasich would be working with New Day for America to engage in prototypical “testing-the-waters” activities, such as traveling around the country and meeting with voters to learn about their ideas.²³ On July 8, 2015, New Day for America entered into an advertising contract with WCVB for \$58,400 worth of advertising time in the New Hampshire media market,²⁴ and public reports indicate that an ad run by New Day for

¹⁹ FEC Adv. Op. 2015-09 (Senate Majority PAC and House Majority PAC).

²⁰ *Id.*

²¹ New Day For America, Political Organization Notice of Section 527 Status, Form 8871, available at http://forms.irs.gov/app/pod/basicSearch/search?_eventId_displayForm=true&formId=80871&formtype=e8871&execution=e1s3.

²² New Day For America, *Donate*, <https://newdayforamerica.com/donate/> (last visited July 29, 2015) [<https://web.archive.org/web/20150729210304/https://newdayforamerica.com/donate/>].

²³ Henry Gomez, *Ohio Gov. John Kasich begins raising money to test the waters for a 2016 presidential run*, Northeast Ohio Media Group, Apr. 20, 2015, http://www.cleveland.com/open/index.ssf/2015/04/ohio_gov_john_kasich_begins_ra.html.

²⁴ Contract Agreement between WCVB and New Day For America, July 8, 2015, [https://stations.fcc.gov/collect/files/65684/Political%20File/2015/Non-Candidate%20Issue%20Ads/NEW%20DAY%20FOR%20AMERICA/NEW%20DAY%20FOR%20AMERICA%201359129%20\(14363795488829\).pdf](https://stations.fcc.gov/collect/files/65684/Political%20File/2015/Non-Candidate%20Issue%20Ads/NEW%20DAY%20FOR%20AMERICA/NEW%20DAY%20FOR%20AMERICA%201359129%20(14363795488829).pdf).

America in New Hampshire on July 8, titled “Us,” featured Mr. Kasich speaking directly to the camera about his qualifications to be President.²⁵ These expenditures preceded Governor Kasich’s July 21, 2015, announcement that he was running for President.²⁶ And, as discussed in the July 3, 2015 Complaint, the television advertisements were a coordinated communication. In fact, Fred Davis directly stated that the 527 organization had worked with Governor Kasich to produce the television advertisements that aired in New Hampshire.²⁷ In light of the recent advisory opinion, it is clear that New Day for America made, and Governor Kasich accepted, impermissible contributions in support of pre-candidacy activities.

2. *Governor Kasich’s Candidacy*

In addition, Advisory Opinion 2015-09 shows that Mr. Kasich’s candidacy began far earlier than the date on which he filed a Statement of Candidacy. “Although an individual may raise or spend more than \$5,000 on ‘testing-the-waters’ activity without becoming a candidate, the testing-the-waters exemption does not apply ‘to individuals who have decided to become candidates.’”²⁸ The Commission has stated that conducting testing-the-waters activities “in close proximity to the election or over a protracted period of time” may indicate that an individual has decided to become a candidate.²⁹ Similarly, making or authorizing written or oral statements that refer to an individual as a candidate for a particular office tends to indicate that an individual has decided to become a candidate.³⁰ Statements made and retracted do not eradicate the Act’s

²⁵ Dan Tuohy, *Kasich to air first major ad buy in NH*, New Hampshire Union Leader (July 8, 2015), <http://www.unionleader.com/article/20150708/NEWS0605/150709332#>. The ad is also available on YouTube, New Day For America, *Us*, YouTube (July 8, 2015), https://www.youtube.com/watch?v=Dg9Liwfs_tI.

²⁶ Sheryl Gay Stolberg, *John Kasich Enters 2016 Race, Hoping Centrist Appeal Sets Him Apart*, N.Y. Times (July 21, 2015), <http://www.nytimes.com/2015/07/22/us/politics/john-kasich-election-2016-presidential-race.html>.

²⁷ Mark Halperin and John Heileman, *Why Fred Davis Is Going to Miss John Kasich*, Bloomberg News, July 21, 2015, <http://www.bloomberg.com/politics/videos/2015-07-21/why-fred-davis-is-going-to-miss-john-kasich>.

²⁸ FEC Adv. Op. 2015-09 (Senate Majority PAC and House Majority PAC) (quoting 11 C.F.R. §§ 100.72(b), 100.131(b) and citing FEC Adv. Op. 1981-32 (Askew)).

²⁹ 11 C.F.R. §§ 100.72(b)(4), 100.131(b)(4).

registration and reporting requirements.³¹ In addition, the FEC has clearly stated that “an individual who has raised or spent more than \$5000 on testing-the-waters activities and who informs the media (either directly or through an advisor) that he or she ‘will announce candidacy’ would be a candidate.”³²

The factual record strongly suggests that Mr. Kasich qualified as a candidate at least three weeks before he filed his Statement of Candidacy or formally announced his candidacy. As early as April 2015, Governor Kasich and New Day for America launched a committee to “start getting around the country more, meeting and talking with more people,” and posted a web video featuring Governor Kasich speaking directly to camera, announcing the creation of New Day for America.³³ In the video, Governor Kasich declares a number of policy prerogatives: “we can balance our nation’s budget,” “we can create jobs by cutting taxes and streamlining regulations,” “we can help our fellow Americans who live in the shadows move up,” and “get smart about making health care affordable.”³⁴ These statements demonstrate that Governor Kasich was not engaging in recognized testing-the-waters activities like “conducting a poll, telephone calls, and travel,” but rather had decided to become a candidate.³⁵ Similarly, on April 18, 2015, at the New Hampshire Republican Party’s “First in the Nation” Leadership summit, an event at which Senator Ted Cruz, Senator Rand Paul, Jeb Bush, Chris Christie, Donald Trump, and Carly Fiorina spoke, Governor Kasich stated that “America regains its strength” if it can tackle its immigration problem, balance its budget, lower the corporate tax rate, and invest in

³⁰ FEC Adv. Op. 2015-09 (Senate Majority PAC and House Majority PAC) (citing 11 C.F.R. §§ 100.72(b)(3), 100.131(b)(3)).

³¹ *Id.* (citing Factual and Legal Analysis, MUR 5363 (Sharpton)).

³² *Id.*

³³ Henry Gomez, *Ohio Gov. John Kasich begins raising money to test the waters for a 2016 presidential run*, Northeast Ohio Media Group, Apr. 20, 2015, http://www.cleveland.com/open/index.ssf/2015/04/ohio_gov_john_kasich_begins_ra.html.

³⁴ *Id.*

³⁵ 11 C.F.R. § 100.72(a).

infrastructure.³⁶ He asked attendees at the end of his appearance to “think about me, would you . . . don’t commit too soon . . . let us all have a chance to breathe and get out, and you know what I really look forward to, being out in your homes again, letting you get to know me and see me, that’s what it’s really all about, it’s why I love New Hampshire”³⁷

On May 17, 2015, CNN reported that a source close to Governor Kasich told the media outlet that he is “very likely” to run for President.³⁸ The same story indicated that Governor Kasich said in late April that “If I can win, I’m likely to run.”³⁹ The CNN report stated that, as of May 2015, “sources close to Kasich have been sending out positive signals.”⁴⁰ In late April, Governor Kasich spoke of the benefits of being perceived as running for President; he said “One good thing about thinking of running for President is that I get invited to stuff like this, where I can talk about what I care about.”⁴¹ The proximity of the statements to the election and the duration over which Governor Kasich made similar statements strongly suggests that he had decided to become a candidate many weeks before he formally announced.⁴² At a minimum, Governor Kasich clearly became a candidate no later than June 28, 2015, the date his advisers told the media that he would be announcing his candidacy on a date certain in the future.⁴³

These are the types of candidate and agent statements that indicate candidacy. The statements were made “in close proximity” to the election, and they referred to Governor Kasich as a candidate for President.⁴⁴ In the case of the statements made to the press, the FEC has

³⁶ New Hampshire Republican Leadership Summit, Day 2, C-SPAN, <http://www.c-span.org/video/?325374-1/new-hampshire-republican-leadership-summit-day-2>.

³⁷ *Id.*

³⁸ Gloria Borger and Brian Rokus, *Source: John Kasich ‘very likely’ to run in 2016*, CNN, May 17, 2015, <http://www.cnn.com/2015/05/17/politics/john-kasich-election-2016-running-announcement/>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

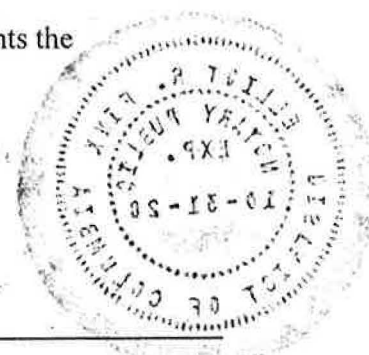
⁴² 11 C.F.R. §§ 100.72(b)(4), 100.131(b)(4).

⁴³ 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.html>.

clearly stated that “an individual who has raised or spent more than \$5000 on testing-the-waters activities and who informs the media (either directly or through an advisor) that he or she ‘will announce candidacy’ would be a candidate.”⁴⁵ Applying that instruction, Governor Kasich clearly established candidacy by late June and may have established it even earlier. At the same time, Governor Kasich was benefiting from expenditures by New Day for America in the form of political advertising that allowed him to convey his policy prerogatives and solicit support for his nascent candidacy.⁴⁶ This coordinated activity, by the personal admission of New Day for America’s media adviser, extended up to the date Governor Kasich publicly announced his candidacy on July 21, 2015, many weeks after Governor Kasich’s candidacy in fact began.⁴⁷

As a result, not only did Governor Kasich benefit from impermissible expenditures spent on his testing-the-waters activities, he also violated the Act by accepting impermissible contributions after he had become a candidate for President. The FEC should not permit a candidate to circumvent the Act’s contribution and source restrictions and reporting and registration requirements by establishing a 527 organization that raises and spends “soft money” over an artificially prolonged pre-candidacy period. The conduct at issue in this Complaint undermines several key pillars of the campaign finance architecture, and warrants the Commission’s attention.

C. CONCLUSION



⁴⁴ FEC Adv. Op. 2015-09 (Senate Majority PAC and House Majority PAC) (citing 11 C.F.R. §§ 100.72(b)(3), 100.131(b)(3)).

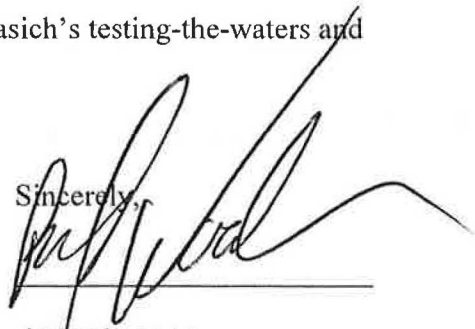
⁴⁵ *Id.* (emphasis added).

⁴⁶ Contract Agreement between WCVB and New Day For America, July 8, 2015, [https://stations.fcc.gov/collect/files/65684/Political%20File/2015/Non-Candidate%20Issue%20Ads/NEW%20DAY%20FOR%20AMERICA/NEW%20DAY%20FOR%20AMERICA%201359129%20\(14363795488829\).pdf](https://stations.fcc.gov/collect/files/65684/Political%20File/2015/Non-Candidate%20Issue%20Ads/NEW%20DAY%20FOR%20AMERICA/NEW%20DAY%20FOR%20AMERICA%201359129%20(14363795488829).pdf).

⁴⁷ Mark Halperin and John Heileman, *Why Fred Davis Is Going to Miss John Kasich*, Bloomberg News, July 21, 2015, <http://www.bloomberg.com/politics/videos/2015-07-21/why-fred-davis-is-going-to-miss-john-kasich>.

In light of the recent decision in Advisory Opinion 2015-09, the Commission should investigate the use of impermissible funds for Governor Kasich's testing-the-waters and candidate activities.

Sincerely,



SUBSCRIBED AND SWORN to before me this 10 day of March, 2016.

Elliot R. Fink
Notary Public

My Commission Expires:

10/31/2020

