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July 10, 2017

Lisa J. Stevenson, Esq.
Acting General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Response of NRCC in MUR 7249

Dear Ms. Stevenson,

This Response is submitted by the undersigned counsel on behalf of the NRCC in response to the Complaint designated as Matter Under Review 7249.

I. Background

Greg for Montana, the Montana Republican State Central Committee, and the NRCC entered into a joint fundraising agreement in March 2017. Pursuant to that agreement, the participants agreed to form a separate joint fundraising committee named Gianforte Victory Fund.

The Complainant alleges that "Respondents have used the Gianforte Victory Fund to raise funds into the MRSCC and NRCC earmarked to aid Gianforte's campaign, in circumvention of the federal contribution limits and reporting requirements." Complaint at 1. More specifically, the Complaint alleges that "to the extent that donors on the call contributed to the Gianforte Victory Fund or the MRSCC after Gianforte's remarks, those contributions would be subject to Gianforte's candidate limits, and would need to be aggregated with any other contributions made to Greg for Montana." Complaint at 3.

The Complaint is premised entirely on one unclear, and likely misunderstood, statement made by Mr. Gianforte, who reportedly said on a fundraising call that "if someone wanted to support through a PAC our Victory Fund allows that money to go to all the get-out-the-vote efforts." The same news report upon which the Complaint is based also notes that "it's not clear what Gianforte meant when he said 'our Victory Fund.'" Simone Pathe, *Montana Candidate's Comments Raise Questions About Corporate Money*, Roll Call, May 16, 2017, http://www.rollcall.com/news/politics/montana-gianforte-quist-pacs. When asked what Mr. Gianforte meant by the term "our Victory Fund," "the Gianforte campaign said … that he was referring to the Republican Party" rather than the joint fundraising committee. As a campaign

spokesman correctly noted, the term "'victory' has sometimes been synonymous with the party." *Id.* (*Roll Call*'s report capitalized the term "Victory Fund," which creates the impression that Mr. Gianforte was using a proper name and referring to the joint fundraising committee. This impression is not necessarily accurate.)

Historically, the Republican party committees have referred to their grassroots and get-out-the-vote efforts as "victory programs" or "victory plans," and these victory programs (or plans) are paid for with "victory funds." *See*, *e.g.*, *McConnell v. FEC*, 540 U.S. 93, 159-160 (2003) ("plaintiffs point to the Republican Victory Plans, whereby the RNC acts in concert with the state and local committees of a given State to plan and implement joint, full-ticket fundraising and electioneering programs"); *McConnell v. FEC*, 251 F. Supp. 2d 176, 466 (D.D.C. 2003) ("The RNC's 'Victory Plans' are voter contact programs designed to support the entire Republican ticket at the federal, state, and local levels. The RNC works with every state party to design, fund and implement the Plans. . . . The Victory Plans generally incorporate rallies, direct mail, telephone banks, brochures, state cards, yard signs, bumper stickers, door hangers, and door-to-door volunteer activities."). The Democratic party committees generally refer to their equivalent programs as "Coordinated Campaigns." *See*, *e.g.*, *McConnell v. FEC*, 251 F. Supp. 2d 176, 690 (D.D.C. 2003) ("The Democratic national and state political parties implement 'Coordinated Campaigns' which aim to allocate resources and coordinate plans for the benefit of Democratic candidates up and down the entire ticket."). We allow for the possibility that the Republican Party's "victory" terminology may be unfamiliar to some Democratic operatives, which, in turn, could mean that this Complaint is premised on a simple misunderstanding.

The Gianforte campaign's subsequent explanation of what Mr. Gianforte meant when he used the term "victory fund" is entirely and objectively reasonable. Mr. Gianforte's statement was not a solicitation of funds for the Gianforte Victory Fund, and that statement should not be construed as evidence that the Respondents "used the Gianforte Victory Fund to raise funds into the MRSCC and NRCC earmarked to aid Gianforte's campaign, in circumvention of the federal contribution limits and reporting requirements." Complaint at 1.

Nevertheless, the Complainant presumes that Mr. Gianforte's statement was a reference to the Gianforte Victory Fund, which in turn rendered certain unidentified contributions "earmarked" and subject to the "aggregation rule at 11 C.F.R. § 110.1(h) and 110.2(h)." Even if one assumes for the sake of argument that Mr. Gianforte's statement was a reference to the Gianforte Victory Fund, the Complaint still does not provide evidence that any contributions made to the NRCC through the Gianforte Victory Fund were earmarked, subject to the aggregation rule, and/or misreported.

II. NRCC Financial Activity

All funds raised by the Gianforte Victory Fund were governed by the terms set forth in a joint fundraising agreement that satisfied all applicable provisions of 11 C.F.R. § 102.17. This agreement included the following provision: "The Committees specifically agree that each Committee's share of net proceeds is not earmarked for any other particular candidate or use and that each Committee shall use its share of net proceeds in its sole discretion." In other words, the

participants agreed at the outset that they were *not* raising funds earmarked for any particular candidate or use, and that each participant retained the right to spend its proceeds at its own sole discretion.

Roll Call's report was published on May 11, 2017, and indicates that the telephone call in question occurred during the previous week (*i.e.*, the week of May 1). During the month of May 2017, the Gianforte Victory Fund transferred fundraising proceeds to the NRCC on two occasions. First, on May 2, the Gianforte Victory Fund transferred $11,081.19. As the NRCC's public disclosure report indicates, the contributions that made up this transfer were received by the joint fundraising committee on April 19 and April 21, before the telephone call at issue. A second transfer of $19,187.34 was made on May 23, 2017. The contributions that made up this transfer also were also made to the joint fundraising committee in April. **Thus, to date, the NRCC has not received any contributions through the Gianforte Victory Fund that were contributed after the telephone call at issue occurred.**[1]

III. Section 110.1(h): Contributions Given With Knowledge That a Substantial Portion Will Be Contributed To, or Expended on Behalf of, a Candidate

The Complainant speculates that Representative Gianforte's reported remarks during a fundraising call led to contributions made in violation of 11 C.F.R. § 110.1(h) and 110.2(h), and that "Respondents may have violated the Act by failing to report these earmarked contributions as such." Complaint at 3.

The Complaint refers to the "aggregation rule at 11 C.F.R. § 110.1(h) and 110.2(h)" which provides:

> A person [or multicandidate committee] may contribute to a candidate or his or her authorized committee and also contribute to a political committee which has supported, or anticipates supporting, the same candidate in the same election, as long as –
>
> (1) The political committee is not the candidate's principal campaign committee or other authorized political committee or a single candidate committee;
>
> (2) The contributor does not give with the knowledge that a substantial portion will be contributed to, or expended on behalf of, that candidate for the same election; and
>
> (3) The contributor does not retain control over the funds.

11 C.F.R. §§ 110.1(h), 110.2(h)

The aggregation rule is similar to the Commission's earmarking rules, but past enforcement matters have described the two provisions as having distinct purposes and standards. For example, in MUR 5445 (Nesbitt), the Office of General Counsel explained:

[1] The NRCC is eligible to receive two contributions made to the Gianforte Victory Fund, on May 16 and June 3, following the committee's final payment of expenses. To the best of our knowledge, neither contribution included instructions from the donor with respect to use.

> Section 110.1(h)(2) only provides for aggregation of a contributor's contributions to different committees in the case *where the contributor has knowledge of the committee's plans*. It applies to situations where a contributor knows that a substantial portion of his contribution will go the candidate, even if it has not been earmarked.

MUR 5445 (Nesbitt), First General Counsel's Report at 9 (emphasis added).

With respect to the degree of knowledge that a contributor must possess in order to violate Section 110.1(h)(2) "[t]he Commission has determined that the contributor must have "*actual knowledge*" of the committee's plans to contribute to the candidate to meet the requirements of Section 110.1(h)(2)." MUR 5732 (Matt Brown for US Senate), Factual and Legal Analysis at 11 (emphasis added).

In the present matter, Mr. Gianforte reportedly stated on a fundraising call that "if someone wanted to support through a PAC our Victory Fund allows that money to go to all the get-out-the-vote efforts." (As noted above, the capitalization of "Victory Fund" may not be appropriate.) This legally correct statement conveyed information that is patently obvious: that a contribution to a state or national political party committee, whether made directly or through a joint fundraising committee, is "allowed" to be spent on "all the get-out-the-vote efforts."

In MUR 5732, the Commission concluded that "[t]hough it may be reasonable to infer that the individual donors solicited by Brown gave to the State Parties under the assumption that some portion of their contribution might then be donated to the Brown Committee, such an inference alone is insufficient to find reason to believe 11 C.F.R. § 110.1(h) has been violated in this matter." MUR 5732 (Matt Brown for U.S. Senate), Factual and Legal Analysis at 11.

Similarly,

> In MUR 5019 (Keystone Corporation PAC), the Commission found no reason to believe respondents made excessive contributions based on this Office's conclusion that "although the contributors were likely aware that the [Keystone PAC] would like contemporaneously contribute to the [candidate committees], it does not appear that the contributors knew that a portion of *their own contributions* would be given to a specific candidate" (emphasis in original).

MUR 5445 (Nesbitt), First General Counsel's Report at 11-12.

Finally, in MUR 5445, the Office of General Counsel concluded, "although Nesbitt acknowledged that it was not unforeseen that the respondent PACs would contribute to the 2004 Davis Committee based on the PACs' contribution histories, it does not appear that Nesbitt ran afoul of section 110.1(h)(2)." *Id*. at 12.

As noted above, the Complaint does not identify any donors whose contributions are, allegedly, subject to the aggregation rule. Even if one or more persons had participated in the

above-mentioned conference call and subsequently contributed to Gianforte Victory Fund in an amount that yielded some contribution to either of the participating party committees, all that could be said of those donors is that they contributed knowing that their funds were "allowed" to be spent on "all the get-out-the-vote efforts." Section 110.1(h)(2) requires that a donor have "actual knowledge" that a substantial portion of his or her contribution will be, in fact, contributed to, or expended on behalf of, a specific candidate. Mr. Gianforte's brief statement of what the law allows could not have conveyed, even hypothetically, anything approaching this required degree of "actual knowledge." The Complaint fails to present any evidence that any donor made any contribution with the requisite "actual knowledge" of a participating committee's plans to contribute to, or expend funds on behalf of, Mr. Gianforte's campaign. At best, this case may, if the Complaint had presented evidence regarding actual donors, involve the sorts of inferences and assumptions that were found insufficient to show violations in MURs 5732 and 5019. Donors may reasonably expect that contributions to a political party may be spent in ways that aid that party's candidates, because, after all, "[d]onations are made to a party by contributors who favor a party's candidates in races that affect them." *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 462 (2001).

Lastly, the Complaint does not allege, or present any evidence suggesting, that any donor retained control over his contributions or that the participating political party committees did not have complete control of contributions received through the joint fundraising committee. *See* 11 C.F.R. § 110.1(h)(3); MUR 5732 (Matt Brown for U.S. Senate), Factual and Legal Analysis at 11-12; MUR 5445 (Nesbitt), First General Counsel's Report at 12.

IV. Section 110.6(b): Earmarked Contributions

With respect to the NRCC, the Complainant alleges that "Respondents may have violated the Act by failing to report these earmarked contributions as such." This is pure speculation on the Complainants' part. There is no evidence that any donor made, or that the Respondents received, any "earmarked" contribution. (In fact, the NRCC, to date, has received no contributions through the Gianforte Victory Committee that was made after the telephone call at issue.) Making an "earmarked" contribution requires action on the part of the donor. A donor must provide "a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee." 11 C.F.R. § 110.6(b)(1). Here, "there is no evidence that individuals instructed the [NRCC] to apply their contributions to a specified candidate." MUR 5019 (Keystone Corporation PAC), First General Counsel's Report at 24; see also MUR 4831/5274 (Missouri Democratic State Committee), Statement of Reasons of Vice Chairman Bradley A. Smith and Commissioner Michael E. Toner at 2 ("for a contribution to be 'earmarked' there must be a designation, instruction or encumbrance by *the donor* (the 'person' mentioned in 441a(a)(8)), that results in a contribution being made to the designee") (emphasis in original).

In 2007, the Commission explained:

> In recent enforcement matters, the Commission has determined that funds are considered "earmarked" only when there is clear documented evidence of acts by

> donors that resulted in their funds being used by the recipient committee for expenditures on behalf of a particular campaign. For example, in MUR 4831/5274 (Nixon), the Commission found reason to believe that funds donated to the Missouri Democratic State Committee were "earmarked" for the U.S. Senate campaign of Jeremiah Nixon where contributors' checks had memo lines that stated "Nixon," "Nixon-Win," "J. Nixon Fund," and "Jay Nixon Campaign Contribution." However, earmarking did not occur where the contributions only resulted from party solicitations suggesting support for Nixon or merely coinciding with support provided to the Nixon campaign. Similarly, in MUR 5520 (Republican Party of Louisiana/Tauzin) the Commission concluded that a newspaper article asserting that the Party acknowledged having a "wink and a nod" arrangement with donors, with no other designation or instruction by the donor, was insufficient to find reason to believe earmarking had occurred.

MUR 5732 (Matt Brown for US Senate), Factual and Legal Analysis at 6.

In a footnote, the Commission added:

> The Commission has routinely rejected allegations of earmarking where the circumstances are purely circumstantial, and there is no clear designation or instruction given by the donor. See, e.g., MUR 5455 (Davis) (finding no earmarking occurred where donor who had maximized contribution to Davis made contributions to six non-candidate committees, each of which then made donations to Davis within nine days because there was no designation or instruction); MUR 5125 (Perry) (finding no earmarking because the complaint contained only bare allegations of earmarking, but showed no designation, instruction or encumbrance); MUR 4643 (Democratic Party of New Mexico) [(]finding no earmarking based only on correlation in timing and amounts of contributions, without other evidence of instruction, designation or encumbrance).

Id. at 6 n.4.

The NRCC did not report receiving any "earmarked" contributions through the Gianforte Victory Committee because it did not receive any contributions that were accompanied by a donor's designation, instruction, or encumbrance. Earmarking cannot be imputed through another person's statement. (Even if earmarking could be imputed, the NRCC has not, to date, received any contributions through the Gianforte Victory Committee that were made after the telephone call at issue.) Only a donor may earmark a contribution, and that earmark must be shown by "clear documented evidence." MUR 5732 (Matt Brown for U.S. Senate), Factual and Legal Analysis at 6. If a donor does not make a contribution with "clear documented evidence" of a designation, instruction, or encumbrance, that contribution is not earmarked.

V. The Reason To Believe Standard Is Not Met In This Matter

The reason to believe standard is not satisfied in this matter because none of the alleged violations can be demonstrated without additional specific information about specific donors and their contributions. The Complaint does not identify who participated on the identified conference call, who subsequently contributed, whether any such person contributed an amount large enough to result in a distribution to either the Montana Republican State Central Committee or the NRCC, what understanding any such donor may have had, or whether any participating committee received any contribution with any earmarking indicia. In short, the Complaint does not contain *any* information about *any* contributor or *any* contribution.

The factual allegations made in the Complaint, even if proven true, are insufficient to show an earmarking violation because: (1) no donor is identified at all; and (2) no evidence is presented with respect to any donor's designation, instruction, or encumbrance. Of course, if there is no evidence that any contribution was "earmarked," there is also no evidence that the NRCC failed to report an allegedly earmarked contribution. The NRCC's public disclosure reports also demonstrate that the NRCC has not, to date, received any contributions through the Gianforte Victory Fund that were made after the telephone call at issue, meaning there are no contributions at issue that could even be subjected to the Complainant's theory.

The factual allegations made in the Complaint, even if proven true, are insufficient to show that any contributor gave with the knowledge that a substantial portion of his or her contributed funds would be contributed to, or expended on behalf of, Mr. Gianforte's campaign because: (1) no donor is identified at all; and (2) no evidence is presented that demonstrates that any donor had "actual knowledge" of a recipient committee's plans to contribute to (or expend funds on behalf of) Mr. Gianforte's campaign. Again, the NRCC's public disclosure reports demonstrate that the NRCC has not, to date, received any contributions through the Gianforte Victory Fund that were made after the telephone call at issue, meaning there are no contributions at issue that could even be subjected to the Complainant's theory.

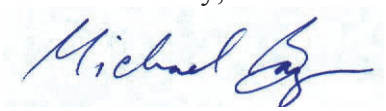
The Complaint consists of allegations that assume many facts not in evidence, and the Complainant's legal conclusions can only be reached through unsupported speculation. The Complaint does not include "sufficient specific facts, which, if proven true, would constitute a violation of the FECA." MUR 4960 (Clinton), Statement of Reasons of Commissioners Mason, Sandstrom, Smith, and Thomas. This is "a complaint bereft of specifics." MUR 6296 (Buck), Statement of Reasons of Vice-Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen at 1. "The RTB standard does not permit a complainant to present mere allegations that the Act has been violated and request that the Commission undertake an investigation to determine whether there are facts to support the charges." MUR 6056 (Protect Colorado Jobs, Inc.), Statement of Reasons of Matthew S. Petersen, Caroline C. Hunter, and Donald F. McGahn at 6, n.12. Without any specific information as to who may have made a contribution that was improperly reported by a Respondent, there are not sufficient facts to satisfy the reason to believe standard with respect to any of the Complainant's alleged violations.

VI. Conclusion

As set forth above, the Complaint filed in this matter should be dismissed. The Complaint does not satisfy the minimum standards for establishing a reason to believe that a violation occurred, as set forth in MUR 4960 (Clinton), and even if those minimum standards are disregarded, the evidence presented in the Complaint is insufficient to show any violation of the law.

Please feel free to contact us if you have any questions or require any additional information.

Sincerely,



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