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April 8, 2020

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

Re: *Response in MUR 7696*

Dear Mr. Jordan

As counsel to Texans for Senator John Cornyn and Kerry N. Cammack in his official capacity as Treasurer (the “Campaign”), we submit the following response to the complaint filed by MJ for Texas (the “Complaint”) alleging that the Campaign has failed to timely disgorge contributions that were illegally given in the names of others. The Complaint should be summarily dismissed for the following reasons:

- it fails to allege sufficient facts that, if proven true, would constitute a violation of the Federal Election Campaign Act of 1971, as amended (the “Act” or “FECA”);
- even assuming *arguendo* that the alleged facts constitute a FECA violation (they do not), the Campaign was unable to take immediate remedial actions because federal prosecutors instructed the Campaign to stand down pending the outcome of their investigation into the perpetrator of the contribution reimbursement scheme (about which the Campaign had been unaware); and
- in any event, the alleged prohibited contributions have been disgorged to the U.S. Treasury, thus removing any possibility of the Campaign receiving improper benefits.

Accordingly, the Commission should find no reason to believe that the Campaign violated the Act and close the file.

I. BACKGROUND

The Complaint alleges that the Campaign violated the Act by failing to timely disgorge contributions that had been illegally reimbursed by the Dannenbaum Engineering Corporation

(“DEC”) in violation of the prohibition against giving in the name of another.¹ The Complaint cites a Houston Chronicle article, dated November 7, 2019, that names James Dannenbaum as the individual who arranged for DEC to reimburse between \$10,000 and \$25,000 in contributions to three federal candidates.² As the Complaint admits,³ the article and the criminal information filed by the U.S. Attorney’s Office for the Southern District of Texas (“USAO”) *do not* name the recipients of the reimbursed contributions. Neither do the article or the criminal information identify the straw donors through whom the reimbursed contributions were made. Nevertheless, the Complaint assumes, without analysis, that the publication of the articles triggered the 30-day clock to refund or disgorge the contributions at issue, and that the Campaign violated the applicable regulation⁴ by failing to refund or disgorge within that timeframe. The Complaint thus requests that the Federal Election Commission (“FEC” or “Commission”) open an investigation into the matter.

In a Texas Tribune article also cited by the complaint, a Campaign representative stated, “The campaign was not aware of what Mr. Dannenbaum was doing and we will fully cooperate with the US Attorney’s office. We will be returning the contributions in full to the Treasury, as required by law.”⁵ True to that statement, the Campaign has been prepared from the outset to disgorge any prohibited contributions it may have received. However, shortly after the Campaign learned about the reimbursement scheme, the USAO notified the Campaign’s counsel that the Campaign should not take action on the matter until its investigation concluded and the USAO provided more specific information about the amounts and donors involved.⁶ The Campaign has abided by that request and remained in communication with the USAO throughout the process.

In early February 2020, counsel to the Campaign again contacted the USAO to ask when the Campaign would learn the names of the straw donors and the total amounts involved in the Dannenbaum reimbursement scheme, noting that the Campaign could not disgorge any prohibited contributions or properly amend its reports until it received this information.⁷ Shortly after counsel’s inquiry, the USAO provided this information to the Campaign, which then immediately made a payment to the U.S. Treasury.

¹ 52 U.S.C. § 30122.

² Gabrielle Banks and Stephanie Lamm, “Former UT Regent, Engineering CEO Resigns After Admitting to Illegal Donations,” Houston Chronicle (Nov. 8, 2019) <https://www.houstonchronicle.com/news/houston-texas/houston/article/Former-UT-regent-engineering-CEO-resigns-after-14817897.php>.

³ Complaint at 2 (“The court records *did not* name the candidates that received the alleged illegal contributions . . .”) (emphasis added).

⁴ 11 C.F.R. § 103.3(b)(2).

⁵ Patrick Svitek, “Top Texas GOP Donor Resigns from Company After Admitting to Prohibited Contributions” (Nov. 7, 2019) <https://www.texastribune.org/2019/11/07/texas-donor-james-dannenbaum-resigns-contributions/>. (The Complaint’s citation to this article incorrectly lists the author as “Peter Svitek.”)

⁶ Telephone conversations between Jason Torchinsky and Carolyn Ferko, Assistant U.S. Attorney (Nov. 7, 2019) (hereinafter, “USAO Call”).

⁷ Letter from Jason Torchinsky to Ryan K. Patrick, U.S. Attorney’s Office, S.D. Tex., and Corey R. Amundson, Chief, Pub. Integrity Section, U.S. Dep’t of Justice (Feb. 4, 2020) (attached as Exhibit 1).

II. LEGAL ANALYSIS

A. The Facts Alleged in the Complaint Do Not Constitute a Violation of the Act.

Under Commission regulations, a campaign treasurer is “responsible for examining all contributions received for evidence of illegality.”⁸ In fulfilling this responsibility, if a treasurer originally determined that a contribution was not from a prohibited source or made in the name of another “but later *discovers* that it *is illegal* based on new evidence not available to the political committee at the time of receipt and deposit, the treasurer shall refund the contribution to the contributor within thirty days of the date on which the illegality is discovered.”⁹ Alternatively, instead of issuing a refund, the committee may disgorge a prohibited contribution to the U.S. Treasury.¹⁰

As the refund regulation makes clear, the 30-day window for refunding or disgorging a prohibited contribution does not open until it is discovered that a contribution “is illegal”—not merely “apparently illegal” or “allegedly illegal.”¹¹ In other words, it appears the regulatory language generally requires that a contribution’s illegality needs to be established through an adjudication, a guilty plea, or some other equivalent action¹² before the refund regulation’s 30-day requirement to refund or disgorge is triggered. Therefore, it is not clear that the Campaign’s legal obligation to refund or disgorge any alleged prohibited contributions has ripened because the USAO’s case against Dannenbaum has not yet been resolved.

Nevertheless, even assuming that discovery of *potential* illegality is sufficient to start the 30-day clock, the Campaign still did not violate the Act or Commission regulations. To “discover” that a contribution “is illegal” requires, at a minimum, that one know the identity of the donor and the specific amount involved in the prohibited transaction. Here, the Campaign could not ascertain this information until the USAO concluded the Dannenbaum investigation and provided to the Campaign specific details regarding the names of the straw donors and the amounts of their contributions.¹³ Thus, even under a broader reading of the refund regulation, the Campaign did not “discover” any illegality for purposes of the refund regulation until the USAO shared these

⁸ 11 C.F.R. § 103.3(b).

⁹ *Id.* § 103.3(b)(2) (emphasis added) (hereinafter, “refund regulation”).

¹⁰ Federal Election Commission Campaign Guide: Congressional Candidates and Committees 34 (June 2014) (citing FEC Adv. Op. 1996-05 (Kim)).

¹¹ The Explanation and Justification for the refund rule further underscores this point by stating that “[p]aragraph 103.2(b)(2) applies to contributions whose legality is not in question when received and deposited but which are later discovered *to be illegal*.” *Final Rule on Contribution and Expenditure Limitations and Prohibitions; Contributions by Persons and Multicandidate Political Committees*, 52 Fed. Reg. 760, 768 (Jan. 9, 1987) (emphasis added).

¹² One such equivalent action is if the orchestrator of a reimbursement scheme is also an agent of the recipient committee. *See* First Gen. Counsel’s Rept. at 10-13, MUR 4843 (Hinchey) (the Commission determined that the trigger date for refunding prohibited contributions was before the date that guilty pleas were made in a parallel criminal case because an agent of the recipient committee (the committee’s finance chairman) actually hatched and carried out the reimbursement scheme). Nothing like that occurred in this matter.

¹³ And as later discussed in part B of this section, even if the Campaign had obtained this information, it could not have acted on it because of the USAO’s instruction not to take remedial actions pending the investigation’s conclusion.

facts with the Campaign; it was only at that point that the Campaign's legal duty to refund or disgorge arose.¹⁴ As noted above, the Campaign immediately made a disgorgement payment to the U.S. Treasury upon receiving the relevant information from the USAO. Therefore, no matter how broadly the Commission's refund regulation is interpreted, the facts presented in the Complaint do not amount to a violation of the Act. Accordingly, the Complaint should be dismissed.

B. Requests from Federal Prosecutors for the Campaign to Take No Action Until the End of the Investigation into the Dannenbaum Reimbursement Scheme Prevented the Campaign from Disgorging Earlier.

As clearly explained in Part A of this section, the Campaign has in no way violated the Act or Commission regulations in its handling of the Dannenbaum reimbursement scheme. Yet even assuming *arguendo* that, as a technical matter, the Campaign's 30-day clock to refund or disgorge began when the USAO released the criminal information regarding Dannenbaum, there still would not be adequate grounds to open an FEC investigation. As noted above, the Campaign was ready from the moment it learned of the Dannenbaum reimbursement scheme to disgorge any contributions related to the scheme. However, in calls with the Campaign's counsel, the USAO instructed the Campaign not to take any actions regarding reimbursed contributions, including making disgorgement payments, pending the outcome of the USAO's investigation.¹⁵ Thus, to comply with the timeframe set forth in the refund regulation (again, assuming that the regulation had even been triggered), the Campaign would have had to defy a request from federal prosecutors and operate at cross purposes with a duly authorized criminal investigation. For obvious reasons, the Campaign declined to do so.

The seriousness of the offense being investigated by the USAO—a reimbursement scheme involving excessive contributions and the ban on corporate giving—patently outweighs any potential harm caused by a technical infringement of the refund regulation's 30-day timeframe. Indeed, the Act's giving-in-the-name-of-another prohibition has been the subject of multiple criminal convictions.¹⁶ By contrast, it appears that the Commission has rarely brought enforcement actions against political committees for late refunds or disgorgements of prohibited contributions—and has done so only when confronted with facts altogether more egregious than those presented in this matter.¹⁷ Therefore, considering the gravity of the allegations against

¹⁴ Of course, the recipient of an allegedly prohibited contribution can proactively refund or disgorge any amounts it may presume to be illegal. Indeed, the Campaign sought to do this very thing as soon as it learned of the USAO's investigation into Dannenbaum. (The Campaign was unable to do so because of USAO's stand-down request.) Nevertheless, the fact that one *may* take the prudential step of refunding or disgorging a contribution before the contribution's illegality is established does not mean that one *must* do so.

¹⁵ USAO Call, *supra* note 7.

¹⁶ See, e.g., Plea Agreement, *United States v. Danielczyk*, No. 1:11CR85 (E.D. Va. Feb. 26, 2013) (William Danielczyk and Eugene Biagi pleaded guilty to making \$186,000 in illegal conduit campaign contributions); Plea Agreement, *United States v. O'Donnell*, No. 08-872(A) (C.D. Ca. Aug. 2, 2011) (Pierce O'Donnell pleaded guilty to reimbursing 10 people who each made \$2,000 contributions).

¹⁷ For instance, in MUR 5744 (Hynes), a committee received multiple notices from the Commission that it had received prohibited contributions and was instructed by the Commission to disgorge such contributions. The committee, however, failed to comply. Thus, nearly 15 months after first providing notice and instruction to the

Dannenbaum, the Campaign's decision to defer to the USAO's request to stand down was entirely reasonable.

Notably, the Commission itself will often hold enforcement matters in abeyance at the suggestion of the Department of Justice ("DOJ") until criminal proceedings have concluded.¹⁸ The Commission does so to ensure, among other reasons, that its actions do not unnecessarily hinder the course of a DOJ investigation. For similar reasons, the Campaign justifiably deferred to the USAO's admonition to hold off on taking remedial actions until the investigation concluded. (Then, when informed by the USAO about the investigation's findings, the Campaign immediately made a disgorgement payment to the U.S. Treasury.) To impose a penalty here would not only be grossly unfair but would also be bad policy and place future respondents facing similar circumstances in a catch-22: *either* honor DOJ's request and get punished by the FEC *or* comply with the FEC refund rule and interfere with a DOJ investigation. Clearly, the wisest, and most just, course in this matter is to summarily dismiss the complaint and close the file.

C. The Prohibited Contributions Have Been Disgorged to the U.S. Treasury.

Following the conclusion of the USAO investigation, the Campaign learned that the amount it received as a result of the Dannenbaum reimbursement scheme was \$10,800. That represents about 0.06% of the total contributions the Campaign has taken in so far in the 2020 election cycle. Contrary to the Complaint's assertion that the Campaign somehow "benefitted" from this relatively miniscule amount, the Campaign had no incentive to retain these funds upon learning of the Dannenbaum investigation. To reiterate, the only reason the Campaign did not disgorge these amounts earlier was because the USAO requested the Campaign to take no remedial actions until the USAO's investigation concluded, at which time the Campaign learned the names and amounts involved in the Dannenbaum reimbursement scheme. Those amounts have since been disgorged to the U.S. Treasury. Thus, there is no possibility that any impermissible monies resulting from the scheme will be spent in, or in any way influence, the upcoming election. Accordingly, even assuming *arguendo* that the refund/disgorgement obligation was triggered in November 2019, the Complaint should be dismissed in an exercise of the Commission's prosecutorial discretion.¹⁹

committee, the Commission found reason to believe that the committee violated 11 C.F.R. § 103.3(b)(2). *See* First Gen. Counsel's Rpt., MUR 5744 (Hynes) ; Certification (May 5, 2006). By contrast, in this matter, not only has the Campaign not been instructed by the Commission to disgorge, it had not even received the complaint from the FEC yet when it made its disgorgement payment. Therefore, the facts here are significantly less problematic than those in MUR 5744 or even MUR 4843 (Hinchey), *supra* note 11, which involved a committee whose own agent masterminded the reimbursement scheme at issue in that matter.

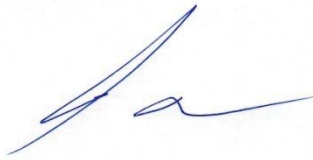
¹⁸ *See* Federal Election Commission, Office of General Counsel Memorandum on Information Sharing with the Department of Justice 4, 9 (Jun. 17, 2013), https://www.fec.gov/resources/updates/agendas/2013/mtgdoc_13-21-d.pdf (discussing DOJ requests for the FEC to hold matters in abeyance).

¹⁹ *See Heckler v. Chaney*, 470 U.S. 821 (1985).

III. CONCLUSION

For the reasons set forth above, the Complaint against the Campaign should be summarily dismissed.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Jason Torchinsky', is positioned below the word 'Sincerely,'.

Jason Torchinsky
HOLTZMAN VOGEL JOSEFIK TORCHINSKY PLLC
Counsel for Texans for Senator John Cornyn

Exhibit 1

HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC
Attorneys at Law

45 North Hill Drive • Suite 100 • Warrenton, VA 20186

February , 020

Ryan K. Patrick
U.S. Attorney's Office
Southern District of Texas
1000 Louisiana, Ste. 00
Houston, TX 77002

Corey R. Amundson
Chief, Public Integrity Section
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 0530

Dear Messrs. Patrick and Amundson:

I write to inquire about the status of the investigation into campaign finance violations committed by James Dannenbaum. As you know, my client, Texans for Senator John Cornyn ("the Committee"), received contributions that Mr. Dannenbaum reimbursed in violation of the Federal Election Campaign Act of 1971. The Committee, which last received an update on the matter in the first week of December 2019, continues to abide by your office's request to wait to disgorge the illegal contributions pending the investigation's outcome.

The Committee remains ready to disgorge all illegally reimbursed contributions. It cannot do so, however, nor can it properly amend its reports, until it knows the total amounts at issue and the names of the straw donors involved in the reimbursement scheme from your office. Furthermore, your office's request for my client to stand down and wait has become the source of misleading political attacks in the media from entities unaware of how this process works. Therefore, on behalf of my client, I request that this information be provided to the Committee as expeditiously as possible so that it can disgorge any prohibited contributions it may have received to the U.S. Treasury.

Please do not hesitate to call me at any time. I can be reached at (540) -8808.

Sincerely,



Jason Torchinsky
Counsel to Texans for Senator John Cornyn

Cc: Jessica Harvey (via electronic mail)