



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Matthew G. Whitaker, Executive Director
Foundation for Accountability & Civic Trust
Suite 900
1717 K Street, NW
Washington, DC 20006

NOV 22 2017

RE: MURs 7169, 7170, 7171, 7172, 7173, 7174,
7175, 7176, 7177, 7178, 7179, 7182, 7187, 7188
DCCC, *et al.*

Dear Mr. Whitaker:

On November 16, 2017, the Federal Election Commission reviewed the allegations in your above-numbered complaints dated October 24, 2016, and October 31, 2016, and found that on the basis of the information provided in your complaints, and information provided by Respondents, there is no reason to believe the Democratic Congressional Campaign Committee and Kelly Ward in her official capacity as treasurer violated 52 U.S.C. § 30116(a) by making excessive in-kind contributions as a result of improperly allocating the costs of the advertisements at issue, and no reason to believe the following Respondents violated 52 U.S.C. § 30116(f) by accepting excessive in-kind contributions as a result of improperly allocating the costs of the advertisements: Santarsiero for Congress and Lora Haggard in her official capacity as treasurer; Ruben Kihuen for Congress and Jay Petterson in his official capacity as treasurer; Nelson for Wisconsin and Dr. Beth Gillis in her official capacity as treasurer; Colleen Deacon for Congress and Jennifer May in her official capacity as treasurer; Applegate for Congress and Douglas Applegate in his official capacity as treasurer; Mowrer for Iowa and Dennis Skinner in his official capacity as treasurer; Texans for Pete and Wayne Alexander in his official capacity as treasurer; Suzanna Shkreli for Congress and Jennifer May in her official capacity as treasurer; Carroll for Colorado and Mitchell S. Wright in his official capacity as treasurer; Eggman for Congress and Jay Petterson in his official capacity as treasurer; Stephanie Murray for Congress and Jennifer May in her official capacity as treasurer; Bryan Caforio for Congress and Gonzalo Freixes in his official capacity as treasurer; Friends of Christina M. Hartman and Diane Topakian in her official capacity as treasurer; and LuAnn Bennett for Congress and Jennifer May in her official capacity as treasurer. The Commission further found no reason to believe that the Democratic Congressional Campaign Committee and Kelly Ward in her official capacity as treasurer violated 52 U.S.C. § 30116(a) and no reason to believe Hillary for America and Jose Villarreal in his official capacity as treasurer violated 52 U.S.C. § 30116(f) in connection with the coordinated communication allegation. Last, the

WASHINGTON

Matthew G. Whitaker, Executive Director
MURs 7169, et al. (DCCC, et al.)
Page 2 of 2

Commission found no reason to believe the Colorado Democratic Party and Judith Steinberg in her official capacity as treasurer violated 52 U.S.C. § 30116(a) by making excessive in-kind contributions as a result of improperly allocating the costs of the advertisements or in connection with the coordinated communication allegation. Accordingly, the Commission closed its files in these matters.

Documents related to the case will be placed on the public record within 30 days. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016). The Factual and Legal Analysis, which more fully explains the Commission's findings, is enclosed.

The Federal Election Campaign Act of 1971, as amended, allows a complainant to seek judicial review of the Commission's dismissal of this action. *See* 52 U.S.C. § 30109(a)(8).

Sincerely,

Lisa J. Stevenson
Acting General Counsel



BY: Mark Allen
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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1 **II. FACTUAL AND LEGAL ANALYSIS**

2 **A. Allocation of the Costs of the Advertisements**

3 The Act defines a contribution as “any gift, subscription, loan, advance, or deposit of
4 money or anything of value made by any person for the purpose of influencing any election for
5 Federal office.”¹ The term “anything of value” includes all in-kind contributions.² Contributions
6 from a national or state committee to a candidate committee are limited to a total of \$5,000 per
7 election, and candidates and political committees are prohibited from knowingly accepting
8 contributions in excess of the Act’s limits.³ The Act grants the national and state committees of
9 a political party authority to also support their general election candidates with coordinated
10 expenditures subject to certain limits.⁴ Political party committees may support their candidates
11 with independent expenditures, defined as expenditures that expressly advocate the election or
12 defeat of a clearly identified federal candidate and are not made in concert or cooperation with or
13 at the request or suggestion of such candidate, the candidate’s authorized political committee, or
14 their agents.⁵

15 Commission regulations provide that “[e]xpenditures, including in-kind contributions,
16 independent expenditures, and coordinated expenditures made on behalf of more than one clearly
17 identified Federal candidate shall be attributed to each such candidate according to the benefit
18 reasonably expected to be derived.”⁶ If either side pays for amounts that exceed their allocated

1 52 U.S.C. § 30101(8)(A).

2 11 C.F.R. § 100.52(d)(1).

3 52 U.S.C. § 30116(a)(2)(A), (f).

4 52 U.S.C. § 30116(d).

5 52 U.S.C. § 30101(17); 11 C.F.R. § 109.30. *See Colorado Rep. Fed. Campaign Comm. v. Federal Election Comm’n*, 518 U.S. 604 (1996). *See also* 11 C.F.R. § 100.22.

6 11 C.F.R. § 106.1(a).

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1 share of the total costs, then those excessive amounts are in-kind contributions to the other
2 candidate(s) involved. For broadcast communications, the attribution is determined by the
3 proportion of space or time devoted to each candidate as compared to the total space or time
4 devoted to all candidates.⁷

5 The Respondents assert that each of the fifteen advertisements in these matters clearly
6 identifies a Democratic candidate for Congress, and either expressly advocates against the
7 candidate's Republican opponent and Trump, or addresses the Republican opponent's support of
8 Trump. Complainant alleges that the DCCC and CDP made, and the Respondent Democratic
9 congressional candidate committees accepted, excessive contributions in connection with the
10 advertisements. Complainant argues that it was improper for the Respondents to allocate the
11 costs of the advertisements and, therefore, the amounts the DCCC paid in connection with each
12 advertisement were excessive, in-kind contributions to the respective individual candidate
13 committee.⁸

14 Respondents assert in response to the Complaints that the methods used to allocate the
15 costs from the ads were appropriate and that the resulting expenditures were reported correctly.
16 Specifically, Respondents assert that they applied the allocation method for broadcast
17 communications set forth in Section 106.1(a) of the Commission's regulations and allocated the
18 costs according to the space and time devoted to each entity as compared to the total space or

⁷ *Id.*

⁸ *See, e.g.*, MUR 7169 (Santarsiero), Compl. at 9. The Complaints discuss at length the Commission's treatment of hybrid ads. *See, e.g.*, MUR 7169, Compl. at 4-9. The Complaints note that the advertisements at issue here are not "hybrid communications" and that Respondents are improperly substituting the standard "generic party reference" with material attacking Donald Trump, while still attributing a portion of the cost of the advertisements to the DCCC/CDP. *See id.* at 2-4. Hybrid ads are defined as "communications that refer both to one or more clearly identified Federal candidates and generically to candidates of a political party." *See id.* at 3 quoting Notice of Proposed Rulemaking on Hybrid Communications, 72 Fed. Reg. 26,569, 26,770 (May 10, 2007). There are no generic references, such as "Democrats" or "Republicans," in any of the 15 ads at issue here.

1 time devoted to all candidates.⁹ According to Respondents, the costs of the advertisements
2 identified in the Complaints were allocated between the DCCC or CDP and the Democratic
3 candidate whose opponent was featured in the ad along with Donald Trump, pursuant to a
4 time/space basis according to the portion of the ad that concerned each candidate.¹⁰ The portion
5 of each ad that addressed Trump was paid for by the DCCC.¹¹ The portion of each ad that
6 addressed the Republican congressional candidate was either paid for in full by the
7 corresponding Democratic congressional candidate or split between that Democratic candidate
8 and the DCCC spending under its coordinated party expenditure limit.¹²

9 For example, Respondents assert that they paid for the advertisement at issue in MUR
10 7170 (Kihuen) as an independent expenditure by the DCCC for the portion of the ad expressly
11 advocating against Trump and as an expenditure by Ruben Kihuen for Congress, the principal
12 campaign committee for Kihuen's campaign for Nevada's 4th Congressional District, because a
13 portion of the ad advocated against the election of Kihuen's opponent.¹³ This advertisement,
14 "Our Values" (0:30), contained the following audio:

⁹ Resp. of DCCC; Santarsiero for Congress, Ruben Kihuen for Congress, Nelson for Wisconsin, Colleen Deacon for Congress, Applegate for Congress, Mowrer for Iowa, Texans for Pete, Suzanna Shkreli for Congress, Eggman for Congress, Stephanie Murray for Congress, Bryan Caforio for Congress, Friends of Christina M. Hartman, and LuAnn Bennett for Congress ("Joint Resp.") at 5-13 (Dec. 22, 2016). This Joint Response applied to all fourteen Complaints at issue in this report. *See id.*

¹⁰ Joint Resp. at 4-5. The available record indicates that the subject advertisements aired during September and October 2016. The Joint Response indicates that the cost for the portion of each broadcast that was dedicated to the required disclaimer was split between the candidate and DCCC using the same ratio applied to the rest of the advertisement. *Id.* at 5-6.

¹¹ Joint Resp. at 4-5. The Respondents assert that this portion was reported by the DCCC as either an independent expenditure if it expressly advocated against Trump or an operating expenditure if it did not. *See id.* *See generally* 11 C.F.R. § 100.22.

¹² Joint Resp. at 4-5.

¹³ *See id.* Respondents allocated the payments in this manner for the advertisements at issue in MURs 7169 (Santarsiero), 7170 (Kihuen), 7171 (Nelson), 7174 (Mowrer), 7176 (Shkreli), and 7182 (Caforio).

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1 *Voiceover*: Donald Trump has made a lot of insulting
2 statements. [Footage of Trump].
3

4 *Trump*: "Ah. I don't know what I said. Ah." [Footage of
5 Trump].
6

7 *Trump*: "He's a Mexican." [Footage of Trump].
8

9 *Voiceover*: Trump insulted immigrants, women, a military
10 family and veterans with PTSD. [Footage of Trump beside
11 "examples," such as Khizr Khan].
12

13 *Kihuen*: "My opponent Crescent Hardy says he'll do anything
14 to help Donald Trump, and Hardy also stands with Cliven
15 Bundy." [Footage of Kihuen, Trump, and Hardy].
16

17 *Bundy*: "And I've often wondered . . . are they better off as
18 slaves, picking cotton?" [Footage of Kihuen and Bundy].
19

20 *Kihuen*: "Yeah, that guy." [Footage of Kihuen and Bundy].
21

22 *Kihuen*: "I'm Ruben Kihuen and I approve this message, because
23 these are not our values, and we're better off without Crescent
24 Hardy and Donald Trump." [Footage of Kihuen].¹⁴
25

26 In other instances, according to Respondents, the portion of an advertisement paid for by
27 the DCCC (under the allocation principles discussed above, because it addressed Trump) was
28 reported as an operating expenditure by the DCCC because that portion of the ad did not
29 expressly advocate Trump's defeat, but instead focused on policy issues.¹⁵ For example, the
30 Respondents assert that the ad in MUR 7172 (Deacon) was paid for by the DCCC in that manner
31 in part and in part as an expenditure by Colleen Deacon for Congress, the principal campaign
32 committee for Colleen Deacon's campaign for New York's 24th Congressional District because

¹⁴ See "Our Values," available at <https://www.youtube.com/watch?v=ulkmwN7ivMU> (Oct. 17, 2016).

¹⁵ Joint Resp. at 4-5. Respondents allocated the payments in this manner for the advertisements at issue in MURs 7172 (Deacon), 7175 (Gallego), 7178 (Eggman), 7179 (Murphy), and 7188 (Bennett).

1 a portion of the ad addressed Deacon's opponent's support for Trump. This advertisement,
2 "Unsettled" (0:30), contained the following audio:

3 *Voiceover:* In an unsettled world, John Katko and Donald
4 Trump's approach takes us down a dangerous path. [Footage of
5 current events].

6
7 *Trump:* "I love war in a certain way." [Footage of Trump].

8
9 *Voiceover:* But when asked about supporting Trump, Katko
10 said "I absolutely will support." [Footage of Katko].

11
12 *Trump:* "Tell them to go [bleep] themselves." [Footage of
13 Trump].

14
15 *Voiceover:* When national security leaders condemn Trump's
16 reckless statements on foreign policy. [Footage of Trump].

17
18 *Reporter:* "People are wondering how those things can happen
19 and you not flat out denounce it." [Footage of Katko and
20 reporter].

21
22 *Katko:* "I'm more concerned about my race." [Footage of
23 Katko].

24
25 *Voiceover:* Not about the safety of our families. [Footage of
26 Katko].

27
28 *Voiceover:* Trump and Katko put our National Security at risk.
29 [Footage of Trump and Katko].

30
31 *Deacon:* "I'm Collen Deacon and I approve this message."
32 [Footage of Deacon].¹⁶

33
34 The one matter involving the CDP, MUR 7177 (Carroll), involves an advertisement paid
35 for by the CDP and Carroll for Colorado, the principal campaign committee for Morgan
36 Carroll's congressional campaign for Colorado's 6th Congressional District.¹⁷ The CDP paid for

¹⁶ See "Unsettled," available at <https://www.youtube.com/watch?v=Ch4ToJp3Br0> (Oct. 8, 2016).

¹⁷ MUR 7177 (Carroll), Compl. at 1 (Oct. 31, 2016).

1 the portion of the advertisement that criticizes Trump's policy positions as an operating expense,
2 while Carroll for Colorado paid for the portion opposing Rep. Mike Coffman, Carroll's
3 opponent.¹⁸

4 Finally, in two matters, MURs 7173 (Applegate) and 7187 (Hartman), all of the costs of
5 the advertisements were split between the Democratic candidate and the DCCC spending under
6 its coordinated party expenditure limit.¹⁹

7 In the circumstances presented in these MURs, we believe it was reasonable for
8 Respondents to allocate the costs of the advertisements on a time and space basis pursuant to
9 Section 106.1(a). The Commission has previously approved the allocation of the costs of
10 communications that relate to more than one Federal candidate in Advisory Opinion 2010-10
11 (NTRL). There, the Commission addressed the appropriate allocation method for independent
12 expenditures in several Federal elections under Section 106.1(a).²⁰ The Commission opined,
13 *inter alia*, that independent expenditures that expressly advocate the election of several Federal
14 candidates in different races and identify, and compare the positions of, those candidates'
15 respective opponents, should be allocated among the different races, based on a time or space
16 analysis.²¹ The allocation is determined by comparing the proportion of the space or time
17 devoted to each race in the communication, with the total space or time devoted to all races in
18 the communication.²² The corresponding portion of the independent expenditure should be
19 reported as having been made in support of the candidates whose elections were expressly

¹⁸ CDP Resp. at 2-3 (Dec. 22, 2016); Joint Resp. at 4.

¹⁹ Joint Resp. at 4-5, 9.

²⁰ See Adv. Op. 2010-10 (National Right to Life PAC) at 5.

²¹ *Id.*

²² *Id.*

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1 advocated.²³ Here, Respondents assert that certain portions of the advertisements relating to
2 Trump do not contain express advocacy,²⁴ and the Commission has not expressly addressed
3 allocation of costs for communications that address multiple candidates but may not expressly
4 advocate for each candidate.²⁵ The Commission has also approved of these Section 106.1
5 allocation principles when an advertisement not only addresses two candidates, but is also paid
6 for by two separate parties.²⁶

7 The Commission has not explicitly addressed the allocation of costs of communications
8 that address multiple candidates but do not expressly advocate the election or defeat of those
9 candidates. However, Section 106.1(a) applies to “expenditures” – covering the DCCC and
10 candidate committee payments for any non-express advocacy ads – as well as to independent
11 expenditures, and the allocation method used by Respondents appears to satisfy the time and
12 space basis set forth in the regulation.²⁷

13 Based on the available record, it appears that the Respondents’ allocation of the costs of
14 the ads between the Democratic House campaign committees and either DCCC or CDP is
15 consistent with Section 106.1(a) and Commission precedent. The Complaints do not provide
16 information suggesting otherwise. Accordingly, the Commission finds no reason to believe that
17 the DCCC and CDP violated 52 U.S.C. § 30116(a) by making, or that the Democratic House

²³ *Id.*

²⁴ We do not analyze in this report whether Respondents have properly characterized the content of each advertisement.

²⁵ *Id.* at n. 5.

²⁶ See Adv. Op. 2007-24 (Burkee/Walz) at 5 (requiring the costs of joint ad devoting equal time and space between two candidates to be split equally between those two candidates’ committees). See also Adv. Op. 2004-37 (Waters) (describing payments by multiple candidates for brochure, under 106.1 allocation principles).

²⁷ Respondents assert that in attributing the cost of a communication among multiple candidates, the Commission does not look to whether or not the segment associated with a particular candidate contains express advocacy. See Joint Resp. at 6.

1 campaign committees violated 52 U.S.C. § 30116(f) by receiving, excessive contributions as a
2 result of improperly allocating the costs of the ads.

3 **B. Coordination**

4 The Complaints also allege that the DCCC and CDP coordinated their advertisements
5 with HFA. Respondents deny these allegations.

6 Under the Act, expenditures that are coordinated with a candidate are treated as
7 contributions to the candidate.²⁸ The Commission regulations further provide that a payment for
8 a communication “coordinated with a candidate, a candidate’s authorized committee, or an agent
9 of either of the foregoing” must be treated as either an in-kind contribution to, or coordinated
10 party expenditure with, the candidate.²⁹ To determine whether a communication constitutes a
11 “party coordinated communication,” Commission regulations apply a three-prong test.³⁰ First,
12 the communication must be paid for by a political party committee or its agent.³¹ Second, the
13 communication must satisfy one of three content standards.³² Finally, the communication must
14 satisfy one of six conduct standards.³³

²⁸ 52 U.S.C. § 30116(a)(7)(B).

²⁹ 11 C.F.R. § 109.37(a), (b).

³⁰ 11 C.F.R. § 109.37(a)(1),(2),(3).

³¹ 11 C.F.R. § 109.37(a)(1).

³² The content standards are: (1) a public communication that disseminates, distributes, or republishes, in whole or in part, a candidate’s campaign materials; (2) a public communication containing express advocacy; and (3) a public communication that refers to a clearly identified Federal candidate that is publicly distributed or disseminated 90 days or fewer before a primary or general election, and was directed to voters in the jurisdiction of the clearly identified candidate. 11 C.F.R. § 109.37(a)(2)(i),(ii),(iii).

³³ The conduct prong is satisfied where any of the following types of conduct occurs: (1) the communication was created, produced, or distributed at the request or suggestion of a candidate or his campaign; (2) the candidate or his campaign was materially involved in decisions regarding the communication; (3) the communication was created, produced, or distributed after substantial discussions with the campaign or its agents; (4) the parties contracted with or employed a common vendor that used or conveyed material information about the campaign’s plans, projects, activities or needs, or used material information gained from past work with the candidate to create, produce, or distribute the communication; (5) the payor employed a former employee or independent contractor of the candidate who used or conveyed material information about the campaign’s plans, projects, activities or needs,

1 In these matters, the payment prong of the coordinated communication test is satisfied
2 because the DCCC and CDP paid for, in part, the ads at issue. The content prong also appears to
3 be satisfied because the ads are either public communications containing express advocacy, or
4 public communications that clearly refer to a federal candidate and were publicly distributed or
5 disseminated in that candidate's jurisdiction within 90 days of a general election.³⁴

6 However, the Complaints do not allege specific facts that are sufficient to provide reason
7 to believe that the conduct prong has been satisfied. In fact, the Complaints offer only that there
8 is "close and ongoing coordination between the DCCC and HFA," and the Commission sees no
9 basis on the current record to conclude or reasonably infer that any of the types of conduct
10 described in the conduct prong have been satisfied.

11 Moreover, the Complaints' broad allegations of coordination between the DCCC and
12 HFA or the CDP and HFA are sufficiently rebutted by the specific sworn responses denying the
13 alleged coordination. The DCCC's Response provides a declaration from its Deputy Executive
14 Director, Michael Ian Russell, who worked on and supervised DCCC employees working on the
15 advertisements mentioning Trump.³⁵ According to Russell, during 2016 he did not work for
16 HFA in any capacity, and no DCCC employee or House campaign staff working on these
17 advertisements was employed by HFA at any time during the 120 day period prior to the date
18 each ad was created.³⁶ Russell avers that the program of advertisements was conceived by
19 DCCC without the request, suggestion, or assent of HFA or its agents, that staff were instructed

or used material information gained from past work with the candidate to create, produce, or distribute the communication; or (6) the payor republished campaign material under circumstances that satisfy one of the first five criteria identified here. 11 C.F.R. § 109.37(a)(3); *see also* § 109.21(d)(1)-(6).

³⁴ See 11 C.F.R. § 109.37(a)(2)(ii), (iii).

³⁵ Joint Resp., Ex. A.

³⁶ Russell Decl. ¶¶ 1, 9.

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- 1 satisfied. Therefore, the Commission finds no reason to believe that the DCCC and CDP made
- 2 excessive in-kind contributions to HFA in violation of 52 U.S.C. § 30116(a), or that HFA
- 3 received excessive in-kind contributions in violation of 52 U.S.C. § 30116(f) in connection with
- 4 the coordinated communication allegation.

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