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Jeff S. Jordan
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Complaints Examination & Legal Administration
1050 First Street NE
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Re: MUR 7331

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 (collectively, "Respondents"), in response to the complaint filed by Fredy Burgos on February 17, 2018 (the "Complaint").

The Complaint advances two meritless claims, in each case taking Respondents' lawful conduct and characterizing it as a violation:

First, the Complaint alleges that Respondents "illegally re-routed" funds raised through Respondents' joint fundraising activity to HFA. The Complaint fails to present any facts that represent a violation of the Act. Respondents' joint fundraising activity was entirely lawful under the Federal Election Campaign Act of 1971, as amended (the "Act") and its accompanying regulations ("the Commission Regulations"). Donors made contributions to HVF according to the joint fundraising agreement, under the participants' combined limits exactly as Federal Election Commission Regulations ("FEC" or the "Commission") provide. The Complaint does not allege that any contribution was designated or earmarked for any particular participant, although the Commission Regulations would have allowed the contributors to do exactly that. HVF distributed the contributions to the state party member committees according to the joint fundraising agreement. The state party participants transferred funds to the DNC under statutes that expressly

[1] HVF terminated on November 20, 2017. Notably, the Federal Election 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.

permit unlimited transfers between political party committees. 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—"Americans for the Trump Agenda"—advances an unsupported and erroneous 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."[2] Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true, and provide no independent basis for investigation.[3] The Complaint presents no facts that would constitute a violation of the Act or the Commission Regulations. Accordingly, the Commission should find no reason to believe that Respondents violated the Act and should dismiss this matter.

FACTUAL BACKGROUND

I. Respondents' Joint Fundraising Activity

On September 10, 2015, HFA and the DNC formed HVF, a joint fundraising committee.[4] HVF amended its Statement of Organization on September 16, 2015 to add various Democratic state

[2] 11 C.F.R. § 111.4.

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

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

party committees as participants. 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.[5] 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 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*." (Emphasis added). 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.[6] HVF properly filed quarterly, pre-general, and post-general reports with the Commission that correctly detailed its contributions, expenditures, and transfers.

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. The DNC used the funds it received directly through HVF, the transfers

[5] *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.

[6] 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.

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.

LEGAL ANALYSIS

I. Respondents' Joint Fundraising Activity Was Entirely Lawful under the Act and Commission Regulations.

The Complaint alleges that funds raised by HVF were "illegally re-routed" to HFA. This allegation is entirely conclusory and hinges solely on the Complaint's characterization of Respondents' permissible activities. Through their joint fundraising activity, Respondents engaged in a series of independent, expressly lawful transactions that allowed the DNC to support the Democratic presidential nominee in addition to other Democratic candidates up and down the ballot. *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. Each activity was independently lawful; none represents a violation, whether by itself or in combination with others. The Commission has previously rejected 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.[10] Ultimately, whether viewed in part or as a whole, Respondents' fundraising activities did not violate the Act.

A. The Complaint does not allege that any individual donor earmarked his contribution.

The Complaint's conclusory allegation that money was "illegally re-routed" to HFA hinges on the unsupported assumption that individual donors earmarked their contributions to HVF for the DNC, which in turn used the funds to benefit HFA. Without such earmarking, there is no violation. Yet,

[10] 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).

the Complaint fails to allege that any earmarking occurred. The Complaint should therefore be dismissed.

The Commission has followed clear standards in identifying earmarked contributions. The Commission has repeatedly and unequivocally stated that a contribution is only earmarked when a donor has clearly indicated how the contribution is to be used. 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."[11] In this case, such contributions are treated as contributions from the donor to the candidate.[12]

Commission regulations also permit an individual donor to contribute to a candidate for a particular election, and 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.[13] 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.[14]

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

- *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 designation, instruction or encumbrance as to its use.[15] Similarly, in MUR 5445 (Davis),

[11] 11 C.F.R. § 110.6(b)(1).

[12] *Id.* § 110.6(a).

[13] *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)).

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

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

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.[16]

- *Second, timing alone does not offer reason to believe that earmarking occurred.*[17] 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 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."[18]

- *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.*[19] For example, in MUR 5732 (Matt Brown for Senate), the Commission found no reason to believe that

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

[17] 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).

[18] 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).

[19] 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).

donors to Matt Brown for U.S. Senate gave to state parties to circumvent the contribution limits.[20] 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.[21] 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.[22] 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).[23]

The Complaint conspicuously lacks any allegation that any donor made any prohibited designation or instruction, or gave with actual knowledge of how their funds would be used. To the contrary, as noted above, the HFA solicitation materials expressly said: "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*." (Emphasis added.) Without a designation, instruction or actual knowledge, there can be no earmarking, and so the Complaint's conclusory allegation of "illegally re-routed" funds must fail.

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

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.[24] The Commission strictly regulated joint fundraising by adopting 11 C.F.R. § 102.17 in 1983,

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

[21] *Id.* at 1.

[22] *Id.* at 10.

[23] *Id.* at 11.

[24] *See McCutcheon v. FEC*, 134 S. Ct. 1434, 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)).

setting "forth the basic rules for conducting joint fundraising activities."[25] These strict rules 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.[26] HVF followed these rules, and 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.[27]

The Commission has already 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."[28] 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."[29] 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.'"[30] 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.[31] There is no basis for the Commission to decide otherwise in this matter.

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

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

[27] *See* Exhibits A and C.

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

[29] Complaint, MUR 3135, at 2.

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

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

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

The Complaint improperly alleges that money was "re-routed" from state parties to HFA. Even if the Commission were to overlook the absence of any allegation of any actual earmarking, the Complaint still fails to allege that any donor's funds was transferred to or spent for the benefit of HFA. The Complaint appears to allege simply that state parties made transfers to the DNC, which the Act expressly permits.

Nothing in the Act or the Commission Regulations 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 party committees of the same political party may transfer funds to one another without limit.[32] 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.*"[33]

Likewise, Commission rules allowed the DNC to spend funds to help Secretary Clinton and the party as a whole. They sharply limit the conditions in which DNC expenditures for communications are 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.[34] A payment by a political party committee for a communication that is coordinated with a candidate must be treated by the political party making

[32] *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).

[33] 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").

[34] 11 C.F.R. § 109.37.

the payment as either an in-kind contribution or a coordinated party expenditure.[35] 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 on behalf of a clearly identified candidate and the expenditure.can be directly attributed to that candidate."[36]

While the DNC interacted with HFA on a wide range of matters, that in no way suffices 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 alleges nothing to support a finding of excessive contributions or coordinated party expenditures by the DNC.

[35] *Id.*

[36] *Id.* § 106.1(c)(1).

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
Brian G. Svoboda
Graham S. Wilson
Counsel to Respondents

[65] 52 U.S.C. § 30104(b); 11 C.F.R. §§ 104.3(a), (b).

[66] Letter from Matthew J. Gehringer to William W. Taylor, III, Oct. 24, 2017.

[67] Statement of Policy: "Purpose of Disbursement" Entries for Filings With the Commission, 72 Fed. Reg. 887 (Jan. 9, 2007).

[68] *See* Statement of Reasons of Commissioners Petersen, Hunter & Goodman, Matter Under Review 6698, at 5 (Dec. 5, 2016).

Exhibit A