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November 26, 2018

Jeff S. Jordan
Assistant General Counsel
Complaints Examination & Legal Administration
Federal Election Commission
1050 First Street, NE
Washington, DC 20463

VIA EMAIL: cela@fec.gov

Re: **MUR 7465: Fighting for Ohio Fund and Christopher Marston Response to Complaint**

Dear Mr. Jordan:

We are writing this letter on behalf of Fighting for Ohio Fund and Christopher Marston in his official capacity as treasurer (the “Committee”), in response to the Complaint filed in the above-referenced matter by Citizens for Responsibility and Ethics in Washington (“CREW”). The Complaint incorrectly alleges, based on nothing but speculation and innuendo, that Freedom Vote, Inc. (“FV”), a 501(c)(4) with no association with the Committee, acted as a conduit for contributions to the Committee for the purpose of concealing the names of the original donors. To reach this conclusion, CREW relies solely on the apparent similar timing and amount of donations FV received from its donors and made to the Committee, reasons which have been found insufficient to establish a reason to believe finding in recent enforcement matters.

The Federal Election Commission (the “Commission”) has explicitly stated that similarities in donation amounts and temporal proximity “are too speculative to support a reason to believe finding and justify further investigation.”¹ Indeed, 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.² Unwarranted legal conclusions from asserted facts or mere

¹ Factual & Legal Analysis, MUR 7246 (Loudermilk for State Senate).

² See 11 C.F.R. § 111.4(a), (d).

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speculation will not be accepted as true.³ Moreover, the Commission will dismiss a complaint when the allegations are refuted with sufficiently compelling evidence.⁴

As explained in more detail below, the allegations made in the Complaint do not support a reason to believe finding in this matter because they are nothing more than worst case speculation from a group (CREW) whose business model is based on ginning up allegations against conservative organizations. The Committee explicitly and unequivocally denies the allegations. Thus, the Commission should either dismiss the Complaint on its face, or find no reason to believe a violation of the Federal Election Campaign Act of 1971 (the “Act”) or the Commission’s regulations occurred with respect to the Respondents.

Factual Background and the Complaint

The Committee is an independent-expenditure only committee formed in 2015. Since its inception, the Committee has raised nearly \$10 million from almost one hundred separate contributors, including FV. The Committee has reported all its donors and other activity in full compliance with the Act.

The Complaint alleges seven “counts,” six of which have nothing to do with the Committee. In the lone count against the Committee, the Complaint alleges that “five of the six transfers FV made to [the Committee] during the time period covered by the organization’s 2015 tax return correspond to the exact amounts FV reported receiving” from its own donors.⁵ The Complaint alleges that because FV and the Committee used a common fundraising consultant, the Committee “knowingly” accepted contributions in the name of another, and failed to report the identities of the true source of the contributions in its reports to the Commission.

Legal Analysis and Discussion

The Act and Commission regulations prohibit knowingly accepting a contribution made by one person in the name of another.⁶ When one donors makes a pass-through contribution using a conduit donor, it is sometimes known as making an “earmarked” contribution. The Act and Commission regulations require political committees to report the identity of those who make earmarked contributions, as well as anyone who acted as conduits for the contributions.⁷

³ See MUR 4960, Commissioners Mason, Sandstrom, Smith and Thomas, Statement of Reasons (Dec. 21, 2001).

⁴ See *id.*

⁵ Compl. at 20-21.

⁶ 52 U.S.C. § 30122; 11 C.F.R. § 110.4(b).

⁷ 52 U.S.C. § 30104(b)(2); 11 C.F.R. § 104.3(a)(2), (j).

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Most of the Commission's guidance regarding conduit contribution schemes or earmarked contributions is in the context of contributions to a candidate's authorized committee. Under Commission regulations, 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 of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee."⁸ 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.⁹ 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.¹⁰ Indeed, the Commission has determined that "weak circumstantial evidence" such as "suspicious timing standing alone" is insufficient to justify a reason to believe finding.¹¹

Where the Commission has found reason to believe a conduit scheme existed, it required factors in addition to the timing of the contributions. In MUR 5119, the Office of General Counsel noted four factors in addition to suspicious timing that justified a reason to believe recommendation: (1) the correlation in the amounts of the contributions at issue; (2) correspondence between the respondents mentioning the contributions; (3) the recipient's initial disclosure of the contribution as being made by another contributor; (4) a statement by respondents "that seemed akin to an admission"; and (5) an apparent motive for making a contribution in the name of another because of the recipient's policy of not accepting PAC contributions.¹²

Although the similarities in amounts was an additional factor for consideration listed by OGC in MUR 5199, similarities in both timing and amount have been found to be insufficient evidence of a conduit scheme by the Commission. For instance, in MUR 7246, the Commission determined that "alleged temporal connections and similarities in amounts" were "too speculative to support a reason to believe finding and justify further investigation," particularly

⁸ 11 CFR § 110.6(b).

⁹ See MURs 4831/5274 (Nixon) (finding contributions were earmarked where checks contained express designations on memo lines); *see also*, MUR 5732 (Matt Brown for U.S. Senate), MUR 5520 (Republican Party of Louisiana/Tauzin), MUR 5445 (Davis), 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).

¹⁰ See MUR 5445 (Davis) and MUR 4643 (Democratic Party of New Mexico).

¹¹ See MUR 5732, Statement of Reasons of Vice Chairman David G. Mason (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").

¹² General Counsel's Report #2 at 1-2, MUR 5119.

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where “[s]ome of the alleged temporal connections involved contributions made months apart.”¹³ Moreover, in 7246, the Commission was unpersuaded by other circumstantial evidence that a violation may have occurred, including that the initial inaccurate reporting of the contributions in question by the recipient committee.¹⁴

Here, the temporal window for the alleged conduit contribution scheme here is over a year long, and the Complaint cannot point to any specific date when FV received the alleged conduit contributions. Although the Complaint attempts to tie the amounts of some of the donations from FV to the Committee, the amounts in question are common, round amounts. And finally, the only other “evidence” Respondent includes to support its allegation is that FV and the Committee used a common fundraiser. However, Respondent conveniently excludes the fact that the Committee used multiple fundraisers during the 2016 election, and FV and the Committee’s common fundraiser presumably had numerous other clients during that time period. The Complaint also ignores Commission guidance explaining that an agent of a committee may “wear multiple hats,” and “at different times act in his capacity as an agent on behalf of [one party] and act as an agent on behalf of [another party].”¹⁵ The Complaint’s thin speculation is well short of the level of specific, reliable evidence the Commission has required to support a reason to believe finding in matters involving similar allegations. There is no evidence of any intent on the part of the donors to hide their identities or that they directed FV to forward their contributions to the Committee, which is what the Commission has expressly stated is the type of information required to support a reason to believe finding.

To be clear, even if FV did in fact use the exact funds in question to make the contributions to the Committee, it would not create a violation of federal law. Instead, FV must have received the funds with the purpose of concealing the identities of the donors, and there is no information in the Complaint, or otherwise, to support such a finding. Moreover, in order to find that the Committee violated the law, there would have to be evidence supporting that it “knowingly” accepted contributions in the name of another, and again, there is no information to support such a finding. Instead, we have included a sworn declaration from the Committee rebutting the allegations in the Complaint. In light of the insufficiency of the allegations in the Complaint, and direct evidence to the contrary, the Commission must dismiss the Complaint on its face or find no reason to believe a violation occurred.

¹³ Factual & Legal Analysis at 7, MUR 7246 (Loudermilk for State Senate).

¹⁴ *Id.*

¹⁵ AO 2003-10; *see also* 67 Fed. Reg. at 49,083 (“Under the Commission’s final rules defining ‘agent,’ a principal can only be held liable for the actions of an agent when the agent is acting on behalf of the principal, and not when the agent is acting on behalf of other organizations or individuals. Specifically, it is not enough that there is some relationship or contact between the principal and agent; rather, that agent must be acting on behalf of the principal to create potential liability for the principal. This additional requirement ensures that liability will not attach due solely to the agency relationship, but only to the agent’s performance of the prohibited acts for the principal.”)

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Conclusion

It is clear that Complainant is attempting to further its own well-known agenda of wanting politically-engaged 501(c)(4) organizations to be required to publicly disclose their donors. To achieve that goal, it has resorted to filing baseless complaints against (right-leaning) political committees that have fully complied with all legal requirements. The Complaint here is only the most recent example. The Commission should decline to join Complainant on its requested fishing expedition, and dismiss the Complaint or find no reason to believe a violation occurred.

Thank you for your prompt consideration of this matter, and please do not hesitate to contact us directly at (202) 572-8663 with any questions.

Respectfully submitted,



Charles R. Spies

Derek H. Ross

*Counsel to Fighting for Ohio Fund and Christopher
Marston in is official capacity as treasurer*

DECLARATION OF CHRISTOPHER MARSTON

My name is CHRISTOPHER MARSTON. I have personal knowledge of the facts set forth herein, and declare as follows:

1. I am the Treasurer of Fighting for Ohio Fund (the "PAC").
2. As Treasurer, I am responsible for keeping all financial records for the PAC.
3. I have reviewed the Complaint in MUR 7465 and allegations therein and discussed them with the PAC's counsel.
4. Based on my personal knowledge and the information I have received from the PAC and its agents, it is my belief that the PAC did not receive, knowingly or otherwise, any contributions in the name of another or any contributions through conduit donors, including from Freedom Vote, Inc.
5. Based on my personal knowledge and the information I have received from the PAC and its agents, it is my belief that the PAC fully and accurately reported the true identities of all its contributors.
6. Based on my extensive experience as a treasurer, familiarity with all records related to the PAC, and consultation with PAC's agents and counsel, it is my belief that the PAC is in compliance with all federal laws and regulations.
7. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on this 26 day of November, 2018.

Chris Marston

Christopher Marston
Treasurer
Fighting for Ohio Fund

City: ALEXANDRIA

State: VIRGINIA

THE FOREGOING INSTRUMENT WAS
ACKNOWLEDGED BEFORE ME ON
THIS 26TH DAY OF NOVEMBER
2018, BY CHRISTOPHER MARSTON

Brenda Marie Hankins

My Commission Expires
7/31/2022

