

**FEDERAL ELECTION COMMISSION****FIRST GENERAL COUNSEL'S REPORT**

MUR 7747

COMPLAINT DATE: June 17, 2020

NOTIFICATION DATE: June 23, 2020

LAST RESPONSE RECEIVED: July 2, 2020

ACTIVATION DATE: August 5, 2020

EXPIRATION OF STATUTE OF LIMITATIONS:

April 1, 2025

ELECTION CYCLE: 2020

**COMPLAINANT:**

Rush Perez, Treasurer

Bronx United

**RESPONDENTS:**

Rev. Rubén Díaz for Congress and Andreina Cruz

in her official capacity as treasurer

Rev. Rubén Díaz

Fresh Direct LLC

**RELEVANT STATUTES****AND REGULATIONS:**

52 U.S.C. § 30104

52 U.S.C. § 30118

11 C.F.R. § 100.52

11 C.F.R. § 109.20

**INTERNAL REPORTS CHECKED:** Disclosure Reports**AGENCIES CHECKED:**

None

**I. INTRODUCTION**

The Complaint alleges that New York City Council Member Rev. Rubén Díaz, a candidate for New York's 15th Congressional seat, and Rev. Rubén Díaz for Congress, his campaign committee (the "Committee")(collectively "Respondents"), violated the Federal Election Campaign Act of 1971, as amended, (the "Act") by accepting illegal corporate contributions and knowingly failing to disclose contributions to his campaign. As discussed in

1 further detail below, we recommend that the Commission dismiss the allegations outlined in the  
2 Complaint and close the file in this matter.

## 3 **II. DISCUSSION**

4 The Complaint alleges that Rev. Díaz used city government resources to support his  
5 federal campaign, citing Díaz's participation in a number of government-sponsored food drives  
6 outside of his council district at which a corporate entity, Fresh Direct, LLC ("Fresh Direct")  
7 donated groceries and masks.<sup>1</sup>

8 Respondents deny the allegations. The joint response of the Committee and Díaz ("Díaz  
9 Respondents") maintains that Díaz attended the events in question "in his capacity as the head of  
10 a long established Ministers group," and notes that the candidate "did not display any campaign  
11 posters, literature etc."<sup>2</sup> The Díaz Respondents further deny that Díaz had any contact with the  
12 corporations that donated the food.<sup>3</sup> Additionally, Respondents assert that Fresh Direct did not  
13 coordinate its efforts with, or make an in-kind contribution to Díaz or the Committee, as there  
14 were no communications or agreements as to how much and what kinds of food would be  
15 donated.<sup>4</sup>

16 Fresh Direct denies that it made a contribution by providing the food and masks. It  
17 explains that it entered into a contract with the New York City Sanitation Department

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<sup>1</sup> Compl. at 2-7 (June 17, 2020).

<sup>2</sup> Joint Response of the Committee and Rev. Ruben Díaz ("Joint Resp.") at 1 (June 30, 2020).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 2. Díaz's biography on the New York City Council website notes that he is the pastor of the Christian Community Neighborhood Church ("CCNC"). <https://council.nyc.gov/ruben-diaz-sr>. Díaz regularly appears on its CCNC's Facebook page with respect to various church services. Iglesia Cristiana Comunidad, *Missionary Service*, FACEBOOK (Oct. 4, 2020); Iglesia Cristiana Comunidad, *Sunday Service*, FACEBOOK (Sept. 13, 2020); Iglesia Cristiana Comunidad, *Sunday Service*, FACEBOOK (Aug. 16, 2020); Iglesia Cristiana Comunidad, *Programa: La Iglesia Cristiana de la Comunidad Todos los Domingo(s)*, FACEBOOK (May 31, 2020); Iglesia Cristiana Comunidad, *Bodas de Esther*, FACEBOOK (Mar. 29, 2020).

1 (“NYCSD”) to provide food boxes across all five boroughs of the city.<sup>5</sup> Under this arrangement,  
2 Fresh Direct assembled food boxes and delivered them to locations as requested by local elected  
3 officials “without reference to any federal election.”<sup>6</sup> Fresh Direct further states that Rev. Díaz’s  
4 opponents for federal office also requested food box distributions.<sup>7</sup>

5 The Act and Commission regulations prohibit any corporation from making contributions  
6 to a candidate’s principal campaign committee.<sup>8</sup> “Contribution” is defined to include any gift of  
7 money or “anything of value” for the purpose of influencing a federal election.<sup>9</sup> “Anything of  
8 value” includes in-kind contributions, such as the provision of goods or services without charge  
9 or at a charge that is less than the usual and normal charge.<sup>10</sup>

10 Officers and directors of corporations may not consent to any contribution prohibited by  
11 section 30118(a).<sup>11</sup> Correspondingly, federal candidates and their authorized committees may  
12 not knowingly accept a corporate contribution.<sup>12</sup> An expenditure made by any person “in

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<sup>5</sup> Response of Fresh Direct (“Fresh Direct Resp.”) at 2 (July 2, 2020).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* On June 23, 2020, Díaz lost the Democratic primary, finishing third out of 15 candidates. Grace Panetta, *Live Updates: See the Full Results of the Democratic Primary in New York’s 15th Congressional District*, BUSINESS INSIDER (Jun. 29, 2020). Fellow Councilman Ritchie Torres, who also requested deliveries from Fresh Direct, won the primary. *Id.*

<sup>8</sup> 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b).

<sup>9</sup> 52 U.S.C. § 30101(8)(A); 11 C.F.R. § 100.52(a).

<sup>10</sup> 11 C.F.R. § 100.52(d)(1).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

1 cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his  
 2 authorized political committees, or their agents” constitutes a contribution to the candidate.<sup>13</sup>

3 Under the Act and Commission regulations, an entity does not make a contribution if they  
 4 provide services in the ordinary course of business and at the usual and normal charge.<sup>14</sup>  
 5 Commission regulations define the “usual and normal charge” for goods is “the price of those  
 6 goods in the market from which they ordinarily would have been purchased at the time of the  
 7 contribution.”<sup>15</sup> The Commission has previously opined that entities may establish the “usual  
 8 and normal charge” of goods or services by reference to the “fair market price” of goods or  
 9 services,<sup>16</sup> “commercial considerations,”<sup>17</sup> or the fee provided to “similarly situated persons in  
 10 the general public.”<sup>18</sup> The Commission has determined in advisory opinions that the provision

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<sup>13</sup> 52 U.S.C. § 30116(a)(7)(B)(i); *see also* Explanation and Justification for Regulations on Coordinated and Independent Expenditures (“Coordination E&J”), 68 Fed. Reg. 421, 426 (Jan. 3, 2003).

<sup>14</sup> 11 C.F.R. §§ 100.52(d), 100.110(e). The Commission has determined in advisory opinions that the provision of services, when done so at the usual and normal charge, does not constitute a contribution. Advisory Op. 2018-05 (CaringCent) at 4-5; *see also* Advisory Op. 2016-08 (eBundler.com) at 6-7; Advisory Op. 2012-09 (Points for Politics) at 5-6; Advisory Op. 2007-04 (Atlatl) at 3-4. In these advisory opinions, the Commission determined that a commercial vendor must meet certain criteria, including the requirement that it render services in the ordinary course of business and at the usual and normal charge. *See, e.g.*, AO 2018-05 at 4-5; AO 2016-08 at 6-7; AO 2012-09 at 5-6; AO 2007-04 at 3-4.

<sup>15</sup> *Id.* at § 100.52(d)(2).

<sup>16</sup> *See* MUR 5682 (Bachmann for Congress) (finding that respondent assigned an appropriate valuation to a mailing list where respondent had consulted with a “reputable list broker” regarding the “proper fair market value” of the list); *see also* Advisory Op. 2010-30 (Citizens United) (“Because the ‘fair market price’ is the price of the list in the market in which lists are ordinarily rented at the time of the rental, the ‘fair market price’ is the usual and normal charge for renting the list [of email contacts].”).

<sup>17</sup> Advisory Op. 2012-31 (AT&T) (opining that AT&T’s proposed rate structure for text-message fundraising was not a contribution because, although rates would be lower than those AT&T usually charges to use its text message platform, the proposed rates would cover the company’s costs as well as profit and would be offered on the same terms to all political customers).

<sup>18</sup> Advisory Op. 2004-6 (Meetup) (concluding that a fee is usual and normal if the charge is “set in accordance with the fixed set of fee criteria” and “applied equally between the various classes of candidates...and other members of the general public who are similarly situated with respect to the respective classes of candidates and political committees.”); *see also* Advisory Op. 2014-09 (Reed Marketing).

1 of services, when done so at the usual and normal charge, does not constitute a contribution.<sup>19</sup>

2 Díaz's appearance and participation in a city-funded event, whether as a city council  
3 member or as a minister, is insufficient information to conclude that Fresh Direct made an in-  
4 kind contribution to Díaz.<sup>20</sup> Díaz's participation at the distributions outside of his council  
5 district arguably could be viewed as beneficial to his candidacy by increasing his public profile  
6 and demonstrating goodwill. However, there is no specific information suggesting that Fresh  
7 Direct provided these services for the purpose of influencing a federal election.

8 Fresh Direct's attached "Award Letter" detailing the terms of its agreement with the  
9 NYCSO undercuts the Complaint's allegation, as it indicates that Fresh Direct would have  
10 provided the same materials for the food drives irrespective of Díaz's candidacy, or anyone  
11 else's.<sup>21</sup> The agreement obligated the NYCSO to pay Fresh Direct \$5,000,000 to provide 2,500  
12 food boxes per day over a three-month period. Fresh Direct maintains that it had no input with  
13 respect to the disposition of the food boxes, and that the "[d]eliveries [were] made across the city  
14 without reference to the political affiliation of any elected official involved in requesting a

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<sup>19</sup> See, e.g., MUR 6141 (Friends of Dave Reichert) (respondents provided sworn declaration from committee staff member stating that vendor provided examples of nonpolitical commercial clients who received the same extension of credit arrangement); MUR 6023 (John McCain 2008) (respondents provided documentation concerning vendor's own practices); MUR 5496 (Huffman for Congress) (respondents provided documentation demonstrating car dealership did not deviate from its standard practices in the sale of a vehicle as part of a campaign raffle event); MUR 4989 (Dole/Kemp '96) (documentation provided regarding vendor's credit policies).

<sup>20</sup> These events appear to be less candidate-focused than those in other matters that the Commission has dismissed, particularly in situations where an officeholder engaged in activities while simultaneously running for federal office. See Factual & Legal Analysis ("F&LA") at 7-8, MUR 6376 (Lori Edwards) (dismissing complaint and noting that Edwards, who held the office of Polk County, Florida, Supervisor of Elections while running for federal office, disseminated public service announcements encouraging persons to vote, but the ads did not focus on her role as a federal candidate and did not appear to contain any electoral content regarding her candidacy); See also Statement of Reasons of Chairman Lenhard and Comms. von Spakovsky, Walther and Weintraub, MUR 5770 (Laffey) at 2-3 (explaining Commission's dismissal of allegations where city mayor and simultaneous federal candidate mailed cover letter with property tax bills to residents that listed accomplishments achieved by city while candidate was Mayor).

<sup>21</sup> Fresh Direct Resp. at 2; Attachment.

1 delivery or distributing the boxes.”<sup>22</sup> And the Díaz Respondents state that at each food  
2 distribution event at issue, “neither Rev. Díaz, nor his campaign distributed or in any manner  
3 publicized, his campaign for Congress.”<sup>23</sup>

4 Thus, the available information indicates that Fresh Direct provided the food and masks  
5 pursuant to a city contract to anyone who made a proper request under that contract, and there is  
6 no information that that the price the City paid for those goods was less than the usual and  
7 normal charge. Even if Díaz or other candidates tried to leverage the city-sponsored food  
8 giveaways to their political advantage, there is insufficient information to conclude that Fresh  
9 Direct made an in-kind contribution to Díaz.

10 The responses do raise questions regarding possible communications between  
11 Respondents. While the Díaz Respondents contend that “Fresh Direct has never had any  
12 communications with [either Respondent],”<sup>24</sup> Fresh Direct states that it provided supplies based  
13 requests from lawmakers, including Díaz.<sup>25</sup> Fresh Direct’s “Award Letter” stipulates that  
14 NYCSD would appoint a point of contact who would communicate with Fresh Direct, and this  
15 contact could have been an intermediary between Fresh Direct and Díaz.<sup>26</sup> This provision could  
16 explain the discrepancy, but the responses do not specifically address this issue, and it is possible  
17 that the Committee or other agents of Díaz communicated with Fresh Direct. Even so, the

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<sup>22</sup> Fresh Direct Resp. at 2.

<sup>23</sup> *Id.*

<sup>24</sup> Joint Resp. at 2.

<sup>25</sup> Fresh Direct Resp. at 2.

<sup>26</sup> *Id.*; Attachment.

1 available information does not support a reasonable inference that Fresh Direct's performance of  
2 the city contract resulted in any contribution to Díaz or the Committee.<sup>27</sup>

3 Accordingly, we recommend that the Commission dismiss the allegation that Fresh  
4 Direct violated 52 U.S.C. §§ 30104(b) and 30118(a) by making prohibited and unreported in-  
5 kind contributions to Rev. Rubén Díaz for Congress. Further, we recommend that the  
6 Commission dismiss the allegation that Rev. Ruben Díaz violated 52 U.S.C. § 30118(a) by  
7 accepting prohibited in-kind contributions from Fresh Direct LLC, and that Rev. Rubén Díaz for  
8 Congress and Andreina Cruz in her official capacity as treasurer violated 52 U.S.C. §§ 30104(b)  
9 and 30118(a) by accepting prohibited and unreported in-kind contributions from Fresh Direct  
10 LLC. Finally, we recommend that the Commission close the file in this matter.

### 11 **III. RECOMMENDATIONS**

- 12 1. Dismiss the allegation that Fresh Direct violated 52 U.S.C. §§ 30104(b) and  
13 30118(a) by making prohibited and unreported in-kind contributions to Rev.  
14 Rubén Díaz for Congress;
- 15  
16 2. Dismiss the allegation that Rev. Ruben Díaz violated 52 U.S.C. § 30118(a) by  
17 accepting prohibited in-kind contributions from Fresh Direct LLC;
- 18  
19 3. Dismiss the allegation that Rev. Rubén Díaz for Congress and Andreina Cruz in  
20 her official capacity as treasurer violated 52 U.S.C. §§ 30104(b) and 30118(a) by  
21 accepting prohibited and unreported in-kind contributions from Fresh Direct LLC;
- 22  
23 4. Approve the Factual and Legal Analysis;
- 24  
25 5. Approve the appropriate letters; and  
26

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<sup>27</sup> The Complaint incorporates various posts from Díaz's Twitter account. It is unclear whether the account in question was a personal account or Díaz's official city council account. If it is the latter, though not mentioned in the Complaint, we recognize the possibility that non-federal funds could have been used for the purpose of influencing a federal election. *See* 11 C.F.R. § 300.61. Nevertheless, since the amount of this activity appears to be *de minimis*, we make no recommendation as to this issue.

1           6.       Close the file.  
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3                           Lisa J. Stevenson  
4                           Acting General Counsel  
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6                           Charles Kitcher  
7                           Acting Associate General Counsel for Enforcement  
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10           10.29.20

  
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11   Date

Stephen Gura  
Deputy Associate General Counsel for Enforcement



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Mark Shonkwiler  
Assistant General Counsel

  
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Roy Q. Lockett  
Attorney

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24   Attachment:  
25       Factual and Legal Analysis



1 **FEDERAL ELECTION COMMISSION**

2  
3 **FACTUAL AND LEGAL ANALYSIS**

4 RESPONDENTS: Rev. Rubén Díaz for Congress and MUR 7747  
5 Andreina Cruz in her official capacity  
6 as treasurer  
7 Rev. Rubén Díaz  
8 Fresh Direct LLC  
9

10 **I. INTRODUCTION**

11  
12 This matter was generated by a Complaint filed with the Federal Election Commission (the  
13 “Commission”) by Rush Perez, treasurer of Bronx United.<sup>1</sup> The Complaint alleges that New York  
14 City Council Member Rev. Rubén Díaz, a candidate for New York’s 15th Congressional seat, and  
15 Rev. Rubén Díaz for Congress, his campaign committee (the “Committee”)(collectively  
16 “Respondents”), violated the Federal Election Campaign Act of 1971, as amended, (the “Act”) by  
17 accepting illegal corporate contributions and knowingly failing to disclose contributions to his  
18 campaign. As discussed in further detail below, the Commission dismisses the allegations outlined  
19 in the Complaint.

20 **II. FACTUAL AND LEGAL ANALYSIS**

21 The Complaint alleges that Rev. Díaz used city government resources to support his  
22 federal campaign, citing Díaz’s participation in a number of government-sponsored food drives  
23 outside of his council district at which a corporate entity, Fresh Direct, LLC (“Fresh Direct”)  
24 donated groceries and masks.<sup>2</sup>

25 Respondents deny the allegations. The joint response of the Committee and Díaz (“Díaz  
26 Respondents”) maintains that Díaz attended the events in question “in his capacity as the head of

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<sup>1</sup> See 52 U.S.C. § 30109(a)(1).

<sup>2</sup> Compl. at 2-7 (June 17, 2020).

1 a long established Ministers group,” and notes that the candidate “did not display any campaign  
2 posters, literature etc.”<sup>3</sup> The Díaz Respondents further deny that Díaz had any contact with the  
3 corporations that donated the food.<sup>4</sup> Additionally, Respondents assert that Fresh Direct did not  
4 coordinate its efforts with, or make an in-kind contribution to Díaz or the Committee, as there  
5 were no communications or agreements as to how much and what kinds of food would be  
6 donated.<sup>5</sup>

7 Fresh Direct denies that it made a contribution by providing the food and masks. It  
8 explains that it entered into a contract with the New York City Sanitation Department  
9 (“NYCSD”) to provide food boxes across all five boroughs of the city.<sup>6</sup> Under this arrangement,  
10 Fresh Direct assembled food boxes and delivered them to locations as requested by local elected  
11 officials “without reference to any federal election.”<sup>7</sup> Fresh Direct further states that Rev. Díaz’s  
12 opponents for federal office also requested food box distributions.<sup>8</sup>

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<sup>3</sup> Joint Response of the Committee and Rev. Ruben Díaz (“Joint Resp.”) at 1 (June 30, 2020).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 2. Díaz’s biography on the New York City Council website notes that he is the pastor of the Christian Community Neighborhood Church (“CCNC”). <https://council.nyc.gov/ruben-diaz-sr>. Díaz regularly appears on its CCNC’s Facebook page with respect to various church services. Iglesia Cristiana Comunidad, *Missionary Service*, FACEBOOK (Oct. 4, 2020); Iglesia Cristiana Comunidad, *Sunday Service*, FACEBOOK (Sept. 13, 2020); Iglesia Cristiana Comunidad, *Sunday Service*, FACEBOOK (Aug. 16, 2020); Iglesia Cristiana Comunidad, *Programa: La Iglesia Cristiana de la Comunidad Todos los Domingo(s)*, FACEBOOK (May 31, 2020); Iglesia Cristiana Comunidad, *Bodas de Esther*, FACEBOOK (Mar. 29, 2020).

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1           The Act and Commission regulations prohibit any corporation from making contributions  
2 to a candidate’s principal campaign committee.<sup>9</sup> “Contribution” is defined to include any gift of  
3 money or “anything of value” for the purpose of influencing a federal election.<sup>10</sup> “Anything of  
4 value” includes in-kind contributions, such as the provision of goods or services without charge  
5 or at a charge that is less than the usual and normal charge.<sup>11</sup>

6           Officers and directors of corporations may not consent to any contribution prohibited by  
7 section 30118(a).<sup>12</sup> Correspondingly, federal candidates and their authorized committees may  
8 not knowingly accept a corporate contribution.<sup>13</sup> An expenditure made by any person “in  
9 cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his  
10 authorized political committees, or their agents” constitutes a contribution to the candidate.<sup>14</sup>

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<sup>10</sup> 52 U.S.C. § 30101(8)(A); 11 C.F.R. § 100.52(a).

<sup>11</sup> 11 C.F.R. § 100.52(d)(1).

<sup>12</sup> *Id.*

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<sup>14</sup> 52 U.S.C. § 30116(a)(7)(B)(i); *see also* Explanation and Justification for Regulations on Coordinated and Independent Expenditures (“Coordination E&J”), 68 Fed. Reg. 421, 426 (Jan. 3, 2003).

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1 kind contribution to Díaz.<sup>21</sup> Díaz’s participation at the distributions outside of his council  
2 district arguably could be viewed as beneficial to his candidacy by increasing his public profile  
3 and demonstrating goodwill. However, there is no specific information suggesting that Fresh  
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5 Fresh Direct’s attached “Award Letter” detailing the terms of its agreement with the  
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13 distribution event at issue, “neither Rev. Díaz, nor his campaign distributed or in any manner  
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<sup>21</sup> These events appear to be less candidate-focused than those in other matters that the Commission has dismissed, particularly in situations where an officeholder engaged in activities while simultaneously running for federal office. *See* Factual & Legal Analysis (“F&LA”) at 7-8, MUR 6376 (Lori Edwards) (dismissing complaint and noting that Edwards, who held the office of Polk County, Florida, Supervisor of Elections while running for federal office, disseminated public service announcements encouraging persons to vote, but the ads did not focus on her role as a federal candidate and did not appear to contain any electoral content regarding her candidacy); *See also* Statement of Reasons of Chairman Lenhard and Comms. von Spakovsky, Walther and Weintraub, MUR 5770 (Laffey) at 2-3 (explaining Commission’s dismissal of allegations where city mayor and simultaneous federal candidate mailed cover letter with property tax bills to residents that listed accomplishments achieved by city while candidate was Mayor).

<sup>22</sup> Fresh Direct Resp. at 2; Attachment.

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1           Thus, the available information indicates that Fresh Direct provided the food and masks  
2 pursuant to a city contract to anyone who made a proper request under that contract, and there is  
3 no information that that the price the City paid for those goods was less than the usual and  
4 normal charge. Even if Díaz or other candidates tried to leverage the city-sponsored food  
5 giveaways to their political advantage, there is insufficient information to conclude that Fresh  
6 Direct made an in-kind contribution to Díaz.

7           The responses do raise questions regarding possible communications between  
8 Respondents. While the Díaz Respondents contend that “Fresh Direct has never had any  
9 communications with [either Respondent],”<sup>25</sup> Fresh Direct states that it provided supplies based  
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15 available information does not support a reasonable inference that Fresh Direct’s performance of  
16 the city contract resulted in any contribution to Díaz or the Committee.<sup>28</sup>

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<sup>25</sup> Joint Resp. at 2.

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<sup>27</sup> *Id.*; Attachment.

<sup>28</sup> The Complaint incorporates various posts from Díaz’s Twitter account. It is unclear whether the account in question was a personal account or Díaz’s official city council account. If it is the latter, though not mentioned in the Complaint, the Commission recognizes the possibility that non-federal funds could have been used for the purpose of influencing a federal election. *See* 11 C.F.R. § 300.61. Nevertheless, since the amount of this activity appears to be *de minimis*, the Commission makes no findings as to this issue.

1           Accordingly, the Commission dismisses the allegation that Fresh Direct violated  
2   52 U.S.C. §§ 30104(b) and 30118(a) by making prohibited and unreported in-kind contributions  
3   to Rev. Rubén Díaz for Congress. Further, the Commission dismisses the allegation that Rev.  
4   Ruben Díaz violated 52 U.S.C. § 30118(a) by accepting prohibited in-kind contributions from  
5   Fresh Direct LLC, and that Rev. Rubén Díaz for Congress and Andreina Cruz in her official  
6   capacity as treasurer violated 52 U.S.C. §§ 30104(b) and 30118(a) by accepting prohibited and  
7   unreported in-kind contributions from Fresh Direct LLC.