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**FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463**

FIRST GENERAL COUNSEL'S REPORT

MUR: 5937
DATE COMPLAINT FILED: September 4, 2007
DATE OF NOTIFICATION: September 11, 2007
LAST RESPONSE RECEIVED: November 2, 2007
DATE ACTIVATED: December 4, 2007

EXPIRATION OF STATUTE OF
LIMITATIONS: June 24, 2012

COMPLAINANT: Greg Sabine

RESPONDENTS: Romney for President, Inc. and
Darrell Crate, in his official capacity
as treasurer
Kem Gardner

RELEVANT STATUTES
AND REGULATIONS: 2 U.S.C. § 431(8)(A)
2 U.S.C. §§ 431(8)(B)(i) and (iv)
2 U.S.C. § 434(b)
2 U.S.C. § 441a(a)
2 U.S.C. § 441a(f)
11 C.F.R. § 100.74
11 C.F.R. § 100.79

INTERNAL REPORTS CHECKED: None

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

The complaint in this matter alleges that Kem Gardner made, and Romney for President, Inc. and Darrell Crate, in his official capacity as treasurer ("RFP") accepted, an excessive in-kind contribution when Gardner paid \$150,000 to charter an airline plane to fly himself and a large number of other persons from Utah to Boston to work as volunteers at an RFP fundraising event.

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1 Complaint at 1. In their responses, both RFP and Gardner contend that travel expenses incurred
2 to attend fundraisers are not contributions. As discussed in more detail below, however, Gardner
3 and the attendees accompanying him on his chartered flight were volunteers providing services
4 on behalf of the candidate, and any unreimbursed volunteer travel payment exceeding \$1,000
5 constitutes a contribution. *See* 2 U.S.C. § 431(8)(B)(iv), 11 C.F.R. § 100.79. Accordingly, given
6 that the volunteers onboard the chartered flight did not reimburse Gardner for any travel
7 expenses, his reported payment of \$150,000 for the flight constitutes an in-kind contribution
8 exceeding the maximum allowable limit pursuant to 2 U.S.C. § 431(8)(B)(iv) and 11 C.F.R.
9 § 100.79. Thus, Kem Gardner made, and RFP received, an excessive in-kind contribution. RFP
10 also failed to report the receipt of the in-kind contribution. Therefore, we recommend that the
11 Commission find reason to believe that Kem Gardner violated 2 U.S.C. § 441a(a) and that
12 Romney for President, Inc. and Darrell Crate, in his official capacity as treasurer, violated
13 2 U.S.C. §§ 434(b) and 441a(f). We also recommend that the Commission enter into pre-
14 probable conciliation with both Mr. Gardner and RFP.

15 **II. FACTUAL SUMMARY**

16 *The event in issue, which RFP dubbed "America's Calling," took place on June 25, 2007.*
17 RFP's June 25, 2007 press release following the event states "Mitt Romney, family, friends and
18 supporters gathered at the TD Banknorth Garden to reach across the country and raise the
19 resources necessary for a national campaign" and notes that the participants made more than
20 20,000 telephone calls. The press release also states that the calling arena, which was more than
21 17,000 square feet, housed more than 600 volunteer fundraisers who used 400 landline phones.
22 The calling event raised approximately \$2 million. RFP Response at 2. The press was invited to

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1 cover the event and it received extensive press coverage.¹ *See, e.g., Romney raises campaign*
2 *cash at Boston sports venues*, June 25, 2007; Michael Luo, *Romney Campaign Reaches Back*
3 *Into His Deep Pockets*, *New York Times*, June 26, 2007.

4 In a video posted on the campaign's website, RFP national finance director Spencer
5 Zwick, shown speaking the evening before the calling event, stated:

6 Well, we've got a great group of supporters from around the
7 country. . . . we have close to a thousand people that have
8 traveled at their own expense coming to Boston with the idea
9 that they are going to raise money to help us push toward the
10 end of the quarter. So tonight [a Fenway Park barbecue on
11 July 24] is a thank you for their support, but by and large we
12 are here to raise money. So starting tomorrow, we'll go to the
13 Boston Garden and they will call their personal rolodex. They'll
14 call their friends. They'll call their family. They'll call people
15 that maybe contributed a little bit but need to contribute some
16 more. So our goal is to raise money and expand our base of
17 support.

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19 Available at <http://mittromney.permissiontv.com/index.html>.

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¹ The June 25, 2007 event followed an extremely successful similar event sponsored by the Romney campaign in January 2007, called "National Calling Day." According to a press account concerning the earlier event, Spencer Zwick, RFP's fundraising director, reportedly wanted Romney, a multimillionaire, to avoid the fates of other wealthy candidates, like Steve Forbes and Ross Perot, who provided considerable self-financing. Zwick is quoted as saying, "By Mitt or anyone else self-funding, you don't have a lot of people making investments in you.... To be credible, you have to show that you have raised resources from around the country." *See* David D. Kirkpatrick, *Romney Used His Wealth to Enlist Richest Donors*, *The New York Times*, April 6, 2007. Thus, according to the article,

[i]nstead of tapping his own money directly, Mr. Romney embarked on an effort to leverage his personal fortune into donations to his Republican primary campaign.... At the start of the first quarter of this year, for example, Mr. Romney lent his campaign \$2.35 million to pay for an elaborate demonstration of just how fast he could raise money from others. He rented the Boston convention center, furnished it with more than 400 laptop computers, loaded each with custom software and had more than 400 telephone lines installed. He invited 400 wealthy supporters, including dozens of chief executives he knew through business connections, to a reception at an adjacent hotel. The next day each sat down before a personal-contact list loaded into an assigned laptop, with dozens of technical support staff and campaign finance advisers standing by to assist. Reporters watched from the sidelines for hours as Mr. Romney's supporters raised \$6.5 million.

Id.

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1 Kem Gardner, a resident of Utah, states in his response to the complaint that at the
2 invitation of RFP, he traveled to Boston to raise funds for RFP and to attend a Fenway Park
3 dinner, and chartered a plane at his own expense for his travel to and from Boston. He also states
4 that he invited a large group of friends and families who were planning to attend the events to
5 accompany him on the plane.² Gardner Response at 1-2. His response does not address the
6 alleged \$150,000 cost of the plane, which was based on a press article attached to the complaint.
7 See Thomas Burr, *Did Utahn violate contribution laws by paying for Romney volunteers' flight*
8 *to Boston?*, The Salt Lake Tribune, June 29, 2007 (reporting that Gardner told The Salt Lake
9 Tribune that he paid \$150,000 to charter a Jet Blue plane to fly Utahns to Boston).³ At the time
10 of the event, Gardner had already contributed \$2,300 to RFP, the maximum for the primary; he
11 had not yet made a monetary contribution to Romney for the general election.

12 **III. ANALYSIS**

13 The Federal Election Campaign Act of 1971, as amended ("the Act") provides that no
14 person shall make contributions to any candidate and his authorized political committee with
15 respect to any election for Federal office that, in the aggregate, exceed \$2,300. 2 U.S.C.
16 § 441a(a)(1). The Act also provides that no candidate or political committee shall knowingly

² Kem Gardner is the founder of the Gardner Company, a commercial and real estate development firm. Known for being active in Utah affairs, Gardner was instrumental in persuading Romney to serve as the CEO of the organizing committee for the 2002 Winter Olympic Games, which at the time were embroiled in numerous financial scandals. See David Lightman, *Candidate known as turnaround artist*, Islandpacket.com (January 12, 2008) available at <http://www.islandpacket.com/news/local/story/128897.html>. Romney's subsequent actions as CEO have been credited with "rescuing" these Olympic Games. See Kirk Johnson, *The Long Run: In Olympics Success, Romney Found New Edge*, The New York Times, September 19, 2007. In a July 31, 2007 RFP press release, Romney named Gardner one of the RFP's National Finance Co-Chairs for the State of Utah.

³ Gardner's Response also does not address how many people he transported. On his website, blogger Eli Eyre, who attended the "America's Calling" event, apparently traveling on Gardner's plane, states "Kem Gardner chartered the whole flight, and between the 150 people on the plane, about \$700,000 was raised. Not bad." <http://elijahscseyre.blogspot.com>. The press account attached to the complaint account also reports that 150 people were onboard the chartered flight.

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1 accept any contribution in violation of the prescribed limits, 2 U.S.C. § 441a(f), and that political
2 committees must report all contributions. 2 U.S.C. § 434(b). The Act defines the term
3 “contribution” as (1) “any gift, subscription, loan, advance, or deposit of money or anything of
4 value made by any person for the purpose of influencing any election for Federal office.”
5 2 U.S.C. § 431(8)(A)(i); *see also* 11 C.F.R. § 100.52. (“anything of value” includes all in-kind
6 contributions).

7 The Act exempts from the definition of contribution “the value of services provided
8 without compensation by any individual who volunteers on behalf of a candidate or political
9 committee,” 2 U.S.C. § 431(8)(B)(i), 11 C.F.R. § 100.74 (the “volunteer exception”), as well as,
10 in pertinent part, any unreimbursed payment for travel expenses made by any individual on
11 behalf of a candidate to the extent that the cumulative value of such activity by such individual
12 does not exceed \$1,000 with respect to any one election. 2 U.S.C. § 431(8)(B)(iv), 11 C.F.R.
13 § 100.79.

14 In Advisory Opinion (“AO”) 2007-8, the Commission stated that the volunteer exception
15 “is restricted to donations of the volunteer’s own time and services and does not generally
16 exempt actual costs incurred on behalf of a Federal candidate or political party.” As an
17 illustration of that restriction, the Commission advised that if the AO requester traveled across
18 the country at the request of a Federal candidate to arrange for an entertainer to perform at the
19 candidate’s campaign event, then the unreimbursed payment for that travel would be a
20 contribution to that candidate’s committee to the extent that it exceeded \$1,000. *Id.*

21 In its Response, RFP appears to suggest that if attendees travel to an event that is
22 nominally a “fundraiser”—that is, an event at which funds are raised the travel expenses are not
23 subject to the restrictions on the volunteer exception. According to the RFP, the complaint

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1 apparently contends that outside the volunteer exception, "federal committees must pay for the
2 travel of *all* fundraising event attendees *for every* type of fundraising event." RFP Response at 1
3 (emphasis in original). But the complaint does not say this and it is not the case.

4 There is a distinction between typical fundraising events at which attendees eat lunch or
5 dinner, dance, play golf, view performances, and/or listen to speakers, and other such events
6 where the attendees provide uncompensated services to the campaign. As to the former, where
7 individuals do not provide services on behalf of the candidate, but merely make or deliver
8 contributions, their travel costs over \$1,000 are not in-kind contributions. See MUR 5020
9 (Trump Hotels and Casinos *et al.*) (a supporter's payment of his plane ticket and a friend's plane
10 ticket to a candidate's fundraiser was not an in-kind contribution, given that neither did any work
11 on behalf of the candidate at the fundraiser). On the other hand, where the event involves
12 volunteers, at the invitation of the campaign, expending their time and services on behalf of the
13 candidate, the Act and the regulations provide that their unreimbursed travel expenses exceeding
14 \$1,000 are contributions. 2 U.S.C. § 431(8)(B)(iv), 11 C.F.R. § 100.79.

15 Ken Gardner and his fellow attendees, at the invitation of RFP, participated as volunteer
16 fundraisers for Mitt Romney in the "America's Calling" event. A January 9, 2008 press release,
17 in which RFP announced the results of another volunteer phone-a-thon in Boston on that date,
18 states that "[t]oday marks the first Romney for President finance event in which general election
19 dollars were raised." Since the June 25, 2007 event was therefore geared to raising funds for the
20 primary, for which Gardner had already "maxed-out," it appears that Gardner's participation in
21 that event was solely devoted to raising money from others on Romney's behalf. That would
22 have been true for the other participants who had already made the maximum contribution to
23 Romney for the primary by June 25, 2007.

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1 RFP attempts to downplay the use of the volunteer services by describing the event as one
2 “where donors were invited to bring check contributions, solicit friends and personal contacts,
3 and socialize with other donors....a large fundraiser where *donors*—some ‘maxed out,’ and some
4 not—also solicited contributions.” RFP Response at 2. (Emphasis in the original). But RFP’s
5 own press releases and website videos show otherwise, as they reveal a meticulously staged
6 phone-a-thon that reflected a massive volunteer effort.

7 Far from the volunteer activity being incidental to the fundraising event, it was, in fact,
8 the event itself. In effect, “America’s Calling” constituted a human telephone bank staffed by
9 Romney supporters, which, over the course of several hours, made thousands of similar phone
10 calls touting Mitt Romney and soliciting contributions. *Cf.* 11 C.F.R. §§ 100.26-28.

11 Accordingly, the participants’ donations of their time and service, and their unreimbursed travel
12 expenses not in excess of \$1,000, were not contributions. However, as an unreimbursed travel
13 expense exceeding \$1,000, the reported \$150,000 cost Gardner incurred in chartering a plane to
14 travel to and from the event, constituted an excessive in-kind contribution. *See* 2 U.S.C.
15 § 431(8)(B)(iv), 11 C.F.R. § 100.79.

16 Based on the above, we recommend that the Commission find reason to believe that Kem
17 Gardner violated 2 U.S.C. § 441a(a) by making an excessive in-kind contribution to Romney for
18 President, Inc. consisting of unreimbursed travel expenses exceeding \$1,000 paid on behalf of
19 the candidate.⁴ RFP has long known that Gardner paid for these travel expenses on behalf of the
20 candidate/campaign and did not reimburse him. Therefore, we also recommend that the

⁴ The complaint references the aforementioned January 2007 calling event, *supra* footnote 1, and suggests that the Commission should also investigate whether there were excessive in-kind contributions for travel in connection with that event. Complaint at 1. The complaint contains no specific allegations concerning the January 2007 event, and we have found no information suggesting that any volunteers (or others) chartered a plane or otherwise incurred considerable travel expenses to participate in that event.

1 Commission find reason to believe that Romney for President, Inc. and Darrell Crate, in his
2 official capacity as treasurer violated 2 U.S.C. § 441a(f) by knowingly accepting an excessive in-
3 kind contribution. Finally, because RFP did not report Gardner's in-kind contribution, we
4 recommend that the Commission find reason to believe that Romney for President, Inc. and
5 Darrell Crate, in his official capacity as treasurer, violated 2 U.S.C. § 434(b).

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V. RECOMMENDATIONS

1. Find reason to believe that Romney for President, Inc. and Darrell Crate, in his official capacity as treasurer violated 2 U.S.C. § 441 a(f) by knowingly accepting an excessive in-kind contribution;
2. Find reason to believe that Romney for President, Inc. and Darrell Crate, in his official capacity as treasurer violated 2 U.S.C. § 434(b) by failing to disclose an excessive in-kind contribution;
3. Find reason to believe that Kem Gardner violated 2 U.S.C. § 441 a(a) by making an excessive in-kind contribution to Romney for President Inc;
- 4.
5. Approve the attached Conciliation Agreements;
6. Approve the attached Factual and Legal Analyses; and

7. Approve the appropriate letters.

Date

2/29/08

Thomasenia P. Duncan
General Counsel

BY:



Mark D. Shonkwiler
Acting Deputy Associate General Counsel
for Enforcement



Susan L. Lebeaux
Assistant General Counsel



Roy Q. Luckett
Attorney

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