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**RECEIVED
FEDERAL ELECTION
COMMISSION**
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**OFFICE OF GENERAL
COUNSEL**

Re: MUR 7138

Dear Mr. Jordan:

We write as counsel to Friends of Patrick Murphy ("the Committee"), Brian Foucart, in his official capacity as Treasurer, Representative Patrick E. Murphy and Coastal Construction Group of South Florida, Inc. (collectively, the "Respondents") in response to the Complaint filed by the Foundation for Accountability and Civic Trust on September 6, 2016 alleging a violation of the Federal Election Campaign Act of 1971, as amended (the "Act") or Commission regulations.

The Complaint falsely alleges that Respondents engaged in prohibited coordination with Floridians for a Strong Middle Class ("Floridians") and Senate Majority PAC ("SMP") in connection with an advertisement regarding the U.S. Senate race in Florida. The factual basis for this allegation is that the advertisement references an endorsement that was also posted on the Committee's publicly available website. However, the Commission has made clear on numerous occasions that such activity does not constitute "coordination" for purposes of the Act. As the Complaint does not allege any additional facts to demonstrate that coordination took place, and because no coordination took place, the Commission should find no reason to believe that Respondents violated the Act and dismiss the Complaint.

FACTUAL BACKGROUND

Representative Murphy is a member of the U.S. House of Representatives and a candidate for U.S. Senate in Florida. Friends of Patrick Murphy, Representative Murphy's principal campaign committee, maintains a publicly available website located at www.murphyforflorida.com. The Committee uses this website to communicate information about Representative Murphy, as well as his opponent, to the general public.

Representative Murphy's father, Thomas Murphy, Jr., is the Chairman and Chief Executive Officer of Coastal Construction Group of South Florida, Inc. ("Coastal"), and Representative Murphy himself is a shareholder in Coastal.

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Floridians and SMP are both independent expenditure-only committees that were formed and operate completely separately from Representative Murphy or the Committee.

LEGAL ANALYSIS

The Complaint alleges that Floridians and SMP both ran an identical advertisement entitled "Endorse" in coordination with the Committee. However, the Complaint does not provide any facts establishing that the advertisement was a coordinated communication.

A communication is a "coordinated communication" under 11 C.F.R. § 109.21 only if it satisfies all three prongs of the regulation: the payment prong, the content prong, and the conduct prong. The Complaint fails to allege facts that demonstrate that the conduct prong was satisfied in connection with the referenced advertisement. As such, the Complaint fails to allege facts which, if true, would constitute a violation of the Act and must be dismissed. *See* 11 C.F.R. § 111.4(a), (d); FEC Matter Under Review 4960 (Clinton for U.S. Senate), Statement of Reasons of Commissioners Mason, Sandstrom, Smith and Thomas at 1 (Dec. 21, 2000).

The Complaint claims that the advertisement meets the conduct prong under 11 C.F.R. § 109.21(d)(1) because the Committee requested the advertisement through a public posting on its website that stated: "Florida Democrats, especially those from Tampa to Orlando, deserve to know that President [Barack] Obama endorsed Patrick Murphy." *See* Complaint at 3, 6.¹ This assertion is simply incorrect as a matter of law. The Commission's regulations, and the Commission's interpretation of those regulations on numerous occasions, make clear that communications appearing on a campaign's publicly available website are never sufficient to find that the conduct prong has been satisfied.

As part of the revision of the coordination regulations in 2003, the Commission established that the conduct prong would be satisfied if a campaign made a "request of suggestion" that a third party disseminate a communication on its behalf. 11 C.F.R. § 109.21(d)(1). In the accompanying Explanation and Justification, the Commission clarified that "[t]he 'request or suggestion' conduct standard in paragraph (d)(1) is intended to cover requests or suggestions made to a select audience, but not those offered to the public generally. For example, a request that is posted on a web page that is available to the general public is a request to the general public and does not trigger the conduct standard in paragraph (d)(1), but a request posted through an intranet service or sent via electronic mail directly to a discrete group of recipients constitutes a request to a select audience and thereby satisfies the conduct standard in paragraph (d)(1)."

¹ The Complaint references one other message on the Committee's website that read: "[v]oters from Tampa to Orlando need to know that Marco Rubio has the worst attendance record . . ." However, the Complaint does not allege that this posting led any specific committee, person or entity to make an expenditure of any kind. *See* Complaint at 3.

Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003). A request or suggestion made on a publicly available website simply does not satisfy the conduct prong.

The Commission subsequently confirmed that the use of publicly available information by a third party does not satisfy the conduct prong, noting that “[u]nder the new safe harbor, a communication created with information found, for instance, on a candidate's or political party's Web site, or learned from a public campaign speech, is not a coordinated communication if that information is subsequently used in connection with a communication.” Coordinated Communications, 71 Fed. Reg. 33,190, 33,205 (June 8, 2006).

Most recently, the Commission re-affirmed this basic principle in response to a complaint with facts nearly identical to those presented in the Complaint. *See* MUR 6821. That complaint alleged that a coordinated communication occurred when Senate Majority PAC began to air an advertisement with similar themes to those contained in a message posted on the publicly available website of Shaheen for Senate, the principal campaign committee of Senator Jeanne Shaheen. In finding that there was no reason to believe that any violation of the Act occurred, and dismissing the complaint, the Commission emphasized that “a communication resulting from a general request to the public or use of publicly available information, including information contained on a candidate's campaign website, does not satisfy the conduct standards.” *See* Factual and Legal Analysis, Shaheen for Senate, Matter Under Review 6821 at 8 (Dec. 2, 2015).

Here, as was the case in MUR 6821, the message identified in the Complaint was posted on the publicly available website of the Committee. The message was accessible directly through a prominent link on the www.murphyforflorida.com homepage. Moreover, the sole similarity alleged between the Committee's posting and the advertisement is the inclusion of a publicly reported fact in both -- that President Obama supports Representative Murphy. *See* Complaint at 3. Accordingly, the posting alone cannot be a basis to find that the advertisement “Endorse” satisfies the conduct prong.

The only other alleged evidence of coordination presented in the Complaint is that Representative Murphy's father contributed to Floridians and SMP, while Coastal contributed to Floridians. *See* Complaint at 3-5. This allegation also fails to offer any factual support demonstrating that the advertisement meets the “conduct” prong. The conduct prong is only satisfied if a communication: (1) is created, produced, or distributed at the request or suggestion of a candidate or candidate's agent, or is created, produced, or distributed at the suggestion of the person paying for the communication, and the candidate or candidate's agent assents to the suggestion; (2) is the result of material involvement by the candidate or candidate's agent in decisions regarding six specifically delineated aspects of the communication; (3) is created, produced, or distributed after one or more substantial discussions about the communication between the payor and the candidate or candidate's agent if those discussions satisfy certain requirements; (4) is created by a common vendor

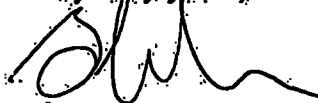
that uses or conveys certain material information in the creation, production, or distribution of the communication; (5) is sponsored by person, or by the employer of a person, who is a former employee or independent contractor of the candidate or candidate's agent and that person conveys certain material information in the creation, production, or distribution of the communication; or (6) disseminates, distributes, or republishes campaign material. A contribution from Representative Murphy's father and/or Coastal to Floridians or SMP does not satisfy any of the above conduct standards and therefore cannot support a finding of coordination.

CONCLUSION

The Act requires that the Commission find "reason to believe that a person has committed, or is about to commit, a violation" of the Act as a precondition to opening an investigation into the alleged violation. 52 U.S.C. § 30109(a)(2). In turn, the Commission may find "reason to believe" only if a complaint sets forth specific facts, which, if proven true, would constitute a violation of the Act. See 11 C.F.R. § 111.4(a), (d); FEC Matter Under Review 4960 (Clinton for U.S. Senate), Statement of Reasons of Commissioners Mason, Sandstrom, Smith and Thomas at 1 (Dec. 21, 2000). Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true, and provide no independent basis for investigation. *Id.*

The Complaint has not alleged facts that provide a sufficient basis for the Commission to find "reason to believe" that the Act or Commission regulations have been violated. What is more, the Complaint's unsubstantiated allegation of coordination is patently false. Respondents have not engaged in any prohibited coordination with Floridians or SMP. Accordingly, the Commission must reject the Complaint's request for an investigation. It should instead immediately dismiss the Complaint and close the file.

Very truly yours,



Marc E. Elias
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Jacquelyn K. Lopez
Counsel to Respondents