



1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

7925 JONES BRANCH DRIVE
MCLEAN, VA 22102
PHONE 703.909.2800
FAX 703.905.2820

www.wileyrein.com

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COUNSEL

Jan Witold Baran
202.719.7330
jbaran@wileyrein.com

October 22, 2010

BY HAND

Mr. Christopher Hughey
Acting General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: MIJR 6366 (U.S. Chamber of Commerce/Bill Miller)

Dear Mr. Hughey:

This office represents the Chamber of Commerce of the United States of America ("Chamber") and Bill Miller in the above-captioned Matter Under Review ("MUR"). This letter responds to a Complaint by Ryan Miskell received by the Federal Election Commission ("FEC" or "Commission") on September 2, 2010. The Complaint alleges that the Chamber and Mr. Miller coordinated an electioneering communication with the Senate campaign of Jane Norton.

The Chamber and Mr. Miller deny coordinating an electioneering communication with the Norton campaign. Furthermore, and as detailed below, the Complaint's speculation is insufficient to find reason to believe that the Chamber and Mr. Miller violated the Federal Election Campaign Act of 1971, as amended ("Act" or "FECA").

FACTS

The Chamber is an incorporated trade association that serves as the world's largest federation of business companies and associations representing the interests of over 3,000,000 businesses and business associations. Mr. Miller is the Chamber's Senior Vice President for Political Affairs & Federation Relations. Miller Aff. at ¶ 1. In that capacity, Mr. Miller often plays a role in selecting and announcing the federal candidates endorsed by the Chamber and in the Chamber's electioneering communications. Miller Aff. at ¶ 2.

The Chamber maintains a formal coordination firewall policy that allows the Chamber to maintain the independence of its public advertising – including its electioneering communications – notwithstanding the Chamber's endorsements and other interactions with federal candidates and officeholders. Mr. Miller received a copy of this policy on June 17, 2010, and has followed it. Miller Aff. at ¶ 3.

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On June 28, 2010, the Chamber issued a press release endorsing Ms. Norton for election to the United States Senate from Colorado. Miller Aff. at ¶ 4. The same day, the Norton campaign hosted and paid for a conference call with reporters so that Thomas J. Donohue, the President and CEO of the Chamber, could announce the endorsement. Miller Aff. at ¶ 6. Participants on the call included Ms. Norton, Mr. Donohue, and members of the media. Miller Aff. at ¶ 6. Contrary to the assertion in the Complaint at ¶ 3, Mr. Miller did not participate in the call. Any discussion between the Norton campaign and the Chamber prior to the call was limited to communications about the endorsement and the logistics of the call itself. Miller Aff. at ¶¶ 5, 7.

At no point prior to the June 28, 2010, press release and conference call did Mr. Miller or any other representative of the Chamber discuss with Ms. Norton or her campaign the Chamber's public advertising or the campaign's non-public campaign plans, projects, activities, or needs in connection with any future public advertising by the Chamber. Miller Aff. at ¶ 7. One of the press accounts regarding the endorsement that is appended to the Complaint confirms this fact: "Norton's campaign said Monday that it has no knowledge of money help coming her direction from the endorsement." See Allison Sherry, *U.S. Chamber Backs Norton*, The Denver Post, June 28, 2010, <http://blogs.denverpost.com/thespot/2010/06/28/u-s-chamber-backs-norton/11096>.

On August 2, 2010, the Chamber sponsored an electioneering communication that referred to Ms. Norton. On July 29, 2010, the Chamber filed an FEC Form 9 disclosing the electioneering communication.¹ The electioneering communication was not made at the request or suggestion of the Norton campaign or with its involvement. Miller Aff. at ¶ 8. Furthermore, neither Mr. Miller nor any other representative of the Chamber discussed with Ms. Norton or her campaign its non-public campaign plans, projects, activities, or needs in connection with the electioneering communication. Miller Aff. at ¶ 8.

¹ The Chamber initially filed its FEC Form 9 identifying the title of the electioneering communication as "Rock Ribbed Conservative." Later the same day, the Chamber filed an amended FEC Form 9 indicating that the title of the electioneering communication had been renamed as "Stand up to Washington." Copies of these FEC Form 9 filings are available at <http://query.nictusa.com/pdf/881/10030394881/10030394881.pdf#navpanes=0> and <http://query.nictusa.com/pdf/022/10030400022/10030400022.pdf#navpanes=0>.

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Lastly, an affiliate of the Chamber, the Institute for Legal Reform (the "ILR"), has retained Brownstein Hyatt Farber Schreck, LLP ("Brownstein") for lobbying services. Miller Aff. at ¶ 9. Ms. Norton's sister, Judy Black, works for Brownstein. Neither Ms. Black nor Brownstein helped prepare or disseminate the Chamber's August 1, 2010, electioneering communication. Miller Aff. at ¶ 9.

THE COMPLAINT

On September 17, 2010, the Associate General Counsel of the Chamber received notice of a Complaint filed by Ryan Miskell alleging that the Chamber coordinated its August 2, 2010, electioneering communication with Ms. Norton and her campaign. The only facts in the Complaint supporting the alleged coordinating conduct are:

On June 28, 2010 Bill Miller joined Jane Norton and her campaign manager Josh Penry announcing the endorsement on a telephone conference call.²

Judy Black a representative of the Jane Norton campaign also works for a lobbying firm that works for the U.S. Chamber of Commerce.³

Compl. at ¶¶ 3, 9. From these two statements, the Complaint makes the following conclusions:

It is believed that Bill Miller in his role as Senior Vice President of the U.S. Chamber knew the personal political plan of Mrs. Norton.

² This factual assertion appears in the Complaint under the heading "Facts." The Complaint also states in its section titled "Allegations" that: "Mr. Miller as a representative of the Chamber had also met with Jane Norton and her campaign team to discuss campaign strategy." Compl. at ¶ 11. Because there is no other information about such a meeting provided in the Complaint, this statement must be referring to the above-described conference call.

³ Based on the attachments to the Complaint, the lobbying firm referred to in this factual representation appears to be Brownstein Hyatt Farber Schreck, LLP and Ms. Black's status as "a representative of the Jane Norton campaign" appears to be based on the fact that Ms. Black and Ms. Norton are sisters.

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It is believed through public information and knowledgeable sources that Josh Penry and Bill Miller coordinated with Charlie and Judy Black to raise the money for the independent expenditure.

Compl. at ¶¶ 4, 8.⁴ From these conclusions the Complaint makes the following allegation:

In this case, the U.S. Chamber launched the television advertisement after meeting with Jane Norton and her staff and consulting team as well as after formally endorsing Norton. This is a per se violation of the anti-coordination provisions of the FEC rules and regulations.

Compl. at ¶ 10. The Complaint's two factual predicates do not support this coordination allegation.

This is not the first unsubstantiated complaint alleging that the Chamber has coordinated its electioneering communications. On May 6, 2009, the Commission found there was no reason to believe that the Chamber coordinated with a 2008 Senate candidate. In that matter, the Commission concluded that "the Complaint's inference" of coordination was not enough to proceed. FEC MUR 6077, Factual and Legal Analysis at 5. The Commission further explained:

There is no other support offered for the Complaint's allegation as to the coordinating conduct. Unwarranted legal conclusions from asserted facts, or mere speculation, will not be accepted as true and

⁴ The Complaint also states: "The U.S. Chamber of Commerce did not list contributors on the FEC Form 9." Compl. at ¶ 7. When coupled with the Complaint's statement above that the Chamber coordinated to "raise the money for the independent expenditure," the Complaint appears to be suggesting that the Chamber was required to disclose donors on its FEC Form 9 report of its August 2, 2010, electioneering communication. Notably, the Complaint does not specifically make any such allegation. As will be discussed below, the Complaint's inadequate factual claims do not justify any of its allegations. Furthermore, the Chamber denies that its funding for this electioneering communication was raised in this way or otherwise "for the purpose of making electioneering communications" which is the standard for disclosing contributors on the FEC Form 9. See 11 C.F.R. § 104.20(c)(9).

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such speculative charges, especially when accompanied by direct refutation, do not form an adequate basis to find reason to believe that a violation of the FECA has occurred. More, Complainant's inferences are convincingly refuted by the available information, including the response of the Chamber, which denies any coordinating activity.

Id. at 6 (internal quotations and citation omitted); *see also* FEC MUR 6164, Factual and Legal Analysis at 10 ("[b]ased on the speculative nature of the allegations as to the coordination between the [respondents], the Commission finds no reason to believe that" coordination occurred); FEC MUR 6120, Factual and Legal Analysis at 5-6 (respondent "denies any coordination" and the Commission has "no evidence to the contrary"). As explained in the Commission's regulations, a complaint "should contain a clear and concise recitation of the facts which describe a violation." 11 C.F.R. § 111.4(n)(3). The Complaint fails to do so.

THE ACT AND IMPLEMENTING REGULATIONS

As a corporation, the Chamber is prohibited from making "contributions" to candidates for federal office. 2 U.S.C. § 441b. The Commission's regulations explain: "Any person who is otherwise prohibited from making contributions ... is prohibited from paying for a coordinated communication." 11 C.F.R. § 109.22. A communication will be deemed a coordinated communication if it satisfies three criteria. *Id.* § 109.21(a). The Chamber's electioneering communication satisfied the first two criteria which require, in relevant part, that the communication: "Is paid for, in whole or in part, by a person other than [a] candidate, authorized committee, or political party committee [and] is an electioneering communication." *Id.* § 109.21(a)(1), (c)(1).

The third criterion, the so-called "conduct standards," is satisfied if the communication is made at the "request or suggestion" or with the "material involvement" of a candidate or campaign committee or after one or more "substantial discussions" about the communication with a candidate or campaign committee. *Id.* § 109.21(d)(1)-(3). This third criterion is also satisfied if the communication is made with a "common vendor" or "former employee or independent contractor" to a candidate or campaign committee. *Id.* § 109.21(d)(4)-(5).

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However, these "conduct standards" are not satisfied if an organization has "established and implemented a firewall" unless "specific information indicates that, despite the firewall, information about the candidate's ... campaign plans, projects, activities, or needs that is material to the creation, production, or distribution of the communication was used or conveyed to the person paying for the communication." *Id.* § 109.21(h).

DISCUSSION

The facts alleged by the Complaint are insufficient to justify a coordination claim. Furthermore, the Chamber and Mr. Miller specifically deny engaging in the coordinating conduct alleged by the Complaint. Inadequate factual substantiation coupled with the Chamber's denials cannot form the basis for a finding by the Commission that there is reason to believe that the Chamber and Mr. Miller engaged in the coordination.

Contrary to the Commission's regulations that a complaint should contain "facts which describe a violation," 11 C.F.R. § 111.4(d)(3), the facts offered by the Complaint fail to do so. Those facts are: (1) Chamber personnel participated in a campaign-sponsored conference call during which the Chamber announced its endorsement of Ms. Norton, and (2) the Brownstein law firm represents a Chamber affiliate and also employs Ms. Black who is Ms. Norton's sister.

Neither of these facts are sufficient to support the Complaint's coordination claim. The Complaint concedes this weakness by using the qualifier "[i]t is believed" before concluding that (1) Mr. Miller "knew the personal political plan of Mrs. Norton," and (2) Mr. Miller coordinated fundraising activity for the electioneering communication with Mr. Black through the Chamber's engagement of Brownstein.

These two conclusions do not result from the two corresponding factual statements offered by the Complaint. First, to say that Mr. Miller gained knowledge of the Norton campaign's plans from the campaign's conference call about the Chamber's endorsement is pure conjecture. In addition, it is false. The press accounts – presumably of reporters who participated in the conference call – attached to the Complaint do not refer to any discussion of the campaign's plans during the call.

Furthermore, private discussion between the Chamber and the Norton campaign in connection with the call was limited to the endorsement itself and the logistics of the call. Miller Aff. ¶¶ 5, 7. At no point was the Chamber's August 2, 2010,

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electioneering communication discussed with the Norton campaign. Miller Aff. ¶ 8. The Norton campaign's statement contained in one of the press accounts attached to the Complaint that the campaign "has no knowledge of money help coming her direction from the endorsement" confirms this fact. See Allison Sherry, *U.S. Chamber Backs Norton*, The Denver Post, June 28, 2010, <http://blogs.denverpost.com/thespot/2010/06/28/u-s-chamber-backs-norton/11096>.

Second, the Complaint does not explain how the retention by a separately incorporated affiliate of the Chamber of a law firm that employs Ms. Norton's sister supports the Complaint's conclusion that the Chamber coordinated its electioneering communication. Like the first of the Complaint's conclusions, this too is naked speculation and, in addition, is false. Brownstein's work for the ILR has been limited to lobbying and did not involve any work in connection with the Chamber's August 2, 2010, electioneering communication. Miller Aff. at ¶ 9.

The "conduct standards" of the coordination regulations are satisfied if the alleged coordinated communication is made at the "request or suggestion" or with the "material involvement" of a candidate or campaign committee or after one or more "substantial discussions" about the communication with a candidate or campaign committee. 11 C.F.R. § 109.21(d)(1)-(3). The Chamber's August 2, 2010, electioneering communication was prepared and disseminated independently of the Norton campaign and did not satisfy any of these "conduct standards" of the coordination regulations.

Similarly, the "conduct standard" that describes coordination through a "common vendor" is only satisfied if the common vendor has been retained to provide certain services to a campaign within 120 days of being retained "to create, produce, or distribute [a] communication" for a third party. 11 C.F.R. § 109.21(d)(4); see also FEC MUR 6077, Factual and Legal Analysis at 5 ("a vendor is a 'common vendor' for the purposes of the Act only if the same vendor creates or distributes the ad alleged to be coordinated"). First, there has been no allegation that Brownstein was retained as a vendor to the Norton campaign. Ms. Black's work for Brownstein does not make it a vendor to her sister's campaign. Second, the ILR retained Brownstein to engage in lobbying on behalf of the ILR, not to prepare and disseminate the Chamber's electioneering communication. Furthermore, neither Brownstein nor Ms. Black participated in the creation, production, or distribution of the Chamber's August 2, 2010, electioneering communication.

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Lastly, the Chamber has established and implemented a coordination firewall policy. Mr. Miller has adhered to the terms of the firewall. In order to overcome the protections of the firewall, Commission regulations require "specific information ... that, despite the firewall, information about the candidate's ... campaign plans, projects, activities, or needs that is material to the creation, production, or distribution of the communication was used or conveyed to the person paying for the communication." *Id.* § 109.21(h). The Complaint offers no such "specific information."

CONCLUSION

The Complaint does not allege facts to support its coordination allegations and the Chamber and Mr. Miller specifically deny that they engaged in coordinating conduct. Accordingly, there is no reason to believe a violation occurred and this matter should be dismissed.

Sincerely,



Jan Witold Baran
Caleb P. Burns

Enclosure

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