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Federal Election Commission
1050 First Street NE
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Re: MUR 7464; Response to Complaint from LZP, LLC

Dear Mr. Jordan:

We are writing this letter on behalf of LZP, LLC ("LZP") in response to the Complaint filed in the above-referenced matter by Citizens for Responsibility and Ethics in Washington ("CREW"). The Complaint is just the latest edition in a long line of purely speculative, politically-charged complaints by CREW – filed disproportionately against conservative organizations and their donors. It should be promptly dismissed.

The Federal Election Commission (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 Federal Election Campaign Act (the "Act"). *See* 11 C.F.R. § 111.4(a), (d). Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true. *See* MUR 4960, Commissioners Mason, Sandstrom, Smith and Thomas, Statement of Reasons (Dec. 21, 2001). Moreover, the Commission will dismiss a complaint when the allegations are refuted with sufficiently compelling evidence. *See id*.

CREW alleges that "LZP appears to have…violated 52 U.S.C. § 30122 and 11 C.F.R. § 110.4(b) by knowingly permitting its name to be used to effect a $175,000 contribution by Unknown Respondent (or Respondents) to Honor and Principles PAC." Compl. at ¶19. CREW fails to provide a single piece of evidence to support this allegation other than speculation about the timing of the cited contribution made by LZP to Honor and Principles PAC ("HPP") and its own self-serving conclusions about LZP's activities. In short, CREW's accusations are without legal or factual support, and the Complaint should be promptly dismissed.

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I. Legal Analysis

A. LZP Did Not Effect the Making of a Contribution in the Name of Another

As the Complaint notes, LZP "is a Domestic Nonprofit Limited Liability Company organized and registered in Ohio." Compl. ¶8. Ohio is one of a handful of states that allows for nonprofit LLCs. Ohio corporate law makes clear that "[a] limited liability company may be formed for any purpose or purposes for which individuals lawfully may associate themselves, including for any profit or nonprofit purpose…" Ohio Rev. Code § 1705.02. More precisely, LZP is a single-member nonprofit LLC whose sole member is a 501(c)(4) nonprofit corporation. LZP is treated as a disregarded entity for federal income tax purposes.

Despite LZP's clear nonprofit status, CREW spends much of the Complaint speciously inferring that LZP is somehow organized as a for-profit entity that is solely dependent on "business activity" to generate income. In fact, on the very first page of the Complaint, CREW blindly asserts that LZP "has no known business activity," and therefore, "it is virtually impossible that it generated sufficient income to pay for the contribution [to HPP] in just one day." Compl. ¶2. Such a flawed conclusion is not only entirely speculative, but it overlooks the plain language of Ohio's laws governing single-member nonprofit LLCs. Ohio law states, in pertinent part, that "a single member limited liability company that operates with a nonprofit purpose…shall be treated as part of the same legal entity as its nonprofit member, and all assets and liabilities of that single member limited liability company shall be considered to be that of the nonprofit member." Ohio Rev. Code § 5701.14.

The Commission has historically deferred to the "well established principle[s] of [state] corporate law" when addressing the intricacies of corporate organizational structures,[1] and it should do the same here. For instance, in MUR 6102 (Georgianna Oliver), the Commission considered an allegation that a candidate loaned corporate funds to her own campaign.[2] The Commission drew heavily on principles of corporate law, but dismissed the case on the grounds that the candidate had, according to sworn testimony, followed corporate bylaws in distributing the funds.[3] In Advisory Opinion 1981-50, the Commission concluded that "[p]artnerships are generally recognized as a type of voluntary, unincorporated business organization pursuant to state law, and their legal character is determined with reference to state law."[4] Likewise, in Advisory Opinion 2008-05 (Holland and Knight), the Commission noted: "Neither the Act,

[1] Plaintiff Federal Election Commission's Motion for Summary Judgment, *FEC v. Kalogianis*, No. 06-68 (Feb. 28, 2007) at 18.
[2] *See* Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Cynthia L. Bauerly, Caroline C. Hunter and Donald F. McGahn II at 1 (Sept. 28, 2009), MUR 6102 (Georgianna Oliver).
[3] *Id*. at 6.
[4] Advisory Opinion 1981-50 (Hansell, Post, Brandon & Dorsey), at 2.

Commission regulations, nor the Act's legislative history define 'corporation' or 'partnership.' Instead, the Act's legislative history and Commission regulations rely on State law to distinguish a partnership from a corporation."[5] Lastly, the Commission's own "personal use" regulation explicitly mandates deference to "applicable state law" when determining a candidate's "personal funds."[6] In this case, the Commission should therefore defer to Ohio law's treatment of nonprofit LLCs when considering CREW's allegations.

In light of Ohio's treatment of a single-member nonprofit LLC as being "part of the same legal entity as its nonprofit member," where all assets of the nonprofit LLC are considered to be "that of the nonprofit member," CREW's argument that LZP "knowingly permitt[ed] its name to be used to effect a $175,000 contribution by Unknown Respondent (or Respondents) to Honor and Principles PAC" is facially defective. Compl. ¶19. Likewise, CREW's contention that "this appears to be a prototypical example of a conduit contribution scheme," (Compl. ¶2) also holds no water, as LZP and its nonprofit corporate member's assets are one in the same under Ohio state law, and there were more than enough of such assets to cover the contribution to HPP. In reality, LZP could not have effected the making of a contribution in the name of another to HPP because such a conduit arrangement is not possible where a nonprofit LLC and its sole nonprofit corporate member are considered the same legal entity with indistinguishable assets.

Further bolstering this conclusion is the fact that, under Ohio law, LZP is required to convey its property in its own name. Under Chapter 1705 of the Ohio Revised Code, which addresses Limited Liability Companies, "[r]eal and personal property owned or purchased by a limited liability company shall be held and owned in the name of the company," and "[c]onveyance of that property shall be made in the name of the company." Ohio Rev. Code § 1705.34. Therefore, not only did LZP make its contribution to HPP using its own assets that are legally indistinguishable from those of its nonprofit corporate member, but LZP was required to convey such property in its own name under Ohio corporate law.

The Ninth Circuit has concluded that "[a] straw donor contribution is an indirect contribution from A, through B, to the campaign. It occurs when A solicits B to transmit funds to a campaign in B's name, subject to A's promise to advance or reimburse the funds to B." *U.S. v. O'Donnell*, 608 F.3d 546, 549 (9th Cir. 2010). In this matter, there is no such straw donor arrangement because LZP made its contribution to HPP with its own funds, which are indistinguishable from those of its nonprofit corporate member, and Ohio law treats LZP and its nonprofit corporate member as "part of the same legal entity." Further, LZP was required to convey its contribution to HPP in its own name pursuant to Ohio Rev. Code § 1705.34. Applying

[5] Advisory Opinion 2008-05 (Holland and Knight), at 2.
[6] See 11 C.F.R. § 100.33(a) ("Amounts derived from any asset that, under applicable State law, at the time the individual became a candidate, the candidate had legal right of access to or control over…").

the Ninth Circuit's rationale above, there is no A and B in this matter—only A; and A made the contribution in question and was correctly reported as the donor on HPP's 2018 April Quarterly report.

Not surprisingly, CREW chooses to ignore these laws and facts, and instead opts to push conspiracy theories about "Unknown Respondents" being the true source of funds in this matter. Such propagandizing should be swiftly discarded by the Commission.

B. The Complaint Fails to Provide Any Evidence of an Earmarked Contribution

The Complaint asserts that one or more "Unknown Respondents" made an earmarked contribution to HPP by using LZP as an intermediary or conduit. Compl. ¶16. Specifically, the Complaint claims that "an unknown Respondent (or Respondents) appears to have made a $175,000 contribution to Honor and Principles PAC in the name of LZP in violation of 52 U.S.C. § 30122 and 11 C.F.R. § 110.4(b)" (Compl. ¶18) and that "LZP appears to have correspondingly violated 52 U.S.C. § 30122 and 11 C.F.R. § 110.4(b) by knowingly permitting its name to be used to effect a $175,000 contribution by Unknown Respondent (or Respondents) to Honor and Principles PAC." Compl. ¶19. Aside from the fact that such a conduit arrangement is legally untenable in this case under the state law analysis set forth above, CREW has also failed to provide any evidence to sustain an earmarking claim under the Commission's regulations and precedent.

A contribution is 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 or a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee." 11 C.F.R. § 110.6(b). In the past, the Commission has determined that contributions were earmarked where there was clear documentary evidence demonstrating a designation or instruction by the donor. *See* MURs 4831/5274 (Nixon) (finding contributions were earmarked where checks contained express designations on memo lines); MUR 6920 (American Conservative Union) (finding contributions were earmarked where American Conservative Union's ("ACU") Director of Operations characterized funds received from true donor as a "pass through," and ACU amended its 2012 IRS Form 990 to reflect donation from true donor as "a political contribution received by the Organization and promptly and directly delivered to a separate political organization."); *see also*, MUR 5732 (Matt Brown for U.S. Senate), MUR 5520 (Republican Party of Louisiana/Tauzin), MUR 5445 (Nesbitt), MUR 4643 (Democratic Party of New Mexico) (rejecting earmarking allegations where there was no evidence of a clear designation, instruction, or encumbrance by the donor), and MUR 5125 (Perry) (finding no earmarking because the complaint contained only bare allegations of earmarking, but showed no designation, instruction or encumbrance). The Commission has rejected earmarking claims even where the timing of the contributions at issue

appeared to be a significant factor, but the contributions lacked a clear designation or instruction. *See* MUR 5445 (Nesbitt) and MUR 4643 (Democratic Party of New Mexico).

In this case, any allegation of earmarking is irrelevant on its face because LZP used its own funds to make the cited contribution to HPP. However, even if LZP's contribution to HPP stemmed from a donation from another individual or entity, which it did not, the Complaint fails to provide any evidence that such "Unknown Respondent" made a transfer of funds to LZP, let alone a transfer that contained "designations, instructions and encumbrances" required for a violation of 52 U.S.C. § 30116(a)(8) and 11 C.F.R. § 110.6(b)(l). Moreover, LZP never received an express or implied, or written or oral instructions or designations from any mysterious "Unknown Respondent" with respect to the funds it used to make its contribution to HPP. The only purported evidence CREW cites to support its earmarking claim is the timing of LZP's contribution to HPP and its registration as a nonprofit LLC. However, this line of reasoning, based exclusively on the timing of a contribution, has been explicitly rejected by the Commission in the numerous enforcement matters referenced above. The Commission has made clear that "weak circumstantial evidence" such as "suspicious timing standing alone" is insufficient to justify a reason to believe finding.[7]

In short, LZP never received an earmarked contribution from anyone, as the funds it used to make the contribution to HPP were its own. CREW's argument, which relies solely on the timing of the cited contribution, amounts to mere conjecture and is not sufficient evidence on which to base an earmarking claim under the Commission's precedent.

C. The Commission's Recent Statements of Reasons Concerning LLC Contributions to Super PACs Do Not Contemplate Contributions from a Single-Member Nonprofit LLC with a Nonprofit Corporate Member.

As stated above, LZP made the contribution to HPP using its own assets, which are legally indistinguishable from those of its nonprofit corporate member because they are considered to be "part of the same legal entity." Ohio Rev. Code § 5701.14. The Commission has never addressed the attribution requirements of a Super PAC donor organized as a single-member nonprofit LLC with a nonprofit corporate member. In fact, all of the recent Statements of Reasons in matters alleging violations of 52 U.S.C. § 30122 and 11 C.F.R. § 110.4(b) by LLCs over the last several years have dealt with for-profit LLCs contributing to Super PACs.

[7] *See* MUR 5732 (Matt Brown for U.S. Senate), Statement of Reasons of Vice Chairman David G. Mason (May 10, 2007) (noting that "[t]he Commission has rejected investigating allegations of earmarking unsupported by evidence or where only weak circumstantial evidence existed…suspicious timing alone, without any indication in the record that contributors directed, controlled, or took action to earmark their contributions, was insufficient to find reason to believe a violation occurred…").

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Furthermore, all of these matters involved for-profit LLCs that chose to be taxed as a corporation or a disregarded entity, where the LLC's member or members consisted only of natural persons or statutory or living trusts. *See* MURs 6485 (W Spann LLC), 6487/6488 (F8 LLC), 6711 (Specialty Investments Group, Inc.), 6930 (SPM Holdings LLC), 6968 (Tread Standard LLC), 6995 (Right to Rise), 7014/7017/7019/7090 (DE First Holdings), 6969 (MMWP12 LLC), and 7031/7034 (Children of Israel LLC). None of these recent matters involved contributions to a Super PAC from a nonprofit LLC whose single member is a 501(c)(4) nonprofit corporation. Thus, this is a case of first impression.

Neither the Commission's regulations nor the guidance presented in any of the foregoing Statements of Reasons provide any clarity with respect to the attribution requirements applicable to a contribution to a Super PAC from a single-member nonprofit LLC with a nonprofit corporate member. Under the Internal Revenue Code (the "Code"), a single member LLC cannot elect to be classified as a partnership; instead, it may choose to be treated either as a corporation or to be disregarded as an entity separate from its owner. 26 C.F.R. § 301.7701-3(a). A single-member LLC that does not affirmatively elect treatment as a corporation is treated by default as a disregarded entity. *See* 26 C.F.R. §§ 301.7701-3(b)(1) and 7701-2(c)(2); *see also* Advisory Opinion 2009-02 (TPN), at 3.

Despite these classification provisions under the Code, the Commission's regulations state that, "[a] contribution by an LLC that elects to be treated as a partnership by the Internal Revenue Service pursuant to 26 CFR 301.7701-3, or does not elect treatment as either a partnership or a corporation pursuant to that section, shall be considered a contribution from a partnership pursuant to 11 CFR 110.1(e)." 11 C.F.R. § 110.1(g)(2). Section 110.1(e) of the Commission's regulations, which addresses "contributions by partnerships," states, in pertinent part, that "[a] contribution by a partnership shall be attributed to the partnership and to each partner…in direct proportion to his or her share of the partnership profits…" 11 C.F.R. § 110.1(e). With respect to contributions to Super PACs from for-profit LLCs that have one or more natural person members who share in the LLC's profits, these attribution requirements are quite clear. Indeed, then-Vice Chair Weintraub was correct when she said, "there should be no confusion that the law prohibits individuals from using such entities [referring to disregarded entities] to make contributions in the name of another."[8]

[8] Statement of Reasons of Vice Chair Ellen L. Weintraub, at 2, in the Matters of MURs 6969 (MMWP12 LLC) and 7031/7034 (Children of Israel), dated July 13, 2018, *available at* https://www.fec.gov/files/legal/murs/6969/6969_1.pdf.

For example, in MUR 6969, MMWP12 LLC was organized as a single member for-profit LLC whose sole member was K2M, an LLC taxed as a partnership and owned by Mark and Megan Kvamme through living trusts. Because MMWP12 LLC was organized for-profit, and its ultimate owners were natural persons who shared partnership profits, the Republican Commissioners concluded in their controlling Statement of Reasons that, "MMWP12's contributions should have been attributed to K2M and each of its owners, Mark and Megan Kvamme."[9]

Conversely, a single member nonprofit LLC with a nonprofit *corporate* member does not legally involve any natural persons or individuals. Moreover, by definition and law, a nonprofit LLC with a single 501(c)(4) nonprofit corporate member does not have profits. This is because a nonprofit LLC takes on the nonprofit characteristics of its sole nonprofit corporate member, and its activities must be in line with those of the nonprofit corporate member. *See* IRS Announcement 99-102, 1999-43 I.R.B. 545. In this case, LZP takes on the characteristics of its nonprofit corporate member, which is organized under 26 U.S.C. § 501(c)(4). Section 501(c)(4) of the Code makes clear that a social welfare organization is "not organized for profit" and does not permit any "net earnings [to] inure[] to the benefit of any private shareholder or individual." 26 U.S.C. § 501(c)(4)(A)-(B). The Commission's attribution regulation governing partnership contributions at 11 C.F.R. § 110.1(e) would therefore not be applicable in this matter because it requires attribution of underlying partners "in direct proportion to his or her share of partnership profits." In this case, there are simply no "partnership profits," so as a matter of law, no attribution of LZP's single nonprofit corporate member would be required.

Lastly, it should be noted that the Commission's regulations governing contributions by single member LLC's with natural person members at 11 C.F.R. 110.1(g)(4) would also not apply in this case because LZP's single member is not a natural person. The Commission has stated that its "regulations provide that contributions by an LLC with a single natural person member that does not elect to be treated as a corporation for Federal income tax purposes 'shall be attributable only to that single member.'" *See* 11 C.F.R. § 110.1(g)(4); Advisory Opinion 2009-02 (TPN), at 3. Because LZP's single member is a 501(c)(4) nonprofit corporation, this regulation is not applicable.

[9] Statement of Reasons of Chair Caroline C. Hunter and Commissioner Matthew S. Peterson at 5 in the Matters of MURs 6969 (MMWP12 LLC) and 7031/7034 (Children of Israel), dated September 13, 2018, *available at* https://www.fec.gov/files/legal/murs/6969/6969_2.pdf.

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In sum, the Commission has never addressed the attribution requirements for contributions to a Super PAC made by a single member nonprofit LLC with a nonprofit corporate member, which makes this a matter of first impression. As specified in the controlling Statements of Reasons in the LLC matters referenced above, "principles of due process, fair notice, and First Amendment clarity counsel against applying a standard to persons and entities that were not on notice of the governing norm."[10] In light of lack of clarity and guidance with respect to this type of LLC disclosure, the Commission should prudently exercise its prosecutorial discretion and dismiss the Complaint.

II. Conclusion

In presenting such a hollow argument, CREW identifies "no source of information that reasonably gives rise to a belief in the truth of the allegations presented." *See* MUR 4960, Commissioners Mason, Sandstrom, Smith and Thomas, Statement of Reasons (Dec. 21, 2001). CREW's partisan tactics have no place before the Commission, and the Complaint should be summarily dismissed.

In presenting politically-motivated and factually and legally unsubstantiated arguments, CREW has failed to demonstrate that LZP has violated any provision of the Act or the Commission's regulations. Instead, CREW has yet again invoked an administrative process as a means to continue its assault on its political opponents. The Complaint is based on malicious speculation and innuendo. We therefore respectfully request that the Commission recognize the legal and factual insufficiency of the Complaint on its face and immediately dismiss it.

Thank you for your consideration of this matter, and please do not hesitate to contact me directly at (202) 344-4522 with any questions.

Respectfully submitted,

James E. Tyrrell III
Counsel to LZP, LLC

[10] MURs 6485, 6487, 6488, 6711, and 6930, Statement of Reasons of Chairman Matthew S. Peterson and Commissioners Caroline C. Hunter and Lee E. Goodman, at 2.