



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

SEP 23 2014

Dr. Samuel M. Aanestad

Penn Valley, CA 95946

Re: MUR 6578
Doug LaMalfa Committee and David Bauer
in his official capacity as treasurer
Doug LaMalfa
Mark Spannagel

Dear Dr. Aanestad:

On September 16, 2014, the Federal Election Commission reviewed the allegations in your complaint dated May 21, 2012, and found that on the basis of the information provided in your complaint, and information provided by the respondents, that there is no reason to believe that the respondents violated 52 U.S.C. § 30103 (formerly 2 U.S.C. § 433), 52 U.S.C. § 30104(c) (formerly 2 U.S.C. § 434(c)), or 52 U.S.C. § 30124 (formerly 2 U.S.C. § 441h). On that same date, the Commission dismissed the allegation that the respondents violated 52 U.S.C. § 30120 (formerly 2 U.S.C. § 441d), as well as, the allegations that www.sam4congress.com violated the Act. Accordingly, the Commission closed its file in this matter. The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009).

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The Federal Election Campaign Act of 1971, as amended, allows a complainant to seek judicial review of the Commission's dismissal of this action. See 52 U.S.C. § 30109(a)(8) (formerly 2 U.S.C. § 437g(a)(8)).

Sincerely,

Lisa J. Stevenson
Deputy General Counsel — Law



BY: Peter G. Blumberg
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3 **RESPONDENTS:** Doug LaMalfa Committee and MUR 6578
4 David Bauer in his official capacity as treasurer
5 Doug LaMalfa
6 Mark Spannagel
7 www.sam4congress.com.
8

9 **I. INTRODUCTION**

10 This matter was generated by a complaint filed with the Federal Election Commission
11 (the "Commission") by Dr. Samuel M. Aanestad alleging violations of the Federal Election
12 Campaign Act of 1971, as amended, (the "Act") by the Doug LaMalfa Committee and David
13 Bauer in his official capacity as treasurer, Doug LaMalfa, Mark Spannagel, and
14 www.sam4congress.com. See 52 U.S.C. § 30109(a)(1) (formerly 2 U.S.C § 437(a)(1)).¹
15

16 **II. FACTUAL AND LEGAL ANALYSIS**

17 Dr. Samuel M. Aanestad was a candidate in the June 5, 2012, Republican primary
18 election for California's 1st congressional district. The Complaint alleges that one of Aanestad's
19 opponents, Doug LaMalfa, in coordination with LaMalfa's authorized committee and campaign
20 staff, violated the Act by creating a website (www.sam4congress.com) expressly advocating
21 Aanestad's defeat in the primary election without the correct disclaimer. The Complaint also
22 contends that the website was attributed falsely to supporters of another primary candidate,
23 Michael Dacquisto. See 52 U.S.C. §§ 30120, 30124 (formerly 2 U.S.C. §§ 441d, 441h);
24 11 C.F.R. § 110.11; Compl. at 1-3 (May 16, 2012). Finally, the Complaint alleges that,
25 depending on the cost of the activity, Respondents may have violated the Act by failing to file
26 the necessary independent expenditure reports and by failing to register as a political committee

¹ On September 1, 2014, the Act was transferred from Title 2 to new Title 52 of the United States Code.

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1 with the Commission. *See* 52 U.S.C. §§ 30103, 30104(c) (formerly 2 U.S.C. §§ 433, 434(c));
 2 Compl. at 1-2.

3 **A. Background**

4 Prior to running for Congress, Aanestad, a dentist and oral surgeon, served as a member
 5 of the California General Assembly and State Senate. *See* Compl. at 2. LaMalfa and Aanestad
 6 were candidates in the June 5, 2012, Republican congressional primary. Resp., Attach. 1, Ex. C.

7 Spannagel was LaMalfa's Chief of Staff in the California Senate and served as the
 8 Committee's "Campaign Director" from April 2, 2012, to June 5, 2012. Decl. of Mark
 9 Spannagel ¶¶ 4-5 (Aug. 12, 2012) (included as Attachment 1 to the Response). The Committee
 10 made numerous disbursements to Spannagel during the primary election period, including a
 11 \$4,500 disbursement on April 17, 2012, described as a payment to "campaign staff," various
 12 disbursements for transportation, mileage, lodging, meals, and parking, and one disbursement for
 13 "media related services." *See* 12-Day Pre-Election Report at 48 (May 24, 2012); 2012 July
 14 Quarterly Report at 54-58 (July 15, 2012). Spannagel's affiliation with the Committee continued
 15 into the general election campaign period, and the Committee made a disbursement to him for
 16 "media services" as late as August 31, 2012. *See* Amended October 2012 Quarterly Report at 89
 17 (Dec. 7, 2012).

18 On or about April 18, 2012, Spannagel launched a website attacking Aanestad under the
 19 domain name "www.sam4congress.com" (the "Website").² Resp. at 1-2; Spannagel Decl. ¶ 8.
 20 The Website included a quote attributed to a local newspaper, the *Record Searchlight*, describing

² The Website was created on April 18, 2012, and registered under the domain name "sam4congress.com" through the free website builder, Wix.com. Compl., Ex. A (Letter from Wix.com to Barry Pruett, Esq., May 14, 2012). The username and e-mail address submitted in connection with the creation of the Website were "aanestadnotforengress" and "aanestadnotforcongress@gmail.com," respectively. *Id.* According to records provided with the Complaint, Spannagel paid to establish the account. *Id.*

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1 Aanestad as “Arrogant and out of touch” above the caption “Sam Aanestad Not for Congress.”
2 *Id.* (emphasis in original). A block of text located above a picture of Aanestad stated, in
3 pertinent part, that “Unlike the real deal — the real Sam Aanestad has a long history of bad votes
4 and out of touch elitism” and “isn’t the Principled Conservative he claims.” *Id.* On the bottom
5 right, another block of text stated “FYI Sam Aanestad is not an ‘Oral Surgeon’ or ‘Doctor’ as he
6 claims” and that this is “evidence of a long and deliberate habit of misleading to [sic] the
7 voters of the district.”³ Compl., Ex. B. (emphasis in original).

8 The Website also included a text block at the foot of the cover page stating “FREE
9 THINKERS FOR D’ACQUISTO.” Compl., Ex. B.⁴ This was apparently a reference to
10 Republican primary candidate Michael Dacquisto. Dacquisto states in a declaration attached to
11 the Complaint that, although “the language and its position on the website creates the impression
12 it was authored and approved by an entity known as FREE THINKERS FOR D’ACQUISTO,”
13 he had never heard of “Free Thinkers for D’Acquisto” until he viewed the Website. Decl. of
14 Michael Dacquisto ¶¶ 4, 6 (May 2, 2012) (included as Attachment C to the Complaint). He also
15 says he had no connection with the creation or publication of the Website and did not give
16 anyone permission to use his name in connection with any such group. *Id.* ¶¶ 7-8.

³ On or about May 7, 2012, Aanestad filed a lawsuit against Spannagel and the Committee for defamation. See *Samuel M. Aanestad v. Mark Spannagel, et al.*, Civ. No. 12-078512 (Cal. Super. Ct. Nev. Cnty. May 7, 2012), <http://eaccess.nvadacountycourts.com/eservices/home.page.7>. The lawsuit was formally dismissed on January 14, 2013, following a settlement between the parties. See *Aanestad*, Civ. No. 12-078512 at <http://eaccess.nvadacountycourts.com/eservices/?x=1zu4E3uZ1aLHJ0aop1J3MvKEcmRfUrc9HPSn-cNpKbZy4BghUu@lWxfginasQABxfg07cSxs6Tn0vxhuHjqAOA>

⁴ The original screenshot of the Website attached to both the Complaint and the Response reflect that it included links to four additional pages, captioned “NEWS,” “THE RECORD,” “WHERE’S SAM,” and “ENDORSEMENTS.” See Compl., Ex. B; Resp., Attach. 1, Ex. A. Neither source includes copies of any pages associated with those links, however, and the Response asserts that the Website consisted of only a “single” homepage. Resp. at 1.

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1 On or about April 28, 2012, Spannagel made several key revisions to the Website. He
2 replaced the tag-line “Free Thinkers for D’Acquisto” with the text “100% TRUE, 100%
3 VERIFIABLE, 100% POLITICAL SATIRE” and removed the text asserting that Aanestad’s
4 professional credentials were false. *Id.* ¶ 24. *Compare* Compl. Ex. B, *with* Resp., Attach. 1, Ex.
5 A. Spannagel claims he removed the tag-line after he became concerned that it might be
6 mistaken for a disclaimer under the Act. Spannagel Decl. ¶ 24. Spannagel says he took down
7 the Website permanently on May 15, 2012, shortly after the Aanestad campaign objected to its
8 content. *Id.* ¶¶ 25, 27. Documents provided with the Response indicate that the Website
9 received 168 “unique visitors” from a total of 319 visits between April 18, 2012, and May 14,
10 2012. *See* Resp. at 3, Attach. 1, Ex. D.

11 Respondents contend that Spannagel created the Website on his own initiative and
12 without the knowledge or assistance of LaMalfa, the Committee, or anyone connected with the
13 LaMalfa campaign. Resp. at 3, 8; Spannagel Decl. ¶ 10. Spannagel likewise asserts that he did
14 not “advise, consult or inform” LaMalfa or anyone associated with the Committee prior to or
15 during the production or launch of the Website. Spannagel Decl. ¶ 10. Spannagel explains that
16 he produced the Website in part to reflect his “own thoughts” on the “conservative credentials”
17 of LaMalfa and Aanestad — an ongoing issue during the primary campaign. *Id.* ¶¶ 15-16.
18 According to Spannagel, questions relating to Aanestad’s professional qualifications also
19 surfaced during the campaign and became an “afterthought in assembling the Webpage.” *Id.*
20 ¶ 18. Spannagel states that he conducted on-line research and, after concluding Aanestad was
21 not a “licensed” oral surgeon, included the information on the Website because it went to the
22 candidate’s “credibility” and “veracity.” *Id.* ¶¶ 18-20. Spannagel also denies that he intended
23 for the tag-line referencing Dacquisto to suggest that the Dacquisto campaign paid for or

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1 authorized the Website. Instead, Spannagel claims that he included the tag-line to persuade
2 voters who supported Dacquistto but might be considering supporting a more viable candidate
3 that Aanestad would be a poor choice. *Id.* ¶ 23.

4 Spannagel describes his authority to act for the Committee as limited, claiming that he
5 provided “general political consulting” as directed by Gilliard Blanning, the Committee’s lead
6 political consultant for the primary election. Spannagel Decl. ¶¶ 5-6, 9. Spannagel also asserts
7 that his duties did not include producing content for or helping to maintain or administer the
8 Committee’s website. *Id.* ¶ 9.

9 The Committee, for its part, states that Spannagel was not a campaign employee, but
10 instead served as an independent contractor under a contract that was designed to prevent
11 accusations that he performed campaign activity while on the California Senate’s payroll. Resp.
12 at 5; Spannagel Decl. ¶ 6. According to the Response, this contract “prohibited” Spannagel from
13 becoming an employee and “did not obligate him to perform any specific services.” Resp. at 5.
14 Spannagel also contends that the contract provides that he would not “become an employee of
15 the Committee” while the agreement was in effect. Spannagel Decl. ¶ 7.

16 The Response states that Spannagel was not authorized “to undertake binding financial or
17 fiduciary actions on behalf of the Committee,” was not under the Committee’s control, and had
18 no “general or special nature” agency authority. Resp. at 6. Spannagel likewise maintains that
19 his contract with the Committee “did not provide [him] any authority, financial or equitable to
20 act on behalf of the Committee or the candidate.” Spannagel Decl. ¶ 6. Finally, the Response

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1 concludes that Spannagel's creation of the Website cannot be imputed to the Committee because
 2 these acts were not within the ambit of Spannagel's contractual duties.⁵

3 Respondents contend that Spannagel paid for all expenses associated with the registration
 4 and development of the Website using two personal credit cards. Resp. at 2; Spannagel Decl.
 5 ¶¶ 11-12. Documents provided with the Response indicate that these expenses totaled \$135.22.
 6 Resp., Attach. 1, Ex. B; *see* Spannagel Decl. ¶ 11. Spannagel also states that the Website was
 7 produced at his residence using his personal computer and that "no assets, resources, goods or
 8 services of the Committee or the State Senate office" were used in its production. Spannagel
 9 Decl. ¶ 13.

10 According to Spannagel, he asked the Committee to report the \$135.22 he spent on the
 11 Website as an in-kind contribution on its "May 25, 2012," disclosure report. *Id.* ¶ 14. And the
 12 Committee's 12-Day Pre-Election report reflects a disbursement to Spannagel of \$135.22 for
 13 "media related services" on April 18, 2012, which was the same day Spannagel launched the
 14 Website.⁶ *See* 2012 12-Day Pre-Election Report at 48.

⁵ Respondents did not provide a copy of this contract. Spannagel's declaration, however, generally supports the assertions in the Response concerning the nature of the alleged contract with the Committee. *See* Spannagel Decl. ¶¶ 5-6, 9.

⁶ The Committee was not required to itemize the \$135.22 as a receipt because it was below the \$200 itemization threshold, and, since Spannagel had not contributed to the campaign, the receipt could not be aggregated with any other contributions. The Committee itemized the payment as a disbursement because it had disbursed amounts to Spannagel in excess of \$200 prior to April 18, 2012. *See* 11 C.F.R. §§ 104.3(a)(4)-(b)(4), 104.13(a)(1)-(2). The Committee did not identify the disbursement as an in-kind contribution in the applicable memo entry; based on other likely in-kind contributions, however, it appears that the Committee did not customarily report in-kind contributions as such. The Commission's Congressional Campaign Guide encourages designating in-kind contributions in memo entries, but the practice is not required by the Act or Commission regulations. *See* Campaign Guide for Congressional Candidates and Committees at 94 (Aug. 2011).

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1 **B. Legal Analysis**

2 1. Disclaimer Requirement
3

4 According to the Complaint, Doug LaMalfa created a website expressly advocating the
5 defeat of Sam Aanestad in the June 5, 2012, Republican primary election in coordination with
6 his authorized committee and campaign director Mark Spannagel. The Complaint alleges that
7 Respondents violated the Act by failing to include the correct disclaimer. *See* 52 U.S.C. § 30120
8 (formerly 2 U.S.C. § 441d). Respondents contend that Spannagel created the website on his own
9 without the knowledge or assistance of LaMalfa, the Committee, or anyone connected with the
10 LaMalfa campaign.

11 The Commission has broad discretion to determine how to proceed with respect to
12 complaints. *See Heckler v. Chaney*, 470 U.S. 821 (1985). “Pursuant to the exercise of its
13 prosecutorial discretion, the Commission will dismiss a matter when the matter does not merit
14 further use of Commission resources, due to factors such as the small amount or significance of
15 the alleged violation, the vagueness or weakness of the evidence, or likely difficulties with an
16 investigation, or when the Commission lacks majority support for proceeding with a matter for
17 other reasons.” Statement of Policy Regarding Commission Action in Matters at the Initial Stage
18 in the Enforcement Process, 72 Fed. Reg. 12, 545, 12,546 (Mar. 16, 2007). This matter raises
19 complicated questions of law and fact, but the dollar amount at issue (\$135.22) is *de minimis* and
20 the number of visitors to the Website during the relevant period was quite low (168 “unique
21 visitors”). Accordingly, the Commission dismisses the allegation in the exercise of its
22 prosecutorial discretion. *See Heckler*, 470 U.S. 821.

1 2. Fraudulent Misrepresentation of Campaign Authority

2
3 The Act prohibits federal candidates and their employees or agents from fraudulently
4 misrepresenting themselves, or any committee or organization under their control, as speaking or
5 otherwise acting on behalf of any other candidate or political party on a matter that is damaging
6 to such other candidate or party. 52 U.S.C. § 30124(a)(1) (formerly 2 U.S.C. § 441h(a)(1));
7 11 C.F.R. § 110.16(a)(1). It is also unlawful to “willfully and knowingly” participate in such a
8 plan or scheme to fraudulently misrepresent campaign authority. 52 U.S.C. § 30124(a)(2)
9 (formerly 2 U.S.C. § 441h(a)(2)); 11 C.F.R. § 110.16(a)(2). The Complaint alleges that
10 Respondents violated this provision by falsely attributing the Website’s attack on Aanestad to a
11 “pseudonymous” organization (“Free Thinkers for D’Acquisto”). Compl. at 5-6. Respondents
12 deny violating 2 U.S.C. § 441h based on their claim that Spannagel was solely responsible for
13 the Website and was not an employee or an agent of a candidate for federal office as required by
14 the statute. *Id.*

15 Section 30124(a) (formerly section 441h(a)) prohibits fraudulently misrepresenting that a
16 candidate or political party is the source of a communication that is damaging to that candidate
17 or party. For example, a candidate who distributes letters containing statements damaging to an
18 opponent would violate that provision if the letters were fraudulently attributed to that opponent.
19 *See Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds*,
20 *67 Fed. Reg. 76,962, 76,968 (Dec. 13, 2002)*. Here, the federal candidate that the Website
21 “damaged” was Aanestad. To violate the prohibition on fraudulent misrepresentation of
22 campaign authority, however, the Website would have had to misrepresent that its source was

1 Aanestad, the targeted candidate. The Website contains no such suggestion.⁷ Accordingly, the
2 Commission finds no reason to believe that Respondents violated 52 U.S.C. § 30124 (formerly
3 2 U.S.C. § 441h).

4 3. Independent Expenditure Reporting and Political Committee Status

5 Any person who is not a political committee and makes more than \$250 in independent
6 expenditures with respect to a given election in a calendar year as defined in the Act and
7 Commission regulations must file an independent expenditure report. 52 U.S.C. § 30104(c)
8 (formerly 2 U.S.C. § 434(c)); 11 C.F.R. § 109.10(b).

9 The Complaint alleges that Respondents were required to file an independent expenditure
10 report or statement if the costs associated with the Website exceeded \$250. Compl. at 4. They
11 did not. The record reflects that the costs associated with the creation, launch, and maintenance
12 of the Website did not exceed \$250. *See* Spannagel Decl. ¶ 11 (identifying the total cost of the
13 Website as \$135.22). Accordingly, the Commission finds no reason to believe that Respondents
14 violated 52 U.S.C. § 30104(c) (formerly 2 U.S.C. § 434(c)).

15 The Complaint also alleges that Respondents may have made expenditures in connection
16 with the Website that triggered the registration requirements of the Act. Compl. at 5; *see*
17 52 U.S.C. § 30103 (formerly 2 U.S.C. § 433). The Act defines a political committee as “any
18 committee, club, association, or other group of persons which receives contributions aggregating

⁷ The URL address for the Website, Sam4Congress, might falsely indicate that Aanestad sponsored the Website himself. But the nature of the Website’s attack on Aanestad, the Website’s caption “Sam Aanestad not for Congress,” and the tag-line suggesting it was sponsored or otherwise associated with “Free Thinkers for D’Acquisto” all militate against drawing that inference from the URL address. Moreover, the use of a false tag-line attributing the communication to a fictional entity ostensibly connected to candidate Michael Dacquisto did not result in a violation of section 30124 (formerly section 441h). Although Dacquisto provided a declaration denying that he had a role in publishing the Website, neither he nor the Complaint allege that Dacquisto was damaged by the apparent association of his candidacy with the Website. *See* Dacquisto Decl. ¶ 7. Accordingly, the Website — which targets Aanestad — does not appear to be a communication in Dacquisto’s name “on a matter which is damaging to” him. 52 U.S.C. § 30124(a)(1) (formerly 2 U.S.C. § 441h(a)(1)); 67 Fed. Reg. at 76,968-69.

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1 in excess of \$1,000 during a calendar year or makes expenditures aggregating in excess of
2 \$1,000 during a calendar year.” 52 U.S.C. § 30101(4)(A) (formerly 2 U.S.C. § 431(4)(A)).
3 Even assuming the other elements of the definition of political committee were satisfied as to
4 each Respondent, the expense required to create, host, and maintain the Website does not meet
5 the \$1,000 statutory threshold for political committee status. Accordingly, the Commission finds
6 no reason to believe that Respondents violated 52 U.S.C. § 30103 (formerly 2 U.S.C. § 433).

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