

1 **FEDERAL ELECTION COMMISSION**

2 **FIRST GENERAL COUNSEL'S REPORT**

3 **MUR: 7606**

4 DATE COMPLAINT FILED: May 6, 2019

5 DATE OF NOTIFICATION: May 13, 2019

6 LAST RESPONSE RECEIVED: July 2, 2019

7 DATE ACTIVATED: September 4, 2019

8 EARLIEST SOL: March 13, 2024

9 LATEST SOL: March 19, 2024

10 ELECTION CYCLE: 2020

11 **COMPLAINANT:**

12 Daniel Rufty

13 **RESPONDENTS:**

14 Committee to Elect Leigh Brown and Joseph Clark
15 in his official capacity as treasurer

16 Leigh Brown

17 National Association of Realtors Political Action

18 Committee and John R. Flor in his official

19 capacity as treasurer

20 **RELEVANT STATUTES**

21 **AND REGULATIONS:**

22 52 U.S.C. § 30104(b)

23 52 U.S.C. § 30116(a)

24 52 U.S.C. § 30116(f)

25 11 C.F.R. § 109.20

26 11 C.F.R. § 109.21

27 **INTERNAL REPORTS CHECKED:**

28 Disclosure reports

29 **FEDERAL AGENCIES CHECKED:**

30 None

31 **I. INTRODUCTION**

32 The Complaint alleges that the National Association of Realtors Political Action
33 Committee (“NAR PAC”) coordinated television and print advertising with Leigh Brown and the
34 Committee to Elect Leigh Brown and Joseph Clark in his official capacity as treasurer (“Brown
35 Committee”), constituting unreported and illegal in-kind contributions by NAR PAC.¹ All of the
36

¹ Compl. at 1, 3 (May 6, 2019).

1 Respondents filed responses to the Complaint and deny that they violated the Federal Election
2 Campaign Act of 1971, as amended (the “Act”).

3 As set forth below, we recommend that the Commission dismiss the allegations that NAR
4 PAC violated 52 U.S.C. §§ 30116(a) and 30104(b), that the Brown Committee violated
5 52 U.S.C. §§ 30116(f) and 30104(b), and that Leigh Brown violated 52 U.S.C. § 30116(f).
6 Finally, we recommend that the Commission close the file in this matter.

7 **II. FACTS**

8 NAR PAC is registered with the Commission as a separate segregated fund connected to
9 the National Association of Realtors (“NAR”).² It makes contributions to candidates and
10 political committees and makes independent expenditures through a separate account.³ Leigh
11 Brown was a 2019 congressional candidate in North Carolina’s Ninth Congressional District for
12 the special election held on May 14, 2019. The Brown Committee is her principal campaign
13 committee.⁴

14 The Complaint alleges that Brown served as NAR Party Fundraising Liaison prior to her
15 candidacy. The Complaint states that Brown resigned from her NAR position on March 13,
16 2019, and announced her candidacy for the North Carolina Ninth Congressional District special
17 election two days later.⁵ The Complaint cites a press article in the *Charlotte Observer* reporting
18 that NAR PAC was planning to spend as much as \$900,000 on ads supporting Brown and that
19 Ninth Congressional District voters received letters from NAR urging them to “Vote Leigh

² See NAR PAC Amended Statement of Organization (Jan. 7, 2019).

³ *Id.*

⁴ See Brown Committee Statement of Organization (Mar. 30, 2019).

⁵ Compl. at 1-2. Brown lost the primary election on May 14, 2019.

1 Brown for [C]ongress [in the] Republican Primary May 14th.”⁶ The Complaint concludes that
2 the Commission’s three-part coordination test is satisfied because of Brown’s status as an NAR
3 employee shortly before the NAR PAC communication in support of her candidacy.⁷ The
4 Complaint alleges that “the timing of the advertising makes the coordination obvious” and “the
5 close proximity in timing makes the coordination self-evident.”⁸

6 From April 17 through April 19, 2019, NAR PAC filed three 48-Hour Notices of
7 Independent Expenditures supporting Brown in amounts totaling \$1,296,905.⁹ Among the
8 disbursements are direct mail costs, Facebook advertisements, administrative consulting, TV
9 buys and production costs, and polling costs.¹⁰ On April 17, 2019, NAR PAC made a
10 contribution to the Brown Committee in the amount of \$5,000.¹¹

11 Respondents deny that they engaged in coordinated activity regarding the
12 communications at issue. NAR PAC argues that Brown’s voluntary role as a Fundraising
13 Liaison “in no way compromised the independence of [NAR PAC’s] independent expenditures
14 in support of Leigh Brown’s candidacy,” as its decision to support Brown was “made following
15 pre-established policies premised on preserving independence and weeks after Leigh Brown
16 resigned her role as [Fundraising Liaison],” and Brown never possessed or had access to
17 information related to the independent expenditures.¹² NAR PAC also attached a sworn affidavit

⁶ Compl. at 2, Ex. 3.

⁷ *Id.* at 2-3.

⁸ *Id.* at 3.

⁹ See 48-Hour Notices of Independent Expenditures (Apr. 17, 2019, Apr. 18, 2019, and Apr. 19, 2019).

¹⁰ *Id.*

¹¹ See Brown Committee Amended 2019 Pre-Special Report at 184 (July 15, 2019).

¹² Response of the National Association of Realtors Political Action Committee (“NAR PAC Resp.”) at 7-8 (July 2, 2019).

1 from NAR Director of Public Advocacy Lisa Friday Scott, who described the process by which
2 NAR PAC approved the making of the expenditures supporting Brown on April 5, 2019.¹³ Scott
3 declares that Brown never participated in the process to review or approve any NAR PAC
4 expenditures or disbursements.¹⁴

5 In her own affidavit, Brown attests that she did not discuss with any representative or
6 official of either NAR or NAR PAC “prior to resigning [her] position, or after,” any public
7 communications to be distributed by those entities in connection with the special election.¹⁵
8 Brown also declares that she “did not share any non-public information about [her] campaign
9 plans, projects, activities, strategies, or needs with any representative or official of the [NAR or
10 NAR PAC].”¹⁶ Brown further attests that she “did not see any such public communications prior
11 to their public distribution” and first learned of the NAR PAC advertising buy for her election
12 when a reporter contacted her on or about April 12, 2019, seeking comment.¹⁷

13 Respondents further assert that Brown was never an employee of NAR or NAR PAC but
14 rather served as a volunteer role as NAR’s “Party Fundraising Liaison,” and her role was limited
15 to fundraising activities.¹⁸

¹³ *Id.*, Ex. 1.

¹⁴ NAR PAC Resp., Lisa Friday Scott Aff. ¶ 16.

¹⁵ Joint Response of Leigh Brown and the Committee to Elect Leigh Brown (“Brown Resp.”) at 3-4 (June 3, 2019), Leigh Brown Aff. ¶ 9.

¹⁶ *Id.* at ¶ 13.

¹⁷ *Id.* at ¶¶ 10, 12.

¹⁸ NAR PAC Resp. at 1, 6; Brown Resp., Brown Aff. ¶¶ 4, 5, 6.

1 **III. LEGAL ANALYSIS**

2 The Act defines the terms “contribution” and “expenditure” to include “anything of
3 value” made by any person for the purpose of influencing an election.¹⁹ The term “anything of
4 value” includes in-kind contributions.²⁰ In-kind contributions result when goods or services are
5 provided without charge or at less than the usual and normal charge,²¹ and when a person makes
6 an expenditure in cooperation, consultation or in concert with, or at the request or suggestion of a
7 candidate or the candidate’s authorized committee or their agents.²²

8 Under Commission regulations, expenditures for “coordinated communications” are
9 addressed under a three-prong test at 11 C.F.R. § 109.21.²³ Specifically, a communication is
10 coordinated and treated as an in-kind contribution when: (1) it is paid for by someone other than
11 a candidate, a candidate’s authorized committee, a political party committee, or the authorized
12 agents of either (the “payment prong”); (2) it satisfies one of five content standards (the “content
13 prong”); and (3) it satisfies one of five conduct standards (the “conduct prong”).²⁴ A communication
14 must satisfy all three prongs to be considered coordinated.²⁵

15 No multicandidate political committee shall make contributions to any candidate or his or
16 her authorized committee with respect to any election for Federal office that in the aggregate

¹⁹ 52 U.S.C §§ 30101(8)(A)(i), 30101(9)(A)(i).

²⁰ 11 C.F.R. § 100.52(d).

²¹ *Id.*

²² 52 U.S.C. § 30116(a)(7)(B); 11 C.F.R. § 109.20. *See also Buckley v. Valeo*, 424 U.S. 1, 46-47 (1976).

²³ *Id.* § 109.20(a); *see also* 52 U.S.C. § 30116(a)(7)(B)(i).

²⁴ 11 C.F.R. § 109.21(a); *see also id.* § 109.21(b) (describing in-kind treatment and reporting of coordinated communications); *id.* §§ 109.21(c), (d) (describing content and conduct standards, respectively). A sixth conduct standard describes how the other conduct standards apply when a communication republishes campaign materials. *See id.* § 109.21(d)(6).

²⁵ *See* 11 C.F.R. § 109.21; *see also* Explanation and Justification, *Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 453 (Jan. 3, 2003).

1 exceed \$5,000.²⁶ No candidate or political committee shall knowingly accept any contribution
2 or make any expenditure in violation of the provisions of 52 U.S.C. § 30116.²⁷ The Act requires
3 committee treasurers to file reports of receipts and disbursements in accordance with the
4 provisions of 52 U.S.C. § 30104, and the reports must include, *inter alia*, the total amount of
5 receipts and disbursements, including the appropriate itemizations, where required.²⁸

6 NAR PAC concedes that the first two prongs of the coordination test are satisfied because
7 it paid for express advocacy communications in support of Brown's candidacy.²⁹ As to the
8 conduct prong, the Complaint alleges that NAR employed Brown within 120 days of the
9 communication, thus, the "former employee" element of the conduct prong is implicated.³⁰
10 Under the Commission's regulations, the conduct prong may be satisfied where the payor
11 employed a former employee or independent contractor of the candidate who used or conveyed
12 material information about the campaign's plans, projects, activities or needs, or used material
13 information gained from past work with the candidate to create, produce, or distribute the
14 communication.³¹

15 Here, the Complaint does not allege any specific conduct by the parties that they shared
16 information about the Brown campaign's plans, projects, activities, or needs. Rather, the
17 Complaint bases its coordination allegation on the timing of Brown's involvement with NAR
18 and NAR PAC's communications. That conduct standard, however, applies to a situation in

²⁶ See 52 U.S.C. § 30116(a)(2)(A).

²⁷ See 52 U.S.C. § 30116(f).

²⁸ 52 U.S.C. § 30104(a)(1), 30104(b); 11 C.F.R. § 104.3.

²⁹ NAR PAC Resp. at 5.

³⁰ See Compl. at 3.

³¹ 11 C.F.R. § 109.21(d)(5).

1 which the former employee or independent contractor of the candidate subsequently becomes
2 employed by the payor, or is the payor.³² Brown, on the other hand, stopped working for the
3 payor to become a federal candidate, and the former employer later paid for the communications.
4 Thus, by its terms, the former employee standard does not apply.

5 As to the other conduct standards, Respondents deny any coordination occurred and have
6 submitted affidavits declaring that there were no discussions between Brown and either NAR
7 entity that might support a coordination finding on any other aspect of the conduct prong.³³
8 While these affidavits do not entirely foreclose the possibility that Brown Committee personnel
9 or other agents of Brown could have communicated with the NAR PAC, we have no information
10 to that effect. Thus, in light of the lack of factual support in the Complaint or other available
11 information, there is not a reasonable inference that the conduct prong was satisfied.

12 Accordingly, we recommend that the Commission dismiss the allegation that the National
13 Association of Realtors Political Action Committee and John R. Flor in his official capacity as
14 treasurer violated 52 U.S.C. §§ 30116(a) and 30104(b) by making and failing to report excessive
15 in-kind contributions in the form of coordinated communications. We also recommend that the
16 Commission dismiss the allegation that the Committee to Elect Leigh Brown and Joseph Clark in
17 his official capacity as treasurer violated 52 U.S.C. §§ 30116(f) and 30104(b) by receiving and
18 failing to report the alleged excessive contributions. Additionally, we recommend that the
19 Commission dismiss the allegation that Leigh Brown violated 52 U.S.C. § 30116(f) by receiving

³² See 11 C.F.R. § 109.21(d)(5)(i).

³³ See 11 C.F.R. § 109.21(d)(1), (2), (3) (conduct standards). See also NAR PAC Resp., Scott Aff. ¶ 16; Brown Resp., Brown Aff. ¶¶ 9, 11-13.

1 the alleged excessive contributions. Finally, we recommend that the Commission close the file
 2 in this matter.

3 **IV. RECOMMENDATIONS**

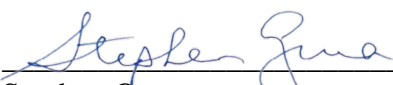
- 4 1. Dismiss the allegation that National Association of Realtors Political Action
 5 Committee and John R. Flor in his official capacity as treasurer violated 52 U.S.C.
 6 §§ 30116(a) and 30104(b) by making and failing to report excessive in-kind
 7 contributions in the form of coordinated communications;
- 8 2. Dismiss the allegation that the Committee to Elect Leigh Brown and Joseph Clark in
 9 his official capacity as treasurer violated 52 U.S.C. §§ 30116(f) and 30104(b) by
 10 receiving and failing to report excessive in-kind contributions from the National
 11 Association of Realtors Political Action Committee in the form of coordinated
 12 communications;
- 13 3. Dismiss the allegation that Leigh Brown violated 52 U.S.C. § 30116(f) by receiving
 14 excessive in-kind contributions from the National Association of Realtors Political
 15 Action Committee in the form of coordinated communications;
- 16 4. Approve the attached Factual and Legal Analysis;
- 17 5. Approve the appropriate letters; and
- 18 6. Close the file.

19 Lisa J. Stevenson
 20 Acting General Counsel

21 Charles Kitcher
 22 Acting Associate General Counsel for Enforcement

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 26 12.03.19

27 Date



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