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September 21, 2004

Lawrence Norton, General Counsel
Office of the General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: MUR 5506, The Honorable Betty Castor, Betty Castor for US Senate, and Charles L Lester, as Treasurer

Dear Mr. Norton:

This is the response of our clients, the Honorable Betty Castor, the Betty Castor for US Senate Committee (the "Committee"), and Charles L. Lester, as treasurer, (collectively, the "respondents") to the complaint in the above-captioned matter under review. For the reasons stated below, we respectfully request that the Federal Election Commission (the "Commission" or "FEC") find no reason to believe that any violations of the Federal Election Campaign Act of 1971, as amended, (the "Act" or "FECA") have occurred and close this file as soon as possible.

Introduction and Summary

This complaint was filed in the context of a hard-fought contentious primary election for the Democratic nomination in the United States Senate race in the state of Florida. Consequently, and as demonstrated below, this complaint was motivated by political gamesmanship and was filed without one iota of supporting evidence or information for its baseless and, at times, false, claims.

In summary, the complainant alleges coordination between the Committee and Emily's List, a well-known political committee registered with the Commission. At issue are independent expenditure ads run by Emily's List, and the dearth of support for the allegation is striking. The respondents had no advance knowledge of these ads and no involvement with their preparation, planning, broadcast, or any other aspect. None of respondents' actions or activities triggered the Commission's coordination standard. Complainants have provided nothing to indicate that any information was transmitted

from the Committee to Emily's List that would have been material or even related to the independent ads.

Legal Discussion

A. In order for independent expenditures to be considered coordinated under the Act, one of the Commission's conduct standards must be triggered.

The Act has long permitted political committees to make expenditures in the form of communications that are considered independent, unless made "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents." 2 U.S.C. 441a(a)(7)(B)(i). In the Bipartisan Campaign Reform Act of 2002, Pub. Law No. 107-155, sec. 214(a), 116 Stat. 81, 94 (Mar. 27, 2002) ["BCRA"], Congress repealed the Commission's prior regulations on coordinated communications, directed the Commission to promulgate new regulations on coordinated communications, and specified certain matters that the Commission was required to address in promulgating new regulations. See BCRA, sec. 214(b) and (c), 116 Stat. at 94-95. The Commission's revised "coordinated communication" regulation at 11 CFR 109.21 implements a three-pronged test: (1) the communication must be paid for by a person other than a Federal candidate, a candidate's authorized committee, or political party committee, or any agent of any of the foregoing; (2) one or more of the four content standards set forth in 11 CFR 109.21(c) must be satisfied; and (3) one or more of the six conduct standards set forth in 11 CFR 109.2l(d) must be satisfied. See 11 CFR 109.21(a).[1] The Commission explained that if one or more of the three prongs are not met, then the communication is not a coordinated communication and thereby does not constitute a contribution under 2 U.S.C. 441a(a)(7)(B)(i) and (ii). Coordinated and Independent Expenditures, Final Rules, 68 Fed. Reg. 421, 427 (Jan. 3, 2003) (Explanation and Justification for 11 CFR 109.21(b)) ["E & J, Coordinated Expenditures"].

Of particular importance in this matter under review are the six conduct standards.[2] These consist, in pertinent part of (1) a communication is created, produced, or distributed at the *request or suggestion* of a candidate, candidate's committee or agent

[1] This response notes the recent decision in Shays v FEC, No. 02-1984, slip op. (D.D.C 2004). On behalf of our clients, we have responded to the allegations in light of the most recent Commission rules, as promulgated, while reserving the right to examine the Court's opinion and subsequent judicial and/or Commission action and amend or supplement our arguments.

[2] Because the respondents did not pay for these independent ads, they accept, for purposes of this response, that the payor prong has been satisfied. Respondents do not similarly accept that the content prong has been satisfied, because, as independent expenditures, the respondents have no information as the content of the ads, other than what personal recollections there may be, and because the conduct prong has not been satisfied, there is no need to examine the content prong. However, respondents reserve the right to seek copies of the ads to examine their content for this purpose, should the Commission determine to pursue this matter.

or is created, produced, or distributed at the suggestion of the person paying for the communication, and the candidate, candidate's committee or agent assents to the suggestion; (2) a candidate, candidate's committee, or agent is *materially involved* in decisions regarding six specifically delineated aspects of the communication; (3) a communication is created, produced, or distributed after one or more *substantial discussions* about the communication between the payor, including its employees or agents, and the candidate, candidate's committee or agent, if information about the candidate's campaign plans, projects, activities, or needs is conveyed to a payor and that information is material to the communication's creation, production or distribution; (4) the payor or its agent contracts with or employs a *common vendor* of certain delineated services and the common vendor uses or conveys certain information in the creation, production or distribution of the communication; (5) the payor is or employs a *former employee or independent contractor* of the candidate, candidate's committee or agent and that person uses or conveys certain information in the creation, production or distribution of the communication; or (6) the dissemination, distribution, or *republication of certain campaign material.* 11 C.F.R. §109.21(d)(1)-(6). (Shorthand reference appears above in italics.)[3]

If one of these six conduct standards is not triggered by the circumstances of a particular communication, then the requirements for coordination have not been satisfied, and the communication itself will not be deemed to be a coordinated communication. Consequently, a communication that is purported to be independent will, in fact, be considered an independent expenditure, and the candidate on whose behalf the communication is broadcast will not have accepted an in-kind contribution.

Although the Commission has thus far had little opportunity to apply the conduct standards to real campaign circumstances, their Explanation and Justification provides additional guidance as to the intent behind their promulgation and the expectation with respect to their enforcement. Most importantly, the Commission recognized that not all interactions between a campaign and outside entities give rise to coordination or, in fact, trigger the conduct standard; there must be some specific conduct that differentiates the activity from other activity.[4] E & J, Coordinated Expenditures, 68 Fed. Reg. 421, 426-7. As a result, the Commission recognizes that this necessitates a fact-based inquiry, and the particular circumstances must give rise to specific facts that support a finding that one or more of the conduct standards has been met. Id. at 431. In the absence of such facts, a communication that is intended to be independent cannot be converted to one that is coordinated.

Complainant repeatedly and disingenuously misstates and distorts the law, by asserting that "coordination of election activities . . . is a violation of the campaign

[3] The references to a political party committee or agent thereof have not been included, since complainant makes no allegation with respect to any entity of the Democratic party.

[4] For example, the Commission has stated that where a payor "merely informs" a candidate of its plans, coordination would not result. Instead, something more is needed. See E & J, Coordinated Expenditures, 68 Fed. Reg. 421, 432.

finance laws." Complaint at ¶1, 3 and 13. Neither the Act nor BCRA make coordination, per se, a violation. The Commission has never held that coordination is a violation. Instead, coordination is a type of election activity. Numerous coordinated activities are legal, e.g., party coordinated expenditures ("Political party committees may also make coordinated party expenditures . . ." 11 C.F.R. §109.30) or disbursements for communications to the restricted class of a corporation, labor union or membership association ("The activities permitted under this section may involve election-related coordination with candidates and political committees." 11 C.F.R. §114.3(a)(1)). Others may not be, e.g., where the three prongs of the coordinated communication standard of 11 C.F.R. §109.21 have been satisfied.

Instead, the Commission has stated for the regulated community that coordination is a means by which political activity is defined; it is evidence of the characteristics of that activity, e.g., "coordination may be considered evidence that *could* negate the independence of subsequent communications . . . and *could* result in an in-kind contribution." 11 C.F.R. §114.2(c)(emphasis added).[5] Thus, contrary to complainant's assertions, coordination per se is not illegal and merely stating such conclusions, as complainant does, cannot make it so.

B. Nothing in respondents' actions triggered the conduct standards for coordinated communications, and complainant has provided no evidence to the contrary.

1. Respondents had no advance knowledge of or involvement with and did not discuss, request, suggest or assent to these independent ads.

Complainant alleges that certain independent television advertisements run by Emily's List were coordinated with the respondents. Complaint at ¶5-6. This allegation is false. The respondents had no knowledge of these ads prior to their broadcast. In addition, no conduct of respondents triggered the conduct standards of 109.21. In particular, the respondents did not request, suggest or otherwise assent to the production or broadcast of these ads, because they were not aware of them until broadcast. None of these respondents, or any agents thereof, were involved materially or at all with these ads. Not only was there no substantial discussion about the ads with anyone, there was no discussion at all. Thus, in terms of the first three conduct standards, there was no discussion, no involvement, and no request, suggestion or assent – and complainant offers nothing to the contrary.[6]

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[5] However, given the recent decision in Shays, *supra*, the coordination standard is arguably far from clear for the regulated community, and the respondents would respectfully urge the dismissal of this matter on the grounds that despite the fact that the court did not stay enforcement in invalidating the Commission's regulations, there is no clear standard to be followed by the regulated community.

[6] Given that the sixth conduct standard – that of republishing the campaign's materials – requires that one of the first three conduct standards to also have been met, it too has not been satisfied herein. 11 C.F.R. §109.21(d)(6). In addition, the Commission indicated that "assuming no contacts", a communication does not satisfy the request or suggestion conduct standard and is not a coordinated communication, even though it contains campaign material supplied by the candidate. E & J, Coordinated Expenditures, 68 Fed Reg.

Complainant argues that a speech given by the candidate constitutes "substantial discussion" because it was complimentary of Emily's List, saying that it puts coordination "beyond doubt". Complaint at ¶13. Nothing could be further from the truth, and the speech comes nowhere near satisfying the substantial discussion standard. This prong is satisfied only if a communication is created after a discussion with the candidate in which information about the campaign's plans, projects, activities or needs is conveyed and such information is material to the creation, production or distribution of the communication. Complainant does not allege that private information was conveyed during this speech, and none was so provided. The two quotes cited by complainant are appreciative of Emily's List fundraising and neither convey the required type of information nor have anything to do with – let alone be material to – the independent ads at issue.[7]

Complainant further alleges that there must have been coordination because the Committee altered its own advertising buys in certain market where the Emily's List ad was run. Complaint at ¶10. However, complainant offers nothing to show that this action was taken in coordination with Emily's List. In fact, after the Emily's List independent ads began running, the Committee did reduce its buys, but not for the reasons asserted by complainant. To the contrary, the Committee believed that its own message was in danger of not getting through to prospective voters because of the other ads, making the other ads a hindrance rather than a help. The Committee reduced its buys because it felt their effectiveness was being limited.

The Committee took this action to reduce its buys based on publicly available information that television stations are required to make public and not based on any communications with or information from Emily's List. The location and amount of the Emily's List buys was collected by the Committee's own media buyer – who is a different vendor from the Emily's List media vendor – and the Committee made its own internal decisions based solely on this information.[8] It should be noted that it is common practice for campaign media vendors to review the public information made available by the stations as to buys being purchased by both the campaign's opposition and its allies. No part of this activity triggers the conduct standard; it is no different from a campaign

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421, 439 However, respondents do state for the purposes of this response that they did not supply any campaign material that they prepared to Emily's List for republication, distribution or dissemination in these ads. Otherwise, as stated above, respondents have not addressed the content of the independent ads and reserve the right to do so, should the Commission pursue this matter

[7] The Commission indicated that "discuss" shall have its "plain and ordinary meaning which the Commission understands to mean an interactive exchange of views or information," at E & J, Coordinated Expenditures, 68 Fed. Reg. 421, 435, and that did not occur here.

[8] Complainant does not allege a common media or other vendor. There is no information presented in the complaint that the common vendor prong of the conduct standard was in any way triggered, and given the difference in media vendors between the Committee and Emily's List, the respondents do not address this prong in detail herein except to state that it was not, in fact, triggered.

reading the publicly released Gallup, Pew or other media-sponsored polls and making advertising decisions based thereon.[9]

Thus, there is no evidence or other information to suggest that the (1) request or suggestion, (2) material involvement, or (3) substantial discussion prongs of the conduct standard have been triggered. While the Commission has stated that this is, of necessity, a fact-based inquiry, the complainant must allege, at minimum, sufficient facts that, if true, would trigger these standards. That they have failed to do, and the Commission should dismiss this complaint for that reason.

2. Respondents are not aware of any former employees of Emily's List on its payroll.

Complainant alleges that the conduct standard is satisfied because one or more former employees of Emily's List is an employee of the Committee. Complaint at ¶6. Complainant obviously has misread the law: the former employee prong of the conduct standard is triggered when campaign employees leave the employ of the campaign, go to the employ of the payor of the independent expenditure, and conveys or uses certain pertinent information in connection with the expenditures. This provision is silent as to the reverse situation alleged herein.[10]

However, should the Commission determine that this provision somehow applies to these allegations, it should be noted that complainant's allegation is false. To the best of the Committee's knowledge, the Committee is not aware of any of its employees being former Emily's List employees.

Complainant offers no facts to support this meritless allegation, but merely a broad and conclusory statement that "[m]any former employees of Emily's List are now employed by the Castor Campaign". No individuals are actually identified as former Emily's List employees. Interestingly, the one Committee employee named by complainant – Deborah Reed, the Committee's Campaign Manager – is not alleged to have ever been employed by Emily's List, but, rather, to have "worked on other EMILY's List campaigns, including another EMILY's List candidate in Maine." Complaint at ¶7. Presumably, this means that Ms. Reed worked on other campaigns of candidates endorsed by Emily's List. That fact is irrelevant. Ms. Reed is not a former employee of Emily's List and has never been on their payroll. Thus, the former employee prong of the conduct standard has not been satisfied.

[9] This situation is clearly distinguishable from the illustration provided by the Commission at E & J, Coordinated Expenditures, 68 Fed. Reg. 421, 434, which specifically involves a communication faxed between the parties, a fact absent here.

[10] Despite the fact that complainant does not allege that any former campaign employees are working for Emily's List, the respondents state that, to the best of their knowledge, there are none who fall into that category.

3. Fundraising by Emily's List does not trigger the conduct standards.

Finally, complainant states that Emily's List has engaged in fundraising on behalf of the Committee, which is "circumstantial evidence" of ties between the Committee and Emily's List.[11] It is not clear which, if any of the conduct standards that complainant is alleging has been violated by the fact that volunteers are raising funds for the Committee. However, as stated earlier, there is no evidence or other information to suggest that the (1) request or suggestion, (2) material involvement, or (3) substantial discussion prongs of the conduct standard have been triggered by the fundraising. There were no communications about the independent ads, and the respondents did not provide Emily's List or any individual fundraising volunteers with any information material to the creation, distribution or broadcast of the independent ads. While the Commission has stated that this is, of necessity, a fact-based inquiry, the complainant must allege, at minimum, sufficient facts that, if true, would trigger these standards. That they have failed to do, and the Commission should dismiss this complaint for that reason.

Though not expressed, the complainant may be alleging by innuendo that the volunteer fundraisers are to be treated as "former employees" for purposes of the conduct standard. The Commission addressed and rejected this very situation in its E & J:

> The Commission sought comment as to whether this conduct standard should be extended to volunteers, such as "fundraising partners," who by virtue of their relationship with a candidate or a political party committee, have been in a position to acquire material information about the plans, projects, activities or needs of the candidate or political party committee. . . .[t]he Commission is not extending the scope of the "former employee" standard in its final rules to encompass volunteers . . . E & J, Coordinated Expenditures, 68 Fed. Reg. 421, 439.

Accordingly, there is no basis to proceed with this matter simply because Emily's List has assisted the Committee's fundraising efforts. The Commission should reject these baseless accusations and dismiss this complaint.

Conclusion

For the reasons stated above, there is simply no evidence or other information to conclude that the independent ads sponsored by Emily's List were in any way coordinated with the respondents. Notwithstanding the conclusory allegations made by complainant, none of the conduct standards promulgated by the Commission and required

[11] Emily's List is well-known for its fundraising efforts on behalf of numerous candidates over the course of many election cycles. Complainant has made no allegation that there is anything improper about these efforts on behalf of the respondents, and to the respondents' knowledge, all such fundraising has been conducted properly and in compliance with the Act's requirements. In fact, the Committee has paid the costs of such activities when required, and while complainant implies that such payment somehow relates to coordination, there is nothing in the conduct standard that even hints that such activity is evidence of coordination. Complainant would have respondents penalized for complying with the law.

to establish coordination have come close to being satisfied herein. The innuendo posited by complainant falls far short of the information necessary to question the independence of the Emily's List advertisements. Accordingly, we respectfully request that the Commission find no reason to believe that any of these respondents have violated any provision of the Act or the Commission's regulations and, further, close this file as soon as possible.

Respectfully submitted,

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Lyn Utrecht
Counsel for Respondents