

**FEDERAL ELECTION COMMISSION**  
**FIRST GENERAL COUNSEL'S REPORT**

**MUR 7168**

DATE COMPLAINT FILED: Oct. 31, 2016

DATE OF NOTIFICATIONS: Nov. 2, 2016

LAST RESPONSE RECEIVED: Dec. 22, 2016

DATE ACTIVATED: Feb. 15, 2017

EXPIRATION OF SOL: Sept. 7, 2021

ELECTION CYCLE: 2016

**COMPLAINANT:** Foundation for Accountability and Civic Trust

**RESPONDENTS:** Catherine Cortez Masto  
 Catherine Cortez Masto for Senate  
 and Kim R. Wallin in her official capacity  
 as treasurer  
 Senate Majority PAC and Rebecca Lambe in  
 her official capacity as treasurer

**RELEVANT STATUTES  
 AND REGULATIONS:**

52 U.S.C. § 30116(a), (f)

52 U.S.C. § 30118(a)

11 C.F.R. § 109.21

11 C.F.R. § 109.23

**INTERNAL REPORTS  
 CHECKED:**

Disclosure Reports

**AGENCIES CHECKED:** None

**I. INTRODUCTION**

Complainant alleges that the principal campaign committee of U.S. Senate candidate Catherine Cortez Masto, Catherine Cortez Masto for Senate ("Committee"), coordinated advertisements with Senate Majority PAC, an independent-expenditure-only political committee ("Super PAC"), resulting in excessive and prohibited in-kind contributions. We recommend that the Commission find no reason to believe that the Respondents violated 52 U.S.C. §§ 30116(f) or 30118(a), and close the file.

## 1 II. FACTUAL BACKGROUND

2 Complainant alleges that the Committee placed information on the “media” page of its  
 3 publicly available campaign website (“Website”) to direct the Super PAC to purchase  
 4 advertisements in specific markets and with specific messages.

5 According to the Complaint, in “September 2016,”<sup>1</sup> the Committee posted to its Website  
 6 the following information about Masto’s general election opponent, Joe Heck:

7 Attention! On the issues that matter to Nevada Hispanics, there’s  
 8 no difference between Joe Heck and Donald Trump. Heck  
 9 continues to support Trump for President, and he voted 4 TIMES  
 10 to end DACA and put thousands of DREAMers at risk of  
 11 deportation. Heck voted to cut Pell Grants, and the two of them —  
 12 Heck and Trump — would make it harder for Nevada students to  
 13 pay for college.<sup>2</sup>

14  
 15 The Super PAC allegedly “responded” with the following ad, translated and transcribed  
 16 as follows:

17 NARRATOR: “Is there any difference between Joe Heck and  
 18 Donald Trump? On immigration, Heck voted four times against  
 19 DACA and DAPA, putting thousands of DREAMers at risk of  
 20 being deported.” TRUMP: “We’re going to have a deportation  
 21 force.” NARRATOR: “Heck says he cares about education, but he  
 22 voted to cut Pell grants.” TRUMP: “We’re going to cut the  
 23 Department of Education.” NARRATOR: “On the issues that are  
 24 most important to us, there is no difference between Joe Heck and  
 25 Donald Trump.”<sup>3</sup>

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<sup>1</sup> Compl. Ex. B (Oct. 31, 2016). The Complaint does not identify the exact day in September of the printout of the Website.

<sup>2</sup> *Id.* The Website also provides a Spanish translation of this paragraph.

<sup>3</sup> Compl. at 4. The original ad was in Spanish and is transcribed as follows: NARRATOR: “¿Hay alguna diferencia entre Joe Heck y Donald Trump? Sobre la inmigración, Heck votó cuatro veces en contra de DACA y DAPA, poniendo a miles de DREAMers en riesgo de ser deportados.” TRUMP: “We are going to have a deportation force.” NARRATOR: “Heck dice que le preocupa la educación, pero votó por cortar las becas Pell.” TRUMP: “We are going to cut the Department of Education.” NARRATOR: “En los temas que más nos importan, no hay diferencia entre Joe Heck y Donald Trump.” “Ninguna Diferencia,” <https://www.youtube.com/watch?v=aFZ2trOtvW0> (published Sept. 7, 2016) (last accessed May 8, 2017).

Following the Super PAC's publication of the ad "that copied language from Cortez Masto's web page," Complainant alleges that "Masto apparently approved and changed the 'media' page."<sup>4</sup>

The Complaint also attaches an "October 2016" printout of the Website that contains the phrases "voters need to know" or "voters should hear" certain information regarding Joe Heck, which allegedly was a code to alert Senate Majority PAC to run ads in specific markets.<sup>5</sup> For example, "[a]t all points between now and Election Day voters should hear how in Washington, Joe Heck has voted ten times to defund Planned Parenthood and Heck even threatened to shut down the federal government in order to eliminate funding for Planned Parenthood."<sup>6</sup> The "October 2016" version of the Website also identified messages for specific markets: "Radio listeners across Nevada should hear the attacks for Joe Heck have been called 'bogus,' 'highly misleading' and 'false.' The truth is Catherine Cortez Masto has been a leader in cracking down on sex trafficking and sexual assault."<sup>7</sup>

However, the Complaint does not identify a Super PAC ad that was published after the "October 2016" iteration of the Website.<sup>8</sup>

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<sup>4</sup> Compl. at 4.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* The Complaint alleges that the Committee's Website provided photographs to be placed in the ads. *Id.* at 2.

<sup>8</sup> Senate Majority PAC published at least three other ads critical of Joe Heck, but they all pre-date the "September 2016" printout of the Website. See "Investment," <https://www.youtube.com/watch?v=g9MtQ8YDz1w> (published July 1, 2016) (last accessed May 8, 2017); "Side," <https://www.youtube.com/watch?v=OgleQXrrXjM> (published Aug. 16, 2016) (last accessed May 8, 2017); "23 Times," <https://www.youtube.com/watch?v=Rd7AzLOFrnA> (published Aug. 24, 2016) (last accessed May 8, 2017).

Complainant argues that the specificity of the Committee's Website regarding the message and the desired media markets – *e.g.*, “radio listeners” or “digital users, especially younger voters, Latinos and women” – indicates that the Committee used the Website to coordinate with the Super PAC. Therefore, the Super PAC allegedly made, and the Committee accepted, prohibited and excessive contributions in violation of the Act.<sup>9</sup>

Both the Candidate and the Super PAC responded similarly by arguing that information posted on the Committee's publicly available Website cannot satisfy the coordinated communications test as a matter of law.<sup>10</sup>

### III. LEGAL ANALYSIS

The Act provides that an expenditure made by any person “in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees or their agents” constitutes an in-kind contribution.<sup>11</sup> Super PACs are prohibited from making contributions to candidates and their authorized committees.<sup>12</sup> It is unlawful for candidates and political committees to knowingly accept a prohibited or excessive contribution.<sup>13</sup>

The Commission's regulations provide a three-part test for determining when a communication is a coordinated expenditure, which is treated as an in-kind contribution.<sup>14</sup> The communication must: (1) be paid for by a third party; (2) satisfy one of five “content” standards

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<sup>9</sup> Compl. at 5-7.

<sup>10</sup> The Committee did not submit a response.

<sup>11</sup> 52 U.S.C. § 30116(a)(7)(B)(i); 11 C.F.R. § 109.20; *see also* 52 U.S.C. § 30104(b) (requiring political committees to disclose to the Commission contributions received from other political committees and persons).

<sup>12</sup> *See* 52 U.S.C. §§ 30116(a), 30118(a); Advisory Op. 2010-11 (Commonsense Ten) at 2-3.

<sup>13</sup> *See, e.g.*, 52 U.S.C. §§ 30116(f), 30118(a).

<sup>14</sup> 11 C.F.R. § 109.21(a)-(b).

1 listed in 11 C.F.R. § 109.21(c); and (3) satisfy one of six “conduct” standards listed in 11 C.F.R.  
 2 § 109.21(d).<sup>15</sup> The Respondents have not disputed that the ads satisfy the “payment” and  
 3 “content” requirements. We therefore focus our analysis on the “conduct” standards.

4 Complainant alleges that the ad satisfies the “request or suggestion” conduct standard,  
 5 which requires that the communication be “created, produced, or distributed at the request or  
 6 suggestion of a candidate [or] authorized committee.”<sup>16</sup> The Commission has explained that the  
 7 “request or suggestion” standard refers to requests or suggestions “made to a select audience, but  
 8 not those offered to the public generally.”<sup>17</sup> As an example of the distinction between  
 9 generalized and targeted requests, the Commission provided that “a request that is posted on a  
 10 web page that is available to the general public is a request to the general public and does not  
 11 trigger the [request or suggestion] conduct standard,” whereas a request sent through an intranet  
 12 service or by email to a discrete group of recipients would satisfy the standard.<sup>18</sup>

13 In MUR 6821 (Shaheen for Senate), the Commission found that the use of publicly  
 14 available information, including the use of information contained on a candidate’s website, was  
 15 not sufficient to satisfy the “conduct” standards.<sup>19</sup> In that case, the Complaint alleged that

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<sup>15</sup> *Id.* § 109.21(a).

<sup>16</sup> *Id.* § 109.21(d)(1).

<sup>17</sup> Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003) (explanation and justification) (“2003 E&J”). The Complaint argues that in 2006 the Commission added a safe harbor to the regulations for publicly available information to each conduct standard except the request or suggestion conduct standard, which evidences the Commission’s intent to exclude the request or suggestion conduct standard from the safe harbor. *See* Coordinated Communications, 71 Fed. Reg. 33190, 33204-05 (June 8, 2006) (explanation and justification) (“2006 E&J”). The 2006 E&J, however, explicitly notes that the safe harbor was not added to the request or suggestion conduct standard to avoid protecting alleged coordination that was both available on a public source and was privately conveyed. *Id.* There is no allegation here that the Committee privately requested or suggested that the Super PAC run any ads.

<sup>18</sup> *See* 2003 E&J at 432.

<sup>19</sup> Factual & Legal Analysis at 7-8, MUR 6821 (Shaheen for Senate).

1 Shaheen's principal campaign committee and the Democratic Senatorial Campaign Committee  
 2 coordinated with a Super PAC when they posted information about Shaheen's opponent on  
 3 Shaheen's campaign website and on Twitter. The Super PAC allegedly responded to the posts  
 4 within two days, circulating a television commercial criticizing Shaheen's opponent on the same  
 5 grounds as discussed in the posts.<sup>20</sup>

6 In both MUR 6821 and this matter, the alleged request for advertising appeared on the  
 7 candidate's publicly available campaign website. The Complaint does not allege any private  
 8 communication between the Committee and the Super PAC.<sup>21</sup> Moreover, the only Super PAC  
 9 ad identified in the Complaint preceded the "October 2016" iteration of the Website, and the  
 10 "September 2016" version of the Website does not contain the phrases "voters need to know" or  
 11 "voters should hear," which the Complaint alleges were coded messages to the Super PAC.<sup>22</sup>  
 12 Therefore, the communication at issue does not appear to satisfy the conduct standard.<sup>23</sup>

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<sup>20</sup> *Id.* at 1-3; *see also* Factual & Legal Analysis, MUR 7124 (McGinty for Senate); *id.*, Certification (Apr. 28, 2017) (Commission found no reason to believe there was coordination where the alleged request was on the candidate's publicly available website).

<sup>21</sup> By contrast, in MUR 6908 (National Republican Congressional Committee) (currently open), OGC recommended reason to believe that the NRCC impermissibly coordinated with Super PACs by publicly posting encrypted polling data, which the Super PACs allegedly were able to decipher and used to coordinate their ad campaigns.

<sup>22</sup> *See* Compl. at 4 & Ex. B.

<sup>23</sup> Although the Complaint alleges that the Super PAC ad "copied language from Cortez Masto's web page," it does not specifically allege that it impermissibly republished her campaign materials. Compl. at 4. Nevertheless, the ad is merely thematically similar to the Website, and not a direct copy of any campaign materials of which we are aware. *See* 11 C.F.R. § 109.23. Therefore, the ad does not appear to constitute republication. *See* F&LA at 7, MUR 6821 (Sheehan for Senate).

Because the available record does not support a reasonable inference that the Committee coordinated with the Super PAC, we recommend that the Commission find no reason to believe that Respondents violated 52 U.S.C. §§ 30116(f) or 30118(a), and close the file.<sup>24</sup>

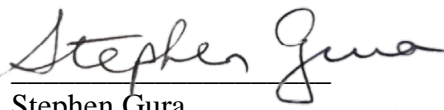
#### IV. RECOMMENDATIONS


1. Find no reason to believe that Catherine Cortez Masto violated 52 U.S.C. §§ 30116(f) or 30118(a);
2. Find no reason to believe that Catherine Cortez Masto for Senate and Kim R. Wallin in her official capacity as treasurer violated 52 U.S.C. §§ 30116(f) or 30118(a);
3. Find no reason to believe that Senate Majority PAC and Rebecca Lambe in her official capacity as treasurer violated 52 U.S.C. §§ 30116(f) or 30118(a);
4. Approve the attached Factual and Legal Analysis;
5. Approve the appropriate letters; and
6. Close the file.

Lisa J. Stevenson  
 Acting General Counsel

Kathleen M. Guith  
 Associate General Counsel for  
 Enforcement

5.15.17  
 DATE

  
 Stephen Gura  
 Deputy Associate General Counsel for  
 Enforcement

  
 Mark Allen  
 Assistant General Counsel

<sup>24</sup> The Commission came to the same result in a substantially similar MUR generated by a complaint filed by the same Complainant. *See* Factual & Legal Analysis, MUR 7124 (McGinty for Senate).

MUR 7168 (Catherine Cortez Masto, *et al.*)  
First General Counsel's Report  
Page 8 of 8

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2  
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8



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Attorney