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June 12, 2023

SENT VIA EMAIL

Federal Election Commission
Office of Complaints Examination & Legal Administration
Roy Q. Lockett, Acting Assistant General Counsel
Attn: Trace Keeys, Paralegal
1050 First Street NE
Washington, DC 20463
cela@fec.gov

RE: Response to MUR 8110

Dear Mr. Lockett:

On behalf of Chris Marston (“Marston”) and Moses Ayala (“Ayala”), for themselves and on behalf of the organization Policies, Solutions, and Action for America, Inc. (“PSAA”), whom Marston served as treasurer and Ayala served as vice president and secretary prior to its dissolution in 2022, (collectively “Respondents”),¹ this response to the complaint filed in MUR 8110 (the “Complaint”) serves to explain why the Federal Election Commission (“Commission”) should take no action thereupon, other than to dismiss it. Please direct any future correspondence for Respondents to my attention.

At its core, the Complaint alleges PSAA served as a conduit and facilitated contributions in the name of another in violation of federal campaign finance law. This matter, filed by an organization known to target organizations it opposes ideologically,² lacks the factual foundation required to support the alleged violations and fails to meet the pleading standards required by the Commission. Respondents specifically deny all of the allegations contained therein and respectfully request that the Commission conclude there is no reason to believe Respondents violated the Federal Election Campaign Act of 1971, as amended (the “Act”), or to otherwise dismiss the complaint on alternative grounds.

Background

PSAA was incorporated in the District of Columbia and organized as a 501(c)(4) nonprofit organization. Marston Affidavit Para. 4; Ayala Affidavit Para 4. Operations commenced in 2020 and continued through 2022 when the organization dissolved in the normal course of operations.

¹ This appearance on PSAA’s behalf does not constitute a concession that the organization is a proper party in this Matter.

² See, e.g., InfluenceWatch, *Citizens for Responsibility and Ethics in Washington (CREW)*, NON-PROFITS, <https://www.influencewatch.org/non-profit/citizens-for-responsibility-and-ethics-in-washington/> (last visited April 12, 2023); Robert Knight, *KNIGHT: Time to disarm partisan CREW*, THE WASHINGTON TIMES (July 29, 2011), <https://www.washingtontimes.com/news/2011/jul/29/time-to-disarm-partisan-crew/> (last visited April 12, 2023).

Marston Affidavit Para. 5; Ayala Affidavit Para. 5. During the organization's existence, Marston served as the organization's treasurer and personally oversaw the organization's financial activities, including reviewing contributions received and supervising expenditures made by the organization. Marston Affidavit Paras. 3, 6. Marston has extensive experience serving in the role of treasurer for nonprofit organizations like PSAA and is generally familiar with the legal requirements applicable to such an organization. Marston Affidavit Para. 7.

As treasurer of PSAA, Marston states unequivocally that he is without knowledge, or reason to suspect, as to any illicit conduct on the part of PSAA in the receipt or issuance of any contribution, or otherwise. Marston Affidavit Paras. 8-11.

Similarly, Ayala – also a seasoned campaign-finance professional – served as an officer of PSAA. Ayala Affidavit Para. 3. Ayala too states that he is without knowledge, or reason to suspect, as to any illicit conduct on the part of PSAA in the receipt or issuance of any contribution, or otherwise. Ayala Affidavit, Paras. 8-11.

The Complaint is light on facts and heavy on unsubstantiated inferences for one reason: there was no violation of 52 U.S.C. § 30122. Respondents did not engage in the conduit conduct alleged and did not facilitate a contribution in the name of another, and the only evidence on point before the Commission is Marston's and Ayala's explicit denials. Respondents specifically deny the allegations contained in the Complaint and, for the reasons discussed in detail below, request the Commission dismiss this matter.

Discussion

I. The Commission should dismiss the Complaint as against PSAA, because it dissolved well before the Complaint was filed.

Preliminarily, the Commission has broad discretion in determining which enforcement matters to pursue. “This Court has recognized on several occasions over many years that an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.” *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). “[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are particularly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.” *Id.*

The Commission has previously utilized such discretion and dismissed enforcement matters where the respondents included terminated entities. For example, Commissioners Petersen, Hunter, and Goodman indicated in their Statement of Reasons concerning MUR 6391 (Commission on Hope, Growth, and Opportunity) that the enforcement file should be closed because:

[t]he organization no longer existed, having filed termination papers with the IRS in 2011. It had no money. Its counsel had resigned. There were no people acting on its behalf, and we learned that there did not appear to be any agents of CHGO with whom the Commission could conciliate or who could otherwise legally bind the defunct organization. Indeed, we were informed that any further enforcement action in this matter was a pyrrhic exercise.

At that point . . . we concluded that any conciliation effort would be futile, and the most prudent course was to close the file consistent with the Commission's exercise of its discretion in similar matters.

Id. at 4 and n.17.

PSAA elected to dissolve in the normal course of operations, well before any notice of this matter was received, and thereafter wound up the organization's affairs. Marston Affidavit Para. 5; Ayala Affidavit Para. 5. The entity no longer exists. As noted above, the Commission has previously exercised its discretion and declined to pursue enforcement matters involving terminated organizations. The Commission should exercise such discretion here.

II. The Commission should dismiss the Complaint as against Marston, Ayala and PSAA because it offers no evidence of a violation, just innuendo.

Dismissal of this matter is further warranted because the Complaint fails to sufficiently articulate a factual or legal basis for a finding that Respondents violated the Act, including 52 U.S.C. § 30112. The basic reason that the Complaint fails to meet this pleading standard is because the allegations are false.

“The Commission may find ‘reason to believe’ only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the FECA. Complaints not based upon personal knowledge must identify a source of information that reasonably gives rise to a belief in the truth of the allegations presented.” MUR 4960, Statement of Reasons of Commissioners Mason, Sandstrom, Smith, and Thomas, at 1; *see also* 11 C.F.R. § 111.9(a). Furthermore, “[u]nwarranted legal conclusions from asserted facts . . . or mere speculation . . . will not be accepted as true.” MUR 4960, Statement of Reasons, at 2. Finally, “a complaint may be dismissed if it consists of factual allegations that are refuted with sufficiently compelling evidence provided in the response to the complaint”. *Id.* As is evident from even a cursory review of the Complaint, the allegations asserted against Respondents fail to rise above mere speculation and conjecture.

52 U.S.C. § 30122 provides, “No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.” That the conduct be knowing and willful is a threshold matter.

The U.S. Supreme Court described in *United States v. Bryan*, 524 U.S. 184 (1998), an intermediate standard of knowledge and willfulness that has since been applied to campaign finance violations. In *Bryan*, a criminal case that involved a violation of federal firearms licensing requirements, the Court discussed what it means for conduct to be considered “willful,” and provided, “[m]ost obviously, [willfully] differentiates between deliberate and unwitting conduct, but in the criminal law it also typically refers to a culpable state of mind.” *Id.* at 191. “In other words, in order to establish a ‘willful’ violation of a statute, ‘the Government must prove that the defendant acted with knowledge that his conduct was unlawful.’” *Id.* at 191-192, citing *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994).

The *Bryan* standard of knowing and willful violations of the law has been applied to prosecutions for federal campaign finance violations, including those involving contributions in the name of another in violation of 52 U.S.C. § 30122. In *United States v. Kukushkin*, 2023 U.S. App. LEXIS 5487, *12 (2nd Cir. 2023), the Second Circuit indicated that in prosecuting campaign finance violations, including violations of 52 U.S.C. § 30122, “any number of crimes – including the FEC violations at issue here – require that a defendant ‘knowingly and willfully’ violated the law.” The court further stated, “[i]n *Bryan v. United States*, the Supreme Court held that ‘when used in the criminal context, a willful act is one undertaken with a bad purpose. In other words, in order to establish a willful violation of a statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful.’” *Id.*, citing *Bryan*, 524 U.S. at 191-192. In discussing the defendant’s campaign finance convictions, including violation of 52 U.S.C. § 30122, the court further provided that “[c]riminal penalties of up to five years’ imprisonment attach to violations of . . . § 30122 where 1) donations amount to \$25,000 or more in one calendar year, and 2) the person acts ‘knowingly and willfully.’” *Id.* at *8, citing 52 U.S.C. § 30109(d) (emphasis added).

Other than identifying a contribution received by PSAA and subsequent contributions made by PSAA, the Complaint is utterly devoid of any factual foundation to support a conclusion that Respondents engaged in or otherwise facilitated a straw transaction – let alone that they engaged in any misconduct that would satisfy the knowing and willful standard required for violations of 52 U.S.C. § 30122.

Respondents did not violate 52 U.S.C. § 30122 and the Complaint does not provide any substantive information to indicate otherwise. Where allegations are based on conjecture and speculation, not specific facts, a complaint does not meet the pleading standards required by the Commission. This Matter should be dismissed.

Conclusion

The Complaint filed in this case contains utterly baseless allegations made by a repeat customer that routinely targets organizations it finds ideologically offensive. The allegations that Respondents violated 52 U.S.C. § 30122 are factually unsupported for the simple reason that there was no violation. In filing this Complaint, the Complainant has wasted the Commission’s time in furtherance of a targeted political goal.

Respondents deny any and all alleged violations of the Act, and respectfully request the Commission dismiss the Complaint. Respondents expressly reserve any constitutional, statutory, or other defenses available under the law.

Sincerely,

A handwritten signature in black ink that reads "Michael G. Adams". The signature is written in a cursive, slightly slanted style.

Michael G. Adams
Counsel for Respondents

BEFORE THE
FEDERAL ELECTION
COMMISSION

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AFFIDAVIT OF MOSES AYALA

The undersigned, Moses Ayala, hereby affirms and certifies, under the penalty of perjury, the following:

1. I am over 18 years of age, and I suffer from no legal disability.
2. I am competent to testify concerning the matters stated herein, and the statements contained in this Affidavit are based upon my personal knowledge.
3. I served as the Vice President and Secretary of Policies, Solutions and Action for America, Inc. ("PSAA") during the time period at issue in the Complaint by David Key et al. (the "Complaint").
4. PSAA was organized as a 501(c)(4) nonprofit organization, was incorporated in the District of Columbia, and commenced operations on or about May 6, 2020.
5. In 2022, PSAA elected to terminate its existence in the normal course of operations, dissolve and wind down its affairs, well prior to filing of the Complaint this year.
6. As Vice President and Secretary of PSAA, my duties included assisting in the conduct of the affairs of the organization.
7. I have substantial professional experience in the area of campaign-finance law, which has given me a general familiarity with the legal obligations applicable to organizations such as PSAA.
8. I am not aware of, nor do I have reason to believe that there are, any facts or factual circumstances that would make illegal any contribution received or made by PSAA.
9. I am not aware of, nor do I have reason to believe that there was, any intent on the part of PSAA or any of its officers or agents to violate, or to undertake any act that would have had the effect of violating, any federal campaign finance statute or regulation.
10. I am not aware of, nor do I have reason to believe that there was, any intent or act on the part of PSAA or any of its officers or agents to be party to or to facilitate a conduit contribution, nor of any directive by any contributor to PSAA as to specifically how the contributed funds should be utilized.

- 11. I am not aware of, nor do I have reason to believe that there was, any specific directive by PSAA to Right On Issues, Inc. with respect to the latter's use of funds received from PSAA.
- 12. I specifically deny the allegation in the Complaint's Paragraphs 111 and 113 that I have violated and continue to violate any federal campaign finance statute or regulation.
- 13. I specifically deny the allegation in the Complaint's Paragraph 145 that I have ever served as Treasurer of PSAA.
- 14. Further, the affiant sayeth naught.

I HEREBY AFFIRM AND CERTIFY, UNDER PENALTY OF PERJURY, THAT THE ABOVE STATEMENTS ARE TRUE TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF.

SIGNATURE: Moses Arala
 NAME: Moses Arala
 TITLE: V.P. + Secretary
 ORGANIZATION: Policies, Solutions and Action for America

Signed and sworn to before me this 07 day of June, 2023.

Leslie P. Kim
 Notary Public
 My Commission Expires: _____



LESLIE P. KIM
 NOTARY PUBLIC DISTRICT OF COLUMBIA
 My Commission Expires September 14, 2024

BEFORE THE
FEDERAL ELECTION
COMMISSION

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AFFIDAVIT OF CHRIS MARSTON

The undersigned, Chris Marston, hereby affirms and certifies, under the penalty of perjury, the following:

1. I am over 18 years of age, and I suffer from no legal disability.
2. I am competent to testify concerning the matters stated herein, and the statements contained in this Affidavit are based upon my personal knowledge.
3. I served as the Treasurer of Policies, Solutions and Action for America, Inc. ("PSAA") during the time period at issue in the Complaint by David Key et al. (the "Complaint").
4. PSAA was organized as a 501(c)(4) nonprofit organization, was incorporated in the District of Columbia, and commenced operations on or about May 6, 2020.
5. In 2022, PSAA elected to terminate its existence in the normal course of operations, dissolve, and wind down its affairs, well prior to filing of the Complaint this year.
6. As Treasurer of PSAA, my duties included, but were not limited to, managing and overseeing the financial transactions of the organization, including reviewing contributions received and disbursements made.
7. I have substantial experience in managing the financial affairs of nonprofit organizations and political committees. My experience has given me a general familiarity with the legal obligations applicable to organizations such as PSAA.
8. I am not aware of, nor do I have reason to believe that there are, any facts or factual circumstances that would make illegal any contribution received or made by PSAA.
9. I am not aware of, nor do I have reason to believe that there was, any intent on the part of PSAA or any of its officers or agents to violate, or to undertake any act that would have had the effect of violating, any federal campaign finance statute or regulation.
10. I am not aware of, nor do I have reason to believe that there was, any intent or act on the part of PSAA or any of its officers or agents to be party to or to facilitate a conduit contribution, nor of any directive by any contributor to PSAA as to specifically how the contributed funds should be utilized.

11. I am not aware of, nor do I have reason to believe that there was, any specific directive by PSAA to Right On Issues, Inc. with respect to the latter's use of funds received from PSAA.

12. I specifically deny the allegation in the Complaint's Paragraphs 110 and 145 that I have violated and continue to violate any federal campaign finance statute or regulation.

13. Further, the affiant sayeth naught.

I HEREBY AFFIRM AND CERTIFY, UNDER PENALTY OF PERJURY, THAT THE ABOVE STATEMENTS ARE TRUE TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF.

SIGNATURE: *Chris Marsden*
NAME: CHRIS MARSDEN
TITLE: TREASURER
ORGANIZATION: PSAA



Signed and sworn to before me this 7 day of June, 2023.
Paul M. Hankins
Notary Public
My Commission Expires: 7/31/2026