



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Rev. Ruben Diaz for Congress, *et. al.*) MUR 7747
)

**STATEMENT OF REASONS OF VICE CHAIR ALLEN DICKERSON AND
COMMISSIONERS SEAN J. COOKSEY AND JAMES E. "TREY" TRAINOR, III**

In this matter, we voted to approve the Office of General Counsel’s (“OGC”) recommendations to dismiss the allegations that Fresh Direct violated 52 U.S.C. §§ 30104(b) and 30118(a) by making prohibited and unreported in-kind contributions to Rev. Rubén Díaz for Congress. We further voted to approve OGC’s recommendations to dismiss the allegation that Rev. Ruben Díaz violated 52 U.S.C. § 30118(a) by accepting prohibited in-kind contributions from Fresh Direct LLC, and dismiss the allegation that Rev. Rubén Díaz for Congress and Andreina Cruz in her official capacity as treasurer violated 52 U.S.C. §§ 30104(b) and 30118(a) by accepting prohibited and unreported in-kind contributions from Fresh Direct LLC.

For the purposes of 52 U.S.C. § 30109(a)(8), we attach our proposed Factual and Legal Analysis in this matter.

Allen Dickerson
Vice Chair

December 3, 2021

Date

Sean J. Cooksey
Commissioner

December 3, 2021

Date

James E. "Trey" Trainor, III
Commissioner

December 3, 2021

Date

FEDERAL ELECTION COMMISSION**FACTUAL AND LEGAL ANALYSIS**

RESPONDENTS: Rev. Rubén Díaz for Congress and MUR 7747
 Andreina Cruz in her official capacity
 as treasurer
 Rev. Rubén Díaz
 Fresh Direct LLC

I. INTRODUCTION

This matter was generated by a Complaint filed with the Federal Election Commission (the “Commission”) by Rush Perez, treasurer of Bronx United.¹ 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 further detail below, the Commission dismisses the allegations outlined in the Complaint.

II. FACTUAL AND LEGAL ANALYSIS

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

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

¹ See 52 U.S.C. § 30109(a)(1).

² Compl. at 2-7 (June 17, 2020).

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

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

The Act and Commission regulations generally prohibit any corporation from making contributions to a candidate’s principal campaign committee.⁹ “Contribution” is defined to include any gift of money or “anything of value” for the purpose of influencing a federal

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

⁴ *Id.*

⁵ *Id.* at 2.

⁶ Response of Fresh Direct (“Fresh Direct Resp.”) at 2 (July 2, 2020).

⁷ *Id.*

⁸ *Id.*

⁹ 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b).

election.¹⁰ “Anything of value” includes in-kind contributions, such as the provision of goods or services without charge or at a charge that is less than the usual and normal charge.¹¹

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

Under the Act and Commission regulations, an entity does not make a contribution if it provides services in the ordinary course of business and at the usual and normal charge.¹⁵ Commission regulations define the “usual and normal charge” for goods is “the price of those goods in the market from which they ordinarily would have been purchased at the time of the contribution.”¹⁶ The Commission has previously opined that entities may establish the “usual and normal charge” of goods or services by reference to the “fair market price” of goods or services,¹⁷ “commercial considerations,”¹⁸ or the fee provided to “similarly situated persons in

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

¹¹ 11 C.F.R. § 100.52(d)(1).

¹² *Id.*

¹³ *Id.*

¹⁴ 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).

¹⁵ 11 C.F.R. §§ 100.52(d), 100.110(e).

¹⁶ 11 C.F.R. § 100.52(d)(2).

¹⁷ *See* 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.]”).

¹⁸ 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

the general public.”¹⁹ The Commission has determined that the provision of services, when done so at the usual and normal charge, does not constitute a contribution.²⁰

Díaz’s appearance and participation in a city-funded event, whether as a city council member or as a minister, is insufficient information to conclude that Fresh Direct made an in-kind contribution to Díaz. There is no specific information suggesting that Fresh Direct provided these services for the purpose of influencing a federal election.

Fresh Direct’s attached “Award Letter” detailing the terms of its agreement with the NYCSD indicates that Fresh Direct would have provided the same materials for the food drives irrespective of Díaz’s candidacy, or anyone else’s.²¹ The agreement obligated the NYCSD to pay Fresh Direct \$5,000,000 to provide 2,500 food boxes per day over a three-month period. Fresh Direct maintains that it had no input with respect to the disposition of the food boxes, and that the “[d]eliveries [were] made across the city without reference to the political affiliation of any elected official involved in requesting a delivery or distributing the boxes.”²² And the Díaz Respondents state that at each food distribution event at issue, “neither Rev. Díaz, nor his campaign distributed or in any manner publicized, his campaign for Congress.”²³

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).

¹⁹ 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).

²⁰ *See, e.g.*, MUR 6141 (Friends of Dave Reichert); MUR 6023 (John McCain 2008); MUR 5496 (Huffman for Congress); MUR 4989 (Dole/Kemp ’96).

²¹ Fresh Direct Resp. at 2; Attachment.

²² Fresh Direct Resp. at 2.

²³ *Id.*

Thus, the available information indicates that Fresh Direct provided the food and masks pursuant to a city contract to anyone who made a proper request under that contract, and there is no information that that the price the City paid for those goods was less than the usual and normal charge. There is therefore insufficient information to conclude that Fresh Direct made an in-kind contribution to Díaz.

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