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August 25, 2020

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

via email, cela@FEC.gov

Re: MUR 7764, Dana Balter, Friends of Dana Balter, and Sterling Waters, as Treasurer and Individually

Dear Mr. Jordan,

This is the response of our clients, Dana Balter (“Candidate”), Friends of Dana Balter (“Committee”), and Sterling Waters, as Treasurer and individually (hereinafter collectively, the “Respondents”) to the Complaint filed in the above-captioned Matter Under Review (“MUR”). For the reasons stated below, Respondents respectfully request that the Commission find no reason to believe that any violation of the Federal Election Campaign Act of 1971 (“Act” or “FECA”), as amended, or of the Federal Election Commission’s (“FEC” or “Commission”) regulations, was committed by these Respondents and close this matter as it pertains to them as expeditiously as possible.

A. Background

Respondent Dana Balter is a candidate for the U.S. House Of Representatives from the 24th congressional district of New York.¹ Respondent Committee is Dana Balter’s principal campaign committee, and Sterling Waters is the Committee’s Treasurer. Complainant erroneously alleges that \$6,213.71 in salary payments made during 2020 by the Committee to Ms Balter exceed the salary limitation in the Commission’s personal use regulation. Complainant is wrong.

In short and as more fully explained below, these amounts paid by the Committee to Dana Balter as salary are permissible, not excessive, and have been made in full compliance with the Act and the Commission’s regulations. Complainant’s explanation of the law, and their calculation of the excessive amount is incorrect. Accordingly, Respondents respectfully request that the Commission find no reason to believe that any violation occurred and close this matter as expeditiously as possible.

¹ The New York Democratic Primary was held on June 23, 2020. Ms Balter won the Primary, and the General Election will be held on November 3, 2020.

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B. Discussion

1. Under FECA, Salary Payments By a Principal Campaign Committee to a Non-Incumbent Federal Candidate Are Permissible.

Pursuant to FEC regulations, salary payments by a principal campaign committee to a non-incumbent Federal candidate are permissible and not a per se personal use of campaign funds, provided that certain conditions are met.² In fact, www.fec.gov, includes candidate salary payments under the heading “*Spending that isn’t personal use*” and not under the heading “*Automatic personal use.*” See <https://www.fec.gov/help-candidates-and-committees/making-disbursements/personal-use/>. The two pertinent conditions here are:

- The first payment of a salary shall not be paid to a candidate before the filing deadline for access to the primary election ballot for the federal office that the candidate seeks, as determined by state law.
- The salary must not exceed the lesser of the minimum annual salary for the federal office sought or what the candidate received as earned income in the previous year.

See 11 CFR 113.1(g)(1)(i)(I).

2. The Candidate’s Salary Payments Began After the Filing Deadline.

In this case, the filing deadline for Congressional elections held in the State of New York was April 2, 2020.³ Accordingly, pursuant to the FEC regulations cited above, Dana Balter was eligible to be paid a salary beginning on April 3, 2020. The payments to the Candidate began on April 20, 2020, subsequent to the filing deadline.⁴

3. The Salary Amount Paid to the Candidate Is Not Excessive.

(a) The baseline salary is established by compensation paid to the candidate in the calendar year prior to filing a Statement of Candidacy.

As indicated above, FEC regulations provide that salary payments by a candidate's principal campaign committee to a candidate may not exceed the lesser of: 1) the minimum annual salary paid to a federal officeholder holding the federal office that the candidate seeks; or 2) the

² 11 CFR 113.1(g)(1)(i)(I) — Using Contributions To Pay Salaries to Candidates
<https://www.fec.gov/regulations/113-1/2019-annual-113#113-1-g-1-i-I>

³ 2020 Official Political Calendar, N.Y. Bd. of Elections,
https://www.elections.ny.gov/NYSBOE/law/2020PoliticalCalendar_Rev0319.pdf

⁴ <https://docquery.fec.gov/pdf/792/202006119239687792/202006119239687792.pdf>. Note that the salary to the candidate was paid in regular payroll increments on a pro-rata basis of the amount for which she is eligible, rather than in a lump sum, per FEC guidance. See FEC Explanation and Justification (“E&J”) for 11 CFR 113.1, Personal Use of Campaign Funds, 67 Fed. Reg. 76962, 76972 (2002), <https://sers.fec.gov/fosers/showpdf.htm?docid=8982#page=11>, (“[p]ayments made under this paragraph must be computed on a pro-rata basis. This is intended to prevent a candidate’s principal campaign committee from paying the candidate the entire minimum annual salary for the Federal office sought” in one lump sum.)

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earned income that the candidate received during the year prior to becoming a candidate.⁵ Any earned income that a candidate receives from salary payments, other wages, or compensation from any other source is included in the calculation for total earned income during the year prior to becoming a candidate. Because, in this case, the amount received in compensation by the Candidate in the year prior to becoming a candidate is less than the annual salary of a member of the House of Representatives, that is the relevant number for this analysis.

Dana Balter became a candidate for the House of Representatives in the 2020 election cycle on April 17, 2019.⁶ The relevant FEC regulation requires the amount of the salary that can be paid to be capped at the amount of earned income received by the candidate “during the year prior to becoming a candidate.” In this case the, the applicable baseline year is 2018.

Complainant erroneously argues that “prior” should instead mean the year in which the candidate becomes a candidate, confusing the year of filing the Statement of Candidacy with the year of the filing deadline, and completely reading the word “prior” out of the law. A plain reading of the law would indicate otherwise, namely, that the word “prior” should be given its commonly understood meaning, that is, the year previous to or before becoming a candidate, as established by filing the Statement of Candidacy.

Because the regulation at hand requires a financial and accounting calculation, the commonly accepted accounting definition of “prior” may be instructive regarding the definition of “prior,” and that, too, means income recorded in the previous year.⁷ More importantly, the Commission itself indicated that this is the correct approach in the FEC’s Explanation and Justification for the regulation at hand which references “income *in the year prior*” and hence, to be “in the year prior” would by definition be income generated in the previous calendar year.⁸

In addition, under the relevant regulation, the candidate must provide to the FEC income tax records from the relevant year, and those records, such as a 1040 or W-2, are kept as a matter of course on a calendar year basis.⁹ If the meaning of “prior” meant another alternative, such as the current year or year of candidacy, as Complainant asserts, then it is conceivable that these records would not yet be available to produce, let alone determine the baseline amount.

⁵ 11 CFR 113.1(g)(1)(i)(I). *See also* E&J, 67 Fed. Reg. 76962, 76972, <https://sers.fec.gov/fosers/showpdf.htm?docid=8982#page=11> (“[a]ny earned income that the candidate receives from salaries or wages from *any other* source will count towards the limit of the minimum annual salary...”)(emphasis added)

⁶ *See* Statement of Candidacy of Dana Balter (April 17, 2019), <https://docquery.fec.gov/pdf/916/201904179146418916/201904179146418916.pdf>

⁷ http://www.investorwords.com/15618/prior_period.html; Contrast with “year-to-date:” <https://www.investopedia.com/terms/y/ytd.asp>.

⁸ *See, e.g.*, E&J, 67 Fed. Reg. 76962, 76972, <https://sers.fec.gov/fosers/showpdf.htm?docid=8982#page=11>, (“[a]dditionally, no candidate may receive a salary from campaign funds in excess of what he or she received as earned income in the year prior to becoming a candidate.”)

⁹ 11 CFR 113.1(g)(1)(i)(I). in addition, the candidate’s personal financial disclosure form requires disclosure of compensation on a calendar year basis, and as such, consistency argues in favor of a similar application here.

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The MURs cited by Complainant are simply not relevant to a determination here, as both primarily deal with candidates receiving funds *after* the candidates in those MURs ceased their candidacy, which is a clear distinction from the case at hand. The OGC reports barely touch on issue of what baseline salary should be used. In fact, in MUR 7068, there is a clear inference that the use of salary *during* the year of candidacy, rather than the prior year, is not the correct calculation.¹⁰ In both, OGC focused on the permissibility of post-candidacy payments, rather than the baseline calculation, and to argue that this establishes the baseline salary as being in the year of filing of the Statement of Candidacy is a bridge too far, when that was not the issue at hand in either MUR.¹¹

More relevant would be AO 2008-02, which, while not approved due to a lack of four votes, concluded in draft form that the relevant period for determining income is the year prior to becoming a candidate.¹² The House Ethics Committee took a similar interpretation in its most recent analysis of this FECA provision as applied to incumbent House members, concluding that the calendar year prior to the year in which the candidate registered her campaign committee was the appropriate baseline year for a calculation of income under section 113.¹³ Accordingly under the plain reading of the regulation, in conjunction with the relevant E&J and draft AO, the “year prior” means the calendar year prior to the year in which the individual becomes a candidate, or, in this case, earned income for the year 2018.

(b) The amounts paid to the candidate as salary here are not excessive.

Dana Balter’s earned income for 2018 was \$35,198.¹⁴ This amount is less than the minimum annual salary paid to a federal officeholder holding the federal office that the candidate seeks, and thus, is the applicable amount here. Thus, the aforementioned \$35,198 is the amount which may be paid out on a pro-rata basis during the course of the 2020 campaign.

Complainant asserts that \$6,213.71 paid to the Candidate is excessive, but this assertion is erroneous, given that she is eligible to be paid \$35,198, as confirmed by the attached tax records.

¹⁰MUR 7068, In the Matter of James Mowrer et al, First General Counsel’s Report, page 5, fn 18 (“Although [candidate] filed his statement of candidacy on July 1, 2013, Respondents present [candidate’s] 2013 wages as the relevant pre-candidacy salary,” clearly implying that this was incorrect). <https://www.fec.gov/files/legal/murs/7068/18044452883.pdf>

¹¹ See MUR 5787, In the Matter of Kalyn Free et al, First General Counsel’s Report, page 3, fn 1 (accepting the respondents’ salary calculation). <https://www.fec.gov/files/legal/murs/5787/11044290608.pdf>, and MUR 7068, In the Matter of James Mowrer et al, First General Counsel’s Report, page 5, fn 18 (accepting the respondents’ salary calculation). <https://www.fec.gov/files/legal/murs/7068/18044452883.pdf>

¹² See FEC Draft Advisory Opinion 2008-02 (not approved) <https://www.fec.gov/files/legal/aos/2008-02/980069.pdf>, at page 3 (“the relevant analysis is the earned income that [the candidate] received during the year prior to becoming a candidate.”)

¹³ U.S. House. Committee on Ethics. *In the Matter of Allegations Relating to Representative Rashida Tlaib*. (116 H. Rpt. xx, Page 4)(August 7, 2020), https://ethics.house.gov/sites/ethics.house.gov/files/documents/20200807_Tlaib%20Final%20Report.pdf.

¹⁴ See attached certified copies of tax records, Exhibit A. In addition, contrary to Complainant’s assertion, this amount is consistent with the Personal Financial Disclosure (“PFD”) Form filed for the applicable time period. Although the original was amended to correct a clerical error in the original filing, the public record clearly indicates that the income figure for the applicable time period is \$35,198.

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To date, the Candidate has been paid \$12,296.70 in installments as part of the Committee's regular payroll, clearly not an excessive amount. All such amounts have been or will be reported appropriately in accordance with applicable reporting periods. Accordingly, and for the reason states above, there is no reason to believe that any of the Respondents herein violated the Act or the Commission regulations.

C. Conclusion

In sum, with respect to the Respondents Dana Balter, Friends of Dana Balter and Sterling Waters, as Treasurer and individually, the Complaint and the information provided therein is erroneous, without merit, and clearly does not support a violation of the Act. Respondents have followed the applicable regulation with respect to the salary payments at issue in the complaint, and there has not been an excessive payout of salary in this case.

For these reasons, and as demonstrated above, Respondents respectfully request that the Commission find no reason to believe that they violated any provision of the Federal Election Campaign Act of 1971 (the "Act"), as amended, or the Commission regulations and close this MUR as it pertains to these Respondents as expeditiously as possible.

Respectfully submitted,

Eric Kleinfeld
Adam Clark
Utrecht, Kleinfeld, Fiori Partners
Counsel for Dana Balter, Friends of Dana Balter,
and Sterling Waters, as Treasurer and individually

Exhibit