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October 28, 2016

VIA ELECTRONIC AND FIRST-CLASS MAIL

Jeff S. Jordan, Assistant General Counsel
Office of Complaints Examination and Legal Administration
Federal Election Commission
999 E. Street, NW
Washington, DC 20463

Re: MUR 7131

Dear Mr. Jordan:

I write as counsel to Susan D. Mayer in response to the complaint filed by Brian T. Griset on September 1, 2016 (the "Complaint"). The Complaint fails to set forth sufficient facts, which, if true, would constitute a violation of the Federal Election Campaign Act of 1971, as amended ("the Act"), or Federal Election Commission ("FEC" or "Commission") regulations with respect to Ms. Mayer. Accordingly, the Commission should find no reason to believe a violation occurred and immediately dismiss the Complaint.

FACTUAL BACKGROUND

During the 2014 election cycle, Ms. Mayer was employed part-time as a staffer in Congresswoman Carol Shea-Porter's district office, and volunteered part-time for her re-election campaign. This Complaint concerns a contribution of \$3,110 made on October 29, 2014 by Ms. Mayer to ActBlue, that was earmarked for Senior Votes Count ("SVC"), an independent political action committee ("PAC") registered with the Commission. SVC subsequently purchased \$3,000 in radio ads in support of Congresswoman Shea-Porter's re-election campaign.

The Complaint alleges that Ms. Mayer's contribution was intended to circumvent certain contribution limits, and "for the specific purpose of purchasing radio advertising supporting her . . . employer . . ." Complaint at 7, and therefore should be treated as a contribution made directly to Congresswoman Shea-Porter's campaign. As such, the Complaint alleges, Ms. Mayer's contribution violated Federal law, including the Act, because: (1) it was a contribution by a Congressional staffer to their employing member of Congress, contrary to 18 U.S.C. § 603; (2) it was a contribution in excess of the \$2,600 limit on individual contributions to campaign committees, contrary to 52 U.S.C. § 30116; (3) she tried to circumvent the Act by hiding her

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relationship with Congresswoman Shea-Porter when making the contribution; and (4) she coordinated the radio advertisement with SVC and the Shea-Porter campaign, thus making the advertisement a reportable coordinated communication.

The Complaint presents no facts to support a finding that Ms. Mayer's contribution to SVC was intended as a direct contribution to the Shea-Porter campaign. The Complaint provides no evidence of any communication between Ms. Mayer and SVC to coordinate the contribution. Instead, the Complaint simply concludes that the ad must have been a coordinated effort between Ms. Mayer and SVC for the benefit of the Shea-Porter campaign, because Ms. Mayer and an SVC co-founder, performing artist Jon Bauman, both appeared at a campaign event for Representative Shea-Porter. The Complaint's inability to present any factual evidence of coordination and its reliance on speculation and conspiracy theory are fatal. Accordingly, the Commission should find no reason to believe a violation occurred and immediately dismiss the Complaint.

LEGAL ANALYSIS

The Complaint's allegations against Ms. Mayer are unsupported by any factual evidence, and require an inferential leap based on circumstantial and speculative evidence.

The Complaint fails to show that Ms. Mayer's contribution to SVC was an earmarked contribution directed to Congresswoman Shea-Porter.

The allegations in the Complaint against Ms. Mayer assume that she coordinated with SVC to direct her contribution for the benefit of Congresswoman Shea-Porter. As such, the Complaint argues, the contribution should properly be considered a contribution directly to the campaign.

The Act provides that "all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate."¹ Commission rules define "earmarked" as "a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee."²

The Complaint fails to allege facts sufficient to suggest that Ms. Mayer's contribution was in any way earmarked. The Complaint points to various pieces of circumstantial evidence that Ms. Mayer and Mr. Bauman were in the same place on the same day, and then uses SVC's endorsement of Congresswoman Shea-Porter to conclude that Ms. Mayer must have "designated,

¹ 52 U.S.C. § 30116(a)(8).

² 11 CFR 110.6(b)(1).

instructed, or encumbered" her contribution to ensure that it would be used to benefit Congresswoman Shea-Porter. The Complaint's allegations are speculative at best, and are not based on any provable facts. For instance, the Complaint alleges that Ms. Mayer appeared at a campaign event with Congresswomen Shea-Porter and Mr. Bauman and attaches a photograph in support of the allegation. Contrary to this allegation, Ms. Mayer is not the fifth person from the left in the photograph and does not appear in the photograph at all. The Complaint alleges insufficient facts to state a claim.

The Commission lacks jurisdiction to enforce 18 U.S.C. § 603.

The Complaint alleges a violation of 18 U.S.C. § 603, which prohibits congressional staffers from making contributions to their employers:

It shall be unlawful for an officer or employee of the United States or any department or agency thereof . . . to make any contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 . . . to any Senator or Representative in, or Delegate or Resident Commissioner to, the Congress, if the person receiving such contribution is the employer or employing authority of the person making the contribution. Any person who violates this section shall be fined under this title or imprisoned not more than three years, or both.

The Commission's enforcement jurisdiction is limited to "violation[s] of [the Federal Election Campaign Act (52 U.S.C. § 30101, *et seq.*)] or of chapter 95 or chapter 96 of Title 26."³ In contrast, 18 U.S.C. § 603 is a "[c]riminal provision[] administered by the Department of Justice that relate[s] to elections and political activity."⁴

As Title 18 is outside of the Commission's enforcement jurisdiction, the Commission must immediately dismiss this allegation of the Complaint.⁵

The Complaint fails to allege facts sufficient to constitute a violation of the personal contribution limit.

The Complaint also alleges – relying again on circumstantial evidence – that since Ms. Mayer's contribution to SVC was really a contribution to the Shea-Porter campaign, it exceeded the limit on personal contributions to candidates.

³ 52 U.S.C. § 30109(a)(1).

⁴ "Federal Campaign Finance Laws," Federal Election Commission, <http://www.fec.gov/law/feca/feca.shtml>.

⁵ Even if the Commission determines that it has jurisdiction to enforce 18 U.S.C. § 603, it should nonetheless find the complaint does not allege sufficient facts that a violation of this provision occurred.

Title 52, Section 30116 of the U.S. Code establishes limits on contributions that individuals can make to election campaigns:

Except as provided in subsection (i) and section 30117 of this title, no person shall make contributions . . . to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed [\$2,600]⁶

This allegation, without alleging sufficient facts, assumes that Ms. Mayer's contribution was made directly to or earmarked for Congresswoman Shea-Porter's campaign. Since the contribution was instead made to SVC it is instead subject to the \$5,000 limit on contributions to PACs.⁷ Ms. Mayer's contribution of \$3,110 was well within the limit for personal contributions to PACs. Accordingly, this allegation must be dismissed.

Even if Ms. Mayer's contribution can properly be considered a contribution to a candidate, rather than to a PAC, Ms. Mayer's contribution only exceeded the applicable limit by \$510, and she respectfully requests that the Commission take this fact into account in determining whether a violation occurred and any punishment.

Ms. Mayer did not attempt to hide her employment relationship with Congresswoman Shea-Porter, and in fact clearly disclosed her employer and position when making the contribution.

The Complaint alleges that Ms. Mayer, apparently in coordination with SVC and/or ActBlue, intentionally hid her employment information when making the contribution to SVC. This allegation is contradicted by the complaint's admission that Ms. Mayer properly disclosed her identity, employer and position when making the contribution through ActBlue. The Complaint points to a discrepancy between the information reported by ActBlue and SVC regarding her contribution: ActBlue reported her position and employer as "Congressional Staffer" and "US House of Representatives" respectively; SVC reported "Not-Employed" and "N/A" for the same fields.

The fact that ActBlue correctly reports her employment information clearly shows that Ms. Mayer fully and accurately disclosed such information when making the contribution, and made no attempt to hide her relationship with Congresswoman Shea-Porter. To the extent the Complaint, without evidence, alleges that the data was intentionally manipulated by ActBlue and/or SVC, the allegation does not implicate Ms. Mayer.

⁶ "\$2,000" in original. Subsection (c) provides a mechanism for increasing the limit, which resulted in the limit being \$2,600 in 2014.

⁷ 52 U.S.C. § 30116(a)(1)(C).

Ms. Mayer did not coordinate the purchasing of radio time with SVC for the benefit of Congresswoman Shea-Porter.

The Complaint alleges that Ms. Mayer, acting on behalf of the Shea-Porter campaign, coordinated with SVC to purchase radio airtime to play the advertisement, and therefore the advertisement should be considered a "coordinated" communication, with all attendant reporting requirements.

Under Commission rules, a public communication must satisfy a three-prong test to be a coordinated communication.⁸ First, it must be paid for by a person other than candidate, authorized committee or political party committee with which it is coordinated.⁹ Second, it must satisfy one or more "content" standards.¹⁰ Third, it must satisfy one of several "conduct" standards.¹¹ "The third prong of the coordination test, the conduct standard, requires analysis of *affirmative acts* taken by the parties who are alleged to have engaged in the coordinated activity. The conduct standard may be satisfied by affirmative acts that fall into any one of six general categories: request or suggestion; material involvement; substantial discussion; common vendor; former employee or independent contractor; and dissemination, distribution, or republication of campaign material."¹²

The Complaint presents no facts to show that any of these affirmative acts occurred, and so the conduct standard is not satisfied. The Complaint merely alleges a close relationship between the Shea-Porter campaign and SVC, and some circumstantial evidence that members of both organizations were present at the same event around the time the contribution and expenditure were made. As explained above, the Complaint attaches a photograph falsely alleging that Ms. Mayer is the fifth person from the left in the photograph. This allegation, without more, is insufficient to prove the requisite conduct, as it includes no request, suggestion, material involvement, substantial discussion, etc. Ms. Mayer respectfully submits that the ad was not coordinated.

CONCLUSION

Ms. Mayer respectfully requests that the Commission dismiss the Complaint in MUR

⁸ 11 C.F.R. § 109.21.

⁹ 11 C.F.R. § 109.21(a)(1).

¹⁰ *Id.* § 109.21(c).

¹¹ *See* 11 C.F.R. § 109.21(d).

¹² Factual and Legal Analysis, Matter Under Review 6059 (Sean Parnell for Congress), at 5 (citing 11 C.F.R. § 109.21 (d)(1)-(6)) (emphasis added).

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7131 and appreciates the Commission's consideration of this response.

Very truly yours,

A handwritten signature in black ink, appearing to be 'W.E. Christie', written in a cursive style.

William E. Christie
Counsel to Susan D. Mayer

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