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1 2	BEFORE THE FEDERA	AL ELECTION COMMISSION
2 3 4 5	In the Matter of))
6 7 8 9 0 1	MUR 7317 Friends of Dusty Johnson and Barclay W. Kreth in his official capacity as treasurer) DISMISSAL AND) CASE CLOSURE UNDER THE) ENFORCEMENT PRIORITY) SYSTEM)
3	GENERAL COUNSEL'S REPORT	
4	Under the Enforcement Priority System ("EPS"), the Commission rates matters on its	
15	Enforcement docket using formal scoring criteria to decide which matters to pursue and how	
6	best to allocate the agency's resources. These criteria include, without limitation, an	
17	assessment of the following factors: (1) the gravity of the alleged violation, both with respect	
8	to the type of activity and the amount in violation; (2) the apparent impact the alleged violation	
19	may have had on the electoral process; (3) the legal complexity of issues raised in the case;	
20	(4) recent trends in potential violations of the Federal Election Campaign Act of 1971, as	
21	amended ("the Act"), and developments of the law. It is the Commission's policy that	
22	pursuing relatively low-rated matters on the Enforcement docket warrants the exercise of its	

The Office of General Counsel has scored MUR 7317 as a low-rated matter and determined that it should not be referred to the Alternative Dispute Resolution Office. For the reasons discussed below, we recommend that the Commission dismiss the allegations that

prosecutorial discretion to dismiss cases under certain circumstances and, where appropriate,

to find no reason to believe that a violation occurred.

The EPS rating information is as follows: Filed: February 16, 2018.

Dismissal and Case Closure Under EPS – MUR 7317 General Counsel's Report Page 2

- 1 Friends of Dusty Johnson and Barclay W. Kreth in his official capacity as treasurer (the
- 2 "Committee")² violated the Act or Commission regulations.
- 3 Complainant Lora Hubbel alleges that the Committee failed to timely report a
- 4 disbursement or in-kind contribution for a website advertisement. The Committee allegedly
- 5 advertised Johnson's campaign on a political blog, South Dakota War College, during the third
- 6 quarter of 2017.³ The ad was purportedly worth over \$200, but the Committee failed to report
- 7 a disbursement, estimated debt, or in-kind contribution associated with the blog or its owner,
- 8 Pat Powers.4
- 9 In response, the Committee concedes that Powers's blog ran ads for Johnson's
- campaign in the third quarter of 2017.5 Johnson requested an invoice from Powers during the
- third quarter, and Powers sent a \$1,800 invoice to the Committee after the quarter ended.
- 12 Powers also indicated that the advertisement was intended to be an in-kind contribution.⁶ The
- 13 Committee explains that it was not aware that Powers intended to run the ad as an in-kind
- 14 contribution, and the Committee reported the ad as a \$1,800 in-kind contribution in its 2017
- 15 Year-End Report.⁷

Friends of Dusty Johnson was established November 16, 2016, as Dusty Johnson's principal federal campaign committee. Johnson is a candidate for South Dakota's At-Large Congressional District.

Compl. at 1 (Jan. 30, 2018). The attachment to the Complaint shows an October 5, 2017, blog post that discusses Johnson's October 24, 2017, fundraiser. Next to the body of the blog post an ad reads: "Dusty Johnson for Congress" and "Paid for by Friends of Dusty Johnson." Attach. at 1.

⁴ Compl. at 2.

⁵ Resp. at 1 (Feb. 16, 2018).

i Id.

⁷ Id; see also Amended 2017 Year-End Report at 45 (Mar. 29, 2018), http://docquery fec.gov/pdf/921/201803299097932921/201803299097932921.pdf (the report includes a receipt for in-kind advertising valued at \$1,800, attributed to Pat Powers, and dated December 15, 2017).

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Under the Act and the Commission's regulations, the political committee of a candidate for federal office must report debts for expenditures in excess of \$500 as of the date on which the debt is incurred.⁸ If the political committee does not know the exact amount of the debt, then it must first report an estimated debt and later provide the correct amount that the committee owed for the services rendered.⁹ Moreover, a candidate's political committee must identify individuals whose contributions to the committee aggregate in excess of \$200 in a calendar year.¹⁰

The ad ran during the third quarter of 2017, and, since the Committee requested an invoice from Powers, it appears the Committee intended to pay for it. ¹¹ Thus, the Committee failed to timely report a debt, estimated or otherwise, that arose in connection with the ad. ¹² Further, because Powers absorbed the costs of running the ad, not the Committee, the disclaimer on the ad ("Paid for by Friends of Dusty Johnson") was incorrect. ¹³

Because the Committee ultimately reported the transaction, albeit in an untimely manner, and the amount at issue is modest, we recommend that the Commission dismiss the allegations consistent with the Commission's prosecutorial discretion to determine the proper

¹¹ C.F.R. § 104.11(b); see also 52 U.S.C. § 30104(b)(8) (requiring the disclosure of debt).

See 11 C.F.R. § 104.11(b) (describing how to report estimated debt for expenditures). These reports must include estimated debts and in-kind contributions arising from the purchase or receipt of internet advertising. See 11 C.F.R. § 100.52(a) ("A gift . . . or deposit of money or anything of value . . . is a contribution."); 11 C.F.R. § 100.52(d)(1) (stating that "anything of value includes all in-kind contributions" including advertising services provided without charge); 11 C.F.R. § 100.111(a) ("A purchase . . . or gift of money or anything of value . . . is an expenditure."); 11 C.F.R. § 100.111(e)(1) (stating that "anything of value includes all in-kind contributions" including advertising services provided without charge).

^{10 11} C.F.R. § 104.7(b).

Resp. at 1.

The Committee was required to report the estimated cost of advertising in the third quarter of 2017 and then provide the correct amount when Powers provided the invoice. See 11 C.F.R. § 104.11(b).

¹³ 11 C.F.R. § 110.11(b).

Dismissal and Case Closure Under EPS – MUR 7317 General Counsel's Report Page 4

- ordering of its priorities and use of agency resources. Heckler v. Chaney, 470 U.S. 821, 831-
- 2 32 (1985). We also recommend that the Commission approve the attached Factual and Legal
- 3 Analysis, close the file as to all Respondents and send the appropriate letters.

RECOMMENDATIONS

- 1. Dismiss the allegations that Friends of Dusty Johnson and Barclay W. Kreth in his official capacity as treasurer violated the Act and Commission regulations, pursuant to the Commission's prosecutorial discretion under *Heckler v. Chaney*, 470 U.S. 821 (1985);
- 2. Approve the attached Factual and Legal Analysis and the appropriate letters; and
- 3. Close the file as to all Respondents.

Lisa J. Stevenson
Acting General Counsel

Kathleen M. Guith Associate General Counsel

Date

BY: Stephen Gura

Deputy Associate General Counsel

Jeff S. Jordan

Assistant General Counsel

Carlos A. Valdivia

Attorney

Attachment:

Factual and Legal Analysis

FEDERAL ELECTION COMMISSION **FACTUAL AND LEGAL ANALYSIS**

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RESPONDENTS: Friends of Dusty Johnson

MUR 7317

Barclay W. Kreth

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I. INTRODUCTION

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This matter arose from a complaint alleging that Friends of Dusty Johnson and Barclay

- W. Kreth in his official capacity as treasurer (the "Committee") violated the Federal Election 10
- 11 Campaign Act of 1971, as amended ("the Act"), and Commission regulations. The Office of
- General Counsel has scored MUR 7317 as a low-rated matter under the Enforcement Priority 12
- 13 System, whereby the Commission applies formal scoring criteria to determine how to allocate
- 14 agency resources and which matters to pursue.

II. **FACTUAL AND LEGAL ANALYSIS**

A. **Factual Background**

Complainant Lora Hubbel alleges that the Committee failed to timely report a disbursement or in-kind contribution for a website advertisement. The Committee allegedly advertised Johnson's campaign on a political blog, South Dakota War College, during the third quarter of 2017.2 The ad was purportedly worth over \$200, but the Committee failed to report a disbursement, estimated debt, or in-kind contribution associated with the blog or its owner, Pat Powers.³

Friends of Dusty Johnson was established November 16, 2016, as Dusty Johnson's principal federal campaign committee. Johnson is a candidate for South Dakota's At-Large Congressional District.

Compl. at 1 (Jan. 30, 2018). The attachment to the Complaint shows an October 5, 2017, blog post that discusses Johnson's October 24, 2017, fundraiser. Next to the body of the blog post an ad reads: "Dusty Johnson for Congress" and "Paid for by Friends of Dusty Johnson." Attach. at 1.

Compl. at 2.

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Case Closure — MUR 7317 (Friends of Dusty Johnson) Factual and Legal Analysis Page 2

In response, the Committee concedes that Powers's blog ran ads for Johnson's campaign in the third quarter of 2017.⁴ Johnson requested an invoice from Powers during the third quarter, 2 and Powers sent a \$1,800 invoice to the Committee after the quarter ended. Powers also 3 4 indicated that the advertisement was intended to be an in-kind contribution.⁵ The Committee

explains that it was not aware that Powers intended to run the ad as an in-kind contribution, and

the Committee reported the ad as a \$1,800 in-kind contribution in its 2017 Year-End Report.⁶

В. Legal Analysis

Under the Act and Commission regulations, the political committee of a candidate for federal office must report debts for expenditures in excess of \$500 as of the date on which the debt is incurred. If the political committee does not know the exact amount of the debt, then it must first report an estimated debt and later provide the correct amount that the committee owed for the services rendered.⁸ Moreover, a candidate's political committee must identify individuals whose contributions to the committee aggregate in excess of \$200 in a calendar year.⁹

Resp. at 1 (Feb. 16, 2018).

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Id.; see also Amended 2017 Year-End Report at 45 (Mar. 29, 2018), http://docquery.fec.gov/pdf/921/201803299097932921/201803299097932921.pdf (the report includes a receipt for in-kind advertising valued at \$1,800, attributed to Pat Powers, and dated December 15, 2017).

⁷ 11 C.F.R. § 104.11(b); see also 52 U.S.C. § 30104(b)(8) (requiring the disclosure of debt).

See 11 C.F.R. § 104.11(b) (describing how to report estimated debt for expenditures). These reports must include estimated debts and in-kind contributions arising from the purchase or receipt of internet advertising. See 11 C.F.R. § 100.52(a) ("A gift . . . or deposit of money or anything of value . . . is a contribution."); 11 C.F.R. § 100.52(d)(1) (stating that "anything of value includes all in-kind contributions" including advertising services provided without charge); 11 C.F.R. § 100.111(a) ("A purchase... or gift of money or anything of value... is an expenditure."); 11 C.F.R. § 100.111(e)(1) (stating that "anything of value includes all in-kind contributions" including advertising services provided without charge).

¹¹ C.F.R. § 104.7(b).

Case Closure — MUR 7317 (Friends of Dusty Johnson) Factual and Legal Analysis Page 3

- 1 The ad ran during the third quarter of 2017, and, since the Committee requested an
- 2 invoice from Powers, it appears the Committee intended to pay for it. 10 Thus, the Committee
- 3 failed to timely report a debt, estimated or otherwise, that arose in connection with the ad. 11
- 4 Further, because Powers absorbed the costs of running the ad, not the Committee, the disclaimer
- 5 on the ad ("Paid for by Friends of Dusty Johnson") was incorrect. 12
- 6 Because the Committee ultimately reported the transaction, albeit in an untimely manner,
- 7 and the amount at issue is modest, the Commission dismisses the allegations consistent with its
- 8 prosecutorial discretion to determine the proper ordering of its priorities and use of agency
- 9 resources. Heckler v. Chaney, 470 U.S. 821, 831-32 (1985).

¹⁰ Resp. at 1.

The Committee was required to report the estimated cost of advertising in the third quarter of 2017 and then provide the correct amount when Powers provided the invoice. See 11 C.F.R. § 104.11(b).

¹² 11 C.F.R. § 110.11(b).