

JONES DAY*Kathryn Ross*Date:
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15:33:27 -04'00'51 LOUISIANA AVENUE, N.W. • WASHINGTON, D.C. 20001.2113
TELEPHONE: +1.202.879.3939 • FACSIMILE: +1.202.626.1700

April 12, 2018

CONFIDENTIAL
COMMUNICATION**VIA E-MAIL TO CELA@FEC.GOV**Federal Election Commission
Office of Complaints Examination & Legal Administration
Attn: Kathryn Ross, Paralegal
1050 First Street, N.E.
Washington, DC 20463Re: Matters Under Review 7313 & 7319

Dear Office of Complaints Examination & Legal Administration:

On behalf of Donald J. Trump for President, Inc. and Treasurer Bradley T. Crate,
enclosed is a response to the Complaints in the above-captioned MURs.

Very truly yours,



E. Stewart Crosland

Enclosure

cc: Megan Sowards Newton

BEFORE THE FEDERAL ELECTION COMMISSION

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MURs 7313/7319

**RESPONSE OF DONALD J. TRUMP FOR PRESIDENT, INC. AND
BRADLEY T. CRATE, AS TREASURER, TO THE COMPLAINTS**

Donald J. Trump for President, Inc. and Treasurer Bradley T. Crate¹ (collectively, “Respondents” or “the Committee”) respond to the Complaints in the above-captioned Matters Under Review. The Complaints concern a third party’s alleged payment of an expense unrelated to the Committee. To be clear, the Committee was not in any way involved in the making of such a payment and has no knowledge as to whether the payment was actually made. Whatever the facts may be, this Commission has been unwilling to extend its jurisdiction to reach such payments, recognizing that they fall beyond the campaign finance matters subject to its regulation. Because the Complaints fail to allege any violation of law against them, these Respondents respectfully request that the Commission dismiss these matters and close the files.

BACKGROUND

The Complaints allege that the Committee failed to report as an in-kind contribution and corresponding expenditure a payment of \$130,000 purportedly made to Stephanie Clifford around October 27, 2016. The Committee provided no funds to make any payment to Ms. Clifford.² *See* Attachment, Affidavit of Bradley T. Crate [hereinafter “Crate Affidavit”] ¶ 5.

¹ The Complaint in MUR 7319 names Timothy Jost, who served as the Committee’s Treasurer until Mr. Crate took over the role on January 20, 2017, *see* Attachment, Affidavit of Bradley T. Crate [hereinafter “Crate Affidavit”] ¶ 3, and this Response is filed on Mr. Jost’s behalf as well.

² The Complaint in MUR 7319 suggests that a \$130,888.33 lease payment to Trump Tower Commercial LLC made on December 21, 2016, and reported on the Committee’s 2016 Year-End Report filed on January 31, 2017, might have been for payment to Ms. Clifford. That disbursement was for the combined costs of the Committee’s rental of a headquarters (\$128,613.33) and campaign store space (\$2,275.00) at Trump Tower and was made under the terms of amended lease arrangements executed between the Committee and Trump Tower Commercial LLC after Election Day 2016. Crate Affidavit ¶ 8. Up until the election, the Committee had rented

Michael Cohen, who has claimed in media reports that he made the payment,³ was never an employee of the Committee or on the Committee's payroll. *Id.* ¶ 6. He never had authority to enter into contracts on behalf of the Committee. *Id.* And the Committee never made any disbursement at the direction of Mr. Cohen. *Id.*

ARGUMENT

A long line of Commission precedent establishes that, as a matter of law, the type of third-party payment alleged in the Complaints, even if made, would not be considered an in-kind contribution to the Committee because it is not a campaign-related transaction made for the purpose of influencing a federal election.⁴ Accordingly, even if the facts alleged in the Complaints were true, the Commission has no reason to believe the Committee violated the law and should dismiss the Complaints.⁵ *See* Statement of Reasons of Comm'rs Mason, Sandstrom, Smith & Thomas, MUR 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory Committee,

additional space in Trump Tower and thus paid higher rent, as reflected on every disclosure report it filed through November 2016. *Id.*

³ *E.g.*, Alex Johnson & Ali Vitali, *Trump's lawyer Michael Cohen says he paid Stormy Daniels \$130,000 of his own money*, NBC News (Feb. 13, 2018), <https://www.nbcnews.com/politics/donald-trump/trump-s-lawyer-michael-cohen-says-he-paid-stormy-daniels-n847866>.

⁴ The Federal Election Campaign Act ("the Act") defines a "contribution" as "any gift, subscription, loan, advance, deposit of money, or anything of value made by any person for the purpose of influencing an election." 52 U.S.C. § 30101(8); *see also* 11 C.F.R. § 100.52(a). FEC regulations provide further that a third party's payment of a candidate's personal expense may be deemed a contribution made to assist the campaign committee, "unless the payment would have been made irrespective of the candidacy." 11 C.F.R. § 113.1(g)(6).

⁵ A basic counterfactual underscores the absurdity of the "heads we win, tails you lose" nature of the Complaint's allegations against the Committee. Had the payment to Ms. Clifford been made from Committee proceeds, the Commission – not to mention Complainants – undoubtedly would have considered it an improper personal use of Committee funds. To treat the payment as an in-kind contribution would have the same result. In fact, the Commission recognized this concern with respect to the case against former presidential candidate John Edwards relating to third-party payments made to his mistress. During a July 2011 Open Meeting discussion of the FEC audit of Edwards's campaign committee, then-Commissioner McGahn admonished that it would be "odd . . . to say that the transaction is a campaign transaction," since that would require reporting the funds as both a campaign receipt and expenditure and thereby necessarily result in a personal use. Open Meeting at 22:42, Audit Division Recommendation Mem. on John Edwards for President (July 21, 2011), <https://www.fec.gov/resources/audio/2011/2011072103.mp3>.

Inc.), at 1 (Dec. 21, 2000) (“The Commission may find ‘reason to believe’ only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the [Act].”).

The federal campaign finance laws do not treat all third party spending as campaign-related simply because a payment conceivably could help a candidate’s electoral chances. *See generally, e.g., Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986) (upholding FEC’s determination that a corporation’s payment for an event sponsored by a Congressman/candidate was not a contribution because it was not campaign-related, even though it clearly benefited the Congressman’s electoral prospects). The Commission has recognized that “there are a number of issues arising from a candidate’s personal situation . . . that may become campaign issues, but the Commission will not necessarily therefore deem expenses arising from such controversies to be campaign expenses.” Statement of Reasons of Comm’rs McDonald, Mason, Sandstrom, Smith & Thomas, MUR 4944 (Hillary Rodham Clinton), at 2 n.2 (Aug. 28, 2001) [hereinafter “Clinton SOR”]. In other words, the Commission acknowledges that during a candidacy, personal transactions “that are beyond the campaign finance matters regulated by the” Commission will arise. Factual & Legal Analysis, MUR 7025 (Friends of Mike Lee), at 6 (March 23, 2016) [hereinafter “Friends of Mike Lee F&LA”].⁶

The Commission, consequently, has determined that “a finding of reason to believe that a . . . personal transaction resulted in a contribution to [a] campaign requires specific information demonstrating a nexus between the transaction[] and the campaign.” *Id.*; *see also* Statement of Reasons of Comm’rs Petersen, Bauerly, Hunter, McGahn & Weintraub, MUR 6200 (Ensign), at

⁶ This makes particular sense given that a Complainant choosing to leverage an otherwise personal claim against a candidate in an upcoming election could automatically render that complaint “in connection with an election” based only on the timing of making the demand.

10 (dismissing unanimously a complaint alleging a Senator's parents made an unlawful campaign contribution by sending nearly \$100,000 in payments to former campaign worker because there was no evidence the payment fulfilled an obligation of the campaign). To find a nexus requires evidence objectively indicating the payment directly benefited the campaign committee by "free[ing] up funds then used . . . for campaign expenses." Clinton SOR at 2–3 (internal quotation mark omitted) (noting that "a loan the proceeds of which were used for direct campaign expenses would be subject to the Act, regardless of whether the loan was secured by a mortgage on a personal residence"); *see also* Friends of Mike Lee F&LA at 6–7 ("[T]he basis for this determination is the context of the transaction's surrounding circumstances." (footnote and citation omitted)).

The Commission's unanimous decision in MUR 5141 (Moran) is illustrative. The Commission concluded that a lobbyist's unsecured \$25,000 personal loan to a Congressman to help him pay legal expenses related to a domestic relations matter was not directly campaign-related and therefore not a contribution. *See* Statement of Reasons of Comm'rs Mason, Sandstrom, McDonald, Smith, Thomas & Wold, MUR 5141 (Moran), at 3 (March 11, 2002) [hereinafter "Moran SOR"] ("The facts establish that although this loan was made directly to a candidate, it was not made for use in connection with the candidate's campaign."). The Commission explained that in order to determine whether a third-party payment is directly campaign-related, it must look at objective factors to assess whether the campaign had a need for, and as a result benefited from, the payment. *Id.* at 4; *see also* Friends of Mike Lee F&LA at 8. The unsecured loan was found not to be campaign-related because it did not substantially affect the campaign's ability to fund its campaign activity. To the contrary, the campaign was

“by any standards, . . . well-funded at all times before and after the transaction at issue.” Moran SOR at 4.

The same is true here. Nothing suggests the \$130,000 payment alleged in the Complaints defrayed an obligation owed by the Committee, and it did not otherwise materially “free up” Committee or candidate funds available for campaign purposes. As in MUR 5141, the Committee was by any measure extremely well-funded at the alleged time of the purported payment – having over \$14 million dollars in operating cash available on October 27, 2016. *See* Crate Affidavit ¶ 7. President Trump, moreover, had the means to contribute \$10 million to the Committee *after* the alleged payment to Ms. Clifford purportedly occurred.⁷ Therefore, consistent with the Commission’s prior decisions, the alleged payment, even if made, lacks the required direct nexus to the Committee.

Furthermore, although 11 C.F.R. § 113.1(g)(6) treats some third-party payments of personal expenses as contributions, it excludes payments that would have been made irrespective of the candidacy. “In this regard, the analysis is similar to that above (i.e., whether the [payment] is ‘in connection with the campaign’).” Clinton SOR at 3. There is no indication in this matter that the alleged third-party payment would not have been made but for Mr. Trump being a candidate for federal office. In fact, as media reports have indicated, sufficient motivation would have existed to address the salacious allegations under any circumstances.⁸ *See, e.g.*, Moran SOR at 4 (concluding that “[t]he responses and information publicly available to the Commission establish[ed] that Mr. Lierman would have made th[e] loan irrespective of Rep.

⁷ *See, e.g.*, Nicholas Confessore, *Donald Trump Kicks In \$10 Million to Campaign*, N.Y. Times (Oct. 29, 2016), <https://www.nytimes.com/2016/10/30/us/donald-trump-campaign-donation.html>.

⁸ *E.g.*, Frances Stead Sellers, *Trump lawyer’s efforts to suppress Stormy Daniels started in 2011*, Wash. Post (March 17, 2018), https://www.washingtonpost.com/politics/trump-lawyers-efforts-to-suppress-stormy-daniels-started-in-2011/2018/03/17/56924c54-29db-11e8-874b-d517e912f125_story.html?utm_term=.79ee30963839.

Moran's candidacy"). Though the timing of an election may be used by one party as a means to leverage a personal payment from another, that does not change the analysis or make the payment in connection with an election.

* * *

For the foregoing reasons, Respondents respectfully request that the Commission dismiss this matter. Under Commission precedents, the lack of a nexus between the payment at issue in the Complaints and the Committee shows that the payment was not campaign-related, and thus not an in-kind contribution to the Committee. To conclude otherwise would have absurd results, subjecting all payments of personal transactions during candidacy to FEC regulation. The Commission must remain wary of such an approach.

Attachment

Commonwealth of Massachusetts
County of Essex

AFFIDAVIT OF BRADLEY T. CRATE

I, Bradley T. Crate, attest under penalty of perjury that the following statements are true and correct to the best of my knowledge and belief:

1. I am President of Red Curve Solutions, LLC ("Red Curve"), a full-service consulting firm that provides treasury and accounting services to political committees registered with the Federal Election Commission ("FEC"), as well as other entities.

2. Red Curve has provided compliance and treasury services to Donald J. Trump for President, Inc. (the "Committee") from the time of the Committee's registration with the FEC in June 2015 to the present.

3. During the 2016 election, as President of Red Curve, I led the team responsible for providing treasury and accounting services to the Committee. Mr. Timothy Jost, a former employee of Red Curve, served as the Committee's FEC Treasurer until January 20, 2017, on which date I became the Committee's FEC Treasurer. I am also the custodian of the Committee's records.

4. I understand that complaints have been filed with the FEC alleging that the Committee failed to report as an in-kind contribution and corresponding expenditure a payment of \$130,000 reportedly made by Michael Cohen to Stephanie Clifford on or around October 27, 2016.

5. No disbursement was authorized by Red Curve or made by the Committee to make a payment to Ms. Clifford.

6. Mr. Cohen has never been on the Committee's payroll and never had authority to authorize expenditures by the Committee, and the Committee never made any disbursement of funds at the direction of Mr. Cohen.

7. Throughout the month of October 2016, the Committee was well funded, and on October 27, 2016, it had more than \$14 million dollars in operating cash available.

8. I understand that one of the complaints before the FEC alleges that a \$130,888.33 lease payment made by the Committee to Trump Tower Commercial LLC on December 21, 2016, and reported on its 2016 Year-End Report filed on January 31, 2017, might have been for payment to Ms. Clifford. That disbursement was for the combined costs of the Committee's rental of a headquarters (\$128,613.33) and campaign store space (\$2,275.00) at Trump Tower – spaces that the Committee had been leasing for several months prior to the election, as disclosed on its monthly FEC reports – and was made in accordance with the terms of amended lease arrangements executed between the Committee and Trump Tower Commercial LLC following Election Day 2016 in light of the Committee's decreased space needs after the election.

Bradley T. Crate
Bradley T. Crate

Subscribed and sworn to before me, this 11th day of April, 2018.

[Signature]
NOTARY PUBLIC

My commission expires: 6 / 22, 2018.

SEAL:

