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COUNSEL

Michael E. Toner
Direct (202) 508-6175
Fax (202) 220-7475
Michael.Toner@Bryancave.com

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June 11, 2010

VIA HAND-DELIVERY

Mr. Jeff S. Jordan
Supervisory Attorney
Complaints Examination & Legal Administration
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: MUR 6277 (Ronald Kirkland, Kirkland for Congress, and Robert Kirkland)

Dear Mr. Jordan:

This office represents Robert Kirkland ("Mr. Kirkland") in the above-captioned MUR.

We have reviewed the Complaint filed on April 20, 2010, by John D. Stevens. The Complaint alleges with no supporting evidence that certain advertisements paid for by Mr. Kirkland were coordinated with Ronald Kirkland and Kirkland for Congress ("Kirkland Campaign"), which resulted in Mr. Kirkland making excessive contributions to the Kirkland Campaign.

The allegations in the Complaint have no basis in law or fact. As is detailed below, the Complaint contains erroneous and speculative allegations that fail to state a claim that a violation has occurred. In addition, all of the advertisements at issue were created by Mr. Kirkland independently of Ronald Kirkland and the Kirkland Campaign and were duly reported to the Commission as independent expenditures. Accordingly, the Commission should find no reason to believe that a violation occurred and should promptly dismiss the Complaint.

THE COMPLAINT

John D. Stevens filed the Complaint on April 20, 2010. The Complaint alleges that Mr. Kirkland made excessive contributions to the Kirkland Campaign under the Federal Election Campaign Act of 1971, as amended ("FECA" or "Act") in the form

Bryan Cave LLP
1155 F Street N.W.
Washington, D.C. 20004
Tel (202) 508-6000
Fax (202) 508-8200
www.bryancave.com

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of coordinated communications. Complaint at 1.¹ The Complaint further alleges that Mr. Kirkland failed to properly report his communications to the Commission. *Id.*

The Complaint speculates that Mr. Kirkland's communications must have been coordinated with Ronald Kirkland and the Kirkland Campaign based upon "the close familial tie between Kirkland and his brother . . ." Complaint at 5. *See also id.* (close familial tie "insinuates that [Mr. Kirkland's] Radio Ad, Television Ad, and/or the Website were created with material involvement and/or substantial discussion by [Ronald] Kirkland or the [Kirkland] Committee."). The Complaint further speculates that Mr. Kirkland's use of the phrase "proven, trusted, conservative" in some of his public communications, which was a phrase also used by the Kirkland Campaign, indicates that "[c]ertainly, at a minimum, [Ronald] Kirkland's and the [Kirkland] Committee's campaign plans, projects, activities, or needs were conveyed to Robert Kirkland before he created the Radio Ad, Television Ad and Website . . ." *Id.* Finally, the Complaint alleges without any factual foundation that Mr. Kirkland "improperly reported coordinated communications as an [sic] independent expenditures . . ." *Id.*

FACTUAL BACKGROUND

I. Ronald Kirkland

Ronald Kirkland is running for the U.S. House of Representatives in the 8th congressional district of Tennessee and resides in Jackson, Tennessee. Ronald Kirkland filed a Statement of Candidacy with the Commission on January 13, 2010, and the Kirkland Campaign filed a Statement of Organization on the same day.

II. Robert Kirkland

Mr. Kirkland is Ronald Kirkland's brother and resides in Union City, Tennessee. *See* Robert Kirkland Affidavit ¶¶ 2-3 (attached hereto as Exhibit 1). Between mid-December, 2009 and the first week of February, 2010, Mr. Kirkland volunteered on behalf of the Kirkland Campaign. *Id.* ¶ 4. Mr. Kirkland's volunteer activities for the Kirkland Campaign included advising the campaign on various matters. Mr. Kirkland also helped to raise funds for the Kirkland campaign. Mr. Kirkland's volunteer fundraising activities for the Kirkland campaign included sending an email on February 6, 2010 soliciting funds for the campaign. *Id.*

¹ The Complaint fails to include numbered pages. All citations herein to the pages of the Complaint are based upon our own page numbering.

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The Complaint erroneously states that Mr. Kirkland sent a second email soliciting funds for the Kirkland Campaign on February 10, 2010. The Complaint includes a copy of an email which was sent on February 10, 2010. See Attachment 3 of the Complaint. However, this February 10 email was sent from _____ to undisclosed recipients, forwarding Mr. Kirkland's February 6 email, and was not sent by Mr. Kirkland himself.

On February 7, 2010, Mr. Kirkland ended all of his volunteer activities on behalf of the Kirkland Campaign. See Robert Kirkland Affidavit ¶ 5. Since that date, Mr. Kirkland has had no involvement with the Kirkland Campaign or any of its campaign activities. *Id.*

In January, 2010, Mr. Kirkland decided to assess the feasibility of making independent expenditures on behalf of the Kirkland Campaign. Mr. Kirkland consulted a political advisor and retained legal counsel to advise him in these matters. *Id.* ¶ 6.

On January 21, 2010, Mr. Kirkland entered into a consulting agreement with Brad Greer with an effective date of February 1, 2010, to serve as a political consultant in connection with making independent expenditures on behalf of the Kirkland Campaign. *Id.* ¶ 7. During the course of creating and disseminating independent expenditures on behalf of the Kirkland Campaign, Mr. Kirkland and his vendors, agents, and employees strictly adhered to a compliance framework to ensure that all of the communications were made independently of Ronald Kirkland, the Kirkland Campaign, and their agents.

III. Brad Greer

Brad Greer ("Mr. Greer") is a political consultant who resides in Jackson, Tennessee. Between December 14, 2009 and January 31, 2010, Mr. Greer volunteered for the Kirkland Campaign, assisting in scheduling, advising the candidate, and making recommendations on hiring campaign staff. See Brad Greer Affidavit ¶¶ 2-3 (Exhibit 2). Mr. Greer terminated all of his volunteer activities for the Kirkland Campaign on January 31, 2010. *Id.* ¶ 4. Since that date, Mr. Greer has had no involvement with the Kirkland Campaign or any of its campaign activities. *Id.*

Effective February 1, 2010, Mr. Kirkland retained Mr. Greer to serve as a consultant to assist Mr. Kirkland in connection with making independent expenditures on behalf of the Kirkland Campaign. *Id.* ¶ 5. Mr. Greer's consulting duties have included overseeing the production and dissemination of Mr. Kirkland's independent expenditures, authorizing payment for the independent expenditures, and managing the reporting of the independent expenditures to the Commission. *Id.* ¶ 6.

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IV. Terry Benham

Terry Benham ("Mr. Benham") is a general consultant to The Political Firm in Baton Rouge, Louisiana. See Terry Benham Affidavit ¶ 2 (Exhibit 3). On February 9, 2010, Mr. Benham and The Political Firm were retained by Mr. Kirkland in connection with making independent expenditures on behalf of the Kirkland Campaign. *Id.* ¶ 4. Mr. Benham has served as Robert Kirkland's media consultant and has assisted in producing Mr. Kirkland's independent expenditures as well as in purchasing and placing airtime for television and radio advertisements. *Id.*

V. Mr. Kirkland's Independent Expenditures To Date

Mr. Kirkland has disseminated a number of independent expenditures to date. Mr. Kirkland's first independent expenditures, radio advertisements and a website, were publicly disseminated on March 26, 2010. Mr. Kirkland has also disseminated television advertisements since early April, 2010, as well as a mail piece in late April, 2010 and yard signs in mid-May, 2010.

VI. The Independence of Mr. Kirkland's Communications

All of the public communications that Mr. Kirkland has disseminated on behalf of the Kirkland Campaign were developed and produced independently of Ronald Kirkland, the Kirkland Campaign, and their agents.

A. No Request or Suggestion

Neither Ronald Kirkland, the Kirkland Campaign, political party committees, nor agents of any of the foregoing requested or suggested to Mr. Kirkland that he undertake independent expenditures on behalf of the Kirkland Campaign, nor have they made any request or suggestion to Mr. Kirkland regarding any specific independent expenditures that Mr. Kirkland has publicly disseminated on behalf of the Kirkland Campaign. See Robert Kirkland Affidavit ¶¶ 8-9. In addition, neither Ronald Kirkland, the Kirkland Campaign, political party committees, nor agents of any of the foregoing requested or suggested to Mr. Greer or Mr. Benham that Mr. Kirkland undertake independent expenditures on behalf of the Kirkland Campaign, nor have they made any request or suggestion to Mr. Greer or Mr. Benham regarding any specific independent expenditures that Mr. Kirkland has publicly disseminated on behalf of the Kirkland Campaign. See Brad Greer Affidavit ¶¶ 8-9 and Terry Benham Affidavit ¶¶ 5-6.

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B. No Material Involvement

Neither Ronald Kirkland, Kirkland for Congress, political party committees, nor agents of any of the foregoing had any material involvement with Mr. Kirkland concerning the content of his independent expenditures on behalf of the Kirkland campaign, the intended audience for the communications, the means or mode of the communications, the specific media outlets used for the communications, the timing or frequency of the communications, or the size or prominence of printed communications or the duration of broadcast or cable communications. See Robert Kirkland Affidavit ¶¶ 10-11.

Neither Ronald Kirkland, Kirkland for Congress, political party committees, nor agents of any of the foregoing had any material involvement with Mr. Greer or Mr. Benham concerning the content of Mr. Kirkland's independent expenditures on behalf of the Kirkland campaign, the intended audience for the communications, the means or mode of the communications, the specific media outlets used for the communications, the timing or frequency of the communications, or the size or prominence of printed communications or the duration of broadcast or cable communications. See Brad Greer Affidavit ¶¶ 10-11 and Terry Benham Affidavit ¶¶ 7-8.

C. No Substantial Discussions

Mr. Kirkland has not had any substantial discussions with Ronald Kirkland, Kirkland for Congress, political party committees, nor agents of any of the foregoing concerning his independent expenditures on behalf of the Kirkland Campaign, including any substantial discussions concerning the Kirkland Campaign's plans, projects, activities, or needs. See Robert Kirkland Affidavit ¶¶ 12-13.

Neither Mr. Greer nor Mr. Benham have had any substantial discussions with Ronald Kirkland, Kirkland for Congress, political party committees, nor agents of any of the foregoing concerning Mr. Kirkland's independent expenditures on behalf of the Kirkland Campaign, including any substantial discussions concerning the Kirkland Campaign's plans, projects, activities, or needs. See Brad Greer Affidavit ¶¶ 12-13 and Terry Benham Affidavit ¶¶ 9-10.

D. No Common Vendors or Former Employees

Mr. Kirkland has not used any common vendor of the Kirkland Campaign, nor any former employee of the Kirkland Campaign, in connection with his independent expenditures on behalf of the Kirkland Campaign. See Brad Greer Affidavit ¶ 14 and Robert Kirkland Affidavit ¶ 14. Each contract signed by a vendor retained by Mr. Kirkland in connection with making independent expenditures on behalf of the Kirkland Campaign stipulated that by signing the contract, the vendor representative was certifying that the vendor had not contracted with, been employed by, or been provided with non-

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public information by the Kirkland Campaign. See Robert Kirkland Affidavit ¶ 14 and Brad Greer Affidavit ¶ 14.

Mr. Greer volunteered for the Kirkland Campaign but never served as a vendor or employee of the Kirkland Campaign. See Brad Greer Affidavit ¶¶ 4-5.

Neither the Political Firm nor Mr. Benham have ever served as a vendor to the Kirkland Campaign, and no employee of The Political Firm has ever been an employee of the Kirkland Campaign. See Terry Benham Affidavit ¶¶ 11-12.

E. Use of Publicly Available Information

To the best of Mr. Kirkland's knowledge, none of his independent expenditures on behalf of the Kirkland Campaign republished campaign materials originally prepared by the Kirkland Campaign. See Robert Kirkland Affidavit ¶ 15. To the best of Mr. Greer's and Mr. Benham's knowledge, none of Mr. Kirkland's independent expenditures on behalf of the Kirkland Campaign republished campaign materials originally prepared by the Kirkland Campaign. See Brad Greer Affidavit ¶ 15 and Terry Benham Affidavit ¶ 13.

Some aspects of Mr. Kirkland's independent expenditures on behalf of the Kirkland Campaign were developed based upon publicly available information. For example, the phrase "proven trusted, conservative" was based on a biography of Ronald Kirkland that was posted on the Kirkland Campaign's website. See Robert Kirkland Affidavit ¶ 16 and Brad Greer Affidavit ¶ 16. After reading the website biography, Mr. Greer decided to use the phrase as a prominent theme in Mr. Kirkland's independent expenditures. See Brad Greer Affidavit ¶ 16. In addition, photos have been used in Mr. Kirkland's independent expenditures that were obtained originally from publicly available media sources. See Brad Greer Affidavit ¶ 16 and Terry Benham Affidavit ¶ 14. Photos have also been used in Mr. Kirkland's independent expenditures that Mr. Greer took originally at events where Ronald Kirkland and other candidates made public appearances. See Robert Kirkland Affidavit ¶ 16; Brad Greer Affidavit ¶ 16; Terry Benham Affidavit ¶ 14.

VII. The Reporting of Mr. Kirkland's Independent Expenditures

Mr. Kirkland's independent expenditures on behalf of the Kirkland Campaign have been timely and duly reported to the Commission. The first independent expenditures that Mr. Kirkland sponsored on behalf of the Kirkland Campaign were publicly disseminated on March 26, 2010, and were duly reported to the Commission on March 28, 2010. See 3/28/10 FEC Form 3 and related Miscellaneous Electronic Submission (Exhibit 4).

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Through May 31, 2010, Mr. Kirkland has filed the following additional notices with the Commission concerning his independent expenditures on behalf of the Kirkland Campaign:

- 48-Hour Notice filed April 7, 2010, covering March 27, 2010 through April 5, 2010;
- 48-Hour Notice filed April 8, 2010, covering April 6, 2010;
- 48-Hour Notice filed April 10, 2010, covering April 7, 2010 through April 8, 2010;
- 48-Hour Notice filed April 13, 2010, covering April 9, 2010 through April 11, 2010;
- 48-Hour Notice filed April 15, 2010, covering April 12, 2010 through April 13, 2010;
- April Quarterly Report filed April 15, 2010, covering February 1, 2010 through March 31, 2010;
- 48-Hour Notice filed April 16, 2010, covering April 14, 2010;
- 48-Hour Notice filed April 17, 2010, covering April 15, 2010;
- 48-Hour Notice filed April 19, 2010, covering April 16, 2010 through April 17, 2010;
- 48-Hour Notice filed April 22, 2010, covering April 18, 2010 through April 20, 2010;
- 48-Hour Notice filed April 26, 2010, covering April 21, 2010 through April 24, 2010;
- 48-Hour Notice filed April 28, 2010, covering April 25, 2010 through April 26, 2010;
- 48-Hour Notice filed May 15, 2010, covering April 27, 2010 through May 13, 2010;
- 48-Hour Notice filed May 17, 2010, covering May 14, 2010 through May 15, 2010;
- 48-Hour Notice filed May 19, 2010, covering May 16, 2010 through May 17, 2010;
- 48-Hour Notice filed May 20, 2010, covering May 18, 2010;
- 48-Hour Notice filed May 23, 2010, covering May 19, 2010 through May 21, 2010;
- 48-Hour Notice filed May 26, 2010, covering May 22, 2010 through May 24, 2010;
- 48-Hour Notice filed May 27, 2010, covering May 25, 2010; and
- 48-Hour Notice filed May 29, 2010, covering May 26, 2010 through May 27, 2010.²

Mr. Kirkland has also filed a number of miscellaneous electronic submissions to provide additional information to the Commission concerning his independent expenditures. Several of the miscellaneous electronic submissions were filed to clarify apparent errors on the Form 5 filings that were caused by defects in the Commission's online filing system or FECfile software.

² In addition to 48-hour notice requirements, individuals or entities making independent expenditures are subject to 24-hour notice requirements for independent expenditures disseminated after the 20th day, but more than 24 hours before 12:01 a.m. of the day of an election. See 11 C.F.R. § 109.10(d). The primary election in the 8th congressional district of Tennessee will be held on August 5, 2010, and the timeframe for 24-hour notices will not begin until July 17, 2010. Accordingly, none of Mr. Kirkland's independent expenditures that have been disseminated to date were subject to 24-hour notice requirements.

THE LAW

The Complaint alleges that Mr. Kirkland (1) made excessive contributions to the Kirkland Campaign under FECA and Commission regulations in the form of coordinated communications, and (2) failed to properly report the communications to the Commission. See Complaint at 1, 5.

Commission regulations provide that "[a] payment for a coordinated communication is made for the purpose of influencing a Federal election, and is an in-kind contribution under 11 C.F.R. § 100.52(d) to the candidate..." 11 C.F.R. § 109.21(b)(1). Under Commission regulations, "coordinated means made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or a political party committee" or an agent of any of these entities. 11 C.F.R. § 109.20. For a communication to be coordinated, the communication must satisfy the payment, content and conduct standards set forth at 11 C.F.R. § 109.21.³

A public communication satisfies the conduct standard in Commission regulations if the communication is made:

- At the request or suggestion of a candidate, candidate's authorized committee, political party committee, or any of their agents;
- With the material involvement of a candidate, candidate's authorized committee, political party committee, or any of their agents;
- After substantial discussions with a candidate, candidate's authorized committee, political party committee, or any of their agents;
- Using a common vendor; or
- Using a former employee or independent contractor of a candidate, candidate's authorized committee, or political party committee.

See 11 C.F.R. §§ 109.21(d)(1) – (d)(6).⁴

³ Although the Commission is currently in the process of revising its coordination regulations as a result of *Shays v. Federal Election Commission*, 528 F.3d 914, 933 (D.C. Cir. 2008) ("*Shays III*"), the Commission's current coordination regulations remain in effect pending the completion of the rulemaking and apply to this matter.

⁴ The full text of the various conduct standards in the Commission's coordination regulations is contained in Exhibit 5.

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The material involvement, substantial discussion, common vendor, and former employee prongs are not satisfied "if the information material to the creation, production, or distribution of the communication was obtained from a publicly available source." 11 C.F.R. §§ 109.21(d)(2), (d)(3), (d)(4)(iii), and (d)(5)(ii). In addition, "[t]he financing of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, the candidate's authorized committee, or an agent of either of the foregoing shall be considered a contribution . . ." 11 C.F.R. § 109.23(a).

The Act and Commission regulations require individuals or entities that make independent expenditures to disclose the independent expenditures on quarterly reports and 48-hour notices. Commission regulations provide that:

Every person that is not a political committee and that makes independent expenditures aggregating in excess of \$250 with respect to a given election in a calendar year shall file a verified statement or report on FEC Form 5...Every person filing a report or statement under this section shall do so in accordance with the quarterly reporting schedule specified in 11 C.F.R. 104.5(a)(1)(i) and (ii)...

11 C.F.R. § 109.10(b).

Commission regulations further require that:

Every person that is not a political committee and that makes independent expenditures aggregating \$10,000 or more with respect to a given election any time during the calendar year up to and including the 20th day before an election, must report the independent expenditures on FEC Form 5...by 11:59 p.m. Eastern Standard/Daylight Time the second day following the date on which a communication is publicly distributed or otherwise publicly disseminated. Each time subsequent independent expenditures relating to the same election aggregate an additional \$10,000 or more, the person making the independent expenditures must ensure that the Commission receives a new 48-hour report of the subsequent independent expenditures.

11 C.F.R. § 109.10(c).

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DISCUSSION

I. The Complaint is Technically Deficient and Should Be Dismissed on This Ground Alone.

The Commission should dismiss the Complaint because it is technically deficient. Commission regulations state that all complaints "shall provide the full name and address of the complainant." 11 C.F.R. § 111.4(b)(1). Although the Complaint purports to provide the full name of the Complainant, John D. Stevens, the Complaint fails to provide an address for the Complainant as required by Commission regulations. Because the Complaint is procedurally defective and fails to comply with Commission regulations, the Complaint should be promptly dismissed on this basis alone.

II. There is No Reason to Believe That Mr. Kirkland's Public Communications Were Coordinated with Ronald Kirkland or the Kirkland Campaign.

The Complainant alleges that Mr. Kirkland's independent expenditures were coordinated with Ronald Kirkland and the Kirkland Campaign based largely on the fact that Mr. Kirkland and Ronald Kirkland are brothers. Based on this unremarkable fact, the Complaint contends without any legal or factual foundation that "the close familial tie between [Mr.] Kirkland and his brother insinuates that the Radio Ad, Television Ad, and/or the Website were created with the material involvement and/or substantial discussion by [Ronald] Kirkland or the [Kirkland] Committee." Complaint at 5. The Complaint further alleges that Mr. Kirkland's "enthusiastic support" of Ronald Kirkland's candidacy "indicates" that Mr. Kirkland's public communications were illegally coordinated with Ronald Kirkland and the Kirkland Campaign. *Id.* Finally, the Complaint contends that because some of Mr. Kirkland's independent expenditures included the generic language "proven, trusted, conservative," the inclusion of this generic language establishes that "at a minimum, [Mr.] Kirkland's and the [Kirkland] Committee's plans, projects, activities, or needs were conveyed to Robert Kirkland . . . which meets the third prong of the [Commission's] coordinated communication test." *Id.*

All of the foregoing allegations are legally and factually baseless. As is detailed below, there is no reason to believe that any of the conduct prongs in the Commission's coordination regulations have been implicated by Mr. Kirkland's independent expenditures. In addition, the relationship between the sponsor of independent expenditures and a candidate—whether of a familial nature or otherwise—is irrelevant in determining whether the communications at issue constitute independent expenditures. Whether the sponsor of independent expenditures supports a given candidate, or previously volunteered on behalf of the candidate, is likewise irrelevant in determining whether the sponsor's communications qualify as independent expenditures. Finally, the use of generic language such as "proven, trusted, conservative" as part of a larger public communication does not constitute republication of campaign materials as a matter of law under Commission regulations.

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Only one issue needs to be disposed of in order to dismiss the Complaint—namely, whether there is reason to believe that Mr. Kirkland's public communications triggered any of the conduct prongs contained in the Commission's regulations. In determining whether any of the conduct prongs have been satisfied, the Commission has long emphasized that the determination "requires analysis of affirmative acts taken by the parties who are alleged to have engaged in the coordinated activity." *See e.g.*, Factual and Legal Analysis in MUR 6059 (Sean Parnell for Congress/Club for Growth PAC) at 5 (emphasis added). Thus, the person or entity alleged to have engaged in coordination must have taken affirmative steps to satisfy one of the six conduct prongs in Commission regulations—specifically, the request or suggestion, material involvement, substantial discussion, common vendor, former employee/independent contractor, or republication prongs *See id.* *See also* 11 C.F.R. § 109.21(d)(1)-(6).

As is detailed below, there is no reason to believe that Mr. Kirkland's independent expenditures have implicated any of the conduct prongs contained in Commission regulations. Given that Mr. Kirkland's independent expenditures have been conducted in full compliance with FECA and were developed, produced, and disseminated independently of Ronald Kirkland and the Kirkland Campaign, the Commission should summarily dismiss the Complaint.

A. The Material Involvement Prong Has Not Been Triggered

The material involvement prong of the Commission's coordination regulations is met if a candidate, authorized committee, or any agents thereof are "materially involved" in decisions regarding a public communication, including the:

- Content of the communication;
- Intended audience;
- Means or mode of the communication;
- Specific media outlet used;
- Timing or frequency of the communication; or
- Size or prominence of a printed communication or duration of a communication by means of broadcast, cable, or satellite.

See 11 C.F.R. § 109.21(d)(2).

When the Commission promulgated the material involvement conduct prong, the Commission noted that in assessing whether a candidate's involvement in a given public communication is "material," the relevant analysis is "the nature of the information conveyed and its importance, degree of necessity, influence of the effect of involvement by the candidate, authorized committee . . . or their agents in any of the communication decisions enumerated in 11 C.F.R. 109.21(d)(2)(i) through (vi)."

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Explanation and Justification of Coordinated and Independent Expenditure Regulations, 68 Fed. Reg. 421, 433 (Jan. 3, 2003). Significantly, in enacting the regulations, the Commission emphasized that "the term 'materially involved in decisions' does not encompass all interactions, only those that are important to the communication." *Id.* Specifically, "[t]he term 'material' is included to safeguard against the inclusion of incidental participation that is not important to, or does not influence, decisions regarding a communication." *Id.* The Commission has also made clear that the material involvement standard "would not be satisfied, for example, by a speech to the general public, but is satisfied by remarks addressed specifically to a select audience, some of whom subsequently create, produce, or distribute public communications." 68 Fed. Reg. at 434. Thus, material involvement cannot be established by access to, or use of, publicly available information.

The Complaint primarily alleges that Mr. Kirkland's public communications were coordinated with the Kirkland Campaign because "the close familial tie between [Ronald] Kirkland and his brother insinuates that the Radio Ad, Television Ad, and/or the Website were created with material involvement . . . by [Ronald] Kirkland or the [Kirkland] Committee." Complaint at 5. The Complaint also alleges that coordination occurred because "[Mr. Kirkland's] enthusiastic support of [Ronald Kirkland's] candidacy in early February indicates that [Mr. Kirkland] was materially involved in his brother's campaign prior to the creation of the Radio Ad, Television Ad, and Website." *Id.* As examples of material involvement, the Complaint seeks to rely on the fact that Mr. Kirkland is Ronald Kirkland's brother and also that Mr. Kirkland previously raised money in a volunteer capacity for the Kirkland Campaign. *Id.* at 1. Both allegations of material involvement are baseless.

The Complaint alleges that coordination occurred because of "the close familial tie" between Mr. Kirkland and Ronald Kirkland. *See* Complaint at 5. As was outlined above, the personal relationship between the sponsor of independent expenditures and a candidate—whether familial or otherwise—is simply irrelevant to determining whether particular public communications are coordinated. Moreover, Mr. Kirkland, Mr. Greer, and Mr. Benham have provided sworn testimony in this matter in the form of affidavits indicating that neither Ronald Kirkland nor anyone else associated with the Kirkland Campaign was materially involved in any of Mr. Kirkland's independent expenditures on behalf of the Kirkland Campaign. *See* Robert Kirkland Affidavit ¶¶ 10-11; Brad Greer Affidavit ¶¶ 10-11; Terry Benham Affidavit ¶¶ 7-8. Although Mr. Kirkland and Ronald Kirkland did communicate after Mr. Kirkland made the decision to disseminate independent expenditures, none of the communications was material to Mr. Kirkland's independent expenditures on behalf of the Kirkland Campaign. *See* Robert Kirkland Affidavit ¶ 10. Moreover, prior to making any independent expenditures, Mr. Kirkland ceased all involvement with the Kirkland Campaign and consulted legal counsel to ensure that the necessary compliance framework was in place to make independent expenditures on behalf of the Kirkland Campaign. *Id.* ¶¶ 5-6.

Prior to making independent expenditures on behalf of the Kirkland Campaign, Mr. Kirkland attended a fundraising event and volunteered to help raise money for the Kirkland Campaign. *Id.* ¶ 4. The Complaint speculates that because of such "enthusiastic support" by Mr. Kirkland, "[c]ertainly, at

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a minimum," the Kirkland Campaign's plans, projects, activities, or needs must have been conveyed to Mr. Kirkland. Complaint at 5. However, as was noted above, an independent expenditure sponsor's past volunteer efforts and interaction with a candidate is irrelevant to determining whether subsequent public communications disseminated by the sponsor are coordinated. Although Mr. Kirkland was exposed to campaign-related information when he attended Kirkland Campaign fundraising and other political events, such information was publicly available and therefore cannot be the basis for a finding of material involvement. The Complaint further alleges that since only seven weeks elapsed between Mr. Kirkland's fundraising email on behalf of the Kirkland Campaign on February 6, 2010 and the dissemination date of the first independent expenditure on March 26, 2010, that Mr. Kirkland's independent expenditures must have necessarily been coordinated. See Complaint at 1-2, 5. However, time is not an element in the material involvement analysis; either a candidate or his agents were materially involved in the decision-making process related to an independent expenditure or they were not.

The Complaint erroneously presumes that Ronald Kirkland was materially involved in Mr. Kirkland's independent expenditures because the two are brothers and because Mr. Kirkland at an earlier time solicited contributions on behalf of the Kirkland Campaign. However, the Commission has never inferred illegal coordination based upon family relationships—or any other kind of relationship—between the sponsor of independent expenditures and a candidate. Nor has the Commission ever concluded that individuals are barred from making independent expenditures if they ever helped to raise funds or otherwise volunteered on behalf of a candidate's campaign. To the contrary, the relevant analysis is whether a candidate was materially involved in the particular public communications at issue. See e.g., Factual and Legal Analysis in MUR 5754 (MoveOn.org Voter Fund) at 3 (finding no reason to believe that MoveOn.org coordinated communications with the Democratic party and emphasizing that "[a]lthough the complainant alleges that MoveOn.org has made no secret of its ongoing communications with Democratic party officials...[the complaint] does not connect any such discussions to [MoveOn.org's] alleged coordinated communications.") (internal quotations omitted). The presence or absence of a "close familial tie" between Mr. Kirkland and Ronald Kirkland is not relevant, nor are Mr. Kirkland's previous volunteer activities on behalf of the Kirkland Campaign. Accordingly, there is no reason to believe that the material involvement prong has been implicated.

B. The Substantial Discussion Prong Has Not Been Met

The substantial discussion prong is satisfied if a public communication is created, produced, or distributed after one or more substantial discussions between the individual paying for the communication (or the person's agents) and the candidate or candidate's opponent (or the candidate's agents). See 11 C.F.R. § 109.21(d)(3). A discussion is "substantial" if information about the plans, projects, activities, or needs of the candidate that is material to the creation, production, or distribution of the communication is conveyed to the individual paying for the communication. See *id.*

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In describing the scope of the substantial discussion prong, the Commission has emphasized that this prong "addresses a direct form of coordination between a candidate, authorized committee . . . or their agents and a third-party spender, and the Commission is narrowing the scope of this standard through the additional requirements that the discussion be 'substantial' and the information conveyed be 'material.'" 68 Fed. Reg. at 435. The Commission has further indicated that "[d]iscuss' has its plain and ordinary meaning, which the Commission understands to mean an interactive exchange of views of information . . . [i]n other words, the substantiality of the discussion is measured by the materiality of the information conveyed in the discussion." *Id.*

As outlined above, the Complaint's coordination allegations rely primarily on "the close familial tie between [Ronald] Kirkland and his brother" because it "insinuates that the Radio Ad, Television Ad, and/or the Website were created with . . . substantial discussion by [Ronald] Kirkland or the [Kirkland] Committee." Complaint at 5. Additionally, the Complaint contends that "[c]ertainly, at a minimum, [Ronald] Kirkland's and the [Kirkland] Committee's campaign plans, projects, activities, or needs were conveyed to Robert Kirkland before he created the Radio Ad, Television Ad, and Website..." *Id.*

The familial relationship between the sponsor of an independent expenditure and a candidate is no more relevant to assessing whether the substantial discussion prong has been implicated than it is in determining whether the material involvement prong is met—namely, it is totally irrelevant. Moreover, the Complaint provides no factual support for the allegation that Mr. Kirkland and Ronald Kirkland or anyone else associated with the Kirkland Campaign had substantial discussions concerning Mr. Kirkland's independent expenditures, relying instead on rank speculation and innuendo. *See* Factual and Legal Analysis in MUR 6059 (Sean Parnell for Congress/Club for Growth PAC) at 5-6 (finding no reason to believe given that the complaint "merely relied on the inference that the communication had been coordinated...[and the complaint failed] to provide probative information of coordination.") (internal quotations omitted). *See also* Factual and Legal Analysis in MUR 5750 (Laffey U.S. Senate) at 6 (finding no reason to believe given that the complainant based allegations on speculative inferences of coordination rather than on specific facts). By contrast, Mr. Kirkland, Mr. Greer, and Mr. Benham have submitted affidavits indicating that no substantial discussions occurred with Ronald Kirkland or anyone associated with the Kirkland Campaign concerning any material aspects of Mr. Kirkland's independent expenditures on behalf of the Kirkland Campaign. *See* Robert Kirkland Affidavit ¶¶ 12-13; Brad Greer Affidavit ¶¶ 12-13; Terry Benham Affidavit ¶¶ 9-10. *See* Factual and Legal Analysis in MUR 5870 (West Virginia Values LLC et. al.) at 6 ("In light of the speculative nature of the allegations and the sworn statements specifically denying the elements necessary to satisfy the conduct standard, there is no support for finding that there were substantial discussions...").

As was discussed above, Mr. Kirkland volunteered for a limited period of time on behalf of the Kirkland Campaign, and Mr. Kirkland attended a Kirkland Campaign fundraising event during this brief time period. However, during this short period of time, Mr. Kirkland was not exposed to any

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non-public Kirkland Campaign plans or strategies that were material to Mr. Kirkland's independent expenditures. *See* Robert Kirkland Affidavit ¶ 12.

Moreover, prior to disseminating any independent expenditures Mr. Kirkland and his consultant, Mr. Greer, terminated all involvement with the Kirkland Campaign and consulted legal counsel to ensure that the necessary compliance framework was in place prior to making any independent expenditures. *See* Robert Kirkland Affidavit ¶¶ 5-6; Brad Greer Affidavit ¶ 4.

In light of the foregoing, and given that the Complainant is unable to support his coordination allegations with anything more than rank speculation and innuendo, there is no reason to believe that the substantial discussion prong of the Commission's regulations has been triggered.

C. The Request or Suggestion Prong Has Not Been Satisfied

The request or suggestion conduct prong is met if the person creating, producing, or distributing a public communication does so at the request or suggestion of a candidate, authorized committee, or any agent thereof; or if the person paying for the communication suggests the creation, production, or distribution of the communication to the candidate, authorized committee, or any agents thereof, and the candidate assents to the suggestion. *See* 11 C.F.R. § 109.21(d)(1).

In its Explanation and Justification for the regulation, the Commission highlighted that "[a] request or suggestion encompasses the most direct form of coordination, given that the candidate . . . communicates desires to another person who effectuates them." 68 Fed. Reg. 421, 432 (2003). The Commission has indicated that "[a]ssent[ing] to a suggestion is merely one form of a request; it is 'an expression of a desire to some person for something to be granted or done.'" *Id.* (quoting *Black's Law Dictionary* 1304 (6th ed. 1990)). The Commission has made clear that a coordination finding does not result "where a payor 'merely informs' a candidate or political party committee of its plans. Rather, under the proposed [and adopted] rule, a candidate as a political party will have accepted an in-kind contribution only if there is assent to the suggestion . . ." 68 Fed. Reg. 421, 432 (2003).

The Complaint alleges that coordination occurred because Ronald Kirkland assented to Mr. Kirkland's suggestion of engaging in independent expenditure activities. *See* Complaint at 4. The Complaint does not specifically allege that Ronald Kirkland made any requests or suggestions to Mr. Kirkland to make any independent expenditures on behalf of the Kirkland Campaign. Rather, the Complaint quotes an April 7, 2010 *Memphis Commercial-Appeal* newspaper article that quotes Brent Leatherwood, who is the Campaign Manager of the Kirkland Campaign, as saying, "Early on, Robert [Kirkland] decided that he wanted to do an independent effort. He wanted to do it to level the playing field, probably wanted to do that because of all the special interest and Washington insider money that is going to be backing our opponents." Complaint at 4-5. *See* April 7, 2010 *Memphis Commercial-Appeal* Newspaper Article (Exhibit 6). Although the Complainant attaches the *Commercial-Appeal* newspaper article to the Complaint, the Complainant chose not to cite the remainder of Mr. Leatherwood's

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quotation, which is highly relevant and is as follows: "On the recommendation of legal counsel they [Mr. Kirkland and Ronald Kirkland] have cut off all communication. We as a campaign have no knowledge of what is being done there and what [Mr. Kirkland is] planning to do." *Id.* (emphasis added).

Moreover, in order for a candidate to assent to the making of a coordinated communication, a third party must first make a suggestion. However, Mr. Kirkland never made any suggestions to Ronald Kirkland or anyone else associated with the Kirkland Campaign concerning potential independent expenditures. At the time Mr. Leathemwood was interviewed for the *Concerned-Appeal* article, Mr. Leathemwood undoubtedly knew about the existence of Mr. Kirkland's independent expenditures on behalf of the Kirkland Campaign because radio advertisements had already been airing. The existence of Mr. Kirkland's independent expenditures was thus public knowledge and broadcasting advertisements does not constitute a suggestion under Commission regulations.

In addition, assent must occur prior to the creation, production, or distribution of a public communication because the assent, in order to be legally relevant under the Commission's coordination regulations, must be related to the creation, production, or distribution of the public communication. However, when Mr. Kirkland made the decision to engage in independent expenditures on behalf of the Kirkland Campaign, Mr. Kirkland ceased all of his involvement with the Kirkland Campaign and consulted legal counsel to ensure that the necessary compliance framework was in place prior to the dissemination of any independent expenditures. See Robert Kirkland Affidavit ¶¶ 5-6.

Finally, the Commission has made clear that "assent" requires affirmative action on the part of the candidate or the candidate's agents and such affirmative action is clearly lacking in this matter. In MUR 5461 (FAN_THE_VOTE), the respondent was alleged to have coordinated certain communications with the Kerry Presidential Campaign. In recommending that the Commission dismiss the complaint based upon prosecutorial discretion, the Office of General Counsel noted that "there is no allegation that the Kerry committee representative conveyed to 'Idleat' any information at all, much less information about the Kerry campaign's plans, projects, activities, or needs. The Kerry committee representative simply 'did not object' to the general nature of FTV's fundraising plans. Under these circumstances, the communication plainly is not a 'coordinated communication.'" First General Counsel's Report in MUR 5461 (FAN_THE_VOTE) at 8. The Commission unanimously voted to dismiss the complaint in MUR 5461, and five commissioners issued a statement of reasons emphasizing that:

In instances such as this where the Commission has substantively analyzed a matter and there is no support for finding reason to believe the respondents violated the Act, the Commission should not simply 'dismiss' the matter. The record is much clearer if the Commission indicates that we made a substantive determination when, indeed, we

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have. Hence, we would have supported finding 'no reason to believe' that the respondents have violated the Act.

Statement of Reasons of Chairman Scott E. Thomas, Vice Chairman Michael E. Toner, and Commissioners David M. Mason, Danny L. McDonald, and Ellen L. Weintraub in MUR 5461 (FAN_THE_VOTE) at 3. The Commission's dismissal of the complaint in MUR 5461 makes clear that a finding of "assent," for purposes of the request or suggestion conduct prong, requires one or more affirmative steps by the candidate or the candidate's agents—specifically, the candidate or the candidate's agents must do more than simply not object to a third party's statement that the third party plans to engage in independent expenditures. Mr. Leatherwood's published comments simply conveyed that the Kirkland Campaign was aware of Mr. Kirkland's ongoing independent expenditure activities, which at that time had been taking place for nearly two weeks. Mr. Leatherwood's comments in no way constitute evidence of any affirmative action taken by Ronald Kirkland, the Kirkland Campaign, or any of their agents to assent to Mr. Kirkland's independent expenditure activities.

For all the foregoing reasons, there is no reason to believe that the request or suggestion prong in the Commission's regulations has been satisfied.

D. No Common Vendors Were Involved With Mr. Kirkland's Communications

The common vendor prong is met if all of the following three things occur:

- The individual paying for the communication contracts with or employs a commercial vendor to create, produce, or distribute the communication;
- The commercial vendor, including any agents, has a current or previous relationship (within the last 120 days) with the candidate that puts the commercial vendor in a position to acquire information about the plans, projects, activities, or needs of the candidate's campaign; and
- The commercial vendor uses or conveys information about the plans, projects, activities, or needs of the candidate's campaign, or information previously used by the commercial vendor in serving the candidate, to the person paying for the communication, and that information is material to the creation, production, or distribution of the communication.

See 11 C.F.R. § 109.21(d)(4).

Mr. Kirkland has not retained any vendors in common with the Kirkland Campaign in connection with his independent expenditures and the Complaint does not allege otherwise. See Robert Kirkland Affidavit ¶ 14; Brad Greer Affidavit ¶ 14; Terry Benham Affidavit ¶¶ 11-12. Prior to engaging a vendor, Mr. Kirkland was careful to ensure that each vendor did not have a current or previous

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vendor relationship with the Kirkland Campaign. *See* Robert Kirkland Affidavit ¶ 14 and Brad Greer Affidavit ¶ 14. In addition, Mr. Kirkland required each vendor to agree not to enter into a contractual relationship with the Kirkland Campaign while the vendor was engaged in connection with Mr. Kirkland's independent expenditures. *Id.*

In light of the foregoing, there is no reason to believe that the common vendor prong of the Commission's regulations has been implicated.

E. Mr. Kirkland Has Not Used Any Former Kirkland Campaign Employees or Independent Contractors in Connection With the Independent Expenditures

The former employee or independent contractor prong of the Commission's regulations is met if the person paying for the communication (or the person's employees) have previously been an employee or independent contractor of a candidate's campaign committee during the 120 days prior to production of the communication. *See* 11 C.F.R. § 109.21(d)(5). In addition, the former employee or independent contractor must use or convey information about the plans, projects, activities, or needs of the candidate, or information used by the former employee in serving the candidate, to the person paying for the communication, and that information must be material to the creation, production, or distribution of the communication. *Id.*

The Commission's regulations clearly require that an individual be a former employee or independent contractor of a candidate's campaign, and the Commission has made clear that prior volunteer activities are not sufficient to implicate this prong of the regulations. In adopting the regulations, the Commission sought comment on whether the former employee or independent contractor standard "should be extended to volunteers, such as 'fundraising partners,' who by virtue of their relationship with a candidate . . . have been in a position to acquire material information about the plans, projects, activities, or needs of the candidate . . ." 68 Fed. Reg. 421, 439 (Jan. 3, 2003). After recognizing that "some, but not all, 'volunteers' operate as highly placed consultants who might be given information about the plans, projects, activities, or needs of the candidate . . . with the expectation that the 'volunteer' will use or convey that information to effectively coordinate a communication paid for by that 'volunteer' or by a third-party spender," the Commission nevertheless made clear that it "is not extending the scope of the 'former employee' standard in its final rules to encompass volunteers . . ." *Id.* In declining to reach persons involved in volunteer campaign activities, including volunteer fundraising activities, the Commission concluded that Congress intended for this standard to be "limited to individuals who were in some way employed by the candidate's campaign, either directly or as an independent contractor." *Id.*

No former employee or independent contractor of the Kirkland Campaign has been involved in Mr. Kirkland's independent expenditures and the Complaint does not contend otherwise. *See* Robert Kirkland Affidavit ¶ 14; Brad Greer Affidavit ¶ 14; Terry Benham Affidavit ¶¶ 11-12. Although Mr.

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Kirkland is Ronald Kirkland's brother and volunteered on behalf of the Kirkland Campaign for a short period of time, Mr. Kirkland was never an employee or an independent contractor for the Kirkland Campaign. See Robert Kirkland Affidavit ¶ 4. In addition, although Mr. Greer volunteered for the Kirkland Campaign for a short period of time, Mr. Greer likewise was never an employee or independent contractor for the Kirkland Campaign. See Brad Greer Affidavit ¶ 3.

For all the foregoing reasons, there is no reason to believe that the former employee or independent contractor prong has been satisfied.

F. Mr. Kirkland Has Not Republished Campaign Materials Because The Use of Generic Language and Commonly-Used Themes Does Not Constitute Republication of Campaign Materials

Under Commission regulations, "[t]he financing of the dissemination, distribution, or republication, in whole or in part, of any broadcast or written, graphic, or other form of campaign materials" prepared by a candidate, a candidate's authorized committee, or any agents thereof is treated as an in-kind contribution from the person paying for the communication to the candidate who prepared the original campaign materials. See 11 C.F.R. § 109.23(a). However, if none of the core standards are also implicated, the candidate does not receive the in-kind contribution, but the person paying for the communication still makes an in-kind contribution to the candidate. *Id.*

The Complaint alleges that several of Mr. Kirkland's independent expenditures constitute the republication of campaign materials previously disseminated by the Kirkland Campaign. See Complaint at 1-2, 4. This allegation relies on Mr. Kirkland's use of the generic words "proven," "trusted," and "conservative" in some of Mr. Kirkland's independent expenditures and the Kirkland Campaign's use of the same generic words. Mr. Kirkland's use of the general phrase "proven," "trusted," and "conservative" in some of his public communications does not constitute republication of campaign materials because as a matter of law such language is too general and generic to constitute republication.

The use of generic and commonly used language and themes, such as "proven," "trusted," and "conservative," cannot constitute republication of campaign materials. First, generic language and commonly-used themes are not "campaign materials" and therefore are not capable of being disseminated, distributed, or republished within the meaning of 11 C.F.R. § 109.23. Second, even if such generic language and commonly-used themes could conceivably be construed to be "campaign materials," Mr. Kirkland's use of such language in his independent expenditures does not qualify as republication.

The Commission's republication regulations are limited to "any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate . . ." 11 C.F.R. § 109.23. See also 2 U.S.C. § 441a(a)(7)(B)(iii). The Act and Commission regulations are limited to a final product—i.e.,

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some kind of broadcast, print, or electronic communication that required preparation—and do not extend to the use of three generic words strung together to create a commonly-used theme that could be employed by multiple campaigns across the country at any one time.

Not surprisingly, a large number of candidates and campaign committees at the federal and state level have recently used the generic words “proven,” “trusted,” and/or “conservative” in their public communications, including the following examples:

- “Dan is a proven conservative leader who is trusted by Hoosiers.” Press Release, Congressman Mike Pence (Apr. 21, 2010) (endorsing Senator Dan Coats, Candidate for U.S. Senate);
- “We need to send a positive, trusted and proven conservative representative to Congress.” Open Letter from John Anderson, et. al, available at <http://www.jimpatterson.com/index.php?id=50> (endorsing Jim Patterson, Candidate for U.S. Congress);
- “The Dockery Campaign is gaining traction with genuine Republican leaders and conservative grass-roots activists because they know Paula Dockery is a proven, trusted leader who will do the right thing.” *End of Session Marks Start of Campaign Blitz, And Open Door to Again Raise Money for Messaging*, CapitalSoup.com, May 2, 2010, <http://capitalsoup.com/2010/05/02/paula-dockery-for-governor-this-week-from-the-campaign-volume-xvi/> (endorsing Paula Dockery, Candidate for Governor of Florida);
- “I have always supported Tim because of his proven, trusted pro-life conservative record.” *Walberg and Rooney Battle Over Who’s the Most Anti-Choice in MI-07*, Blogging for Michigan, May 15, 2010, <http://bloggingformichigan.com/diary/5692/walberg-and-rooney-battle-over-whos-the-most-antichoice-in-mi07> (endorsing Tim Walberg, Candidate for U.S. Congress);
- “He has proven himself to be a fiscal conservative on both the local and state level;” “Tested and Trusted.” Website of Josh Mandel for State Treasurer, <https://www.joshmandel.com/page/a-proven-leader-with-experience> (Candidate for Ohio State Treasurer); and
- “Proven. Tested. Trusted.” Campaign Video of Mike Johanns, available at <http://www.youtube.com/watch?v=z9cWo1DBdaw&feature=related> (2008 Candidate for U.S. Senator from Nebraska).

As the foregoing examples illustrate, generic and commonplace words such as “proven,” “trusted,” and “conservative” are frequently used by campaigns at any one time across the country; no single

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candidate or political committee can possess or even claim to possess the exclusive right to use such generic and general political language.

Moreover, Mr. Kirkland's use of the words "proven," "trusted," and "conservative" do not constitute republication of campaign materials under Commission precedent. In MURs 5743 (Betty Sutton for Congress/EMILY's List) and 5996 (Tim Bee for Congress/Education Finance Reform Group), the Commission addressed the alleged republication of photos obtained from a candidate's publicly available website. In both matters, an outside party downloaded photographs of the candidate from the candidate's publicly available campaign website and subsequently used the photos in direct mail pieces. Although the Office of General Counsel concluded in both matters that the use of the photos constituted a republication of campaign materials, the Office of General Counsel recommended that the Commission exercise its prosecutorial discretion and dismiss the matters because the resulting in-kind contributions were of *de minimis* value.

In MUR 5743, the Commission voted 4-2 to accept the Office of General Counsel's recommendation; however, Commissioners Weintraub and von Spakovsky dissented because the two Commissioners concluded that an outside party's use of campaign photos does not constitute republication of campaign materials. Commissioners Weintraub and von Spakovsky emphasized that:

The downloading of a photograph from a candidate's website that is open to the world, for incidental use in a larger mailer that is designed, created, and paid for by a political committee as an independent expenditure without any coordination with the candidate, does not constitute the 'dissemination, distribution, or republication of candidate campaign materials.' It is not an 'in-kind' contribution from the committee to the candidate.

Statement of Reasons of Commissioners Ellen L. Weintraub and Hans A. von Spakovsky in MUR 5743 (Betty Sutton for Congress/EMILY's List) at 4-5. See also *id.* at 4 ("The photographs [at issue in MUR 5743] comprise only a small portion of the mailers, and are surrounded by EMILY's List's own text and design. In several instances, the photograph used is only a small, smiling 'head shot' of Betty Sutton. The borrowed photographs are certainly not the central elements of the mailers.").

Additionally, in MUR 5996, Commissioners Hunter, McGahn and Petersen voted to dismiss the matter relying upon the reasoning of Commissioners Weintraub and von Spakovsky in MUR 5743. Commissioners Hunter, McGahn and Petersen concluded that:

The activity at issue here is not the type of 'republication of campaign materials' contemplated by the Act and Commission regulations. The traditional type of republication involves the reprinting and dissemination of a candidate's mailers, brochures, yard signs, billboards, or posters—in other words, materials that copy and convey a campaign's message. In addition, reprinting and reproducing a brochure, mailer, or billboard typically has an ascertainable value. Conversely, the download of a

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candidate's photograph from his or her publicly available website, absent some additional content or message, is not enough to constitute republication of campaign materials.

Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn in MUR 5996 (Tim Bee for Congress/Education Finance Reform Group) at 3.

In MURs 5743 and 5996, five Commissioners collectively concluded that the incidental use of a photograph from a candidate's publicly available website in a communication that is otherwise an original communication does not constitute republication of campaign materials within the meaning of 11 C.F.R. § 109.23. Mr. Kirkland's use of the generic words "proven," "trusted," and "conservative" is analogous. The generic words "proven," "trusted," and "conservative" are commonly-used themes in political campaign discourse. Mr. Kirkland used these general words in some of his public communications in combination with other publicly available facts and information. For example, Mr. Kirkland's use of the words "proven," "trusted," and "conservative" in a direct mailpiece he disseminated constituted only a small portion of a larger communication that contained the personal views of Mr. Kirkland. *See* Robert Kirkland Mailpiece (Exhibit 7). The use of the words "proven," "trusted," and "conservative" in Mr. Kirkland's mailpiece was part of a public communication that was independently developed by Mr. Kirkland and contained his personal political views. Mr. Kirkland's use of such commonplace and generic terms does not constitute republication of campaign materials under Commission regulations. *See* Factual and Legal Analysis in MUR 5691 (Whalen for Congress) at 7 (rejecting republication finding despite the fact that the communication at issue used "some of the same themes and images as those used by the candidate in his campaign advertisement...").

For all of the foregoing reasons, there is no reason to believe that Mr. Kirkland republished any campaign materials from the Kirkland Campaign.

**G. Many Aspects of Mr. Kirkland's Independent Expenditures
Were Based Upon Publicly Available Information**

The Commission's coordination regulations establish a safe harbor for the use of information obtained from a publicly available source. Pursuant to this safe-harbor provision, the substantial discussion, material involvement, common vendor, and former employee/independent contractor conduct prongs are not satisfied as a matter of law if the information material to the creation, production, or distribution of the communication was obtained from a publicly available source. *See* 11 C.F.R. §§ 109.21(d)(2), (d)(3), (d)(4)(iii), and (d)(5)(ii). Publicly available sources include, but are not limited to, newspaper or magazine articles, candidate speeches or interviews, transcripts from television shows, press releases, a candidate or political party's website, and any other publicly

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available website. *See* Explanation and Justification of Coordinated Communications Regulations, 71 Fed. Reg. 33190, 33205 (June 8, 2006).

The Commission has examined the use of publicly available information in a variety of contexts. In MUR 5506 (EMILY's List/Betty Castor for Senate), the complainants alleged that EMILY's List made coordinated communications with a candidate because the candidate "assented" when her campaign discontinued television advertising from specific regions after EMILY's List bought television advertising in those same regions. *See* First General Counsel's Report in MUR 5506 (EMILY's List/Betty Castor for Senate) at 2. The Office of General Counsel recommended that the Commission find no reason to believe that EMILY's List made a coordinated communication because the candidate "made its decisions about placing and pulling ads based on information that television stations are required to make public." *Id.* at 7. The Commission voted 5-0 to adopt the Office of General Counsel's recommendation and found no reason to believe that EMILY's List made a coordinated communication.

Mr. Kirkland's public communications were similarly developed in reliance on publicly available information. All of Mr. Kirkland's independent expenditures at issue were based at least in part on publicly available information. Mr. Kirkland's public communications contained biographical and other factual information that was gathered from the Kirkland Campaign's website, which was publicly available. *See* Robert Kirkland Affidavit ¶ 16; Brad Green Affidavit ¶ 16; Terry Benham Affidavit ¶ 14. Mr. Kirkland's public communications also used photos obtained from publicly available media sources in combination with photos that Mr. Green personally shot. *Id.* After publicly available biographical and other factual information was gleaned, Mr. Kirkland's consultants then incorporated the information into new and original public communications.

Mr. Kirkland's reliance on publicly available information in developing his independent expenditures is yet another ground for concluding that there is no reason to believe that Mr. Kirkland's expenditures triggered the material involvement, substantial discussion, common vendor, and former employee/independent contractor prongs of the Commission's coordination regulations.

III. Mr. Kirkland Has Timely and Accurately Reported His Independent Expenditures to the Commission.

Contrary to the baseless allegation in the Complaint, Mr. Kirkland has carefully and diligently reported his independent expenditures in accordance with Commission regulations. As of May 31, 2010, Mr. Kirkland has filed 20 48-hour notices and one quarterly report with the Commission duly disclosing all of his independent expenditures. *See* Factual Background Section, Part VII, *supra*. Mr. Kirkland has also filed a number of miscellaneous electronic submissions to provide additional information to the Commission concerning his expenditures. Several of the miscellaneous electronic submissions were

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filed to clarify apparent errors on the Form 5 filings that were caused by defects in the Commission's online filing system or FECfile software.

Through May 31, 2010, Mr. Kirkland's multitude of filings with the Commission have duly disclosed a total of \$400,425.43 spent on independent expenditures. The fact that Mr. Kirkland to date has not received any Requests for Additional Information ("RFAs") from the Commission's Reports Analysis Division further confirms the thoroughness of these various filings and the many steps that Mr. Kirkland has taken to comply with Commission regulations in connection with his independent expenditures.

CONCLUSION

For all the reasons set forth above, the Commission should find no reason to believe a violation occurred and should promptly dismiss the Complaint.

Respectfully submitted,



Michael E. Toner

cc: Matthew Peterson, Chairman
Cynthia Bauerly, Vice Chair
Caroline Hunter, Commissioner
Donald McGahn, Commissioner
Steven Walther, Commissioner
Ellen Weintraub, Commissioner

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03/28/2010 16:35**FEC FORM 5****REPORT OF INDEPENDENT EXPENDITURES MADE AND CONTRIBUTIONS RECEIVED**

To Be Used by Persons (Other than Political Committees) Including Qualified Nonprofit Corporations

1. (a) Name of Individual, Organization or Corporation Robert Kirkland		3. FEC Identification Number C C00000000
(b) Address (number and street) <input type="checkbox"/> check if different than previously reported 700 Sanders Chapel Rd		
(c) City, State and ZIP Code Union City TN 38201		
2. Corporate filers only Is the filer a qualified nonprofit corporation? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Individual filers only Name of Employer Retired		Occupation Retired

4. TYPE OF REPORT (check appropriate boxes):

- (a) ☐ April 15 Quarterly Report ☐ 24-Hour Notice ☒ 48-Hour Notice
☐ July 15 Quarterly Report
☐ October Quarterly Report
☐ January 31 Year-End Report

(b) Is this Report an amendment? Yes ☐ No ☒

5. COVERING PERIOD: FROM 02 / 01 / 2010
 THROUGH
 03 / 28 / 2010

6. TOTAL CONTRIBUTIONS00

7. TOTAL INDEPENDENT EXPENDITURES 82578.35

Under penalty of perjury, I certify that the independent expenditures reported herein were not made with the cooperation or prior consent of, or in consultation with, or at the request or suggestion of, a candidate or candidate's agent or authorized committee or a political party committee or its agent. In addition, if the independent expenditures reported herein were made by a corporation, I certify that the corporation is a qualified nonprofit corporation under the Commission's regulations.

TYPE OR PRINT NAME OF PERSON COMPLETING FORM

SIGNATURE

DATE

Robert Kirkland

03/28/2010

NOTE: Submission of false, erroneous or incomplete information may subject the person signing this report to the penalties of 2 U.S.C. 437g.

For further information, contact:

Federal Election Commission, 999 E Street, N.W., Washington, D.C. 20463 Toll Free 800-424-9693, Local 202-694-1100

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**SCHEDULE E-E
ITEMIZED INDEPENDENT EXPENDITURES**

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FOR LINE 7 FOR FORM 5

NAME OF FILER (In Full)

Robert Kirkland

Full Name (Last, First, Middle Initial) of Payee
Bryan Cave LLP

Mailing Address
1155 F St, NW

City State Zip Code
Washington DC 20004

Date

02 / 01 / 2010

Amount

10000.00

Purpose of Expenditure
Legal Fees

Category/
Type

Office Sought:

☒ House

State: TN

House

☐ Senate

District: 09

☐ President

Name of Federal Candidate Supported or Opposed by Expenditure:
Ronald Kirkland

Check One:

☒ Support

☐ Oppose

Calendar Year-To-Date Per Election
for Office Sought

10000.00

Disbursement For:

2010

☒ Primary

☐ General

☐ Other (specify)

Full Name (Last, First, Middle Initial) of Payee
Brad Greer

Mailing Address
557 Campbell Street

City State Zip Code
Jackson TN 38301

Date

02 / 05 / 2010

Amount

4500.00

Purpose of Expenditure
Political Strategy Consulting

Category/
Type

Office Sought:

☒ House

State: TN

House

☐ Senate

District: 09

☐ President

Name of Federal Candidate Supported or Opposed by Expenditure:
Ronald Kirkland

Check One:

☒ Support

☐ Oppose

Calendar Year-To-Date Per Election
for Office Sought

14500.00

Disbursement For:

2010

☒ Primary

☐ General

☐ Other (specify)

Full Name (Last, First, Middle Initial) of Payee
Brad Greer

Mailing Address
557 Campbell Street

City State Zip Code
Jackson TN 38301

Date

02 / 05 / 2010

Amount

2400.00

Purpose of Expenditure
Computer Expenses

Category/
Type

Office Sought:

☒ House

State: TN

House

☐ Senate

District: 09

☐ President

Name of Federal Candidate Supported or Opposed by Expenditure:
Ronald Kirkland

Check One:

☒ Support

☐ Oppose

Calendar Year-To-Date Per Election
for Office Sought

16900.00

Disbursement For:

2010

☒ Primary

☐ General

☐ Other (specify)

(a) SUBTOTAL of Itemized Independent Expenditures 16900.00

(b) SUBTOTAL of Unitemized Independent Expenditures

(c) TOTAL Independent Expenditures
(carry total from last page forward to Line 7)

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**SCHEDULE 5-E
ITEMIZED INDEPENDENT EXPENDITURES**

PAGE 8/8
FOR LINE 7 FOR FORM 5

NAME OF FILER (In Full) Robert Kirkland			
Full Name (Last, First, Middle Initial) of Payee Brad Greer		Date 02 / 12 / 2010	
Mailing Address 557 Campbell Street		Amount 2125.00	
City Jackson	State TN	Zip Code 38301	
Purpose of Expenditure Political Strategy Consultant	Category/ Type	Office Sought: <input checked="" type="checkbox"/> House State: TN <input type="checkbox"/> Senate District: 05 <input type="checkbox"/> President Check One: <input checked="" type="checkbox"/> Support <input type="checkbox"/> Oppose	
Name of Federal Candidate Supported or Opposed by Expenditure: Ronald Kirkland		Disbursement For: <input checked="" type="checkbox"/> 2010 <input type="checkbox"/> General <input type="checkbox"/> Other (specify) _____	
Calendar Year-To-Date Per Election for Office Sought		19025.00	
Full Name (Last, First, Middle Initial) of Payee Brad Greer		Date 02 / 14 / 2010	
Mailing Address 557 Campbell Street		Amount 3000.00	
City Jackson	State TN	Zip Code 38301	
Purpose of Expenditure Video Equipment	Category/ Type	Office Sought: <input checked="" type="checkbox"/> House State: TN <input type="checkbox"/> Senate District: 05 <input type="checkbox"/> President Check One: <input checked="" type="checkbox"/> Support <input type="checkbox"/> Oppose	
Name of Federal Candidate Supported or Opposed by Expenditure: Ronald Kirkland		Disbursement For: <input checked="" type="checkbox"/> 2010 <input type="checkbox"/> General <input type="checkbox"/> Other (specify) _____	
Calendar Year-To-Date Per Election for Office Sought		22025.00	
Full Name (Last, First, Middle Initial) of Payee Brad Greer		Date 02 / 15 / 2010	
Mailing Address 557 Campbell Street		Amount 84.91	
City Jackson	State TN	Zip Code 38301	
Purpose of Expenditure Computer Expenses	Category/ Type	Office Sought: <input checked="" type="checkbox"/> House State: TN <input type="checkbox"/> Senate District: 05 <input type="checkbox"/> President Check One: <input checked="" type="checkbox"/> Support <input type="checkbox"/> Oppose	
Name of Federal Candidate Supported or Opposed by Expenditure: Ronald Kirkland		Disbursement For: <input checked="" type="checkbox"/> 2010 <input type="checkbox"/> General <input type="checkbox"/> Other (specify) _____	
Calendar Year-To-Date Per Election for Office Sought		22108.01	
(a) SUBTOTAL of Itemized Independent Expenditures		5209.91	
(b) SUBTOTAL of Unitemized Independent Expenditures			
(c) TOTAL Independent Expenditures (carry total from last page forward to Line 7)			

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SCHEDULE 5-E
ITEMIZED INDEPENDENT EXPENDITURES

PAGE 4/8
FOR LINE 7 FOR FORM 5

NAME OF FILER (in Full) Robert Kirkland			
Full Name (Last, First, Middle Initial) of Payee First State Bank		Date 02 / 17 / 2010	
Mailing Address 100 East Reelfoot		Amount 18.75	
City Union City	State TN	Zip Code 38201	
Purpose of Expenditure Bank Fees	Category/ Type	Office Sought: <input checked="" type="checkbox"/> House <input type="checkbox"/> Senate <input type="checkbox"/> President State: <u>TN</u> District: <u>08</u>	
Name of Federal Candidate Supported or Opposed by Expenditure: Ronald Kirkland		Check One: <input checked="" type="checkbox"/> Support <input type="checkbox"/> Oppose	
Calendar Year-To-Date Per Election for Office Sought 22128.00		Disbursement For: 2010 <input checked="" type="checkbox"/> Primary <input type="checkbox"/> General <input type="checkbox"/> Other (specify)	
Full Name (Last, First, Middle Initial) of Payee McLaughlin & Associates		Date 02 / 22 / 2010	
Mailing Address 919 Prince Street		Amount 14015.00	
City Alexandria	State VA	Zip Code 22314	
Purpose of Expenditure Polling	Category/ Type	Office Sought: <input checked="" type="checkbox"/> House <input type="checkbox"/> Senate <input type="checkbox"/> President State: <u>TN</u> District: <u>08</u>	
Name of Federal Candidate Supported or Opposed by Expenditure: Ronald Kirkland		Check One: <input checked="" type="checkbox"/> Support <input type="checkbox"/> Oppose	
Calendar Year-To-Date Per Election for Office Sought 39144.00		Disbursement For: 2010 <input checked="" type="checkbox"/> Primary <input type="checkbox"/> General <input type="checkbox"/> Other (specify)	
Full Name (Last, First, Middle Initial) of Payee The Political Firm		Date 02 / 23 / 2010	
Mailing Address 811 North Street		Amount 1000.00	
City Baton Rouge	State LA	Zip Code 70802	
Purpose of Expenditure Media Consulting	Category/ Type	Office Sought: <input checked="" type="checkbox"/> House <input type="checkbox"/> Senate <input type="checkbox"/> President State: <u>TN</u> District: <u>08</u>	
Name of Federal Candidate Supported or Opposed by Expenditure: Ronald Kirkland		Check One: <input checked="" type="checkbox"/> Support <input type="checkbox"/> Oppose	
Calendar Year-To-Date Per Election for Office Sought 37144.00		Disbursement For: 2010 <input checked="" type="checkbox"/> Primary <input type="checkbox"/> General <input type="checkbox"/> Other (specify)	
(a) SUBTOTAL of Itemized Independent Expenditures		15034.75	
(b) SUBTOTAL of Unitemized Independent Expenditures			
(c) TOTAL Independent Expenditures (carry total from last page forward to Line 7)			

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SCHEDULE 5-E
ITEMIZED INDEPENDENT EXPENDITURES

PAGE 5/8
 FOR LINE 7 FOR FORM 5

NAME OF FILER (In Full)
 Robert Kirkland

Full Name (Last, First, Middle Initial) of Payee Strategic Information Consultants	Date 02 / 28 / 2010
Mailing Address PO Box 13888	Amount 7900.00
City Memphis	State AR
Zip Code 72118	

Purpose of Expenditure Political Research Services	Category/ Type	Office Sought: <input checked="" type="checkbox"/> House <input type="checkbox"/> Senate <input type="checkbox"/> President	State: TN District: 08
Name of Federal Candidate Supported or Opposed by Expenditure: Ronald Kirkland		Check One: <input checked="" type="checkbox"/> Support <input type="checkbox"/> Oppose	
Calendar Year-To-Date Per Election for Office Sought	44844.66	Disbursement For: 2010 <input checked="" type="checkbox"/> Primary <input type="checkbox"/> General <input type="checkbox"/> Other (specify)	

Full Name (Last, First, Middle Initial) of Payee Brad Greer	Date 02 / 28 / 2010
Mailing Address 587 Campbell Street	Amount 2125.00
City Jackson	State TN
Zip Code 38301	

Purpose of Expenditure Political Strategy Consulting	Category/ Type	Office Sought: <input checked="" type="checkbox"/> House <input type="checkbox"/> Senate <input type="checkbox"/> President	State: TN District: 08
Name of Federal Candidate Supported or Opposed by Expenditure: Ronald Kirkland		Check One: <input checked="" type="checkbox"/> Support <input type="checkbox"/> Oppose	
Calendar Year-To-Date Per Election for Office Sought	45769.66	Disbursement For: 2010 <input checked="" type="checkbox"/> Primary <input type="checkbox"/> General <input type="checkbox"/> Other (specify)	

Full Name (Last, First, Middle Initial) of Payee Brad Greer	Date 05 / 12 / 2010
Mailing Address 587 Campbell Street	Amount 2125.00
City Jackson	State TN
Zip Code 38301	

Purpose of Expenditure Political Strategy Consulting	Category/ Type	Office Sought: <input checked="" type="checkbox"/> House <input type="checkbox"/> Senate <input type="checkbox"/> President	State: TN District: 08
Name of Federal Candidate Supported or Opposed by Expenditure: Ronald Kirkland		Check One: <input checked="" type="checkbox"/> Support <input type="checkbox"/> Oppose	
Calendar Year-To-Date Per Election for Office Sought	48894.66	Disbursement For: 2010 <input checked="" type="checkbox"/> Primary <input type="checkbox"/> General <input type="checkbox"/> Other (specify)	

(a) SUBTOTAL of Itemized Independent Expenditures 11750.00

(b) SUBTOTAL of Unitemized Independent Expenditures

(c) TOTAL Independent Expenditures
 (carry total from last page forward to Line 7)

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10030273891

SCHEDULE 5-E
ITEMIZED INDEPENDENT EXPENDITURES

PAGE 6/8

FOR LINE 7 FOR FORM 5

NAME OF FILER (In Full)

Robert Kirkland

Full Name (Last, First, Middle Initial) of Payee

Brad Greer

Date

05 / 12 / 2010

Mailing Address

587 Campbell Street

Amount

527.57

City

Jackson

State

TN

Zip Code

38301

Purpose of Expenditure

Meals and Computer Software

Category/ Type

Office Sought:

☒ House

State: TN

House

☐ Senate

District: 09

☐ President

Check One:

☒ Support

☐ Oppose

Name of Federal Candidate Supported or Opposed by Expenditure:

Ronald Kirkland

Calendar Year-To-Date Per Election for Office Sought

48722.03

Disbursement For: 2010

☒ Primary

☐ General

☐ Other (specify)

Full Name (Last, First, Middle Initial) of Payee

Bryan Cave LLP

Date

05 / 24 / 2010

Mailing Address

1905 F St., NW

Amount

3883.75

City

Washington

State

DC

Zip Code

20004

Purpose of Expenditure

Legal Fees

Category/ Type

Office Sought:

☒ House

State: TN

House

☐ Senate

District: 09

☐ President

Check One:

☒ Support

☐ Oppose

Name of Federal Candidate Supported or Opposed by Expenditure:

Ronald Kirkland

Calendar Year-To-Date Per Election for Office Sought

53565.78

Disbursement For: 2010

☒ Primary

☐ General

☐ Other (specify)

Full Name (Last, First, Middle Initial) of Payee

Brad Greer

Date

05 / 24 / 2010

Mailing Address

587 Campbell Street

Amount

2125.00

City

Jackson

State

TN

Zip Code

38301

Purpose of Expenditure

Political Strategy Consulting

Category/ Type

Office Sought:

☒ House

State: TN

House

☐ Senate

District: 09

☐ President

Check One:

☒ Support

☐ Oppose

Name of Federal Candidate Supported or Opposed by Expenditure:

Ronald Kirkland

Calendar Year-To-Date Per Election for Office Sought

55710.78

Disbursement For: 2010

☒ Primary

☐ General

☐ Other (specify)

(a) SUBTOTAL of Itemized Independent Expenditures

6816.12

(b) SUBTOTAL of Unitemized Independent Expenditures

(c) TOTAL Independent Expenditures

(carry total from last page forward to Line 7)

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SCHEDULE 5-E
ITEMIZED INDEPENDENT EXPENDITURES

PAGE 7/8

FOR LINE 7 FOR FORM 8

NAME OF FILER (In Full)

Robert Kirkland

Full Name (Last, First, Middle Initial) of Payee
The Political Firm

Date

03 / 24 / 2010

Mailing Address
611 North Street

Amount

28579.88

City
Baton Rouge

State
LA

Zip Code
70802

Purpose of Expenditure
Radio Advertising

Category/
Type

Office Sought:

☒ House

State: TN

House

☐ Senate

District: 08

☐ President

Name of Federal Candidate Supported or Opposed by Expenditure:
Ronald Kirkland

Check One:

☒ Support

☐ Oppose

Calendar Year-To-Date Per Election
for Office Sought

82290.64

Disbursement For:

2010

☐ Other (specify)

☒ Primary

☐ General

Full Name (Last, First, Middle Initial) of Payee
Rob Allen

Date

03 / 26 / 2010

Mailing Address
317 Reynolds Ave

Amount

250.00

City
Dyersburg

State
TN

Zip Code
38024

Purpose of Expenditure
Political Research Services (Estimate)

Category/
Type

Office Sought:

☒ House

State: TN

House

☐ Senate

District: 08

☐ President

Name of Federal Candidate Supported or Opposed by Expenditure:
Ronald Kirkland

Check One:

☒ Support

☐ Oppose

Calendar Year-To-Date Per Election
for Office Sought

82540.64

Disbursement For:

2010

☐ Other (specify)

☒ Primary

☐ General

Full Name (Last, First, Middle Initial) of Payee
Brad Greer

Date

03 / 26 / 2010

Mailing Address
567 Campbell Street

Amount

101.75

City
Jackson

State
TN

Zip Code
38301

Purpose of Expenditure
Domain name and PQ Box

Category/
Type

Office Sought:

☒ House

State: TN

House

☐ Senate

District: 08

☐ President

Name of Federal Candidate Supported or Opposed by Expenditure:
Ronald Kirkland

Check One:

☒ Support

☐ Oppose

Calendar Year-To-Date Per Election
for Office Sought

82642.39

Disbursement For:

2010

☐ Other (specify)

☒ Primary

☐ General

(a) SUBTOTAL of Itemized Independent Expenditures 28831.61

(b) SUBTOTAL of Unitemized Independent Expenditures

(c) TOTAL Independent Expenditures
(carry total from last page forward to Line 7)

**SCHEDULE E-E
ITEMIZED INDEPENDENT EXPENDITURES**

PAGE 8/8
FOR LINE 7 FOR FORM 5

NAME OF FILER (In Full)

Robert Kirkland

Full Name (Last, First, Middle Initial) of Payee

Nex-Tek Inc.

Date

03 / 28 / 2010

Mailing Address
PO Box 10828

Amount

235.86

City
Jackson

State
TN

Zip Code
38308

Purpose of Expenditure

Website Design (estimate)

Category/
Type

Office Sought:

☒ House

State: TN

House

☐ Senate

District: 08

☐ President

Name of Federal Candidate Supported or Opposed by Expenditure:

Ronald Kirkland

Check One:

☒ Support

☐ Oppose

Calendar Year-To-Date Per Election
for Office Sought

82878.35

Disbursement For:

2010

☒ Primary

☐ General

☐ Other (specify)

(a) SUBTOTAL of Itemized Independent Expenditures 235.86

(b) SUBTOTAL of Unitemized Independent Expenditures

(c) TOTAL Independent Expenditures 82878.35

(carry total from last page forward to Line 7)

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Federal Election Commission
ENVELOPE REPLACEMENT PAGE FOR INCOMING DOCUMENTS
The FEC added this page to the end of this filing to indicate how it was received.

<input type="checkbox"/> Hand Delivered	Date of Receipt
<input type="checkbox"/> USPS First Class Mail	Postmarked
<input type="checkbox"/> USPS Registered/Certified	Postmarked (R/C)
<input type="checkbox"/> USPS Priority Mail	Postmarked
Delivery Confirmation™ or Signature Confirmation™ Label <input type="checkbox"/>	
<input type="checkbox"/> USPS Express Mail	Postmarked
<input type="checkbox"/> Postmark Illegible	
<input type="checkbox"/> No Postmark	
<input type="checkbox"/> Overnight Delivery Service (Specify):	Shipping Date
Next Business Day Delivery <input type="checkbox"/>	
<input type="checkbox"/> Received from House Records & Registration Office	Date of Receipt
<input type="checkbox"/> Received from Senate Public Records Office	Date of Receipt
<input type="checkbox"/> Received from Electronic Filing Office	Date of Receipt
<input checked="" type="checkbox"/> Other (Specify): <i>Webform # 408</i>	Date of Receipt or Postmarked <i>3/28/10</i>
<i>Ed</i> PREPARER (3/2005)	<i>3/29/10</i> DATE PREPARED

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ETEXT ATTACHMENT

04/05/2010 14 : 15

To whom it may concern:

The 48-hour notice of independent expenditures filed on behalf of Robert Kirkland on March 28, 2010, disclosed disbursements made as early as February 1, 2010. Please be advised that Mr. Kirkland was not required to file a 48-hour notice until March 28, 2010 because the disbursements, other than those referenced below, were not made for public communications and did not by themselves qualify as independent expenditures.

Payments to Nex-Tec Inc. for website design and to the Political Firm for Radio Advertising related to independent expenditures which were publicly disseminated on March 26, 2010. Accordingly, since the 48-hour notice was filed before midnight on March 28, 2010, it was filed on time.

If you have any questions regarding these activities, please contact me at (731) 234-5776.

Sincerely,
Brad Greer
Consultant to Mr. Kirkland

10920427536

Exhibit 5: The Conduct Standard

Commission regulations include the following conduct standard for coordinated communications.

(d) Conduct standards. Any one of the following types of conduct satisfies the conduct standard of this section whether or not there is agreement or formal collaboration, as defined in paragraph (e) of this section:

(1) Request or suggestion.

(i) The communication is created, produced, or distributed at the request or suggestion of a candidate, authorized committee, or political party committee; or

(ii) The communication is created, produced, or distributed at the suggestion of a person paying for the communication and the candidate, authorized committee, or political party committee assents to the suggestion.

(2) Material involvement. This paragraph, (d)(2), is not satisfied if the information material to the creation, production, or distribution of the communication was obtained from a publicly available source. A candidate, authorized committee, or political party committee is materially involved in decisions regarding:

(i) The content of the communication;

(ii) The intended audience for the communication;

(iii) The means or mode of the communication;

(iv) The specific media outlet used for the communication;

(v) The timing or frequency of the communication; or

(vi) The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite.

(3) Substantial discussion. This paragraph, (d)(3), is not satisfied if the information material to the creation, production, or distribution of the communication was obtained from a publicly available source. The communication is created, produced, or distributed after one or more substantial discussions about the communication between the person paying for the communication, or the employees or agents of the person paying for the communication, and the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee. A discussion is substantial within the meaning of this paragraph if information about the candidate's or political party committee's campaign plans, projects, activities, or needs is conveyed to a person paying for the communication,

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and that information is material to the creation, production, or distribution of the communication.

(4) Common vendor. All of the following statements in paragraphs (d)(4)(i) through (d)(4)(iii) of this section are true:

(i) The person paying for the communication, or an agent of such person, contracts with or employs a commercial vendor, as defined in 11 CFR 116.1(c), to create, produce, or distribute the communication;

(ii) That commercial vendor, including any owner, officer, or employee of the commercial vendor, has provided any of the following services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, during the previous 120 days:

(A) Development of media strategy, including the selection or purchasing of advertising slots;

(B) Selection of audiences;

(C) Polling;

(D) Fundraising;

(E) Developing the content of a public communication;

(F) Producing a public communication;

(G) Identifying voters or developing voter lists, mailing lists, or donor lists;

(H) Selecting personnel, contractors, or subcontractors; or

(I) Consulting or otherwise providing political or media advice; and

(iii) This paragraph, (d)(4)(iii), is not satisfied if the information material to the creation, production, or distribution of the communication used or conveyed by the commercial vendor was obtained from a publicly available source. That commercial vendor uses or conveys to the person paying for the communication:

(A) Information about the campaign plans, projects, activities, or needs of the clearly identified candidate, the candidate's opponent, or a political party committee, and that information is material to the creation, production, or distribution of the communication; or

(B) Information used previously by the commercial vendor in providing services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized

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committee, or a political party committee, and that information is material to the creation, production, or distribution of the communication.

(5) Former employee or independent contractor. Both of the following statements in paragraphs (d)(5)(i) and (d)(5)(ii) of this section are true:

(i) The communication is paid for by a person, or by the employer of a person, who was an employee or independent contractor of the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, during the previous 120 days; and

(ii) This paragraph, (d)(5)(ii), is not satisfied if the information material to the creation, production, or distribution of the communication used or conveyed by the former employee or independent contractor was obtained from a publicly available source. That former employee or independent contractor uses or conveys to the person paying for the communication:

(A) Information about the campaign plans, projects, activities, or needs of the clearly identified candidate, the candidate's opponent, or a political party committee, and that information is material to the creation, production, or distribution of the communication; or

(B) Information used by the former employee or independent contractor in providing services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, and that information is material to the creation, production, or distribution of the communication.

(6) Dissemination, distribution, or republication of campaign material. A communication that satisfies the content standard of paragraph (c)(2) of this section or 11 CFR 109.37(a)(2)(i) shall only satisfy the conduct standards of paragraphs (d)(1) through (d)(3) of this section on the basis of conduct by the candidate, the candidate's authorized committee, or the agents of any of the foregoing, that occurs after the original preparation of the campaign materials that are disseminated, distributed, or republished. The conduct standards of paragraphs (d)(4) and (d)(5) of this section may also apply to such communications as provided in those paragraphs.

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'THE COMMERCIAL APPEAL

Memphis Tennessee

Read more at commercialappeal.com**Tennessee congressional candidate gets
'silent' help from brother**

By Bartholomew Sullivan

Wednesday, April 7, 2010

WASHINGTON — Tennessee 8th Congressional District candidate Ronald Kirkland is getting a lot of help these days from his brother, Robert, but the two aren't talking to one another.

That's because Robert Kirkland has set himself up under Federal Election Commission guidelines to make independent expenditures on behalf of his brother's campaign. In records filed so far, that has amounted to \$82,876.

Under federal campaign finance law, a politician's campaign committee cannot coordinate activities with those making independent expenditures in its behalf.

Ronald Kirkland, a medical doctor in Jackson, is running against Shelby County physician George Flinn and Coahoma County gospel-singing farmer Stephen Fincher in the August GOP primary. Fincher is getting strong support from the Washington-based National Republican Congressional Committee.

"Early on, Robert decided that he wanted to do an independent effort," Ronald Kirkland's campaign manager, Brent Leatherwood, said today. "He wanted to do it to level the playing field, probably wanted to do that because of all the special interest and Washington insider money that is going to be backing our opponents."

"On the recommendation of legal counsel, they have cut off all communication," Leatherwood said of the two brothers. "We as a campaign have no knowledge of what is being done there and what he's planning to do."

Robert Kirkwood has produced at least one television ad for an amount that will be disclosed to the FEC later today and radio advertising costing \$25,579 on his brother's behalf, FEC records show. The television ad is running on WMBQ-Channel 13 in Memphis.

In addition, he has paid political strategy consultant Brad Greer of Jackson, Tenn., \$11,200 and a polling firm \$14,015.

Greer said the money is coming from Robert Kirkland's "personal funds," adding, "more

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Independent expenditures are on the way."



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RON



KIRKLAND

CONSERVATIVE FOR CONGRESS

Join a

PROVEN • TRUSTED • CONSERVATIVE

fighting for Tennessee values.

RON

KIRKLAND

CONSERVATIVE FOR CONSERVES

PROVEN

- Faithful Husband of 41 Years, Father of Four and Ordained Deacon
- Earned the Honor of Being Selected One of "America's Top Physicians"
- Veteran Who Served the United States in Army Intelligence

TRUSTED

- Elected by Colleagues to Chair the State's Largest Private Multi-Specialty Clinic
- Business-Minded Doctor Who Has Created Jobs
- Served as Chairman of UT's National Alumni Association

CONSERVATIVE

- Pro-Life, Pro-Traditional Marriage, Pro-Fight to Keep and Bear Arms
- Supports Free Markets and Less Government
- Strongly Supports/Defends Our Constitution

Paid for by Robert Kirkland, not authorized by any candidate or candidate committee. www.hvdcconservative.com

EV058274001