

SANDLER REIFF

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August 30, 2018

Mr. Jeff S. Jordan
Assistant General Counsel
Office of Complaints Examination
and Legal Administration
Federal Election Commission
1050 First Street, N.E.
Washington, D.C. 20463

Re: MUR 7452

Dear Mr. Jordan:

The undersigned serves as counsel to Ewert for Congress, and Sue Jackson, in her official capacity as Treasurer (the "Committee"). This letter responds on behalf of the Committee to the Commission's notification that it received a complaint (the "Complaint") alleging that the Committee violated the Federal Election Campaign Act (the "Act") and Federal Election Commission (the "Commission") regulations.

As described below, based upon the facts of the Complaint and other information available, there is no reason to believe that the Committee has violated the Act or any of the Commission's regulations. Furthermore, even if the Commission were to find reason to believe that a violation has occurred, the Commission should dismiss the Complaint under the prosecutorial discretion afforded to it by Heckler v. Chaney, because to pursue enforcement over such a small matter would not be an efficient use of the agency's time and resources.¹

This matter was initiated by a Complaint filed by Mark Morgan, Executive Director of the Republican Party of Wisconsin against the Committee for failure to include a disclaimer on a single piece of campaign literature (the "brochures"). The literature at issue was a small, double-sided brochure featuring pictures of the candidate and highlighting a few of the candidate's policy positions. The brochures also included the Committee's name "Ewert for Congress," the Committee's website address, "Ewertforcongress.com," and the Committee's mailing address. Mr. Ewert, and others, personally distributed the brochures at campaign events and parades. No brochures were distributed by mail. Less than 10,000 copies of the brochures were printed, and the Committee spent approximately \$2,000 on the printing.

The Act and Commission regulations require a disclaimer on all public communications and electioneering communications paid for by a campaign committee.² The literature in

¹ Heckler v. Chaney, 470 U.S. 821 (1985).

² 11 C.F.R. § 110.11(a).

question was not an electioneering communication because it was not distributed by broadcast, cable, or satellite.³ The literature was also not plainly a public communication. Under the Commission's regulations:

"Public communication means a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising. The term *general public political advertising* shall not include communications over the Internet, except for communications placed for a fee on another person's website."⁴

The Commission's regulations do not define the term "general public political advertising" except that it does not include communications placed for free over the internet. While the regulations do state the disclaimer specifications for "signs, posters, flyers, newspapers, magazines, or other printed materials," there is little guidance as to what is considered to be "general public political advertising" and therefore, a public communication requiring a disclaimer.⁵ Here, the communication at issue is a brochure, of which less than 10,000 were printed, which the candidate handed out at events and parades, over the course of his primary campaign. In the past, the Commissioners have expressed their position that this type of direct voter contact is not a "public communication" and, as such, the accompanying materials would not require a disclaimer.⁶

Even if the Commission were to find that the brochures were public communications, the Commission should use its prosecutorial discretion to dismiss the matter against the Committee. The cost at issue is *de minimis* and the failure to include the disclaimer was inadvertent. Furthermore, there was no intent to mislead the public as to who paid for the brochures: the brochures were handed out by the candidate and featured the Committee's name, website address, and mailing address.⁷ Moreover, the candidate has since lost the primary election and will not be distributing any more of the brochures.⁸ The committee intends to terminate immediately upon resolution of this matter.

³ 11 C.F.R. § 100.29(a).

⁴ 11 C.F.R. § 110.26.

⁵ 11 C.F.R. § 110.11(c)(2)(i).

⁶ See Concurring Statement of Vice Chair Hunter and Commissioners Goodman and Petersen, Advisory Opinion 2016-21 (Great America PAC) at 1-2 (concluding that door-to-door canvassing is not a "public communication"); See also, MUR 5604 Statement of Reasons of Chairman Toner and Commissioners Mason and von Spakovsky (Friends of William D. Mason) at 4-5 (concluding that a *handbill*, a leaflet distributed by hand, is not a form of general public political advertising and, therefore, not a public communication).

⁷ See, MUR 7012 (Mike Sweeney for Congress) (The Commission voted 5 -1 to dismiss a Complaint where the candidate committee spent less than \$5,000 on yard signs and brochures which failed to include the required disclaimer); See, MUR 6278 (Joyce B. Segers, et al.) (The Commission voted 6-0 to dismiss a Complaint where the candidate committee failed to include the required disclaimer on a campaign flyer when "the public could reasonably discern that the Committee produced the information").

⁸ Mr. Ewert was a candidate in the Democratic primary for the Seventh District of Wisconsin held on August 14, 2018.

If you have any questions regarding this Response, my daytime number is (202) 479-1111. My email address is reiff@sandlerreiff.com.

Sincerely,

A handwritten signature in black ink, appearing to read 'N. P. Reiff', written in a cursive style.

Neil P. Reiff
Counsel to Ewert for Congress
Sue Jackson, Treasurer