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

Re: MUR 7585 and MUR 7588

Dear Mr. Jordan:

We write as counsel to the Lori Trahan for Congress Committee (the "***Committee***"), and Martha Howe, in her official capacity as Treasurer to the Committee (collectively, "***Respondents***"), in response to the complaint filed by Eugene T. Blake, dated March 15, 2019 (the "***MUR 7585 Complaint***"), and the complaint filed by the Campaign Legal Center and Richard A. Graham, dated March 27, 2019 (the "***MUR 7588 Complaint***," and collectively with the MUR 7585 Complaint, the "***Complaints***").[1]

The Complaints allege that some portion of the $371,000 in loans from Congresswoman Trahan to the Committee did not come from her "personal funds" and therefore constituted an excessive contribution under the Federal Election Campaign Act (the "***Act***"). This allegation is false. The loans in question came from two sources in the following amounts: a joint bank account maintained by Congresswoman Trahan and her husband ($300,000), and a home equity line of credit on a house owned jointly by Congresswoman Trahan and her husband ($71,000). Both sources are part of Congresswoman Trahan's "personal funds" under Commission regulations and, accordingly, were eligible to be drawn upon to make loans to the Committee.

MUR Complaint 7588 alleges that the Committee misreported the source of the contributions and should be penalized. Such an outcome would be inappropriate and inconsistent with Commission precedent. The Committee correctly reported the source of the $300,000 in loans from Congresswoman Trahan to the Committee. While the Committee mistakenly omitted the home equity line of credit as the source of the $71,000 loan on its initial filings with the Commission, the Committee had substantially disclosed the key elements of this loan before the 2018 general election and filed an amendment correcting the omission on its own once it learned

[1] Since these Complaints assert similar allegations, we are submitting one response on behalf of the Respondents. Ms. Christal Dennis confirmed via email that the Respondents could submit a singular response to both Complaints.

of the error and without any prodding from the Commission. In these circumstances, a penalty would be inappropriate.

The Commission should dismiss the Complaints and close the files.

I. Factual Background

Congresswoman Trahan was born and raised in a working-class family in Lowell, Massachusetts. The first in her family to graduate from college, Congresswoman Trahan earned a scholarship to play Division 1 volleyball at Georgetown University. Through hard work and innovation, she helped build a successful small business, the Concire Leadership Institute ("***Concire***"). From 2016 to 2018, Congresswoman Trahan earned $893,843 through Concire. Even the Complainant in MUR 7585, who spills copious amounts of ink demeaning the Congresswoman's accomplishments and hurling bizarre jeremiads in her direction, concedes that "Ms. Trahan made very significant income from Concire."

Congresswoman Trahan and her husband, David, have five children. They jointly own two homes valued at $1.4 million and $1.5 million, respectively. During the 2018 election cycle, they maintained two home equity lines of credit on the homes, the first worth up to $200,000 and the second worth up to $500,000. However, since the homes are largely unencumbered – with a mortgage under $100,000 on the $1.4 million home and no mortgage on the second home – the Trahans could have accessed an additional $2.1 million in further equity, as needed. Like many two-income households, the Trahans maintain joint bank accounts, one of which is maintained at Enterprise Bank (hereinafter, the "***Joint Account***"). The Congresswoman and her husband both contribute income from their respective businesses to the Joint Account. They have done so for years and they did so after Congresswoman Trahan declared her candidacy in 2017. The Trahans use the Joint Account to pay for familial expenses, small and large. As the spouse who earns most of the family's income each year, Mr. Trahan has historically contributed more to the Joint Account than the Congresswoman. That was true after Congresswoman Trahan declared her candidacy as well.

In 2018, Congresswoman Trahan made four significant loans to the Committee in amounts ranging from $50,000 to $200,000:

- On March 31, 2018, Congresswoman Trahan made a $50,000 loan designated for the primary election to the Committee from the Joint Account. *See* Lori Trahan for Congress, FEC Form 3, Report of Receipts and Disbursements at 102 (amended Aug. 8, 2018).

- On June 30, 2018, Congresswoman Trahan made a $50,000 loan designated for the primary election to the Committee from the Joint Account. *See* Lori Trahan for Congress, FEC Form 3, Report of Receipts and Disbursements at 235 (July 15, 2018).

- On August 23, 2018, Congresswoman Trahan made a $200,000 loan designated for the primary election to the Committee from the Joint Account. *See* Lori Trahan for Congress, FEC Form 3, Report of Receipts and Disbursements at 102 (amended Dec. 15, 2018).

- On September 4, 2018, Congresswoman Trahan made a $71,000 loan designated for the general election to the Committee from a home equity line of credit. *See id.*

The amount that Congresswoman Trahan earned from Concire in 2016 ($258,219), 2017 ($361,089), and 2018 ($274,535), combined with her one-half share of the home equity lines of credit and the one-half share of the $2.1 million of additional equity that she could have accessed through her homes, well exceeds the $371,000 in loans that she made to the Committee. At the time the loans were made, Congresswoman Trahan did not understand the law to treat funds from the Joint Account any differently than her Concire income or the joint equity line of credit. All these funds were her "personal funds." And, as we explain below, the Commission's resolution of several enforcement matters in recent years is consistent with that understanding.

The Committee omitted the home equity line of credit as the source of the $71,000 loan on the 2018 October Quarterly Report and two subsequent filings. After a review by the Committee's new law firm identified the error, the Committee immediately filed amendments correctly identifying the home equity line of credit as the source of the $71,000 loan to the Committee.

II. Legal Analysis

A. Congresswoman Trahan Used Personal Funds to Loan Funds to the Committee in Compliance with the Act

Federal law permits a candidate to "make unlimited expenditures from personal funds." 11 C.F.R. § 110.10. Because the loans in question came from Congresswoman Trahan's "personal funds," they complied with the Act.

1. The loans came from the Joint Account and a home equity line of credit, and there were sufficient funds in the Joint Account throughout 2018 to finance the loan.

As set forth above, Congresswoman Trahan loaned $300,000 to the Committee from the Joint Account and loaned another $71,000 to the Committee from a home equity line of credit.

The MUR 7585 Complaint alleges that "Ms. Trahan's FEC filings reveal that she did not have nearly the funds" to make the loans in question. Setting aside Complainant's apparent misunderstanding of which federal agency receives financial disclosure filings under the Ethics in Government Act, Complainant provides no credible basis for the claim. Without providing any citation, Complainant baldly asserts that "[u]pon questioning from several media

investigators, Ms. Trahan has provided no clarity." That is utterly false. As noted above, the loans came from two sources: the Joint Account and a home equity line of credit.

The MUR 7588 Complaint, meanwhile, suffers from a basic analytical error: presuming that a candidate's personal financial disclosure ("***PFD***") filing represents a full picture of the candidate's finances for the full election cycle. It does not. While the Joint Account had between $15,001 and $50,000 as of the close of the PFD reporting period, Congresswoman Trahan later clarified via amendment that the Joint Account's "[v]alue fluctuates" and that the "[h]ighest range of value in 2018 was $101,000 - $250,000." The MUR 7588 Complaint then makes yet another analytical error, concluding that the $250,000 represented the *total* amount of funds in the Joint Account available to Congresswoman Trahan (or her husband) to spend during the calendar year rather than the *highest* account balance. Of course, the total funds that move through a bank account in a given year will typically exceed the highest account balance because funds are spent throughout the year and the balance is thereby depleted. For example, a couple that deposits $50,000 per month in a joint account and spends $30,000 of it each month will have a maximum bank *balance* of $240,000, even though $600,000 was available to spend from that account during the calendar year. Simply put, there were sufficient funds in the Joint Account throughout the calendar year to finance the $300,000 loan.

The Act does not permit the Commission to find reason to believe that a violation occurred based on this kind of speculation and faulty math. For the Commission to find reason to believe that a violation occurred, a complaint must set forth sufficient specific facts which, if proven true, would constitute a violation of the law. *See* 11 C.F.R. § 111.4. "Unwarranted legal conclusions from asserted facts … or mere speculation … will not be accepted as true." Matter Under Review 4960, Statement of Reasons of Comm'rs Mason, Sandstrom, Smith, and Thomas (Dec. 21, 2000). Moreover, "[a] mere conclusory accusation without any supporting evidence does not shift the burden of proof to respondents." Matter Under Review 4850, Statement of Reasons of Comm'rs Wold, Mason, and Thomas (July 20, 2000). Here, the Complaints speculate based on news reports that there were insufficient funds in the Joint Account to finance the loan and offer erroneous arithmetic to support that speculation. What they have *not* offered is any concrete evidence to show that there were insufficient funds in the Joint Account to finance the $300,000 loan.

2. The funds used by Congresswoman Trahan to make the loan are "personal funds" under the Commission's regulations and precedents.

A candidate's "personal funds" include "[a]mounts derived from a portion of assets that are owned jointly by the candidate and the candidate's spouse as follows: (1) [t]he portion of assets that is equal to the candidate's share of the asset under the instrument of conveyance or ownership; provided, however, (2) [i]f no specific share is indicated by an instrument of conveyance or ownership, the value of one-half of the property." 11 C.F.R. § 100.33(c). Under that test, the $71,000 that Congresswoman Trahan used from the couple's home equity line of

credit constituted her "personal funds." Congresswoman Trahan owns a one-half interest in the house. Prior to her candidacy, the couple took out two home equity lines of credit worth up to $700,000 in total. *See* 11 C.F.R. § 100.83(a)-(b) (exempting amounts derived from a home equity line of credit from the definition of "contribution"). Under the regulations, up to $350,000 of the lines of credit constituted Congresswoman Trahan's "personal funds," which were eligible for use to finance her campaign. She only utilized $71,000 to finance the loan to the Committee, in full compliance with the Commission's regulations.

The $300,000 that Congresswoman Trahan loaned to the Committee from the Joint Account also constituted her "personal funds." The Joint Account is subject to Massachusetts banking law. Under Massachusetts law, "any part or all of the deposits and interest represented by joint accounts may be withdrawn, assigned or transferred in whole or in part by any of the individual parties." Mass. Gen. Laws Ann. ch. 167D, § 3(a). In other words, state law permits Congresswoman Trahan to withdraw *all* the funds deposited in the Joint Account.

Federal law permits her to do so as well. In a 1995 enforcement action, the Office of General Counsel concluded:

> Generally, joint bank accounts are the exception to the 'one-half interest rule' because each account holder has access to and control over the whole. For example, in MUR 2292, the General Counsel's Report, dated February 24, 1988, at 5, stated: "In a joint bank account where joint tenancy is established, each party has access to and control over the entire bank account, as either can withdraw any part, or the entire amount, of the funds from such account."

FEC Matter Under Review 3505/3560/3569 (Citizens for Ron Klink et. al.), General Counsel's Report (March 8, 1995), at 19. Later in the same opinion, the Office of General Counsel reiterated that "[t]he Commission has determined that bank accounts are an exception to the one-half interest rule and, thus, it is presumed that all funds in the joint account are the candidate's 'personal funds.'" *Id.* at 22.

In recent years, the Commission closed several matters after failing to find that a candidate's use of funds in a joint account violated the Act. During a 2006 audit, the Audit staff questioned a loan from the candidate to his campaign committee. *See* Final Audit Report of the Commission on Friends of Menor (May 10, 2006 to Dec. 31, 2006). The Audit staff found that the "funds were from the sale of stock belonging to the Candidate's spouse and were deposited into a joint personal account of the Candidate and his spouse." *Id.* at 8. The couple submitted an affidavit "explaining the couple's joint intent in making the loan." *Id.* at 9. The Commission's conclusion: "The Commission considered the extent to which the contribution limits … applied to the loan from funds of the Candidate's spouse that had first been deposited into a joint account of the spouse and the Candidate. ***The Commission determined that the contribution limits of the Act and Regulations did not apply to this loan***." *Id.* at 9 (emphasis added). Four commissioners

voted for this conclusion and two voted against it. *See* Vote Certification-Proposed Final Audit Report on Friends of Menor (Nov. 29, 2010).

In an enforcement action stemming from the 2014 election cycle, the Commission again failed to find that a candidate's use of funds in a joint account violated the Act. That case involved a Senate candidate who made $1.45 million in loans to her campaign from a joint checking account maintained with her spouse. The joint account was valued at only $50,001 to $100,000 at the time the campaign began. *See* Matter Under Review 6860 (Land), Office of General Counsel's Report (Feb. 26, 2015), at 9. The candidate's spouse admitted that he had deposited his income into the joint account during the election cycle. *Id.* at 10. Between the start of the campaign and the date of the first loan, the candidate's income was only $1,781 and her dividends from securities was at most $13,000. *Id.* The candidate had already drawn on her interest in a personal business to finance another loan. *Id.* So the factual record established that nearly all the funds in the joint account had come from the candidate's spouse. *Id.* Yet, on a 2-2 vote, the Commission did *not* find reason to believe that the candidate's use of these joint account funds to finance her campaign violated the Act. *See* Matter Under Review 6860 (Land), Notification to Land Committee (Sept. 23, 2016), at 1.

Finally, in another enforcement action from the 2014 election cycle, the Commission once again declined to find a violation when a candidate used $2.5 million in funds transferred by his spouse into a joint account to finance his campaign. There, the undisputed facts showed "that [the candidate] funded the loans to his campaign with money that originated from his wife's individually held account that she transferred to their joint bank account shortly before he declared his candidacy." Matter Under Review 6848 (Demos), Second General Counsel's Report (June 25, 2018), at 12. Moreover, the record also established that the couple had historically managed their finances via separate accounts until ten days before the candidate declared his candidacy, at which point a joint account was established and the candidate's spouse transferred $3 million of her personal funds to the joint account. *Id.* at 6-7. Yet, on a 2-2 vote, the Commission did *not* find that the candidate's use of these joint account funds violated the Act.

These precedents establish a clear rule: funds in a joint bank account maintained with a candidate's spouse are "personal funds" eligible to be used to finance the candidate's campaign. It is immaterial whether the candidate or the spouse originally deposited the funds in the joint account. Applying this rule to the matter at hand, the funds in the Joint Account were Congresswoman Trahan's "personal funds" and her loans to the Committee from the Joint Account complied with the Act and Commission regulations.

This rule is rooted in sound constitutional principles. The U.S. Supreme Court has consistently struck down laws that infringe upon a candidate's core First Amendment right to use personal funds to finance her campaign. *See, e.g. Davis v. FEC,* 554 U.S. 724 (2008). While the Supreme Court has upheld the government's right to limit contributions from family members, it signaled

that such a restriction rests on tenuous constitutional grounds. *See Buckley v. Valeo,* 424 U.S. 1, 53 (1976), *quoting Buckley v. Valeo,* 519 F.2d 821, 855 (D.C. Cir. 1975) ("the core problem of avoiding undisclosed and undue influence on candidates from outside interests has lesser application when the monies involved come from the candidate himself or his immediate family.").

Those grounds have only grown shakier in recent years. In 2014, the Supreme Court held that contribution limits are permissible only where they "target what we have called 'quid pro quo' corruption or its appearance. That Latin phrase captures the notion of a direct exchange of an official act for money." *McCutcheon v. FEC,* 572 U.S. 185, 192, (2014) (citations omitted). The requirement that a regulation target the risk of actual *quid pro quo* corruption or its appearance calls into serious question whether the ban on spousal contributions can withstand constitutional scrutiny. Of course, it is not the Commission's role to anticipate how the Supreme Court will opine in a hypothetical case. However, it is the Commission's responsibility to adopt rules that balance statutory restrictions (in this case, the restriction on intrafamilial contributions) with constitutional rights (in this case, the right to make unlimited expenditures from personal funds). A rule that restricts a spouse from using funds in a joint account – funds that she has an unambiguous right to withdraw and use under state law, without consent from other parties – would directly infringe on that constitutional right.

The allowance for a candidate's use of funds in a joint account co-owned by a spouse is also grounded in the regulation treating "[g]ifts of a personal nature that had been customarily received by the candidate prior to the beginning of the election cycle" as part of the candidate's "personal funds." *See* 11 C.F.R. § 100.33(b)(6). As noted above, the Trahans had established a multi-year pattern of using the Joint Account to pay for familial expenses. The use of the Joint Account by Congresswoman Trahan to loan funds to her Committee is consistent with the pattern. *See* Matter Under Review 5724 (Feldkamp), Statement of Reasons of Vice Chairman Petersen and Comm'r Hunter ("[A]ll that is necessary for a monetary gift to be considered a candidate's personal funds, rather than a contribution to the candidate, is that a custom of gift-giving was established prior to any candidacy … [N]either the regulations nor the statute require gifts to be identical or substantially similar in magnitude or form to pre-candidacy gifts.").

3. These precedents compel the Commission to dismiss the allegation that the loans from the Joint Account violated the Act and Commission regulations.

Based on these precedents, the Commission must dismiss the allegation that the loans from the Joint Account violated the Act and Commission regulations. It is true, as the Office of General Counsel recently observed, that the Commission "has not always been consistent in how it determines how much of the funds in a joint account are the personal funds of the candidate." Matter Under Review 6848 (Demos), Second General Counsel's Report, at 11. And disagreement undoubtedly exists among the commissioners on the legal question. *See, e.g.* Matter Under Review 6848 (Demos), Statement of Reasons of Chair Weintraub (Feb. 1, 2018).

Nonetheless, once the Commission established a clear pattern of non-enforcement with respect to candidate loans from a joint account, it cannot find reason to believe that a violation occurred in this matter.

Finding a violation here, after not finding a violation in the previous matters, would raise serious due process concerns. The Supreme Court has affirmed that "[w]hen speech is involved," agencies must demonstrate "rigorous adherence" to two related principles: that "regulated parties should know what is required of them so that they may act accordingly" and that "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *FCC v. Fox Television Stations, Inc.*, 132 S.Ct. 2307, 2317 (2012). In accordance with this judicial dictate, the Commission has rejected invitations to proceed with enforcement actions after a pattern of non-enforcement has been established. *See* Statement of Reasons of Comm'r Mason, Matters Under Review 4568, 4633, 4634, and 4736 (Jan. 22, 2003) ("Fundamental fairness is also implicated here by the principle of treating like cases alike. The Commission would be exposed to attack if it went forward as to these particular respondents because our actions are subject to judicial review by the arbitrary and capricious standard under the Administrative Procedure Act. A Commission decision will be considered arbitrary if we 'treat like cases differently.'"); Statement of Reasons of Chairman Mason and Comm'rs Wold and Smith, Matter Under Review 4994 (Jan. 11, 2002) ("Proceeding in this case at this time would be unfair to the respondents because it would be exceedingly difficult, if not impossible, to explain why the Commission decided to proceed against them but not to proceed in at least some of the cases cited above. The Commission has an obligation to avoid disparate treatment of persons in similar circumstances."). The importance of consistently applying precedents is particularly relevant in this area of the law, which several commissioners once described as so "hopelessly muddled" that a rulemaking should be required before any additional enforcement takes place. *See* Matter Under Review 5724 (Feldkamp), Statement of Reasons of Vice Chairman Petersen and Comm'r Hunter.

The Commission's closure of the file in these three matters, without a finding of a violation, compels the same result here.

B. Since the Committee's Loan Reporting Was "Substantially Correct" and Simply a Technical Violation of the Act and Commission Regulations, the Committee Asks the Commission to Dismiss this Violation Without Penalty

The MUR 7588 Complaint also alleges that the Committee failed to properly disclose the home equity line of credit and contends that a civil penalty should be imposed. That argument is unpersuasive. In past matters, the Commission has *not* imposed a civil penalty when the Committee timely disclosed the loan amount but inadvertently omitted the bank as the source of the loan and the loan terms.

That is precisely what happened here. The Committee's original 2018 FEC October Quarterly Report correctly reported the loan amount ($71,000), the date the loan was incurred, and the election for which the loan was designated. *See* Lori Trahan for Congress, FEC Form 3, Report of Receipts and Disbursements at 155 (Oct. 15, 2018). The Committee did not understand that it also had to file the Schedule C-1 disclosing the bank as the source of the loan and the loan terms. After a review by the Committee's new law firm identified the omission, the Committee immediately filed amendments (including Schedule C-1) correctly identifying the home equity line of credit as the source of the $71,000 loan to the Committee. The Committee filed these amendments on its own volition *prior to the filing of any complaint. See* Lori Trahan for Congress, FEC Form 3, Report of Receipts and Disbursements at 102, 160 (amended Dec. 15, 2018).

In Matter Under Review 5198 (Cantwell), Senator Cantwell's campaign had inadvertently failed to file a Schedule C-1 disclosing the bank as the source of the funds that she had personally received and then loaned to her campaign. The campaign then filed an amendment correcting the omission. The Office of General Counsel concluded that "[i]n light of the recommendations to find no reason to believe concerning the core allegations in the complaint that the loans were prohibited corporate contributions, and given that the reporting errors appear to have been inadvertent and the Cantwell Committee took prompt corrective action before the initiation of this matter, this Office recommends that the Commission send an admonishment letter … and close the file." *See* Matter Under Review 5198 (Cantwell), First General Counsel's Report (Jan. 7, 2004), at 15. The Commission unanimously approved this recommendation and did *not* impose a civil penalty. Matter Under Review 5198 (Cantwell), Notification of Cantwell 2006 and Keith Grinstein, Treasurer (Jan. 22, 2004).

Likewise, in Matter Under Review 6386 (Fincher), the Commission lacked sufficient votes to impose a civil penalty against a campaign committee that "properly reported that it had received a loan, but … [failed] to report the bank as the source of that loan as well as the loan terms." Matter Under Review 6386 (Fincher), Statement of Reasons of Vice Chair Hunter and Comm'rs McGahn and Petersen (Sept. 15, 2011), at 1. The commissioners who voted against imposing a civil penalty noted that "[i]n similar matters in the past … absent other harm, the Commission has not demanded civil penalties for this type of reporting error." *Id.* Therefore, these commissioners concluded, "although we had reason to believe the reporting of the loan at issue did not meet all the technical requirements of Commission regulations, we did not seek a civil penalty, consistent with Commission precedent and the Commission's prosecutorial discretion." *Id.* Meanwhile, the commissioners who voted to impose a penalty in Fincher justified the decision by the committee's failure to correct the report before the receipt of the complaint. *See* Matter Under Review 6386 (Fincher), Statement of Reasons of Chair Walther and Comm'rs Bauerly and Weintraub (July 21, 2011), at 3. In this matter, of course, the Committee *did* amend its report before a complaint was received.

Therefore, Commission precedent dictates that no civil penalty be imposed. The Committee timely disclosed the loan amount in question. When it discovered its error in having failed to file the Schedule C-1, the Committee amended its filing promptly and *before* any complaint was received. Accordingly, the Commission should close the file without imposing a civil penalty for this inadvertent omission.

III. Conclusion

As described herein, the Complaints do not state any facts, which, if proven true, would constitute a significant violation of the Act. Accordingly, the Commission should reject the Complaints' requests for an investigation, find no reason to believe that a violation of the Act or Commission regulations has occurred, and immediately dismiss these matters.

Very truly yours,

Kate Sawyer Keane
Jonathan S. Berkon
Counsel to Respondents