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February 16, 2018

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

Re: MUR 7304

Dear Mr. Jordan:

The undersigned serves as counsel to Alaska Democratic Party; Democratic Party of Arkansas; Colorado Democratic Party; Democratic State Committee (Delaware); Democratic Executive Committee of Florida; Georgia Federal Elections Committee; Idaho State Democratic Party; Indiana Democratic Congressional Victory Committee; Iowa Democratic Party; Kansas Democratic Party; Kentucky State Democratic Executive Committee; Democratic State Central Committee of LA; Maine Democratic Party; Massachusetts Democratic State Committee – Federal Fund; Michigan Democratic State Central Committee; Minnesota Democratic-Farmer-Labor Party; Mississippi Democratic Party PAC; Montana Democratic Party; New Hampshire Democratic Party; Democratic Party of New Mexico; North Carolina Democratic Party – Federal; Ohio Democratic Party; Oklahoma Democratic Party; Democratic Party of Oregon; Pennsylvania Democratic Party; Rhode Island Democratic State Committee; Democratic Party of South Carolina; South Dakota Democratic Party - Federal; Tennessee Democratic Party; Texas Democratic Party; Utah State Democratic Committee; WV State Democratic Executive Committee; Democratic Party of Wisconsin; and WY Democratic State Central Committee (hereinafter "State Party Committees").

This letter responds on behalf of the State Party Committees to the Commission's notification that it received a complaint (the "Complaint") alleging that the State Party Committees violated the Federal Election Campaign Act (the "Act") and Federal Election Commission (the "Commission") regulations. As described below, based upon the facts of the Complaint and other information available, there is no reason to believe that the State Party Committees have violated the Act or any of the Commission's regulations.

I. The operations of Hillary Victory Fund, the Joint Fundraising Committee, and its participating committees, Hillary for America ("HFA"), the Democratic National Committee ("DNC"), and the State Party Committees were permissible under McCutcheon.[1]

When the Supreme Court struck down aggregate contribution limits in McCutcheon, the possibility of a Joint Fundraising Committee of the size and scale of Hillary Victory Fund ("HVF") was born. As discussed in McCutcheon, a joint fundraising committee is a permissible "mechanism for individual committees to raise funds collectively," so long as it is not used as a means to "circumvent base limits or earmarking rules."[2]

As required under the Commission's regulations, the Joint Fundraising Agreement between HFA, the DNC, and the State Party Committees outlined the allocation of fundraising proceeds to each participating committee up to that committee's legal limit, and subject to any other contributions previously received by that committee from a specific donor.[3] Once funds were transferred to the participating committees, the recipient committee controlled how those funds were spent. After receiving their allocated funds, the State Party Committees and the DNC were permitted to transfer unlimited amounts of their federal funds between and amongst each other at will.[4] As the Court stated in McCutcheon, absent any evidence of "knowledge of circumvention" of base limits or earmarking rules, a joint fundraising committee of this kind would not violate the Act or the Commission's regulations.[5]

The Commission's regulations define earmarking as "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."[6] It is well established that "funds are considered 'earmarked' only when there is clear evidence of acts by donors that resulted in their funds being used by the recipient committee for expenditures on behalf of a particular campaign."[7] The Complaint fails to provide any evidence of such an indication by any donor to HVF, or even the name of a donor who intended to earmark a contribution to a specific candidate. Instead, the Complaint speculates that "it is highly likely – if not an unavoidable inference – at least some major donors were assured the substantial sums they contributed to

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[1] McCutcheon v. Federal Election Commission, 134 S. Ct. 1434 (2014).

[2] Id. at 1455.

[3] 11 C.F.R. § 102.17(c).

[4] 52 U.S.C. § 30116(a)(4); 11 C.F.R. § 102.6(a)(1)(ii).

[5] McCutcheon, 134 S. Ct. 1434, 1456 (2014).

[6] 11 C.F.R. § 110.6(b)(1).

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

HVF would wind up in the hands of, or under the control of, the Clinton campaign . . ."[8] Mere speculation and circumstance is not enough to pursue a violation under the Act.[9] The Complaint fails to provide any evidence beyond this type of speculation or implied inference.

The Commission has faced the issue of vague allegations on numerous occasions. In MUR 5520, the Commission found no reason to believe any illegal earmarking occurred based simply on "timing and amounts of transfers" between committees.[10] Furthermore, the Commission has found that "only bare allegations" of earmarking without any "designation, instruction or encumbrance" are insufficient to support an illegal earmarking scheme.[11] To be certain, a contribution is only considered to be "earmarked" if there is an express or implied designation, instruction or encumbrance resulting in the contribution being spent on behalf of a specific candidate. The Complaint contains no specific allegations of any such direction by the donors or participating committees. The Commission has found repeatedly that "timing alone is insufficient to support an earmarking claim, where there is no clear designation or instruction by the donors."[12]

Similarly, the Complaint provides no evidence that any donor exceeded or attempted to circumvent the individual contribution limits by contributing through HVF. Such a violation would require that the donor have "knowledge that a substantial portion [of the contribution] will be contributed to, or expended on behalf of" a specific candidate and "retain control over the

[8] Complaint at 71, paragraph 116. It is worth noting that the Joint Fundraising Committee utilized by the Republican Party (Trump Victory) made up of Donald J. Trump for President, Inc., the Republican National Committee, and twenty-one republican state party committees operated in an identical manner to HVF.

[9] See, MUR 5732 (Matt Brown for US Senate), Factual and Legal Analysis at Footnote 4 ("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 also, MUR 5952 (Hillary Clinton for President) where the Commission found no reason to believe a violation occurred when the Complaint failed to provide any specific allegations or factual information to support the alleged violation.

[10] MUR 5520 (Billy Tauzin Congressional Committee), First General Counsel's Report at 2. See also, MUR 4643(Democratic Party of NM) (where no earmarking was found "based only on the correlation in timing and amounts of contributions, without other evidence of instruction, designation, or encumbrance.")

[11] MUR 5125 (Paul Perry for Congress), First General Counsel's Report at 9.

[12] MUR 5732 (Matt Brown for US Senate) Factual and Legal Analysis at 8. See also, MUR 5445 (Quentin Nesbitt) (where Commission found no reason to believe contributions were earmarked based on the "lack of any direct indicia of earmarking").

funds."[13] As required by Commission regulations, HVF had a specific allocation formula that indicated to which committees and in what amounts a donor's funds would be transferred.[14] A donor could otherwise request a different allocation, subject to applicable limits, at the time of his or her contribution. No evidence has been provided that any donor had any knowledge or belief that funds from their contribution allocated to the State Party Committees or the DNC would be spent on any specific candidate, nor does the Complaint allege that any donor retained any control of the funds after they were transferred. The Commission has ruled that the contributor must have "actual knowledge" that the Committee will use his or her contribution on behalf of a specific candidate and "an inference alone" is insufficient to find a violation.[15] Neither does the Complaint provide any evidence that any donors retained control over their contributions once they were received by Hillary Victory Fund and subsequently transferred to the participating committees. Without any specific allegations or facts supporting a violation of the Act, the Commission should choose not to pursue an action in this matter.

II. Reporting inaccuracies by State Party Committees were simply process errors and not an indication that the State Party Committees lacked control of the funds transferred from HVF.

The State Party Committees categorically deny the Complainant's allegation that HVF did not transfer the funds allocated to the State Party Committees as reported on the FEC reports of HVF, the DNC and the State Party Committees. The State Party Committees had knowledge of the transfers, and the transfers of joint fundraising proceeds were deposited directly into bank accounts of the State Party Committees.

The State Party Committees acknowledge that there were errors in reporting some of the transactions associated with HVF, due to its size and scale. For many of the State Party Committees, their participation in HVF was the first of its kind and proved to be a compliance challenge. While some of the State Party Committees erred in reporting the transfers received from HVF or made to the DNC, the State Party Committees did, in fact, receive funds from HVF into accounts of the State Party Committees and subsequently transferred funds to the DNC.

The State Party Committees have been, and continue to be, diligently working with the Commission on correcting reporting errors associated with HVF transactions. The Commission has an internal review process under its Reports Analysis and Audit Divisions to address any reporting errors by political committees. The Reports Analysis Division reviews the reports filed

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[13] 11 C.F.R. § 110.1(h).

[14] 11 C.F.R. § 102.17(c).

[15] MUR 5732 (Matt Brown for US Senate) Factual and Legal Analysis at 11. See also, MUR 5678 (Liffrig for Senate); MUR 5968 (John Shadegg's Friends); MUR 5881 (Citizens Club for Growth); MUR 5109 (Keystone Federal PAC); MUR 6221 (Transfund PAC) (all concluding that inferences alone are not enough to establish actual knowledge of the donor).

by each committee and is responsible for issuing Requests for Additional Information and referring committees to the Audit Division when appropriate.

When applicable and appropriate, the Commission will initiate internally generated matters with individual State Party Committee to address these reporting errors.[16] Indeed, the Commission has already initiated pre-MURs and ADR matters addressing reporting errors by State Party Committees in connection with the HVF joint fundraising committee. As such, the allegations related to false, inaccurate, or incomplete reporting by the State Party Committees in the Complaint are duplicative and should be addressed by the Commission through its usual and normal supervisory process.

III. Conclusion

For the reasons outlined above, the Commission should find no reason to believe the State Party Committees violated the Act or the Commission's regulations. The State Party Committees were participating committees in a joint fundraising program designed to support Democratic candidates and party committees up and down the ticket and across the country during the 2016 election cycle. HVF was formed and operated in compliance with the Act and Commission regulations. As participants in HVF, the State Party Committees received the funds that were allocated to them under HVF's allocation formula and any uses of those funds were in compliance with the Act and Commission regulations. Contributions to HVF were neither earmarked nor made to circumvent individual contribution limits. The Complaint provides no factual information or specific allegations to suggest otherwise and any allegations regarding circumvention are based on mere speculation and conjecture. As such, the Commission should not pursue any action against the State Party Committees and find no reason to believe the State Party Committees violated the Act or the Commission's regulations with respect to their participation in HVF.

If you have any questions regarding this matter, my daytime number is (202) 479-1111. My email address is reiff@sandlerreiff.com.

Sincerely,

Neil P. Reiff
Counsel to State Party Committees

[16] Many of the reporting violations alleged in the Complaint are inaccurate because they were either reported correctly initially, or have been since amended to correct the errors.