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Jeff S. Jordan
Assistant General Counsel
Federal Election Commission
Complaint and Examination & Legal Administration
999 E Street, NW
Washington, DC 20463

Re: MUR 7304

Dear Mr. Jordan:

We write as counsel to Hillary Victory Fund ("HVF")[1] and Elizabeth Jones in her official capacity as Treasurer; Hillary for America ("HFA") and Jose H. Villarreal in his official capacity as Treasurer; Secretary Hillary Rodham Clinton in her official capacity as a candidate for President of the United States; the DNC Services Corporation/Democratic National Committee ("DNC") and William Q. Derrough in his official capacity as Treasurer; the Nevada State Democratic Party and Jan Churchill in her official capacity as Treasurer; the Democratic Party of Virginia and Barbara Klear in her official capacity as Treasurer; and the Missouri Democratic State Committee and Lauren Arthur in her official capacity as Treasurer, (collectively, "Respondents"), in response to the complaint filed by Dan Backer on December 21, 2017 (the "Complaint").[2]

[1] HVF terminated on November 20, 2017. Notably, the Commission accepted HVF's termination with full awareness of the transactions described in the Complaint, each of which were detailed in HVF's publicly available campaign finance reports.

[2] The Complaint fails to meet the Federal Election Campaign Act's requirements and is not properly before the Commission. *See* 52 U.S.C. § 30109(a)(1); 11 C.F.R. § 111.4(b)(2). A valid complaint must not only be notarized, but must also "be sworn to and signed in the presence of a notary." 11 C.F.R. § 111.4(b)(2). Here, Complainant's counsel tried to avail himself of a statute that provides for "[u]nsworn declarations under penalty of perjury." 28 U.S.C. § 1746. Although the Complaint was notarized, counsel's written "Verification" is unsworn, and there is no indication that he swore to its contents in the notary's presence, as Federal Election Commission rules require. *See* Compl. at 86. Others have made the same mistake and tried to file complaints under 28 U.S.C. § 1746, and the Commission has accordingly returned their complaints. *See, e.g.*, Letter from Lawrence M. Noble, General Counsel, to Anthony R. Martin, MUR 3443 (Oct. 10, 1991), https://www.fec.gov/files/legal/murs/3443.pdf at 7. Because the Complaint is not properly before the Commission, the Commission may not act upon it. *See* Amendments to Federal Election Campaign Act of 1971; Regulations Transmitted to Congress, 45 Fed. Reg. 15,080, 15,088 (Mar. 7, 1980) ("A complaint is improper if it does not comply with this subsection, and shall not be acted upon by the Commission.")

The Complaint repeatedly mischaracterizes and misconstrues Respondents' lawful joint fundraising activity, but the basic claims are three: *first*, the unsupported allegation that contributions to HVF were earmarked or made in the name of another, resulting in excessive contributions to the DNC and HFA; *second*, the erroneous claim that contributions allocated to HVF's member state party committees under the joint fundraising agreement should be treated as if they were designated to the DNC or HFA instead; and *third*, the false allegation that Respondent state party committees did not disclose transfers made to the DNC in order to conceal an "unlawful scheme" from public disclosure.

The first claim disregards the law on what constitutes an "earmarked contribution." The second claim rewrites the law of joint fundraising and repeals the express allowance for unlimited intra-party transfers. The third claim is simply unsupported by the facts. And all of the claims are based on the Complaint's erroneous premise that donors to HVF earmarked their contributions either for the DNC or HFA, thereby circumventing the contribution limits to those two entities. That premise is invalid, and the Complaint fails as a result.

The Complaint actually describes a series of transactions that were entirely lawful under the Federal Election Campaign Act of 1971, as amended (the "Act") and its accompanying regulations ("the Commission Regulations"). *First*, donors made contributions to HVF according to the joint fundraising agreement, under the participants' combined limits exactly as Commission Regulations provide. The Complaint presents no facts to show that any contribution was designated or earmarked for any particular participant, although the Commission Regulations would have allowed the contributors to do exactly that. *Second*, HVF distributed the contributions to the member committees according to the joint fundraising agreement. *Third*, the state party participants transferred funds to the DNC under statutes that expressly permit unlimited transfers between political party committees. *Fourth*, the DNC used funds received from HVF and the member state party committees to engage in ticket-wide activities.

These lawful activities were no different in form or substance than those engaged in by the Trump Victory Fund, a materially indistinguishable joint fundraising committee in which Donald Trump's principal campaign committee participated, along with the Republican National Committee and multiple Republican state party committees. Ironically, the Complainant—the "Committee to Defend the President"—advances an irregular interpretation of the law under which President Trump, too, would have received "vastly excessive contributions."

A valid complaint must include a "clear and concise recitation of the facts which describe a violation of a statute or regulation."[3] Unwarranted legal conclusions from asserted facts or mere

[3] 11 C.F.R. § 111.4.

speculation will not be accepted as true, and provide no independent basis for investigation.[4] Because the Complaint alleges no conduct that would constitute a violation of the Act or the Commission Regulations, the Commission should find no reason to believe that Respondents violated the Act and should dismiss this matter.

I. FACTUAL BACKGROUND

On September 10, 2015, HFA and the DNC formed HVF, a joint fundraising committee.[5] HVF amended its Statement of Organization on September 16, 2015 to add various democratic state party committees, including the Nevada State Democratic Party, the Missouri Democratic State Committee, and the Democratic Party of Virginia as participants. HVF amended its Statement of Organization again on November 2, 2015 and July 1, 2016, to add and remove various state political party committees as members. The Respondent state party committees were all participants in HVF from September 16, 2015 until HVF was terminated on November 20, 2017.

HVF operated under the Commission's joint fundraising regulations at 11 C.F.R. § 102.17. Like other joint fundraising committees, HVF allowed HFA, the DNC and the member state parties to efficiently raise funds together under a combined limit. Significantly, the Democratic nominee and other party leaders were able to raise money for the Democratic Party as a whole without having to make multiple, separate solicitations for the DNC and each of dozens of state Democratic parties. In August 2015, HFA entered into a Memorandum of Understanding with the DNC that provided that, in exchange for raising funds for the party through HVF, the DNC would cooperate with HFA on its preparation for the general election, such as on data, technology, research, and communications, which would benefit the party and its candidates as a whole.

HVF's participants followed the procedures set forth by 11 C.F.R. § 102.17. They entered into a Joint Fundraising Agreement (the "Agreement") that set forth the allocation formula for proceeds and expenses and the disclaimer language to be used on HVF contribution forms.[6] The standard procedure was to include a notice on HVF contribution forms that clearly stated: (1) the names of all participating committees; (2) the allocation formula for all funds received; (3) a statement that contributors could designate their contributions to a particular participant or participants; and (4) a statement that the allocation would change if the formula would cause a contributor to exceed its limits. HVF contribution forms also provided the following disclaimer: "Contributions will be

[4] *See* Commissioners Mason, Sandstrom, Smith & Thomas, Statement of Reasons, MUR 4960 (Dec. 21, 2000).

[5] HVF Statement of Organization, FEC Form 1 (Sept. 10, 2015).

[6] *See* Exhibit A (HVF Joint Fundraising Agreement). The Agreement was amended several times to account for the addition or removal of state political party members, but the substance of the Agreement remained the same.

used in connection with a Federal election, may be spent on any activities of the participants as each committee determines in its sole discretion, *and will not be earmarked for any particular candidate*."[7] HVF established a separate bank account for all joint fundraising receipts and disbursements.

In accordance with the allocation formula established by the Agreement, HVF distributed its proceeds to the participants after paying expenses out of the gross receipts. HVF did not transfer excessive contributions to any participant committee.[8] Contrary to the Complaint's unsupported speculation, HVF transferred state party proceeds to state party depository accounts, and not to the DNC.[9] HVF properly filed quarterly, pre-general, and post-general reports with the Commission that correctly detailed its contributions, expenditures, and transfers.[10]

After receiving their allocated distributions from HVF, the participating Democratic party committees frequently transferred their funds to the DNC, given the DNC's significant expenditures on infrastructure to support the party as a whole as well as its candidates up and down the ticket. The state parties did not earmark their transfers for any particular purpose or to benefit any particular candidate. There is not even an allegation in the Complaint that these intra-party transfers were ever requested or required by donors to HVF. The DNC used the funds it received directly through HVF, the transfers it received from state parties, and all of the other contributions and monies it received from myriad sources to make contributions and transfers of its own, pay for operating costs and party overhead, and make a permissible amount of coordinated party expenditures all in compliance with the Act and the Commission Regulations. The Complaint does not allege that any expenditure by the DNC should have been treated as a coordinated party expenditure at a time when the DNC did not do so.

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[7] *See* Exhibit B (Sample HVF Contribution Form) (emphasis added); *see also* Exhibit C (Declaration of Elizabeth Jones) ¶ 3.

[8] In some limited instances, re-allocations and refunds of transfers were necessary and they were all reported in accordance with the law. Ultimately, HVF did not transfer excessive contributions to any participant committee.

[9] *See* Exhibit C ¶ 2.

[10] While the Respondent state party committees endeavored to accurately report all receipts and disbursements, whether or not they involved HVF or the DNC, those practices varied from committee to committee. The relatively few omissions identified by the Complaint resulted from these variations. For example, the Nevada State Democratic Party amended its 2016 post-general election report to show transfers received from HVF and made to the DNC, thus belying the Complaint's unsupported speculation that the transactions never occurred. *See* Nevada State Democratic Party Amended Post-General 2016 Report (filed on Feb. 5, 2018).

II. LEGAL ANALYSIS

The Complainant seeks to convert a series of independently, expressly lawful transactions into a "massive, nationwide, multi-million dollar conspiracy."[11] *First*, donors made contributions to HVF; *second*, HVF transferred funds to its participants according to the allocation formula; *third*, certain state party participants made transfers to the DNC; and *fourth*, the DNC interacted with the Democratic presidential nominee. All of these activities are completely legal and appropriate in their own right and it is impossible that that they could somehow become inappropriate when viewed together. Tellingly, the Commission has rejected similar attempts to combine separate, legally permissible transactions into an independent violation. For example, in MUR 5878 (Pederson), the Commission rejected the complainant's allegations that separate, lawful transfers between party committees amounted to a circumvention scheme. Here, just as the Commission found in MUR 5878, the "string of legal transactions" described by the Complaint "is not 'circumvention,' it is compliance."[12] Ultimately, whether viewed in part or as a whole, Respondents' fundraising activities did not violate the Act.

A. The Complaint Fails to Allege that Any HVF Donor Earmarked Funds Impermissibly to the DNC or HFA

Counts I, II, III, IV, and V of the Complaint all hinge on the unsupported assumption that individual donors earmarked their contributions to HVF for the DNC.[13] Absent any such earmarking, there is nothing legally questionable about state parties making unlimited permissible transfers to the DNC. Here, the only "proof" of such earmarking in the Complaint is the supposed "uniformity, regularity, magnitude, and immediacy" of the transfers between HVF member state party committees and the DNC. However, the Commission has repeatedly and unequivocally stated that a contribution is only earmarked when a donor has clearly indicated

[11] Compl. at 7.

[12] Statement of Reasons of Commissioners McGahn, Hunter, and Petersen, MUR 5878 (Pederson) (Sept. 19, 2013). *See also* Statement of Chairman Darryl R. Wold and Commissioners Lee Ann Elliot and David Mason, MUR 4250 (Republican National Committee) (Feb. 11, 2000), where a controlling block of Commissioners opined that transactions that are legally independent cannot be combined to form a legal violation. Statement of Reasons of Chairman Darryl R. Wold and Commissioners Lee Ann Elliott and David Mason, MUR 4250 (Republican National Committee) (Feb. 11, 2000). The Commissioners said that, "[i]t is apparent that each of these two transactions, standing alone, would have been perfectly legal under the Act." and they accordingly could not "agree with any of the various theories advanced for disregarding the separate nature of each of these transactions, to find that taken together, they constitute a violation of § 441e by the RNC." *Id.* The United States Court of Appeals for the District of Columbia upheld this interpretation, saying that the "view that there is no basis for treating the several legally distinct transactions as one is reasonable." *In re Sealed Case*, 223 F.3d 775, 782 (D.C. Cir. 2000).

[13] Compl. ¶¶ 125, 135, 141.

how the contribution is to be used. The Complaint does not allege any earmarking by any individual donor. Counts I, II, III, IV, and V of the Complaint should therefore be dismissed.

1. The Commission has followed clear standards in identifying earmarked contributions—requiring donor instruction and actual knowledge

A contribution is only "earmarked" when there is "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 candidate's authorized committee."[14] Under Commission rules, such contributions are treated as contributions from the donor to the candidate.[15]

The Commission Regulations expressly permit an individual donor to contribute to a candidate for a particular election, and also to a committee which has supported, or anticipates supporting, the same candidate in the same election, without counting the latter contribution against the donor's limit to the candidate, as long as (1) the political committee is not the candidate's principal campaign committee, or other authorized committee or 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.[16] This regulation applies "when a person contributes to a committee with knowledge that a substantial portion of the contribution will be contributed to a certain candidate that the individual has also supported," even if the contribution is not earmarked.[17]

The Commission has applied the following standards when determining whether a contribution has been earmarked or should be aggregated under 11 C.F.R. § 110.1(h):

- *First, contributions are earmarked only when there is clear documentary evidence of a designation or instruction by the donor.* For example, in MUR 5125 (Paul Perry for Congress), the Commission dismissed a complaint alleging that a PAC attempted to launder a contribution through a state party to a congressional campaign, because the available information did not show that the contribution had been made with any

[14] 11 C.F.R. § 110.6(b)(1).

[15] *Id.* § 110.6(a).

[16] *Id.* § 110.1(h)(1)-(3). *See also* Contribution and Expenditure Limitations and Prohibitions; Contributions by Persons and Multicandidate Political Committees, 52 Fed. Reg. 760, 765 (Jan. 9, 1987) (explanation and justification of 11 C.F.R. § 110.1(h)).

[17] *See, e.g.*, First General Counsel's Report, MUR 5019 at 23 (Feb. 5, 2001).

designation, instruction or encumbrance as to its use.[18] Similarly, in MUR 5445 (Davis), the Commission found no reason to believe respondents violated the earmarking rules or 11 C.F.R. § 110.1(h) when the evidence showed limited contacts, a lack of donor understanding about how the political committee would spend the contribution, and the contributor's lack of control over the funds.[19]

MURs 4831/5274 (Nixon) provides a clear contrast between a designation or encumbrance that constitutes earmarking, and the type of indirect action that does not. Although the Commission found earmarking where donor checks indicated clear direction or control by the donor—annotations on the checks like "Nixon," "Nixon-Win," "J. Nixon Fund," and "Jay Nixon Campaign Contribution"—it declined to find earmarking when there was no evidence of donor instruction. Circumstantial evidence about the donor's understanding was not sufficient to present earmarking. In a Statement of Reasons, two Commissioners explained that, "unless the donor specifically earmarks his gift, we do not impose the original donor's limit on party spending, even thought [*sic*] the donor believed that by giving to the party he could assist the party's nominees . . . Under the Act, a contribution subject to our earmarking rules must *in fact* be earmarked by the person making the contribution."[20]

- *Second, timing alone does not offer reason to believe that earmarking occurred.*[21] For example, in MUR 5520 (Republican Party of Louisiana/Tauzin), the Commission declined to find reason to believe when a member of Congress transferred funds to a state party committee for use in his son's congressional race. The complaint's primary evidence of earmarking was the alleged closeness in time between when the member gave to the state party, and when the state party made expenditures supporting the member's son. But the Commission dismissed the case. As the General Counsel put it, "in light of recent Commission action addressing implied earmarking, the timing and

[18] First General Counsel's Report, MUR 5125 (Paul Perry for Congress) at 7-9 (Dec. 20, 2002).

[19] First General Counsel's Report, MUR 5445 (Davis) at 9 (Feb. 2, 2005).

[20] Statement of Reasons of Vice Chairman Bradley A. Smith and Commissioner Michael E. Toner, MURs 4831/5274 at 2-3 (Dec. 1, 2003).

[21] First General Counsel's Report, MUR 4643 (June 29, 1999) (Democratic Party of New Mexico) (finding no earmarking based on correlation in timing and amounts of contributions, without other evidence of instruction, designation, or encumbrance).

amounts of transfers from the Tauzin II Committee to the RPL do not provide a sufficient basis to investigate any violations of the Act's earmarking provisions."[22]

- *Third, for a contribution to an unauthorized committee to be aggregated with an individual's contribution limits for a particular candidate under 11 C.F.R. § 110.1(h), the contributor must have "actual knowledge" of a committee's plans to use his or her contribution to contribute to or expend funds on behalf of the candidate.*[23] For example, in MUR 5732 (Matt Brown for Senate), the Commission found no reason to believe that donors to Matt Brown for U.S. Senate gave to state parties to circumvent the contribution limits.[24] The complaint alleged that maxed-out contributors to the Brown committee were trying to circumvent the limits when they later gave to three state parties in response to solicitations made by the Brown committee, shortly after those state parties had themselves given to the Brown committee.[25] The Commission rejected the allegations, largely because it found that the donors gave to the state parties without knowing how the state parties would use their funds.[26] The Factual and Legal Analysis dismissing the matter stated: "Though 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" a violation of 11 C.F.R. § 110.1(h).[27]

[22] First General Counsel's Report, MUR 5520 at 6-7 (May 31, 2005). *See also* MUR 5445 (Davis) (finding no earmarking where donor who had maximized contributions 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).

[23] MUR 5019 (Keystone Federal PAC) (although contributors were likely aware that the PAC would contemporaneously contribute to the candidates' committees, there was no evidence that the contributors actually knew that a portion of their contributions would be given to specific candidates); Factual and Legal Analysis, MUR 5881 (Citizens Club for Growth) (Aug. 15, 2007) (rejecting claim that contributors had "actual knowledge" as to how their funds would be used even if they may have been able to reasonably infer from the solicitation that some portion of their funds might be used to support the candidate); First General Counsel's Report, MUR 6221(Transfund PAC) (Mar. 3, 2010) (dismissing earmarking allegations because there was no actual knowledge on the part of the donor that his contribution would be used for the benefit of the candidate's campaign or that the donor retained control over his contribution to the PAC in any way).

[24] Factual and Legal Analysis, MUR 5732 at 11 (Apr. 4, 2007).

[25] *Id.* at 1.

[26] *Id.* at 10.

[27] *Id.* at 11.

In MUR 5678 (Liffrig for Senate), the Commission similarly concluded that the donor did not have the requisite knowledge or control over his contribution to run afoul of the rules: "[A]lthough Mr. Newman may have made a contribution with the hope that it would at least partially benefit Liffrig for Senate, the facts in this matter do not demonstrate a level of knowledge or control sufficient to support finding" that the donor earmarked his contribution.[28] In MUR 5968 (John Shadegg's Friends), the Commission could not find "actual knowledge" that a donor's contribution to a candidate's leadership PAC would be used to fund contributions to the candidate's principal campaign committee. Even though the donor may have been able to reasonably infer that "some portion of his or her contribution [to a PAC] might be used to support [the candidate], such an inference alone does not suggest" actual knowledge.[29]

Finally, in MUR 5881, the Commission considered whether a specific solicitation made by Club for Growth PAC ("CFG-PAC") provided donors with the requisite knowledge about how their contributions would be used.[30] The solicitation was titled "Replacing Two RINO Incumbents with Pro-Growth-Republicans," promoted two specific candidates, Tim Walberg and Steve Laffey, and solicited earmarked contributions on behalf of Walberg and Laffey. The contribution page of the solicitation included a header that read: "Replace Chafee with Laffey, Replace Schwarz with Walberg, and Build the Club for Growth PAC."[31] In determining that there was no reason to believe that respondents violated 11 C.F.R. § 110.1(h), the Commission noted that the solicitation "provided does not state either directly or indirectly that contributions to CFG-PAC will be used to support [the candidate committee]."[32] Further, "[a]lthough a contributor might reasonably infer from the solicitation as a whole that some portion of his or her contribution to CFG-PAC might be used to support [the candidate committee], such an inference alone does not suggest that the contributors had 'actual knowledge' that CFG-PAC would use their contributions to support [the candidate committee]."[33]

[28] First General Counsel's Report, MUR 5678 at 8 (Nov. 27, 2006).

[29] Factual and Legal Analysis, MUR 5968 at 5 (Nov. 10, 2008).

[30] Factual and Legal Analysis, MUR 5881 (Aug. 15, 2007).

[31] *Id.* at 4-5.

[32] *Id.* at 8.

[33] *Id.* at 9.

2. The Supreme Court's discussion of joint fundraising committees in *McCutcheon v. FEC* tracked the Commission's long-standing requirement of donor instruction and actual knowledge

Despite the Complaint's allegations that the Supreme Court decision in *McCutcheon v. FEC* somehow demonstrates that Respondents violated the Act, in fact, the *McCutcheon* opinion affirms the Commission's long-standing holdings that a contribution is only earmarked upon donor instruction and actual knowledge.

McCutcheon involved a First Amendment challenge to the aggregate contribution limits placed on the total amounts that an individual may contribute to all federal candidates and political committees during a two-year election cycle. A three-judge panel in the United States District Court for the District of Columbia upheld the aggregate limits partly on the grounds that it would prevent the circumvention of the base contribution limits.[34] The district court offered the following scenario to support its fears of circumvention:

> [A] donor gives a $500,000 check to a joint fundraising committee composed of a candidate, a national party committee, and most of the party's state party committees (actually, 47 of the 50). The committees divide up the money so that each one receives the maximum contribution permissible under the base limits, but then each transfers its allocated portion to the same single committee. That committee uses the money for coordinated expenditures on behalf of a particular candidate.[35]

On appeal, the Supreme Court rejected this scenario as a basis for upholding the aggregate limits:

> The District Court assumed compliance with the specific allocation rules governing joint fundraising committees, *but it expressly based its example on the premise that the donor would telegraph his desire to support one candidate and that many separate entities would willingly serve as conduits for a single contributor's interests*. Regardless whether so many distinct entities would cooperate as a practical matter, the earmarking provision prohibits an individual from directing funds through an intermediary or conduit to a particular candidate. Even the implicit[ ] agreement imagined by the District Court would trigger the earmarking

[34] *McCutcheon v. FEC*, 893 F.Supp.2d 133 (D.D.C. 2012), rev'd, 134 S. Ct. 1434 (2014).

[35] *McCutcheon*, 134 S. Ct. at 1454 (internal quotation marks and citation omitted).

> provision. So this circumvention scenario could not succeed without assuming that nearly 50 separate party committees would engage in a transparent violation of the earmarking rules (and that they would not be caught if they did).[36]

The Court held that the transfer of joint fundraising proceeds among party committees would only present a potential legal issue if the donor earmarked his or her contribution. There is a key difference between the scenario described by the Court, and what the Complaint in this case actually alleges because the Complaint presents no facts to indicate that any donor "telegraphed his desire to support one candidate."[37] To the contrary, in this case the donors gave under an allocation formula that said explicitly: "Contributions will be used in connection with a Federal election, may be spent on any activities of the participants as each committee determines in its sole discretion, and will not be earmarked for any particular candidate."[38]

Thus, the Complaint presents no basis for the Commission to conclude that donors to HVF earmarked their contributions to either the DNC or HFA, except as expressly permitted by 11 C.F.R. § 102.17(c). Without an actual designation or instruction by the donor, and without actual knowledge on the part of the donor as to how the contribution will be spent, there is no earmarking. The Supreme Court's dicta in *McCutcheon* only confirm this. The Complaint's unsupported claim of earmarked contributions fails as a matter of law.

B. The Complaint Fails to Allege that Any Transfer from HVF to Its Participants Resulted in Any Violation

As the Supreme Court recognized in *McCutcheon*, a joint fundraising committee is simply a convenient way for multiple candidates or parties to raise funds together, allowing donors to contribute to multiple entities by writing a single check.[39] The Commission strictly regulated joint fundraising by adopting 11 C.F.R. § 102.17 in 1983, setting "forth the basic rules for conducting joint fundraising activities."[40] Thus, joint fundraising committees operate under strict

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[36] *Id.* at 1455 (emphasis added) (internal quotation marks and citations omitted).

[37] *Id.*

[38] *See* Exhibit B (Sample HVF Contribution Form).

[39] *See McCutcheon*, 134 S. Ct. at 1455 (2014) ("[A] joint fundraising committee is simply a mechanism for individual committees to raise funds collectively, not to circumvent base limits or earmarking rules. Under no circumstances may a contribution to a joint fundraising committee result in an allocation that exceeds the contribution limits applicable to its constituent parts; the committee is in fact required to return any excess funds to the contributor.") (citing 11 C.F.R. § 102.17(c)(5), (c)(6)(i)).

[40] Transfer of Funds; Collecting Agents, Joint Fundraising, 48 Fed. Reg. 26,296, 26,298 (June 7, 1983).

rules to ensure that (1) all contribution limits, source prohibitions, recordkeeping and reporting requirements are observed, and (2) contributors know exactly what the joint fundraising committee is, which committees are participants, and how their contributions will be divided.[41] HVF followed these rules, and in fact, there is no allegation to the contrary. It established a written joint fundraising agreement, adopted an allocation formula, and allocated the contributions it received according to that formula.[42]

The Commission has already squarely rejected the argument that a group of political committees "violated the Act's contribution limits by directing and controlling contributions through a 'bundling' operation run in the form of a joint-fundraising Committee."[43] In MUR 3131/3135, the Commission rejected a Democratic claim that a Republican party committee "devised a scheme of bundling to avoid the limitations of the law on the support it may provide to . . . candidates."[44] The Commission made clear that its regulations exclude joint fundraising activity from the conduit rules: "In fact, 110.6(b)(2)(i)(B) specifically states that for purposes of earmarking 'the following persons shall not be considered conduits or intermediaries: . . . (B) A fundraising representative conducting joint fundraising with the candidate's authorized committee pursuant to 11 C.F.R. 102.17 or 9034.8.'"[45] Because of "the respondent's detailed compliance with our joint fundraising regulations at 11 CFR 102.17," a unanimous Commission found no reason to believe the joint fundraising committee or its participants violated the Act.[46] There is no basis for the Commission to reach anything other than the same finding here.

C. The Complaint Fails to Allege Any Impermissible Transfer from a State Party to the DNC

The Complaint alleges that, because HVF's state party participants transferred funds to the DNC, "contributions to HVF were directly or indirectly earmarked," and hence violated the Act. There is no cognizable legal basis for this argument. The Act expressly authorized the intra-party

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[41] *See* 11 C.F.R. § 102.17(c); *see also* FEC Adv. Op. 1979-35 (DSCC).

[42] *See* Exhibits A and C.

[43] Statement of Reasons of Commissioners Josefiak, McDonald, Aikens, Elliott, and McGarry, MUR 3131/3135, at 1-2 (Sept. 17, 1991).

[44] Complaint, MUR 3135, at 2.

[45] Statement of Reasons of Commissioners Josefiak, McDonald, Aikens, Elliott, and McGarry, MUR 3131/3135, at 4 (Sept. 17, 1991).

[46] *Id.* at 3 (Sept. 17, 1991). Commissioner Thomas was recused.

transfers described in the Complaint, and they provide no basis for the Commission to find reason to believe that Respondents violated the law.

There is nothing in the Act or the Commission Regulations that would have prohibited HVF's state party participants from transferring funds to the DNC, whether those funds included HVF proceeds or not. For more than 40 years, the Act has expressly provided that transfers of funds may be made without limit between or among the party committees of the same political party.[47] Nowhere does the Act limit these transfers or the purposes for which these transfers can be made.[48] Rather, a state party may make unrestricted transfers to a national party (and vice versa) as it sees fit. The Act's unlimited party transfer provision arises from the special associational rights enjoyed by political parties and their adherents: "Transfers between party committees have been part of campaign finance even before FECA and certainly have been an active part ever since. *These transfers allow for the efficient use of funds in all of the locations sending and receiving transfers and thereby further the associational rights of the contributors to the parties.*"[49]

The Commission has refused to disturb the express, unlimited allowance for party-to-party transfers in several different contexts. For example, in MUR 5878, a complaint alleged that a candidate "concocted and implemented a scheme whereby [the candidate] contributed over $1.1 million to the Arizona Democrat Party's nonfederal account, followed by a 'swap' of nearly a half-million dollars in soft money to other state Democrat parties in exchange for $425,000 in funds for the Arizona Democrat Party's federal account."[50] The Complaint further alleged that

[47] *See* 52 U.S.C. § 30116(a)(4); 11 C.F.R. §§ 102.6(a)(1)(ii), 110.3(c)(1); *see also* FEC Adv. Op. 1976-108 (Cleveland) ("Thus, a transfer between one of the congressional campaign committees and the national committee of the same political party is a transfer between political committees of the same party and hence unlimited under 2 U.S.C. § 441a(a)(4)"); FEC Adv. Op. 1976-112 (DNC) (treating an organization called Democrats Abroad as a Democratic party committee and permitting Democrats Abroad to make unlimited transfers to other Democratic party committees).

[48] Efforts to get Congress to ban swaps and transfers between political parties have failed. *See* H.R. 2123, 105th Cong. (2d Sess. 1998) (Congressmen Asa Hutchinson and Tom Allen introduced H.AMDT.862, an amendment that would have banned transfers between state parties; however the amendment failed by a vote of 147-222, and the final bill passed by the House of Representatives did not include such a provision).

[49] Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Petersen, MUR 5878 (Pederson) (Sept. 19, 2013) (emphasis added) (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("political parties' government, structure, and activities enjoy constitutional protection"), *Eu v. San Francisco Cty. Democratic Central Comm.*, 489 U.S. 214, 230 (1989)), and *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) ("holding that California's blanket primary violated political parties' First Amendment right of association").

[50] Complaint, MUR 5878 (Pederson) (Nov. 3, 2006).

the federal funds that were swapped were "being used to support Pederson's campaign/candidacy for the United States Senate . . . in violation of federal law," allegedly allowing the candidate to circumvent and violate the contribution limits established under Bipartisan Campaign Reform Act of 2002 ("BCRA").[51] The Commission did not find reason to believe that Respondents violated the Act. As three Commissioners recognized, the practice of swapping or transferring non-federal and federal funds among state party committees is entirely lawful, and is clearly contemplated by the free transferability of funds by both federal and state laws.[52] The practice allowed the party to organize its activities efficiently, sending the money to the state where it was most needed, and making optimal use of the different types of resources that existed within the party as a whole.[53]

In MUR 4215, the Commission refused to disturb another so-called "swap" arrangement, when the DNC transferred funds to the Michigan Democratic State Central Committee and ten additional Democratic state party committees for the purpose of engaging in generic voter activity such as placing television advertisements.[54] The DNC's transfers allowed the state parties to engage in activities in which the DNC could have engaged itself, but with a far higher ratio of federal-to-nonfederal funds.[55] The Commission voted against the General Counsel's recommendation of finding probable cause to believe because "there is nothing in the current regulations of the Commission that clearly prevents the activity at issue here. To the contrary, the regulations permit a national party committee to make unlimited transfers to a state party committee."[56] The broad allowance for party-to-party transfers trumped the asserted appearance of a scheme to evade pre-BCRA restrictions on the use of nonfederal funds.

The same rationale must lead the Commission to find no reason to believe any violation occurred in this matter. Whether Democratic, Republican or third party, a political party organization enjoys the express right under the Act to organize and distribute its federal funds as it deems most efficient. Section 30116(a)(4)'s unlimited transfer provision secures and effectuates this right. The earmarking rules at 11 C.F.R. § 110.6 and the coordinated expenditure limits at 52

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[51] *Id.*

[52] Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Petersen, MUR 5878 (Pederson) (Sept. 19, 2013).

[53] *Id.*

[54] Statement of Reasons of Commissioners Aikens, Thomas, Elliott, McDonald, and McGarry, MUR 4215 (Mar. 26, 1998).

[55] *Id.* at 3.

[56] *Id.* at 1.

U.S.C. § 30116(d) are sufficient to serve the interest of avoiding quid pro quo corruption and its appearance. In any event, there is no allegation of such donor earmarking in this case.[57] The anti-earmarking rules cannot be augmented through enforcement by an imaginary transfer restriction, that would throw the party "baby" out with the anti-circumvention "bathwater."

D. The Complaint Fails to Allege Any Excessive Contributions or Coordinated Expenditures by the DNC to Benefit HFA

Count VI of the Complaint erroneously alleges that the DNC made and HFA accepted excessive contributions because "[t]he amount of DNC funds over which Clinton and HFA exercised oversight, direction, and control exceeded the amount of contributions and coordinated expenditures a national political party committee may make with a presidential candidate."[58] Yet the Complaint fails to identify a single expenditure made by the DNC that was not a genuine party expense and must have been treated as a contribution to or coordinated expenditure with HFA. For this reason, Count VI should be dismissed.

The Commission Regulations permit a national party committee such as the DNC to make contributions to HFA and to make coordinated party expenditures up to the coordinated party expenditure limit which was $23,821,100 in 2016. The Commission Regulations are explicit on when a political party communication is coordinated with a candidate. Such coordination occurs only when: (1) a party committee pays for the communication; (2) the communication is a public communication and otherwise satisfies at least one of the content standards; and (3) the communication satisfies at least one of the conduct standards.[59] A payment by a political party committee for a communication that is coordinated with a candidate must be treated by the political party making the payment as either an in-kind contribution or a coordinated party expenditure.[60] When an expense is not incurred on behalf of a clearly identified candidate, however, it is treated as party overhead and is not considered a contribution or coordinated expenditure. The Commission Regulations specifically provide that "[e]xpenditures for rent, personnel, overhead, general administrative, fund-raising, and other day-to-day costs of political committees need not be attributed to individual candidates, unless these expenditures are made

[57] *See McCutcheon*, 134 S. Ct. 1434.

[58] Compl. ¶ 160.

[59] 11 C.F.R. § 109.37.

[60] *Id.*

on behalf of a clearly identified candidate and the expenditure can be directly attributed to that candidate."[61]

The Complaint is correct when it alleges that the DNC interacted with HFA on research, hiring and other aspects of the DNC's operations. There is nothing whatsoever wrong with this: the Act even allows a presidential nominee to designate the national party committee as an authorized committee of its own.[62] It would be inexplicable for a national party committee *not* to interact with its general election nominee's campaign on a wide range of matters. But that interaction does not suffice to impute all of the party's spending to the candidate. Rather, the conditions for identifying and reporting contributions and coordinated expenditures are set forth explicitly in the Commission Regulations. The Complaint does not allege a single expense that was made by the DNC solely on behalf of HFA that was not properly reported under the DNC's coordinated party expenditure limit. The facts alleged in the Complaint are insufficient to support a finding of excessive contributions or coordinated party expenditures by the DNC.

E. The Commission Should Exercise Its Prosecutorial Discretion and Take No Action Regarding the Few State Party Reporting Omissions Identified by the Complaint

Count VII of the Complaint alleges that certain Respondent state party committees failed to disclose transfers of funds received from HVF and made to the DNC.[63] Specifically, the Complaint alleges that on two occasions, the Nevada State Democratic Party failed to report transfers received from HVF and transfers made to the DNC.[64]

The Nevada State Democratic Party reported all incoming transfers from HVF, and all outgoing transfers to the DNC, except for two transactions. Upon learning of the omissions, the Nevada State Democratic Party amended its report to properly disclose the transfers.[65] The state party's general reporting practices and prompt corrective action utterly bely the Complaint's baseless assertion that the transfers never actually occurred. The Committee should exercise its prosecutorial discretion and take no further action, because the Respondent has already taken the

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[61] *Id.* § 106.1(c)(1).

[62] *See* 52 U.S.C. § 30102(e)(3)(A)(i).

[63] Compl. ¶ 162.

[64] *Id.* ¶¶ 190-93. The Complaint does not allege that the Democratic Party of Virginia or the Missouri Democratic State Committee filed any inaccurate or incomplete reports.

[65] *See* Nevada State Democratic Party Amended Post-General 2016 Report (filed on Feb. 5, 2018).

necessary corrective action, and the allegations do not merit further use of Commission resources.[66]

III. CONCLUSION

As described herein, the Complaint does not allege any facts, which, if proven true, would constitute a violation of the Act or the Commission Regulations. Accordingly, the Commission should reject the Complaint's request for an investigation, find no reason to believe that a violation of the Act or the Commission Regulations has occurred, and immediately dismiss this matter.

Very truly yours,

Marc E. Elias
Jonathan S. Berkon
Ezra W. Reese
Brian G. Svoboda
Graham S. Wilson
Counsel to Respondents

[66] *See Heckler v. Chaney*, 470 U.S. 821 (1985) (the Commission has broad discretion to determine how to proceed with respect to complaints and referrals); Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,546 (Mar. 16, 2007) ("Pursuant to the exercise of its prosecutorial discretion, the Commission will dismiss a matter when the matter does not merit further use of Commission resources, due to factors such as the small amount or significance of the alleged violation, the vagueness or weakness of the evidence, or likely difficulties with an investigation, or when the Commission lacks majority support for proceeding with a matter for other reasons.").

Exhibit A

JOINT FUNDRAISING AGREEMENT

This Agreement is entered into on this 10th day of September, 2015, by and between Hillary for America (the "Campaign") and the Democratic National Committee ("DNC") (hereinafter collectively referred to as the "Committees").

Whereas the Committees desire to conduct joint fundraising projects in compliance with the Federal Election Campaign Act ("FECA"), the Bipartisan Campaign Reform Act ("BCRA") and applicable Federal Election Commission ("FEC") regulations;

Now, therefore, in consideration of the mutual covenants herein contained, the Committees agree as follows:

1. **Purpose of Joint Fundraising**

The purpose of the joint fundraising activity is to receive contributions to fund the Committees' activities, including the support of candidates seeking election to office.

2. **Participants**

The Committees are all "political committees" within the meaning of the FECA.

3. **Fundraising Representative**

The Committees will establish and register with the FEC a separate political committee, Hillary Victory Fund, (the "Victory Fund") to act as fundraising representative. The Committees will amend their Statements of Organization and Candidacy, as necessary, to reflect the Victory Fund as an affiliated/authorized committee. The treasurer of the Victory Fund shall be Elizabeth Jones. Ms. Jones may not be replaced as Treasurer without the agreement of all parties to the Agreement.

4. **Allocation Formula**

The Committees agree that the allocation formula set forth in Exhibit A to this Agreement (the "Allocation Formula") will be used to allocate the funds raised in connection with this joint fundraising activity.

5. **Exceptions to Allocation Formula**

Under the following circumstances, the Allocation Formula as set forth in Exhibit A will not be used:

a. When a contributor designates his or her contribution to the Committees according to a different allocation formula;

b. When a contributor designates his or her contribution to a single committee;

c. When a contribution allocated according to the Allocation Formula would cause a contributor to exceed applicable contribution limits to any of the Committees.

6. **Depository**

The Victory Fund will establish a depository account to be used solely for the receipt of contributions and for the making of disbursements in furtherance of this agreement as provided for by law and FEC regulations. The Committees will amend their Statements of Organization, as necessary, to reflect this account as an additional depository.

7. **Receipts and Disbursements**

a. All contributions and other donations received by the Victory Fund will be placed in the depository account within 10 days of receipt as required by 11 C.F.R. § 103.3. All disbursements for expenses will be made from this account.

b. Each contribution comprising the gross proceeds of the fundraising activity will be allocated between the Committees according to the Allocation Formula. However, if such allocation would result in a violation of the contribution limits under FECA and BCRA, the Victory Fund will reallocate the contribution between the Committees. In order to ensure proper reallocation of such contributions, each of the Committees agrees to furnish the fundraising representative with a current list of its contributor records and related data for the election cycle.

c. Expenses will be allocated among the Committees according to the Allocation Formula. However, if a reallocation of contributions is required that results in a change in the Allocation Formula, expenses will be reallocated as well.

d. Subject to 11 C.F.R. § 102.17(b)(3), the Committees may agree to advance to the fundraising representative sufficient funds to defray start-up expenses for joint activities. Such advances will be repaid in full prior to any distribution of proceeds.

8. **Distribution of Proceeds**

From time to time and in compliance with FECA, after expenses have been deducted from the gross proceeds, the Victory Fund will transfer the net proceeds to the Committees according to the Allocation Formula, as modified by any reallocation required. The Victory Fund will arrive at the net proceeds figure by subtracting each Committee's share of the expenses from the gross proceeds. Nothing in this Paragraph 8 shall preclude the transfer of any portion of the net proceeds to the Committees before all expenses have been paid. Nothing in Paragraph 8 shall require the Victory Fund to distribute net proceeds on any particular schedule, nor to each Committee at the same time. The timing of distributions of net proceeds under this agreement will be made at the sole discretion of the Treasurer.

9. Accounting to the Committees.

The Committees will establish procedures to cross reference donor limits to ensure compliance with the Allocation Formula and campaign finance law. The treasurer of the Victory Fund shall provide to each party to this Agreement periodic accountings which shall contain the following information:

a. a list of all contributions to the Victory Fund which includes the name, address, occupation and employer of each contributor, the amount of the contribution, and the date of receipt of the contribution;

b. a list of all disbursements, to whom they were made, the purpose, and amount;

c. a list of any outstanding debts of the Victory Fund; and

d. the current funds balance.

10. Reporting

a. The Victory Fund will report all funds received and all disbursements made during each reporting period according to the requirements of the FECA, BCRA and FEC Regulations. All reporting schedules used to report the activity of the Victory Fund will be clearly marked as joint fundraising activity.

b. The Committees will report receipt of the proceeds in accordance with the requirements of the FECA, BCRA and FEC Regulations.

11. Recordkeeping

a. The Victory Fund shall collect and retain contributor information with regard to gross proceeds as required by 11 C.F.R. § 102.8 and shall forward such information to the Committees.

b. The Victory Fund, or a designated agent, will maintain a copy of this Agreement and the records required under 11 C.F.R. § 102.9 regarding fundraising receipts and disbursements for three (3) years from the date of execution, receipt or disbursement, as the case may be. The Agreement shall be made available to the FEC on request.

12. Miscellaneous

a. All solicitations of contributions will be conducted in accordance with the notice provision of 11 C.F.R. § 102.17(c)(2).

b. Any changes to the provisions of this Agreement must be made in writing and signed by all parties to the Agreement.

c. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. For purposes hereof, a facsimile copy of this Agreement, including the signature page hereto, shall be deemed to be an original and will have the same force and effect as an original document with original signatures.

[Signature Pages Follow Immediately.]

IN WITNESS WHEREOF, the parties hereto have executed this Joint Fundraising Agreement as of the date first written above.

HILLARY FOR AMERICA:

By: Beth Jones, COO

DEMOCRATIC NATIONAL COMMITTEE:

By: 9-10-15
CEO - DNC

Exhibit A

JOINT FUNDRAISING AGREEMENT

Allocation Formula

The first $2,700/$5,000 from an individual/multicandidate committee ("PAC") will be allocated to Hillary for America, designated for the primary election. The next $33,400/$15,000 from an individual/PAC will be allocated to the Democratic National Committee.

A contributor may designate his or her contribution for a particular participant. The allocation formula above may change if following it would result in an excessive contribution.

DISCLAIMER LANGUAGE FOR JOINT FUNDRAISER

The following is the disclaimer you should use on all of the materials printed in connection with joint fundraising:

Contributions or gifts to Hillary Victory Fund are not tax deductible.

Paid for by Hillary Victory Fund, a joint fundraising committee authorized by Hillary for America and the Democratic National Committee.

The first $2,700/$5,000 from an individual/multicandidate committee ("PAC") will be allocated to Hillary for America, designated for the primary election. The next $33,400/$15,000 from an individual/PAC will be allocated to the Democratic National Committee.

A contributor may designate his or her contribution for a particular participant. The allocation formula above may change if following it would result in an excessive contribution.

Federal law requires us to use our best efforts to collect and report the name, mailing address, occupation, and name of employer of individuals whose contributions exceed $200 in an election cycle.

Contributions will be used in connection with a Federal election, may be spent on any activities of the participants as each committee determines in its sole discretion, and will not be earmarked for any particular candidate.

Exhibit B

Hillary Victory Fund Contribution Form

Yes, I/we will support the Hillary Victory Fund with a contribution of:

☐ $34,000 per person ☐ $66,800 per couple ☐ Other $ _____

The first $2,700/$5,000 from an individual/multicandidate committee ("PAC") will be allocated to Hillary for America, designated for the primary election. The next $2,700/$5,000 from an individual/PAC will be allocated to Hillary for America, designated for the general election. For contributions made after the primary, the full amount of the contribution, up to $2,700/$5,000, will be designated to the general election. The next $33,400/$15,000 from an individual/PAC will be allocated to the Democratic National Committee. Additional amounts from an individual/PAC will be split equally among the Democratic state parties from these states up to $10,000/$5,000 per state party: AK, AR, CO, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MA, MI, MN, MS, MO, MT, NV, NH, NJ, NM, NC, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VA, WV, WI, and WY.

A contributor may designate his or her contribution for a particular participant. The allocation formula above may change if following it would result in an excessive contribution.

Federal law requires us to use our best efforts to collect and report the name, mailing address, occupation, and name of employer of individuals whose contributions exceed $200 in an election cycle.

Contributions will be used in connection with a Federal election, may be spent on any activities of the participants as each committee determines in its sole discretion, and will not be earmarked for any particular candidate.

First & last name

Address

City | State | Zip

Employer | Occupation

Email | Cell Phone

Home Phone | Work Phone

Second Name On Account, If Joint Account *(Contributions will be evenly attributed between names)*

Second Name Employer | Second Name Occupation

By signing below, I certify that I am least 16 years old, I am a U.S. citizen or lawfully admitted permanent resident of the U.S., and the funds I am donating are not being provided to me by another person or entity for the purpose of making this contribution.

Signature | Second Signature

Please return completed form to the address below.

Contribute by Bank Account or Credit Card Online
Using your routing and account numbers, or credit card you can donate online at www.hillaryclinton.com/finance/hvf

Contribute by Personal Check
Please make check payable to "Hillary Victory Fund" and mail, via FedEx or UPS only, to:
ATTN: Dennis Cheng • Hillary Victory Fund • 300 Cadman Plaza West • 11th Floor • Brooklyn, NY 11201

Contribute by Wire Transfer
Receiving Bank: Amalgamated Bank
275 Seventh Avenue, New York, NY 10001
212.620.8836

ABA/Routing: 026003379
Beneficiary Name: Hillary Victory Fund
Beneficiary Address: 300 Cadman Plaza West, 11th Floor
Brooklyn, NY 11201
Beneficiary Account: 151019530

If you have any questions, please call 646.854.1310 or email donate@hillaryclinton.com.

Contributions or gifts to Hillary Victory Fund are not tax deductible.

Exhibit C

BEFORE THE
FEDERAL ELECTION COMMISSION

IN RE	)	
Hillary Victory Fund, *et al.*	)	MUR 7304

Declaration of Elizabeth Jones

1. I was the Treasurer of Hillary Victory Fund ("HVF"), a federally registered joint fundraising committee comprised of Hillary for America ("HFA"), the Democratic National Committee, and a number of Democratic state party committees ("the State Party Committees"). I was responsible for overseeing the distribution of HVF proceeds to its member committees.

2. HVF proceeds were consistently distributed according to the allocation formula set forth in the joint fundraising agreement for HVF. I know of no instance in which funds allocated to a State Party Committee were transferred to the DNC, instead of to a State Party Committee depository.

3. HVF's standard procedure was to include the following disclaimer in its fundraising contribution forms: "Contributions will be used in connection with a Federal election, may be spent on any activities of the participants as each committee determines in its sole discretion, and will not be earmarked for any particular candidate." *See* Exhibit B (Sample HVF Contribution Form). I know of no instance in which a donor to HVF earmarked funds for the DNC or HFA, except as expressly permitted by 11 C.F.R. § 102.17(c)(2)(i)(C).

4. I am over 21 years of age, of sound mind, and I have personal knowledge of the facts stated above.

I declare under penalty of perjury that this declaration is true and correct.

Elizabeth Jones.

2/15/18

Date