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November 25, 2019

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BY MESSENGER AND EMAIL

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

2019 NOV 26 PM 4: 40
OFFICE OF
GENERAL COUNSEL

Re: Matter Under Review 7647

Dear Mr. Jordan:

We write as counsel to the Democratic National Committee (the “DNC” or “Committee”), and William Derrough, in his official capacity as Treasurer (together, “Respondents”), in response to the Complaint filed by the Committee to Defend the President on September 27, 2019 (the “Complaint”), in the above-referenced matter. Because the Complaint fails to set forth facts that, if true, would constitute a violation by Respondents of the Federal Election Campaign Act of 1971 (the “Act”), as amended, the Federal Election Commission (“FEC” or “Commission”) should immediately dismiss the Complaint and close the file.

LEGAL ANALYSIS

The Complaint claims that a DNC consultant, Alexandra Chalupa, solicited and received contributions from foreign nationals in the form of information and personal services, and that the DNC authorized and was aware of Ms. Chalupa’s activities.¹ The Complaint is riddled with factual inaccuracies and unsupported allegations and, even if accepted as true, alleges no facts sufficient to show that Ms. Chalupa acted on behalf of the DNC while seeking help from any foreign national. To the contrary, the news articles relied on by the Complaint show that Ms. Chalupa also represented other clients, first met with the Ukrainian Embassy to plan a reception that had nothing to do with the DNC, and had a personal interest in Russian and Ukrainian issues that led her to pursue them after leaving the DNC. Moreover, Ms. Chalupa’s agreements with the DNC, which the DNC has voluntarily produced, show that her duties did not include the sort of research in which she was purportedly engaged on its behalf; that she was barred from communicating with the press, as the Complaint suggests she did; and that she was strictly required to comply with the financing restrictions that apply to the DNC, including the prohibition on soliciting, accepting, or

¹ See Compl. at ¶¶ 16-19.

Federal Election Commission
 November 25, 2019
 Page 2

receiving a foreign national contribution. And, contrary to the Complaint's baseless and politically motivated assertions, the allegations that the DNC solicited Ukrainian nationals for information has been repeatedly denied and debunked.² For example, the author of one of the articles on which the Complaint relies heavily in making its allegations has publicly stated that Ms. Chalupa was not representing the DNC in meeting with Ukrainian officials.³ Fox News, in writing about the Complaint in this matter, noted that the Complaint overlooked that journalist's statement that Ms. Chalupa's alleged contact with foreign officials was *not* on behalf of the DNC.⁴ The Ukrainian Embassy has also confirmed its communications with Ms. Chalupa were not in her capacity as a consultant for the DNC.⁵ Nowhere does the Complaint acknowledge these facts.

These allegations come at a time when President Trump is actually and publicly requesting foreign meddling in our elections. The Complaint, full of unsubstantiated claims denied by the very articles it cites as support, is nothing more than a brazen attempt to force a false equivalency narrative that has been credibly and consistently rebutted by the DNC, Ms. Chalupa, the Ukrainian Embassy, PolitiFact, and the journalist who first published the allegations at the heart of this matter.

"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]."⁶ "Unwarranted legal conclusions from asserted facts" or "mere speculation" are not accepted as true.⁷ Finally, a complaint may be dismissed if its allegations are refuted with sufficiently compelling evidence provided in response, or available from public sources.⁸ Because unsubstantiated claims and overt misrepresentations pervade the Complaint, and because it does not sufficiently allege that Ms. Chalupa solicited any contribution from any foreign national on behalf of the DNC, the Commission should find no reason to believe the DNC violated any law and close the file.

² See Bill McCarthy, *Fact-checking Charlie Kirk's misleading tweet about Democrats, Ukraine*, POLITIFACT (Oct. 3, 2019), <https://www.politifact.com/punditfact/statements/2019/oct/03/charlie-kirk/fact-checking-charlie-kirks-misleading-tweet-about/>; Dan Merica, *First on CNN: Former DNC contractor denies working with Ukrainian officials on anti-Trump research*, CNN (July 14, 2017), <https://www.cnn.com/2017/07/14/politics/dnc-contractor-ukraine-alexandra-chalupa-trump/index.html>.

³ See Kenneth P. Vogel (@kenvogel), TWITTER (July 12, 2017, 9:58 AM) ("1 more pt: DNC consultant WAS NOT repping DNC in mtgs with [Ukrainian flag] officials, while DJT, Jr. WAS repping Dad's campaign in mtg w/ [Russia flag]-linked atty."), <https://twitter.com/kenvogel/status/885181638929526785>.

⁴ See Andrew Keiper, *Pro-Trump super PAC files FEC complaint against DNC over Ukraine outreach*, FOX NEWS (Sept. 30, 2019), <https://www.foxnews.com/politics/dnc-hit-with-fec-complaint-for-2016-research-into-manafort>.

⁵ See Gregg Re, *Ukraine embassy says DNC operative reached out for information on Trump campaign in 2016*, FOX NEWS (May 2, 2019), <https://www.foxnews.com/politics/ukraine-embassy-dnc-operative-trump-dirt-2016>.

⁶ FEC Matter Under Review 4960 (Clinton for U.S. Exploratory Committee), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas at 1 (Dec. 21, 2000).

⁷ *Id.* at 2.

⁸ *See id.*

Federal Election Commission
 November 25, 2019
 Page 3

I. Ms. Chalupa Did Not Solicit Foreign Nationals on Behalf of the DNC

A. Ms. Chalupa's Contract with the DNC Barred Her from the Conduct Alleged in the Complaint

While Ms. Chalupa was a DNC consultant, her work involved none of the activities that the Complaint claims to have resulted in prohibited solicitations or contributions. The DNC initially retained Ms. Chalupa in 2014. The DNC retained her again in 2015 as a part-time, independent contractor exclusively to engage in outreach to American ethnic communities.⁹ The articles cited by the Complaint acknowledge that Ms. Chalupa had other clients, as well as a personal interest in Russian and Ukrainian affairs.¹⁰

The DNC engaged Ms. Chalupa in 2015 to support its Ethnic Council, which is one of its many regional and constituency-based caucuses and councils. These sub-entities play a central role in the DNC's recruitment of volunteers and members, the targeting of communications, and political outreach to constituencies. For instance, caucuses and councils convene roundtables and meetings for members and interested parties, organize events, develop and distribute "tool kits" and other resources, train and identify leaders, and recruit volunteers and other members. The councils and caucuses allow individuals across the country to engage with the DNC on issues that are of importance to them, and enhance the flow of communications and ideas within the Committee. Besides geographic regional groups, examples of the Committee's councils and caucuses include the Black Caucus, the AAPI Caucus, the Hispanic Caucus, the LBGT Caucus, the Women's Caucus, the Disability Council, the Labor Council, the Native American Council, the Rural Council, the Senior Council, the Small Business Council, the Veterans & Military Families Council, and the Youth Council.

The DNC engaged Ms. Chalupa to provide the following services for the Ethnic Council, none of which relate in any way to engaging with foreign governments or developing research:

- Scheduling, organizing, and executing "five Ethnic Roundtables."

⁹ See FEC Matter Under Review 7271 Exhibit A, Political Consulting Agreement between Alexandra Chalupa and DNC Services Corporation/Democratic National Committee, effective June 22, 2015 ("Consultant Agreement"). The DNC additionally had previous and subsequent amendment agreements with Ms. Chalupa, which were materially the same. See Political Consulting Agreement between Alexandra Chalupa and DNC Services Corporation/Democratic National Committee, Mar. 31, 2015; Political Consulting Agreement Between Alexandra Chalupa and DNC Services Corporation/Democratic National Committee, Oct. 8, 2014. Several non-substantive amendments to the 2015 Consultant Agreement were reached by Ms. Chalupa and the DNC. See Amendment to 2015 Political Consulting Agreement, Sept. 29, 2015; Mar. 21, 2016; June 30, 2016.

¹⁰ See Re, *supra* note 5; Kenneth P. Vogel & David Stern, *Ukrainian efforts to sabotage Trump backfire*, POLITICO (Jan. 11, 2017), <https://www.politico.com/story/2017/01/ukraine-sabotage-trump-backfire-233446>.

Federal Election Commission
 November 25, 2019
 Page 4

- Working with state party committees and the DNC to build “State Ethnic Councils across the country.”
- Developing and distributing “tool kits” to help states build and operate ethnic councils.
- Helping build lists of leaders for state councils, potential candidates, and media outlets.
- Coordinating with top leaders to publish op-eds.
- Overseeing the development of a database and website for the Ethnic Council.
- Attending a monthly conference call with the Committee and fostering partnerships between the Ethnic Council, other communities (e.g., women, youth, and faith communities), and elected officials.
- Coordinating with the Committee’s Finance Department to develop and implement a fundraising strategy “utilizing the Ethnic Council and their networks.”¹¹

None of these duties involved the sort of research that the Complaint ascribes to Ms. Chalupa. Moreover, while the Complaint alleges that Ms. Chalupa asked the Ukrainian government to arrange an interview with the Ukrainian president on the DNC’s behalf, her contract with the DNC strictly barred her from indirect communications with members of the press without the express approval of specified DNC personnel.¹²

Finally, Ms. Chalupa’s contract specifically prohibited her from soliciting anything from foreign nationals in the scope of her consultancy. Ms. Chalupa’s contract stated that at no time would she, “[w]hile acting on behalf of the Committee . . . directly or indirectly [] solicit, direct, transfer, spend or disburse any funds that do not comply with the source prohibitions . . . [or] solicit any funds from sources prohibited under [the] Committee’s fundraising policies.”¹³ The contract also barred Ms. Chalupa from accepting “anything of value” while she was “acting on behalf of [the] Committee,” unless authorized “in advance in a writing by [the] Committee.”¹⁴ Thus, the

¹¹ Consultant Agreement § 1.

¹² *Id.* § 4(b). The Complaint alleges vaguely that the “DNC encouraged Chalupa” to meet with Ukrainians to ask them to “provide these things and services of value, to bolster Clinton’s campaign efforts.” Compl. ¶ 8. The Complaint does not identify the person at the DNC who was supposed to have done this, or what precisely constituted this “encouragement.” Nor does it provide any evidence of such encouragement or of Chalupa’s purported motivation. The Complaint likewise claims that the “DNC authorized and was aware of Chalupa’s activities, received information from Chalupa that she obtained from foreign nations, and was updated by Chalupa on her interactions with the Ukrainian government” but provides no evidence for this inflammatory, vague, and entirely unsupported claim. *Id.* at ¶ 19.

¹³ Consultant Agreement § 8.

¹⁴ *Id.* § 20.

Federal Election Commission
 November 25, 2019
 Page 5

Complaint presents insufficient evidence to allege that Ms. Chalupa solicited or received anything of value on behalf of the DNC, and the contract presents compelling evidence to show that this allegation is false.

Again, the Complaint shows that Ms. Chalupa had clients besides the DNC, and a personal interest in matters involving Paul Manafort, President Trump, and the Russian government. The law is clear that, if Ms. Chalupa pursued these matters outside of the scope of her DNC consultancy, no violation by the DNC would result. The Commission has repeatedly recognized that an individual may work for a campaign or party committee, but also engage in other activities on behalf of other organizations or on their own behalf that are simply not attributable to the campaign or party. Commission rules define an “agent” as a person with “actual authority, either express or implied, to . . . solicit, direct, or receive any contribution, donation, or transfer of funds”¹⁵ In line with this definition, the Commission has clearly recognized the fundamental principle of agency law that a person’s authority to act on behalf of another is constrained by the scope of authority granted by the principal, specifically to instances where actual authority is granted, whether express or implied.¹⁶ In other words, a “principal can only be held liable for the action 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 . . . it is not enough that there is some relationship or contact between the principal and agent.*”¹⁷ Thus, the regulations on prohibited “soft money” fundraising only apply to agents when they are “acting on behalf of a Federal candidate or individual holding Federal office.”¹⁸ And the Commission allows individuals to establish agency relationships with multiple principals, thus permitting individuals to “wear multiple hats.”¹⁹

The DNC would not have committed any violation if Ms. Chalupa had interacted with the Ukrainian Embassy on her own behalf regarding the Trump campaign. The activities described by the Complaint were beyond the scope of her engagement and were specifically prohibited by contract.

¹⁵ 11 C.F.R. § 300.2(b); *see also* FEC Adv. Op. 2015-09 (Senate Majority PAC).

¹⁶ 11 C.F.R. § 300.2(b); *see also* 71 Fed. Reg. 4975-76 (Jan. 31, 2006) (rejecting inclusion of “apparent authority,” in “agency” definition, as it could “expose principals to liability based solely on the actions of a rogue or misguided volunteer”); *id.* at 4978 (“A master is subject to liability for the torts of his servant committed while acting in the scope of their employment”) (quoting Agency Restatement 219(1)).

¹⁷ 71 Fed. Reg. at 4978 n.6 (citing 67 Fed. Reg. 49083) (emphasis added).

¹⁸ 11 C.F.R. § 300.60(c); FEC Adv. Op. 2007-05 (Iverson). The Commission emphasized this point in defining the term “agent,” stating that candidates may only be liable for their agents’ soft money solicitations when agents are acting on behalf of their principal. 71 Fed. Reg. at 4978 n.6.

¹⁹ 71 Fed. Reg. at 4979; *see also* FEC Adv. Op. 2007-05 (Iverson) (chief of staff is agent for official duties and is not a fundraising agent, as he received no express instruction and did not observe conduct indicating authorization).

Federal Election Commission
 November 25, 2019
 Page 6

B. The Complaint Cherry-picks and Misrepresents News Articles to Support its Unfounded Allegations

While the Complaint relies on a few select news articles for its allegations, other sources contradict this account. For instance, the Committee's research director, Lauren Dillon, denied that the Committee had any contact with foreign governments; she said, "I've been director of research at the DNC for four years and had zero contact with foreign governments."²⁰ The Ukrainian Embassy likewise stated that it "has never coordinated with the DNC on opposition research."²¹ Ms. Chalupa herself has repeatedly stated that she "was not an opposition researcher for the DNC, and the DNC never asked [her] to go to the Ukrainian Embassy to collect information."²² Oksana Shulyar, aide to Ukraine's former ambassador to the United States, Valeriy Chaly, stated that her interactions with Ms. Chalupa "didn't involve the campaign."²³ Even Andrii Telizhenko, who has contradicted Shulyar's account of events, did not state that he or anyone employed by the Ukrainian Embassy had any involvement with the Committee.²⁴ And the allegation of the DNC's involvement has also been debunked by PolitiFact's analysis of the *Politico* article that the Complaint cites so extensively, which concluded "[t]here's no evidence that the DNC was working directly with Ukraine's government."²⁵ *The Politico article's author himself has stated that Ms. Chalupa was not representing the DNC in meetings with officials.*²⁶

The Complaint ignores the reality that Ms. Chalupa did not solicit contributions from foreign nationals on the DNC's behalf and instead makes bald-faced assertions unsupported by any evidence and flatly contradicted by the Complaint's own sources. Apart from cherry-picking a few select articles, the Complaint also unabashedly misrepresents those articles. For example, though the Complaint claims Ukrainian officials provided Ms. Chalupa with valuable information related to "Trump and/or Manafort," the article it cites for this claim in fact says the exact opposite.²⁷ The article cites former Ambassador Valeriy Chaly in stating, "[t]he embassy representatives unambiguously refused to get involved in any way, as we were convinced that this is a strictly U.S.

²⁰ See Merica, *supra* note 2.

²¹ *Id.*

²² Michelle Ye Hee Lee, *The White House's facile comparison of the Trump-Russia and Clinton-Ukraine stories*, WASHINGTON POST (July 25, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/07/25/the-white-houses-facile-comparison-of-the-trump-russia-and-clinton-ukraine-stories/?utm_term=.240086073444.

²³ See Vogel & Stern, *supra* note 10.

²⁴ See *id.* While one journalist suggests that Telizhenko was aware of Ms. Chalupa's work for the DNC, that purported awareness is contradicted by the Embassy's statements and, even if true, does not show that Ms. Chalupa acted on the DNC's behalf. Moreover, that writer's work on Ukraine is currently under scrutiny and his publisher has taken the extraordinary action of vowing to review, update, and annotate those pieces for accuracy. See Michael Calderone, *The Hill vows to review Solomon's Ukraine pieces*, POLITICO (Nov. 18, 2019), <https://www.politico.com/news/2019/11/18/the-hill-review-john-solomon-ukraine-pieces-071345>.

²⁵ See McCarthy, *supra* note 2.

²⁶ See Vogel tweet, *supra* note 3.

²⁷ Compl. ¶ 9.

Federal Election Commission
 November 25, 2019
 Page 7

domestic matter.”²⁸ Similarly, the Complaint claims that Ms. Chalupa, as an agent of the DNC and while performing her duties to the DNC, asked Ukrainian officials to have then-President Petro Poroshenko or another government official ask a Member of U.S. Congress to hold hearings on Manafort and his work in Russia.²⁹ The allegation that Ms. Chalupa requested such hearings comes from news articles that unequivocally state Ms. Chalupa was *not* acting on behalf of the DNC in making that or the other alleged requests set forth in the Complaint. Those articles quote Ambassador Chaly in stating that Ms. Chalupa’s personal interest drove any communications she may have had with the Ukrainian Embassy, and that she was not working in her capacity as DNC consultant: “The Embassy got to know Ms. Chalupa because of her engagement with Ukrainian and other diasporas in Washington D.C., *and not in her DNC capacity*. We’ve learned about her DNC involvement later.”³⁰ Additionally, the Ukrainian embassy “disputed the suggestion that Chalupa sought ‘dirt’ on Trump, saying that she was merely concerned about the role on Manafort due to his previous work in the country -- and said she did not ask for any materials from the embassy. A spokesperson said that the embassy’s encounter with Chalupa was ‘null’ and produced no further action.”³¹

The Complaint further claims that a Ukrainian court has ruled that Ukrainian entities wrongly interfered with the 2016 election. It provides no evidence of Ms. Chalupa’s or the DNC’s involvement in this allegation, nor does the cited article. It is unclear why the Complaint makes this allegation other than to smear Respondents with outlandish attacks holding no basis in reality.

Thus, the Complaint fails to present sufficient facts to show that Ms. Chalupa solicited or received anything from Ukraine or its citizens on behalf of the DNC. To the contrary, the documents controlling her DNC consultancy and the other facts on the public record show strongly that she neither solicited nor received any prohibited contribution on the DNC’s behalf.

II. The Complaint Provides No Evidence Indicating that Ms. Chalupa Solicited Any Contribution at All

The Complaint claims that the DNC encouraged Ms. Chalupa to meet with then-President Poroshenko to ask that he provide “services of value” to the DNC.³² As noted, the Complaint offers no support for this outrageous claim. The only suggestion of such encouragement is a brief,

²⁸ Gregg Re, *Giuliani will travel to Ukraine, saying country’s probes may be ‘very, very helpful’ for Trump*, FOX NEWS (May 10, 2019), <https://www.foxnews.com/politics/giuliani-will-travel-to-ukraine-saying-countrys-probes-may-be-very-very-helpful-for-trump>.

²⁹ Compl. ¶ 7.

³⁰ Re, *supra* note 5 (emphasis added); John Solomon, *Ukrainian Embassy confirms DNC contractor solicited Trump dirt in 2016*, THE HILL (May 2, 2019), <https://thehill.com/opinion/white-house/441892-ukrainian-embassy-confirms-dnc-contractor-solicited-trump-dirt-in-2016> (emphasis added).

³¹ Re, *supra* note 5.

³² Compl. ¶ 8.

Federal Election Commission
 November 25, 2019
 Page 8

unquoted phrase in the *Politico* article cited in the Complaint that states, “with the DNC’s encouragement, Chalupa asked embassy staff to try to arrange an interview in which [Ukrainian President Petro] Poroshenko might discuss Manafort’s ties to [former Ukrainian President Viktor] Yanukovich.”³³ Yet, even if Ms. Chalupa had done this on the DNC’s behalf—and again, the *Politico* article’s author himself has stated that she did not—simply submitting a question about a press conference is not “something of value” that amounts to a “contribution” under the Act.

The Act defines “contribution” as “any gift . . . of money or anything of value made by any person for the purpose of influencing any election for Federal office.”³⁴ “Anything of value” encompasses in-kind contributions, goods, or services provided to a political committee without charge or at a charge that is less than the usual and normal charge.³⁵ “Usual and normal charge” is defined as the price of goods in the market from which they ordinarily would have been purchased at the time of the contribution, or the commercially reasonable rate prevailing at the time the services were rendered.³⁶ Chair Weintraub’s recent statement seeking to clarify the Commission’s interpretation of the foreign national ban explains:

[A]lthough goods or services provided at the usual and normal charge do not constitute a contribution under the Act, soliciting, accepting, or receiving information in connection with an election from a foreign national, *as opposed to purchasing the information at the usual and normal charge* or hiring a foreign national in a bona fide commercial transaction to perform services for a federal campaign, could potentially result in the receipt of a prohibited in-kind contribution.³⁷

The alleged “solicitation” in this case—in the form of requesting a question be asked at a press conference—does not amount to soliciting information, much less the type of information that would be quantifiable to assess a usual and normal charge for its value. There is no “usual and normal charge” to submitting a question at a press conference, and these activities cannot result in contributions.

The Commission has specifically recognized that simply talking to a foreign national is not automatically a contribution in and of itself. In Advisory Opinion 2007-22, the Commission advised a candidate about items for which he would need to pay in order to accept them from foreign nationals without taking a contribution; one of the activities that the Commission approved of without payment was “[c]onsulting with Canadian citizens” to learn about their election

³³ See Vogel & Stern, *supra* note 10.

³⁴ 52 U.S.C. § 30101(8)(A)(i).

³⁵ 11 C.F.R. § 100.52(d)(2).

³⁶ *Id.*

³⁷ See Draft Interpretive Rule Concerning Prohibited Activities Involving Foreign Nationals (Sept. 26, 2019) (emphasis added), available at https://www.fec.gov/resources/cms-content/documents/mtgdoc_19-41-A.pdf.

Federal Election Commission
November 25, 2019
Page 9

activities.³⁸ Thus, even if Ms. Chalupa had been acting on behalf of the DNC, and even if she did precisely what the Complaint alleges, simply requesting an interview, or asking that a question be asked at an interview, is not a “good or service” that would amount to an in-kind contribution.

And the Complaint’s claim that Ms. Chalupa emailed DNC staff to tell them that she had “sensitive information” about Manafort that she wished to share in person does not support finding the solicitation or receipt of a foreign national contribution.³⁹ Neither the Complaint nor the cited article establishes the source of this “sensitive information”—whether it came from a foreign national, a domestic source, or the public domain—or even whether the Committee ultimately received the information at all. Nor does the article provide any basis to conclude that the Committee solicited the information or directed Ms. Chalupa to obtain it.⁴⁰ The Complaint’s remaining allegations, that Ms. Chalupa solicited “valuable derogatory information about Trump and/or Manafort” and “the services of members of the Ukrainian government,” are equally vague and unsubstantiated, and there is likewise no support for the allegation that she acted on the DNC’s behalf to ask a foreign national to request a Congressional hearing on Manafort—on the contrary, the Complaint’s own sources suggest any such request, if true, was made in her personal capacity.⁴¹ Thus, the Complaint fails to show the DNC solicited or received any contribution by or through Ms. Chalupa.

³⁸ FEC Advisory Opinion 2007-22 (Dec. 3, 2007).

³⁹ Compl. ¶ 11.

⁴⁰ In addition, the reported email was part of a leak of documents whose veracity has not been confirmed. And, as two Commissioners recently wrote, “[w]e are concerned . . . that reliance on information made available only as the result of a foreign intelligence operation to inform our decision . . . would be incompatible with our responsibility as Commissioners to help ‘preserve the basic conception of [an American] political community.’ Further, such use might encourage similar violations of U.S. law in the future.” Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter, Matters Under Review 6940, 7097, 7146, 7160, 7193 (Correct the Record, *et al.*) at 8 (Aug. 21, 2019) (internal citation omitted).

⁴¹ Compl. ¶ 17.

Federal Election Commission
November 25, 2019
Page 10

CONCLUSION

Respondents respectfully request the Commission promptly find no reason to believe any violation occurred, dismiss the matter, and close the file.

We appreciate the Commission's consideration of this response.

Very truly yours,

A handwritten signature in blue ink, appearing to be 'Graham M. Wilson', written over a faint, illegible printed name.

Graham M. Wilson
Antoinette M. Fuoto
Counsel to Democratic National Committee