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December 22, 2016

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BY HAND DELIVERY

Federal Election Commission
Office of Complaints Examination and Legal Administration
Attn: Jeff Jordan and Mary Beth deBeau
999 E Street NW
Washington, DC 20436

Re: MUR 7168

Dear Mr. Jordan:

We write as counsel to Catherine Cortez Masto in response to the Complaint filed by the Foundation for Accountability and Civic Trust on October 21, 2016 alleging a violation of the Federal Election Campaign Act of 1971, as amended (the "Act"), or Federal Election Commission (the "Commission" or "FEC") regulations.

The Complaint falsely alleges that Catherine Cortez Masto and her authorized campaign committee, Catherine Cortez Masto for Senate (the "Committee") engaged in prohibited coordination with Senate Majority PAC ("SMP") in connection with an advertisement disseminated by SMP in the Nevada Senate race in 2016. The Complaint bases its allegation on the fact that the Committee posted information on its website that was similar to content used in an SMP advertisement. However, the FEC has clearly stated that this type of activity does not constitute "coordination" under the Act and FEC regulations. Because the Complaint fails to allege any additional facts to demonstration that coordination took place here, the FEC should find no reason to believe that Catherine Cortez Masto violated the Act and dismiss the Complaint. Further, because the Complaint fails to allege specific facts that if proven true would show a violation of the Act, the FEC should not open an investigation as the Complaint requests.

I. Factual Background

The Complaint alleges that Catherine Cortez Masto engaged in impermissible coordination by using her campaign's website to transmit information to SMP, an independent expenditure-only committee, and other organizations, on the content of their advertising.¹ This is false.

During the 2016 election, Catherine Cortez Masto and her Committee maintained a publicly available website located at catherinecortezmasto.com. This website was part of the Committee's

¹ Compl. at 1.

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strategy to communicate to the public throughout the election. And, through content on this website, the Committee communicated to the public about Catherine's campaign and her opponent, Representative Joe Heck. This website highlighted aspects of Rep. Heck's record and his position on issues about which the Committee felt the public should know. The website referenced Rep. Heck's record on Planned Parenthood, immigration, and education, in English and Spanish.² The Complaint points to one section of content on the website which highlighted Rep. Heck and Donald Trump's positions on immigration and education.³

As shown on SMP's YouTube Channel, SMP created an advertisement for the Nevada Senate race. It is unclear from the Complaint if this advertisement was disseminated on any paid media, such as television, during the campaign. The advertisement referenced in the Complaint contains some very broad thematic similarities to content on the Committee's publicly available website on immigration and education. However, information regarding Donald Trump's threat of a deportation force and to cut the Department of Education and Rep. Heck's votes against immigration reform and to cut Pell grants were publicly available and generally known. SMP's advertisement is not a republication of any specific content created by the Committee. The content in SMP's advertisement contains significant differences from the content of the Committee's website. The Committee's website makes no mention of Donald Trump's specific views on immigration and SMP's advertisement includes a clip of Donald Trump discussing a deportation force. Additionally, the Committee's website notes that Rep. Heck supports Donald Trump and the SMP advertisement does not discuss this point at all. Further, the Committee's website notes that Rep. Heck and Donald Trump would make it hard for Nevada students to pay for college. SMP's advertisement does not discuss this point. And, SMP's advertisement mentions that Donald Trump wants to cut the Department of Education, which the Committee's website does not discuss.

The Complaint fails to present any evidence of coordination between the Committee and/or Catherine Cortez Masto and SMP. This is not surprising because there was no coordination. The Committee and Catherine Cortez Masto did not request or suggest that SMP create the advertisement they created nor did Committee and Catherine Cortez Masto have any involvement in the creation, production, or dissemination of the advertisement. Further, the Committee and Catherine Cortez Masto did not discuss with SMP any of the Committee's plans, projects, activities, or needs. Further, the Complaint does not allege that SMP republished the Committee's campaign material.

² See Catherine Cortez Masto for Senate, <http://catherinecortezmasto.com/media>.

³ Compl. at 3-4.

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II. Legal Background

A. The Complaint Fails to Allege Facts Establishing that the Advertisement at Issue was a Coordinated Communication.

Under 11 C.F.R. § 109.21, a communication is a “coordinated communication” if it satisfies three requirements under the regulations. First, the communication must be paid, in whole or in part, by a person other than the candidate, authorized committee, or a political party committee.⁴ Second, the communication must meet the content standards of the regulation, including referencing a Senate candidate and being publicly disseminated in the candidate’s jurisdiction within 90 days of the candidate’s general election.⁵ And, third, the communication must satisfy the conduct standards of the regulations.⁶ The Complaint fails to allege facts that demonstrate that this conduct standard was met by SMP’s advertisement. As a result, the Complaint fails to allege facts which, if true, would constitute a violation of the Act and FEC regulations, and therefore must be dismissed.⁷

The conduct standard is 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.⁸

The Complaint claims that the advertisement meets the conduct standard under 11 C.F.R. § 109.21(d)(1) because “the ads were clearly created and distributed at the request of the candidate and her committee.”⁹ The Complaint alleges that the request was made using the Committee’s

⁴ 11 C.F.R. § 109.21(a)(1).

⁵ *Id.* § 109.21(a)(2).

⁶ *Id.* § 109.21(a)(3).

⁷ *See id.* § 111.4(a), (d); FEC Matter Under Review (“MUR”) 4960 (Clinton for U.S. Senate), Statement of Reasons of Commissioners Mason, Sandstrom, Smith and Thomas at 1 (Dec. 21, 2000).

⁸ 11 C.F.R. § 109.21(d).

⁹ Compl. at 6.

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website.¹⁰ The Complaint's assertion is incorrect as a matter of law. The Commission's regulations, and the Commission's numerous interpretations of them indicate that communications appearing on a campaign's publicly available website are never sufficient to satisfy the conduct standard for the coordinated communication test.

In 2003, as part of its revision to the coordination regulations, the FEC established that the conduct standard would be satisfied if a candidate or campaign made a "request of suggestion" that a third party create, produce, or distribute a communication on its behalf.¹¹ The FEC clarifies this change in the accompanying Explanation and Justification. Specifically, the Commission explained 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).¹²

A "request or suggestion" made on a publicly available website simply does not satisfy the conduct prong.

Since then, the FEC has confirmed that the conduct standard is not satisfied when a third party uses publicly available information in a communication. "[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."¹³

This basic principle was recently reaffirmed by the FEC in response to a complaint similar to the Complaint here, which alleged that SMP engaged in coordination with Senator Jeanne Shaheen's campaign committee, Shaheen for Senate. In that enforcement action, the complainant alleged that SMP coordinated with Shaheen for Senate when it aired an advertisement with similar themes to those contained in a message posted on the campaign's publicly available website.¹⁴ The FEC found no reason to believe that a violation of the Act occurred and dismissed the

¹⁰ *Id.*

¹¹ 11 C.F.R. § 109.21(d)(1).

¹² Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003) (emphasis added).

¹³ Coordinated Communications, 71 Fed. Reg. 33,190, 33,205 (June 8, 2006).

¹⁴ Complaint, FEC MUR 6821 (Shaheen for Senate).

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complaint.¹⁵ In doing so, the Commission reiterated 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.”¹⁶

The facts here are materially indistinguishable from the facts in the Shaheen for Senate enforcement action. Like that matter, here, the content from the Committee’s website mentioned in the Complaint was posted on the Committee’s publicly available website. In fact, by simply clicking on catherinecortezmast.com, any member of the public could view the content. Further, the advertisement at issue in Shaheen for Senate matter was thematically similar to the content on the campaign’s website. Yet, the FEC found no reason to believe a violation of the Act had occurred. As the FEC said in the Shaheen for Senate matter, the Committee’s website content, and the fact that SMP’s advertisement contain similar themes to the content of the Committee’s website, without more, is not a basis for the FEC to find that the advertisement satisfied the conduct standard. And, here, the Complaint does not allege any other facts that would satisfy the conduct standard under the law.

B. The Commission Must Reject the Complaint’s Request for an Investigation.

The Complaint requests an investigation to determine whether there was, in fact, coordination between the Committee and SMP, even though the Complaint fails to allege facts that prove a violation of the Act or Commission regulations. The Commission is not permitted to engage in a fishing expedition under the Act.

In fact, before opening an investigation into an alleged violation of the Act, the Commission must find “reason to believe that a person has committed, or is about to commit, a violation.”¹⁷ “The Commission may find ‘reason to believe’ only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the” Act.¹⁸ The Commission will not accept unwarranted legal conclusions from asserted facts or mere speculation as true.¹⁹ And, for allegations of coordination, the FEC requires a stronger showing: that Complainant provide “probative information of coordination.”²⁰

Here, the Complaint does not set forth any specific facts which, if proven true, would constitute a violation of the Act or show “probative information of coordination.” The

¹⁵ See FEC MUR 6821 (Shaheen for Senate), Factual and Legal Analysis at 8 (Dec. 2, 2015).

¹⁶ *Id.*

¹⁷ 52 U.S.C. § 30109(a)(2).

¹⁸ FEC MUR 4960 (Clinton for U.S. Senate), Statement of Reasons of Commissioners Mason, Sandstrom, Smith and Thomas (Dec. 21, 2001).

¹⁹ *Id.*

²⁰ FEC MUR 5999, Factual and Legal Analysis (Dec. 15, 2008); see also FEC MUR 6059, Factual and Legal Analysis at 6 (Feb. 3, 2009).

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specific facts that the Complaint alleges - that the Committee posted the messages on its publicly available website and that SMP created an advertisement with thematic similarities - does not constitute a violation of the Act. As a result, the FEC must reject the Complaint's request for an investigation, dismiss the Complaint, and close the file.

Very truly yours,



Marc E. Elias
Graham M. Wilson
Rachel L. Jacobs