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**BY HAND DELIVERY**

Jeff S. Jordan, Esq.  
Assistant General Counsel  
Complaints Examination & Legal Administration  
Federal Election Commission  
999 E Street N.W.  
Washington, D.C. 20463

Re: MUR 7193

Dear Mr. Jordan:

We write as counsel to Hillary for America (the "Campaign") and Jose Villarreal in his official capacity as Treasurer (together "Respondents") in response to the complaint filed by Jill Stein on November 7, 2016 (the "Complaint"). As the Complaint fails to set forth sufficient facts which, if proven true, would constitute a violation of the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act"), the Commission should immediately dismiss the Complaint and close the file.

**LEGAL ANALYSIS**

**1. The Complaint exclusively relies on documents obtained through a foreign espionage attack that lack "any indicia of reliability."**

"The 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 [Act]."<sup>1</sup> If those facts are not based upon personal knowledge, they must be "accompanied by an identification of the source of information which gives rise to the complainants['] belief in the truth of such statements."<sup>2</sup> That requires "specific facts from reliable sources."<sup>3</sup> In 2010, three Commissioners voted to dismiss a

<sup>1</sup> Statement of Reasons of Commissioners Mason, Sandstrom, Smith, and Thomas at 1, Matter Under Review 4960 (Dec. 21, 2000).

<sup>2</sup> 11 C.F.R. § 111.4(d)(2).

<sup>3</sup> Statement of Reasons of Chairman Petersen and Commissioners Hunter and McGahn at 6, Matter Under Review 6002 (Aug. 13, 2010).

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complaint that was based solely on a newspaper article that relied on anonymous sources “whose credibility and accuracy are difficult to ascertain.”<sup>4</sup>

In the absence of any personal knowledge of any violation of the Act, the Complaint cites alleged leaked emails from the account of Campaign Chair John Podesta that were published on WikiLeaks.org.<sup>5</sup> U.S. intelligence agencies concluded that the publication of these emails resulted from a sophisticated espionage attack against the Campaign authorized by senior Russian officials.<sup>6</sup> The Central Intelligence Agency has concluded that Russia’s motivation was to help Donald Trump win the Presidency.<sup>7</sup> The theft, publication, and manipulation of these emails remains under active government review.<sup>8</sup>

These stolen, unauthenticated emails are “sources whose credibility and accuracy are difficult to ascertain.”<sup>9</sup> Cybersecurity experts have warned that it would be easy for WikiLeaks or its sources to “salt the files they release with plausible forgeries,” making it impossible to determine which emails were authentic.<sup>10</sup> In addition, a number of emails released in the WikiLeaks dump “don’t have [digital] signatures and can’t be technically verified.”<sup>11</sup> Respondents have never publicly authenticated the emails on WikiLeaks.<sup>12</sup>

The emails, which form the sole basis for the Complaint, are thus not “reliable sources” that provide the “specific facts” necessary for the Commission to find reason to believe Respondents

<sup>4</sup> *Id.*

<sup>5</sup> Complaint ¶¶ 4-11, 13.

<sup>6</sup> Joint Statement from the Department of Homeland Security and Office of the Director of National Intelligence on Election Security, Oct. 7, 2016, <https://www.dni.gov/index.php/newsroom/press-releases/215-press-releases-2016/1423-joint-dhs-odni-election-security-statement>.

<sup>7</sup> Adam Entous, Ellen Nakashima, and Greg Miller, *Secret CIA assessment says Russia was trying to help Trump win White House*, Washington Post, Dec. 9, 2016, [https://www.washingtonpost.com/world/national-security/obama-orders-review-of-russian-hacking-during-presidential-campaign/2016/12/09/31d6b300-be2a-11e6-94ac-3d324840106c\\_story.html?tid=ainl&utm\\_term=.55390640cffe](https://www.washingtonpost.com/world/national-security/obama-orders-review-of-russian-hacking-during-presidential-campaign/2016/12/09/31d6b300-be2a-11e6-94ac-3d324840106c_story.html?tid=ainl&utm_term=.55390640cffe).

<sup>8</sup> See David E. Sanger, *Obama Orders Intelligence Report on Russian Election Hacking*, N.Y. Times, Dec. 9, 2016, <http://www.nytimes.com/2016/12/09/us/obama-russia-election-hack.html?simid=tw-share&r=0>; see also Jennifer Steinhauer, *Senate and House Leaders Call for Inquiry of Russian Hacking in Election*, N.Y. Times, Dec. 12, 2016, <http://www.nytimes.com/2016/12/12/us/politics/mccconnell-supports-inquiry-of-russian-hacking-during-election.html>.

<sup>9</sup> Statement of Reasons of Chairman Petersen and Commissioners Hunter and McGahn at 6, Matter Under Review 6002 (Aug. 13, 2010).

<sup>10</sup> Eric Zorn, *The inherent peril in trusting whatever WikiLeaks dumps on us*, Chicago Tribune, Oct. 13, 2016, <http://www.chicagotribune.com/news/opinion/zorn/ct-WikiLeaks-potential-hoax-zorn-perspec-1014-jm-20161013-column.html>.

<sup>11</sup> Lauren Carroll, *Are the Clinton WikiLeaks emails doctored, or are they authentic?*, PolitiFact, Oct. 23, 2016, <http://www.politifact.com/truth-o-meter/article/2016/oct/23/are-clinton-wikileaks-emails-doctored-or-are-they/>.

<sup>12</sup> *Id.*

have violated the Act.<sup>13</sup> Nor should the Commission put Mr. Podesta to the burden and expense of authenticating these emails. The Commission has stated that its purpose is “to safeguard the integrity of our elections.”<sup>14</sup> The Russian operation against Mr. Podesta had the purpose of “undercut[ing] confidence in the integrity of the vote.”<sup>15</sup> Finding reason to believe based solely on emails published by WikiLeaks would implicitly condone or legitimate a foreign attack on the integrity of American elections. Even if the Commission were inclined to trust WikiLeaks as a source of information, it should consider whether crediting foreign espionage designed to undermine election integrity “best fits the agency’s overall policies” and fits within a “proper ordering of its priorities.”<sup>16</sup> Because the Complaint relies entirely on information obtained by theft, the Commission should exercise its prosecutorial discretion and dismiss it.

**2. Even if the alleged emails were reliable, they fail to show activity that would constitute a violation of the Act.**

Regardless of the authenticity and accuracy of the hacked emails, the Complaint fails to allege facts sufficient to establish a violation of the Act or FEC regulations. To substantiate the allegation that Respondents engaged in efforts to “collaborate with Super PACs on strategy, research, attacks on political adversaries and fundraising,”<sup>17</sup> the Complaint makes the following contentions:

- The Campaign produced a memo generally indicating plans to work with the Democratic National Committee and Correct the Record.<sup>18</sup>
- Several Campaign staff discussed the possibility of talking to an official at Correct the Record about media strategy.<sup>19</sup>
- A fundraiser for Super PACs informed a Campaign official of the seating chart for a future fundraising event.<sup>20</sup>
- A fundraiser for a Super PAC asked a Campaign official to contact a prospective Super PAC donor.<sup>21</sup>

<sup>13</sup> Statement of Reasons of Chairman Petersen and Commissioners Hunter and McGahn at 6, Matter Under Review 6002 (Aug. 13, 2010).

<sup>14</sup> Statement of Reasons of Commissioner Ravel at 1, Matter Under Review 6952 (June 30, 2016).

<sup>15</sup> David E. Sanger & Scott Shane, *Russian Hackers Acted to Aid Trump in Election, U.S. Says*, N.Y. Times, Dec. 9, 2016, <http://www.nytimes.com/2016/12/09/us/obama-russia-election-hack.html>.

<sup>16</sup> *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).

<sup>17</sup> Compl. ¶ 12.

<sup>18</sup> *Id.* ¶ 4.

<sup>19</sup> *Id.* ¶¶ 5-6, 11.

<sup>20</sup> *Id.* ¶ 7.

These contentions—even if authentic—do not establish that Respondents engaged in impermissible coordination.

A communication is a “coordinated communication” under 11 C.F.R. § 109.21 only if it satisfies three prongs; it must be paid for by a person other than the candidate, authorized committee, or political party, it must satisfy one or more content standards, and it must satisfy one of several conduct standards.<sup>24</sup> The content prong can be satisfied in one of five ways.<sup>25</sup> It is satisfied if the communication is an “electioneering communication,” which is publicly distributed by a television station, radio station, cable television station, or satellite system within 60 days before a general election or 30 days of a primary election.<sup>26</sup> The Complaint does not identify any communication that would qualify as an “electioneering communication.”

The remaining four ways to satisfy the content prong require that the communication be a “public communication,”<sup>27</sup> which the Act defines as “a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public or any other form of general public political advertising.”<sup>28</sup>

Under Commission regulations, “general public political advertising” does “not include communications over the Internet, except for communications placed for a fee on another

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<sup>21</sup> *Id.* ¶ 8.

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<sup>24</sup> *See* 11 C.F.R. § 109.21.

<sup>25</sup> *Id.* §§ 109.21(c)(1)-(5).

<sup>26</sup> *See id.* §§ 109.21(c)(1); 100.29(a), (b)(1).

<sup>27</sup> *Id.* §§ 109.21(c)(2)-(5).

<sup>28</sup> 52 U.S.C. § 30101(22).

person's Web site."<sup>29</sup> In its regulations and several enforcement proceedings, the Commission has consistently held that online content—including costs associated with researching and producing that content—is not a "public communication" unless a fee is paid to post it on another's website.<sup>30</sup> That also applies to distributing materials to reporters over the Internet.

The Campaign understands that Correct the Record limited the scope of its activities in order to be able to coordinate with Respondents.<sup>31</sup> Similarly, the Campaign limited its activities with Correct the Record so that there was absolutely no coordination with respect to any public communication. Thus, Respondents did not engage in any communications-related activities with Correct the Record that would qualify as a contribution to Respondents.

The alleged emails that purport to show Respondents and Correct the Record coordinating over media strategy do not refer to any communication that would qualify as a "public communication" under 11 C.F.R. § 109.21 or any other type of in-kind contribution.<sup>32</sup> The Complaint does not describe or refer to any effort to coordinate with respect to any broadcast, cable, or satellite communication or any other form of communication listed in Section 30101(22) of the Act. All of the alleged emails cited in the Complaint are consistent with the limits observed by Respondents to avoid coordination with respect to "public communications."

The Complaint also takes issue with two alleged emails that purport to show Mr. Podesta communicating with fundraisers from Correct the Record about their fundraising efforts.<sup>33</sup> These alleged emails do not include an explicit solicitation by Mr. Podesta. Instead, Mr. Podesta was allegedly informed of an event's seating chart,<sup>34</sup> and asked to contact a prospective donor.<sup>35</sup> An

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<sup>29</sup> 11 C.F.R. § 100.26.

<sup>30</sup> See, e.g., Internet Communications, 71 Fed. Reg. 18589, 18595 (May 12, 2006) ("[P]osting a video on a Web site does not result in a 'public communication' unless it is placed on another person's Web site for a fee," even if costs were incurred to film the video); General Counsel's Report, Matter Under Review 6722 (Aug. 6, 2013) (video placed on YouTube for no fee is not a public communication); General Counsel's Report at 7, Matter Under Review 6522 (Feb. 5, 2013) (YouTube and Facebook postings and a website fail the content prong because they are not placed for a fee on another's Web site and are therefore not public communications); General Counsel's Report at 8, Matter Under Review 6477 (Dec. 27, 2011) (video posted on a website for which respondent paid no fee did not satisfy the content prong); General Counsel's Report at 6-7, Matter Under Review 6657 (May 16, 2013) ("The Commission has narrowly interpreted the term Internet communication 'placed for a fee,' and has not construed that phrase to cover payments for services necessary to make an Internet communication," including renting an email list); General Counsel's Report at 12, Matter Under Review 6414 (Apr. 11, 2012) (a website is not a public communication even though researchers were paid to help build it).

<sup>31</sup> See Matea Gold, *How a super PAC plans to coordinate directly with Hillary Clinton's campaign*, The Washington Post, May 12, 2015, [https://www.washingtonpost.com/news/post-politics/wp/2015/05/12/how-a-super-pac-plans-to-coordinate-directly-with-hillary-clintons-campaign/?utm\\_term=.f738afad796](https://www.washingtonpost.com/news/post-politics/wp/2015/05/12/how-a-super-pac-plans-to-coordinate-directly-with-hillary-clintons-campaign/?utm_term=.f738afad796).

<sup>32</sup> Compl. ¶¶ 5-6, 11.

<sup>33</sup> *Id.* ¶¶ 7-8.

<sup>34</sup> *Id.* ¶ 7.

<sup>35</sup> *Id.* ¶ 8.

agent of a federal candidate is permitted to solicit soft money on behalf of an outside organization if the individual acts in his own capacity and not on the authority of the federal candidate.<sup>36</sup> Such participation includes receiving advanced information on logistics for the event, including information about the seating chart. Here, there is no evidence that Mr. Podesta actually solicited soft money for Correct the Record, and even if he had, there is no evidence that he did so in his capacity as an agent for Respondents, as opposed to in his individual capacity, which would have been permitted.<sup>37</sup>

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The Complaint identifies one alleged email that contains legal advice.<sup>41</sup> Respondents have not waived attorney-client privilege with regard to emails containing legal advice. Under the District of Columbia Bar's Ethics Opinion 318, an opposing counsel may not use a document if (1) its privileged status is readily apparent on its face; (2) receiving counsel knows that the document came from someone who was not authorized to disclose it; and (3) receiving counsel does not have a reasonable basis to conclude that the opposing party waived the attorney-client privilege with respect to such document. Here, the privileged status of the alleged email containing legal advice is readily apparent, complainant knows that the email was part of a database of emails stolen by foreign agents who were not authorized to disclose the information, and complainant has no reasonable basis to conclude that Respondents waived the attorney-client privilege with respect to the alleged email. The District of Columbia Bar's ethics rules therefore prohibit the use of such privileged emails in this Complaint.

The Complaint fails to allege specific facts that would give the Commission reason to believe that Respondents \_\_\_\_\_ or Correct the Record coordinated in a way that would result in an impermissible in-kind contribution, and there is no reason to believe that Respondents violated the Act.

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<sup>36</sup> FEC Adv. Op. 2015-09 (Senate Majority PAC and House Majority PAC) at 7.

<sup>37</sup> *Id.*

<sup>38</sup>

<sup>39</sup> See 11 C.F.R. § 300.2(m) ("solicit" means "to ask, request, or recommend [] that another person make a contribution").

<sup>40</sup>

<sup>41</sup> *Id.* ¶ 13.

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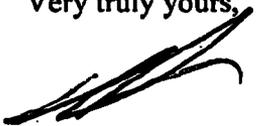
## CONCLUSION

The 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 Act.<sup>42</sup> Unwarranted legal conclusions drawn from asserted facts or mere speculation will not be accepted as true, and provide no independent basis for investigation.<sup>43</sup> The Complaint does not set forth sufficient specific un rebutted facts, which, if proven true, would constitute a violation of the Act. For the reasons set forth herein, the specific facts that it does allege do not constitute a violation of the Act.

Accordingly, the Commission should reject the Complaint's request for an investigation, find no reason to believe that a violation of the Act or Commission regulations has occurred, and immediately dismiss this matter. Respondent respectfully requests the Commission promptly dismiss the matter and close the file.

We appreciate the Commission's consideration of this response.

Very truly yours,



Marc E. Elias  
Counsel to Respondents

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<sup>42</sup> See 11 C.F.R. § 109.21(a).

<sup>43</sup> See Statement of Reasons, Commissioners Mason, Sandstrom, Smith, and Thomas, Matter Under Review 4960 (Dec. 21, 2001).

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