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By Electronic Mail

December 17, 2021

Mr. Roy Q. Lockett
Federal Election Commission
Office of Complaints Examination
& Legal Administration
1050 First Street, NE
Washington, DC 20463

Re: MUR 7931 (Joseph R. Biden, Jr., et al.)

Dear Mr. Lockett:

We write on behalf of Respondents President Joseph R. Biden, Jr.; Biden for President (“BFP”); and Andrea Wise in her official capacity as Treasurer of BFP, in response to the Complaint filed by Committee to Defeat the President in MUR 7931. Respondent Biden Victory Fund (“BVF”), a joint fundraising representative of BFP, will submit a separate response.

The Complaint should be dismissed with no further action because it fails to allege facts that amount to a violation of the Federal Election Campaign Act of 1971, as amended (“the Act”). The Complaint speculates that President Biden, BFP, and/or BVF have received contributions or made expenditures in excess of \$5,000 for the 2024 election cycle, and consequently, President Biden is now a “candidate” for president in 2024. The Complaint alleges that, as a consequence, the respondents are late amending their registration forms and filing a statement of candidacy.

As detailed below, these allegations are incorrect as a matter of fact and law. The Commission should find no reason to believe a violation occurred and dismiss the Complaint.

STATEMENT OF FACTS

President Biden was a candidate for president in the 2020 election and BFP was his principal campaign committee. BVF is a joint fundraising representative of BFP, the Democratic National Committee (“DNC”), and multiple state parties’ federal committees. Both BFP and BVF continue to operate as they wind down their activities.

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I. BFP's Contributions Received and Expenditures Made Post-Election Day

BFP ceased soliciting contributions on Election Day 2020.¹ All contributions BFP has received after that day were solicited and made on or before Election Day or else refunded.² Further, all funds BVP transferred to BFP were comprised solely of contributions made to BVP on or before Election Day.³

Nor has BFP made any expenditures to influence the 2024 presidential election. All of BFP's expenditures made since Election Day relate to the 2020 election, including expenses related to winding down its 2020 activities, a cycle in which it had over \$1 billion in expenditures.⁴ This includes ongoing post-election costs necessary to conclude its 2020 operations, such as maintaining its business systems, legal and compliance costs, financial databases, tax payments, and diminishing payroll for employees to facilitate these operations.⁵

The Complaint cites only two of BFP's post-election disbursements in support of its allegations. The first, payments to NGP VAN Inc., were for an accounting and compliance database subscription necessary to maintain records to comply with the Act.⁶ The second, a payment to Upland Software, was related to BFP's ownership of a SMS short code.⁷ Both of these expenditures were to maintain records or property related to the 2020 election. The Complaint offers no evidence that these, or any other of BFP's post-Election Day expenses, were related to the 2024 presidential election.

II. BVP's Contributions Received and Expenditures Made Post-Election Day

BVP has not been authorized by President Biden or BFP to raise or spend funds for the 2024 election.⁸ Nor has BVP raised funds for the 2024 election, transferred any funds to BFP for that election, or otherwise spent funds to influence that election.⁹ The Complaint cites no evidence to support its claim that any of the funds raised were for the 2024 election. Instead,

¹ Decl. of Taryn Vogel at ¶ 2, 3.

² Decl. of Taryn Vogel at ¶ 4. Separately, BFP established a recount fund, and accepted \$25,380.04 in donations (not contributions) to that fund made after Election Day through Biden Fight Fund, a separate joint fundraising representative not subject to the allegations of this Complaint.

³ Decl. of Joseph Smolskis at ¶ 7; Decl. of Taryn Vogel at ¶ 5.

⁴ Decl. of Taryn Vogel at ¶¶ 2, 6.

⁵ Decl. of Taryn Vogel at ¶ 6.

⁶ Decl. of Taryn Vogel at ¶ 7; *see* 52 U.S.C. § 30102(c).

⁷ Decl. of Taryn Vogel at ¶ 8.

⁸ Decl. of Joseph Smolskis at ¶ 11; Decl. of Taryn Vogel at ¶ 9.

⁹ Decl. of Joseph Smolskis at ¶¶ 5, 7, 11; Response of BVP at 4.

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based on BVF's FEC reports, the Complainant has calculated that \$2,142,313.54 (0.3% of the funds BVF received), were reported as received after Election Day. From this, the Complaint concludes, BVF must have been fundraising for the 2024 election.

As noted in BVF's pleadings, some contributions were made before Election Day but not received by BVF until after Election Day, and some contributions continued to be received by BVF including from pre-election solicitations.¹⁰ Additionally, during the tumultuous post-election period, BVF invited some donors to make contributions via its store. None of those funds were transferred to BFP.¹¹ Nor were they used to influence the 2024 election. Instead, they were allocated to the accounts of other JFC participants or refunded.¹² BVF has not raised any funds for BFP in connection with the 2024 election cycle.¹³

Nor has BVF made expenditures to influence the 2024 election.¹⁴ The Complaint speculates that this may have been so, but specifically identifies only one post-election disbursement: \$100,000 to Vox Media LLC for online fundraising.¹⁵ This expenditure was for an advertisement purchased in August 2020 but for which BVF received an invoice in 2021.¹⁶ BVF post-Election Day disbursements relate to 2020 election campaign or annual party committee fundraising and winding down the operations of BVF, an organization with over \$660 million in receipts over its lifetime.

ARGUMENT

The Complaint should be dismissed because it contains no facts that constitute a violation of the Act by BFP or President Biden.

Commission regulations require that an individual file a Form 2 within fifteen days of becoming a "candidate."¹⁷ A candidate is someone who accepts contributions or makes expenditures in excess of \$5,000 in an election cycle, or who consents to another person doing so on their behalf.¹⁸ The Complaint speculates that, because BVF and BFP had more than insubstantial financial activity after Election Day, that must reflect activity for the 2024

¹⁰ Response of BVF at 3-4; Decl. of Joseph Smolskis at ¶ 8.

¹¹ Decl. of Joseph Smolskis at ¶¶ 7-9.

¹² *Id.*; Response of BVF at 4.

¹³ Decl. of Joseph Smolskis at ¶¶ 5, 7, 11.

¹⁴ Decl. of Joseph Smolskis at ¶ 5.

¹⁵ Compl. ¶ 34.

¹⁶ Decl. of Joseph Smolskis at ¶ 6.

¹⁷ 11 C.F.R. § 101.1(a).

¹⁸ 52 U.S.C. § 30101(2); 11 C.F.R. § 100.3.

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presidential election. The Complaint's sole "fact" to support the claim that BFP and BVF engaged in post-Election Day fundraising for the 2024 race is its calculation of the funds that BVF received after November 3, 2020, a sum equal to about 0.3% of all funds BVF received for the 2020 election.¹⁹ The Complaint makes no specific factual allegations as to BFP's post-Election Day fundraising. As to spending, the Complaint cites to only three specific expenditures, which were disbursements for the maintenance of BFP's financial records and property, and an invoice for a pre-Election Day media expenditure. Commission precedent dictates that reason to believe cannot be premised on such speculation when there are contrary statements by persons with knowledge of the facts.²⁰

The 2020 presidential election was among the most hotly contested in the past 150 years. Each presidential candidate raised and spent over \$1 billion, the GSA did not acknowledge Joe Biden was the president-elect and eligible for transition funding until November 24, and former President Trump did not publicly acknowledge he had been defeated until January 7. In this context, the claim that a national party's receipt of funds from a legacy joint fundraising committee forces a person who is not a candidate for the next election to so declare is not an accurate statement of the law.

I. BFP has not accepted contributions or made expenditures in excess of \$5,000 on behalf of President Biden for the 2024 election cycle.

BFP has not accepted any contributions made after Election Day 2020, whether raised directly by BFP or received as transfers from BVF. Under the Act and Commission regulations, contributions received through a joint fundraising representative are considered received by the participating committee on the date that they were received by the joint fundraising representative.²¹ Although BVF made transfers to BFP after the election, those transfers were entirely composed of contributions made to BVF on or before Election Day.²² Therefore,

¹⁹ Compl. ¶¶ 24-28.

²⁰ See MUR 7370 and 7496 (New Republican PAC), Statement of Reasons of Vice Chair Dickerson and Comm'rs Cooksey and Trainor at 9 (July 21, 2021) ("At the RTB stage, when speculation based on press reports and unattributed comments from "Republican officials" is pitched against a contradictory sworn statement from someone with personal knowledge of the matter at hand, we must credit the sworn statement.") (citations omitted). See also, MUR 7868 (Twitter), Statement of Reasons of Vice Chair Dickerson and Comm'r Trainor at 4 (Sept. 13, 2021) ("At the reason-to-believe stage, we cannot proceed to authorize an investigation based upon "[u]nwarranted legal conclusions from asserted facts or mere speculation.") (quoting MUR 4960 (Clinton), Statement of Reasons of Comm'rs Mason, Sandstrom, Smith, and Thomas at 2 (Dec. 21, 2000)).

²¹ 11 C.F.R. § 102.17(c)(3)(iii). This is of course different from the date that the FEC treats the contribution as having been "made" by the donor. 11 C.F.R. § 110.1(b)(6)

²² Decl. of Joseph Smolskis at ¶ 7; Decl. of Taryn Vogel at ¶ 5.

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because BFP has not received contributions for the 2024 election cycle, contributions to BFP did not trigger candidacy status.

Nor has BFP made any expenditures for the 2024 election cycle. BFP's post-election spending is for trailing vendor invoices related to activity prior to Election Day, and for its significant 2020 winding down activity.²³ It is not surprising that this activity was substantial, given the sums BFP raised and spent during the race. The only two BFP post-election expenditures specifically identified in the Complaint, payments to NGP Van Inc. and to Upland Software Inc., are for a compliance and accounting database necessary for operations during the wind down and the Commission's reporting requirements, and costs necessary to protect BFP's intellectual property.²⁴

II. BVF has not accepted contributions or made expenditures in excess of \$5,000 on behalf of President Biden for the 2024 election cycle.

BVF is not authorized to, and has not, raised or spent any funds for President Biden in the 2024 presidential election.²⁵ An individual becomes a candidate for an election based on the activity of a third party if they consent to that third party receiving contributions or making expenditures on their behalf for that election.²⁶ BVF has not engaged in such activity on behalf of President Biden for the 2024 cycle. This conclusion is not altered by the fact that BVF was an authorized committee of President Biden in a prior election cycle. In fact, it is not uncommon for presidential joint fundraising committees to continue to report receipts after Election Day²⁷ nor has the Commission ever announced that this, on its own, involuntarily triggers candidacy in a future election.

BVF is not authorized to make, nor has it made, any disbursements to raise funds for the 2024 election cycle. All of its expenditures relate to the 2020 election and annual fundraising for its party committee participants or the costs of winding down BVF's operations.²⁸ The

²³ Decl. of Taryn Vogel at ¶ 6.

²⁴ Decl. of Taryn Vogel at ¶¶ 7-8.

²⁵ Decl. of Taryn Vogel at ¶ 9; Decl. of Joseph Smolskis at ¶ 1.

²⁶ 11 C.F.R. § 100.3.

²⁷ As examples, the Hillary Victory Fund had receipts of \$1,183,576 in 2017 or about 0.2% of its total receipts, and the Obama Victory Fund had receipts of \$3,384,867 in 2013, or about 0.7% of its overall receipts.

²⁸ Response of BVF at 4.

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Complaint cites only one specific payment to support its claim that this is not true: \$100,000 to Vox Media.²⁹ This payment related to a pre-Election Day advertising cost.³⁰

III. BVF’s continued status as an authorized committee for President Biden does not cause its post-election receipts and disbursements to be contributions and expenditures on his behalf for the 2024 cycle.

BVF’s status as an authorized committee does not automatically cause receipts of and disbursements by BVF after Election Day 2020 to be considered contributions and expenditures on President Biden’s behalf for the 2024 election cycle. President Biden’s leaving BVF as an authorized committee after Election Day reflects the legal and factual realities of engaging in large-scale joint fundraising, not that he has authorized BVF to raise funds on his behalf for 2024.

Indeed, the law actually requires BVF to remain an authorized committee of President Biden at this time. Under Commission regulations, a joint fundraising representative must be an authorized committee of any participating candidate.³¹ So long as BVF has undistributed funds in its possession that are or may be allocated for BFP, it must remain an authorized committee of President Biden; he cannot remain a participant without authorizing the committee, and if he ceased being a participant, any transfers from BVF to BFP would be excessive contributions.³² The FEC’s regulations permit a joint fundraising committee to delay distribution “until all contributions are received and all expenses are paid.”³³ Therefore, President Biden has appropriately left BVF as an authorized committee for 2020 election cycle purposes until it is prepared for termination. BVF’s conducting of wind-down operations does not mean President Biden has consented to BVF engaging in 2024 fundraising activity on his behalf; indeed, he has not.

Similarly, an authorized committee, including a joint fundraising representative, must contain the authorizing candidate’s name.³⁴ Therefore, until BVF completes its transfer of 2020 election funds to BFP and finalizes its operations, it is appropriate to keep “Biden” in the committee’s name. Continuing to include the President’s name in the name of the joint fundraising committee after Election Day 2020 does not indicate that he has consented to BVF engaging in 2024 activity on his behalf, or that any post-Election Day activity conducted by BVF was necessarily on his behalf.

²⁹ Compl. ¶ 34.

³⁰ Decl. of Joseph Smolskis at ¶ 6.

³¹ 11 C.F.R. § 102.17(a)(1)(i).

³² See 11 C.F.R. §§ 102.6(a)(1)(iii), 110.3(c)(2) (allowing unlimited transfer from joint fundraising representatives to participants as an exception to the contribution limits).

³³ 11 C.F.R. § 102.17(c)(3)(ii).

³⁴ 11 C.F.R. § 102.14(a).

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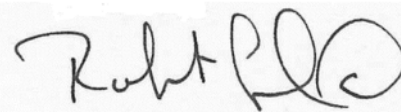
IV. BFP is not required to amend its Form 1 Statement of Organization.

The claim that BFP failed to amend its Form 1 Statement of Organization because President Biden has become a candidate in the 2024 cycle is similarly meritless, in part because Form 1 does not require the campaign committee to identify the election for which the candidate seeks office, and because President Biden has taken no action that has made him a candidate for president in 2024.

CONCLUSION

For the reasons stated above, President Biden has neither accepted contributions nor made expenditures for the 2024 election cycle, nor has he given his consent to another person to do so on his behalf.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert D. Lenhard". The signature is stylized and cursive.

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Derek A. Lawlor
Andrew D. Garrahan
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One CityCenter
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(202) 662-6000

BEFORE THE FEDERAL ELECTION COMMISSION

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In re MUR 7931)
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DECLARATION OF TARYN VOGEL

I, Taryn Vogel, declare as follows based on personal knowledge:

1. I am the founder of BlueBird Consulting LLC, a campaign and political compliance, reporting, and accounting firm. Through BlueBird, I provide compliance consulting services for Biden for President (“BFP”), including reviewing receipts and disbursements to ensure they are accurately and appropriately recorded, and ensuring receipts are permissible and in compliance with regulations.
2. BFP was the principal campaign committee of President Biden for the 2020 election cycle. President Biden has not authorized BFP to solicit or receive contributions or to make expenditures for the 2024 presidential election.
3. BFP staff were instructed to cease soliciting contributions entirely after Election Day 2020. To the best of my knowledge, BFP has not solicited any funds, including through mail, online, or any other source since then.
4. BFP did not accept any contributions made after Election Day 2020. BFP inadvertently deposited, and promptly refunded, approximately \$8,000 in contributions through fundraising vendors and agents. BFP has not accepted any contributions for the 2024 election cycle.
5. To the best of my knowledge, all funds transferred to BFP from BVF consisted of contributions made to BVF prior to Election Day.
6. All expenditures by BFP since Election Day 2020 have been for activity related to the 2020 election or expenses of winding down its 2020 activities. These include but are not limited to costs for databases and other business systems, legal fees, compliance costs, payroll to maintain these operations, and tax payments. BFP has not made any expenditures for the purpose of influencing the 2024 presidential election.
7. BFP made disbursements to NGP VAN Inc. in April, May, and June 2021 to maintain and use an accounting and compliance database. BFP uses this database for filing reports with the Commission, maintaining BFP’s accounts, and other accounting and compliance needs.
8. BFP made disbursements to Upland Software Inc. in June 2021 to maintain ownership of BFP’s SMS short code phone number, used for communications with BFP.

9. BFP has not given consent to BVF to accept contributions or make expenditures on behalf of President Biden for the 2024 election cycle.

* * *

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Date: 12/17/2021

By: Taryn Vogel

TARYN VOGEL