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2018 FEB 26 PM 1:09

CELA

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February 7, 2018

Jeff S. Jordan
Assistant General Counsel
Complaints Examination & Legal Administration
Federal Election Commission
999 E Street, NW
Washington, DC 20463
VIA EMAIL: CELA@fec.gov

Re: MUR 7303; Response to Complaint from McSally for Congress

Dear Mr. Jordan:

We are writing this letter on behalf of Congresswoman Martha McSally, McSally for Congress, and Paul Kilgore, in his official capacity as Treasurer (collectively, the "Committee"), in response to the Complaint filed in the above-referenced matter by Jo M. Holt (the "Complainant"), the Chairwoman of the Pima County Democrat Party. The Complaint was clearly filed for publicity and political gain and is based solely on false information and hearsay from a single news article.

The Federal Election Commission (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 Federal Election Campaign Act (the "Act"). *See* 11 CFR §§ 111.4(a), (d). Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true. *See* MUR 4960, Commissioners Mason, Sandstrom, Smith and Thomas, Statement of Reasons (Dec. 21, 2001). Moreover, the Commission will dismiss a complaint when the allegations are refuted with sufficiently compelling evidence. *See id.*

As explained in more detail below, the allegations made in the Complaint are both factually and legally flawed and do not support a reason to believe finding in this matter. The Complaint should be immediately dismissed.

February 7, 2018

Page 2

Factual Background

Martha McSally is a current Member of Congress representing Arizona's Second Congressional District. She declared her candidacy for the U.S. Senate on January 12, 2018 to fill the seat of retiring Senator Jeff Flake.¹ She filed her FEC Form 2 Statement of Candidacy and FEC Form 1 Statement of Organization for her principal campaign committee for Senate, McSally for Senate, Inc., with the Secretary of the Senate on January 11, 2018.²

Prior to announcing her candidacy for Senate, Congresswoman McSally "tested the waters" following Senator Flake's announcement that he would not seek reelection in 2018. During this exploratory period, she met with various constituents and groups throughout Arizona, and performed other traditional testing the waters activities, such as polling, to determine the viability of her potential candidacy for Senate.

The Complaint

The Complaint speciously alleges that Congresswoman McSally "announced her candidacy for the U.S. Senate no later than November 7, 2017,"³ and suggests that because she subsequently "hired professional pollsters, WPA Intelligence, before November 15th to run a poll,"⁴ it is "inconceivable that [she] did not either raise or spend \$5,000 in support of her candidacy for Senate by November 15th at the latest."⁵ Taking both of these so-called "facts" into consideration, the Complaint asserts that Congresswoman McSally "violated the Act and FEC regulations by failing to file a Statement of Candidacy" by November 30, 2017.

Applying the same fictional and self-serving "facts", the Complaint goes on to conclude that "the continued use of McSally for Congress for fundraising purposes suggests that Representative McSally intends to use her House committee as the authorized committee for her Senate campaign," and that she therefore "violated FEC regulations by not filing an amended Statement of Organization with the Commission."⁶ Such allegations are devoid of reality and should be summarily dismissed.

¹ Dan Nowicki & Ronald J. Hansen, *Martha McSally makes it official: She's running for the Senate*, THE REPUBLIC (Jan. 12, 2018), available at <https://www.azcentral.com/story/news/politics/arizona/2018/01/12/martha-mcsally-arizona-candidate-us-senate/872458001/>.

² See McSally for Senate, Inc. Form 1 (attached as Exhibit A); Martha McSally Form 2 (attached as Exhibit B).

³ Complaint at 2.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 4.

February 7, 2018

Page 3

Legal Analysis

Triggering Candidate Status and Testing the Waters

An individual becomes a candidate for federal office when he or she is deemed to have decided to run for office and receives or has received contributions or makes or has made expenditures in excess of \$5,000.⁷ Funds that were raised or spent to “test the waters” apply to the \$5,000 threshold for qualifying as a candidate, and the candidate must register with the Commission.⁸ After an individual reaches candidate status, all reportable amounts from the beginning of the testing-the-waters period must be disclosed on the first financial disclosure report filed by the candidate’s committee, even if the funds were received or expended prior to the current reporting period. The regulations define testing the waters activities as those activities “conducted to determine whether an individual should become a candidate,” and “include, but are not limited to, conducting a poll, telephone calls, and travel.”⁹ Once an individual meets the \$5,000 threshold, he or she has fifteen days to designate a principal campaign committee by filing a Statement of Candidacy.¹⁰ The principal campaign committee must then file a Statement of Organization within 10 days of its designation,¹¹ and must file disclosure reports with the Commission in accordance with 52 U.S.C. § 30104(a) and (b).

Certain activities may indicate that the individual has decided to become a candidate and is no longer “testing the waters.” Commission regulations set out five non-exhaustive factors to be considered in determining whether an individual has decided to become a candidate. An individual indicates that he or she has gone beyond “testing the waters” and has decided to become a candidate, for example, by (1) using general public political advertising to publicize his or her intention to campaign for federal office; (2) raising funds in excess of what could reasonably be expected to be used for exploratory activities or undertaking activity designed to amass campaign funds that would be spent after he or she becomes a candidate; (3) making or authorizing written or oral statements that refer to him or her as a candidate for a particular office; (4) conducting activities in close proximity to the election or over a protracted period of time; or (5) taking action to qualify for the ballot under state law.¹² These regulations seek to draw a distinction between activities directed to an evaluation of the feasibility of one’s candidacy, as distinguished from conduct signifying that a private decision to become a candidate has been made.¹³

⁷ 52 U.S.C. § 30102(2); 11 C.F.R. § 100.3(a).

⁸ See 11 C.F.R. §§ 100.72(a), 100.131(a); see Factual and Legal Analysis at 8, MUR 6970 (DiCianni); Factual and Legal Analysis at 3, MUR 6533 (Perry Haney); Factual and Legal Analysis at 5, MUR 6449 (Jon Bruning).

⁹ 11 C.F.R. §§ 100.72(a), 100.131(a).

¹⁰ 52 U.S.C. § 30102(e)(1); 11 C.F.R. § 101.1(a).

¹¹ 52 U.S.C. § 30103(a).

¹² 11 C.F.R. §§ 100.72(b), 100.131(b).

¹³ See Advisory Op. 1981-32 (Askew).

February 7, 2018

Page 4

Congresswoman McSally Timely Filed Her Statement of Candidacy

Congresswoman McSally publicly announced her candidacy for U.S. Senate on January 12, 2018. Prior to her announcement, she engaged in traditional testing the waters activities, like commissioning the WPA Intelligence poll cited in the Complaint, and meeting with groups and individuals throughout Arizona. Despite this fact, the Complaint recklessly asserts that Congresswoman McSally “announced her candidacy for the U.S. Senate no later than November 7, 2017,”¹⁴ and bases this claim on hearsay and conjecture.

In fact, the Complaint does not even allege that Congresswoman McSally, through her own words or the words of any of her authorized representatives, stated that she had decided to run for U.S. Senate. Instead, the Complaint relies entirely on a single speculative article in the Arizona Daily Star to arrive at this conclusion. In doing so, the Complaint conveniently fails to mention that the cited article states that “[t]he news didn’t come from McSally but instead from U.S. Rep. David Schweikert.” To be clear, Congressman Schweikert is not an agent or authorized representative of Congresswoman McSally, and he does not have actual or implied authority to act or speak on her behalf. As stated above, one factor in determining whether an individual has moved past testing the waters is if he or she “mak[es] or authoriz[es] written or oral statements that refer to him or her as a candidate for a particular office.”¹⁵ The regulation does not contemplate or include as a factor in this determination hearsay statements from journalists or third parties not affiliated with that individual.

In MUR 5661 (Butler), the Commission dealt with a similar allegation based on third party hearsay from a news article. The complainant in that matter alleged that Keith Butler, a former candidate for U.S. Senate in Michigan, triggered candidate status and should have filed a Statement of candidacy because he distributed a brochure quoting an article where an individual unaffiliated with Butler made statements about his candidacy. Specifically, “the article quotes a Republican National Committee member stating that although there are several prospective Republican challengers, he ‘believes Butler ‘is in, no matter who runs.’”¹⁶ The Commission concluded that because “the brochure contained none of Butler’s own statements and was consistent with his stated purpose of gauging interest in a possible run, [there was] no reason to believe that Keith Butler or his committee violated the Act.”¹⁷ In this case, none of the comments allegedly made by Congressman Schweikert to the Arizona Daily Star were authorized by Congresswoman McSally or her agents, and thus cannot be characterized as some sort of formal statement of her candidacy.

¹⁴ Complaint at 2.

¹⁵ 11 C.F.R. §§ 100.72(b)(3).

¹⁶ MUR 5661 (Butler), First General Counsel’s Report, at 15.

¹⁷ See *id.*; see also MUR 5945 (Lalor), First General Counsel’s Report, at 6 n. 2.

February 7, 2018

Page 5

Furthermore, as stated above, a “reason-to-believe finding by the Commission must be based on specific facts from reliable sources.”¹⁸ The Commission has historically taken a dim view of allegations based solely on unsworn news reports and articles. In MUR 6661 (Murray Energy Corporation), three Commissioners explained that “allegations based upon unsworn news reports, anonymous sources, and an author’s summary conclusions and paraphrases provide questionable legal basis to substantiate a reason to be believe finding.”¹⁹ Likewise, in MUR 6518 (Gingrich), three Commissioners stated that:

As a threshold matter, we observe that unsworn news reports by authors who are not firsthand complainants or witnesses before the Commission present legal and practical problems for the Commission and respondents and, in any event, may be of limited probative value. The Act requires complaints be sworn subject to penalty of perjury. Because Journalists often write quickly and their observations may be factually incorrect, complaints based upon an author’s unsworn summary observations or paraphrases provide questionable legal and factual bases upon which to substantiate a reason to believe finding.²⁰

In short, the Complainant has failed to provide even a scintilla of concrete evidence to support its allegation that Congresswoman “announced her candidacy for the U.S. Senate no later than November 7, 2017,”²¹ and should have filed a Statement of Candidacy by “November 30, 2017.”²² As the Commission has long held, a single unsworn news article paraphrasing an unaffiliated third party simply does not suffice to substantiate such a claim, and that is all the Complaint contains. The fact remains that Congresswoman McSally did not publicly announce her candidacy until January 12, 2018, and she timely filed her Forms 1 and 2 on January 11, 2018.

Conclusion

In presenting politically-motivated and factually and legally unsubstantiated arguments, Ms. Holt has failed to demonstrate that Congresswoman McSally or the Committee have violated any provision of the Act or the Commission’s regulations. Instead, she has invoked an administrative process as a means to assault her political opponents. We therefore respectfully request that the Commission recognize the legal and factual insufficiency of the Complaint on its face and immediately dismiss it.

¹⁸ MUR 6002 (Freedom’s Watch, Inc.), Statement of Reasons of Chairman Matthew S. Petersen, and Commissioners Caroline C. Hunter and Donald F. McGahn II, at 6.

¹⁹ MUR 6661 (Murray Energy Corporation), Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman, at 7.

²⁰ MUR 6518 (Gingrich), Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman, at 6-7.

²¹ Complaint at 2.

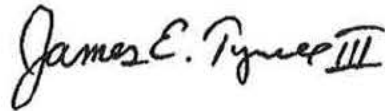
²² *Id.*

February 7, 2018

Page 6

Thank you for your consideration of this matter, and please do not hesitate to contact me directly at (202) 772-0915 with any questions.

Respectfully submitted,

A handwritten signature in black ink that reads "James E. Tyrrell III". The signature is written in a cursive style with a large, stylized "J" and "T".

James E. Tyrrell III
*Counsel to McSally for Congress
and Paul Kilgore as Treasurer*

CLARET

 Digitally signed by
Christal Dennis
Date: 2018.05.07
09:35:00 -04'00'


Exhibit A

STATEMENT OF ORGANIZATION

RECEIVED PAGE 1 / 4
SECRETARY OF THE SENATE
PUBLIC RECORDS

2018 JAN 11 PM 4:39

Office Use Only

1. NAME OF COMMITTEE (in full)  (Check if name is changed) Example: If typing, type over the lines.

12FE4M5

McSally for Senate, Inc.

ADDRESS (number and street)

PO Box 19128

☐ (Check if address is changed)

Tucson

CITY ▲

AZ

STATE ▲

,85731

ZIP CODE ▲

COMMITTEE'S E-MAIL ADDRESS

☐ ◀ (Check if address is changed)

.paul@pdscompliance.com

Optional Second E-Mail Address

COMMITTEE'S WEB PAGE ADDRESS (URL)

☐ (Check if address is changed)

McSallyforSenate.com

2. DATE

01

09

2018

- 3.
- FEC IDENTIFICATION NUMBER**
-

C

4. IS THIS STATEMENT ☒ NEW (N) OR ☐ AMENDED (A)

I certify that I have examined this Statement and to the best of my knowledge and belief it is true, correct and complete.

Type or Print Name of Treasurer Kilgore, Paul, , ,

Signature of Treasurer

Kilgore, Paul, 7

Date _____

01

0

2018

NOTE: Submission of false, erroneous, or incomplete information may subject the person signing this Statement to the penalties of 2 U.S.C. §437g.

ANY CHANGE IN INFORMATION SHOULD BE REPORTED WITHIN 10 DAYS.

Office
Use
Only

For further information contact:
Federal Election Commission
Toll Free 800-424-9530
Local 202-694-1100

FEC FORM 1
(Revised 06/2012)

2001-01-01

5. TYPE OF COMMITTEE

Candidate Committee:

- (a) ☒ This committee is a principal campaign committee. (Complete the candidate information below.)
- (b) ☐ This committee is an authorized committee, and is NOT a principal campaign committee. (Complete the candidate information below.)

Name of Candidate

McSally, Martha, , ,

Candidate Party Affiliation

REP

Office Sought:

☐

House

☒

Senate

☐

President

State

AZ

District

00

- (c) ☐ This committee supports/opposes only one candidate, and is NOT an authorized committee.

Name of Candidate

Party Committee:

- (d) ☐ This committee is a (National, State or subordinate) committee of the (Democratic, Republican, etc.) Party.

Political Action Committee (PAC):

- (e) ☐ This committee is a separate segregated fund. (Identify connected organization on line 6.) Its connected organization is a:
- ☐ Corporation ☐ Corporation w/o Capital Stock ☐ Labor Organization
- ☐ Membership Organization ☐ Trade Association ☐ Cooperative
- ☐ In addition, this committee is a Lobbyist/Registrant PAC.
- (f) ☐ This committee supports/opposes more than one Federal candidate, and is NOT a separate segregated fund or party committee. (i.e., nonconnected committee)
- ☐ In addition, this committee is a Lobbyist/Registrant PAC.
- ☐ In addition, this committee is a Leadership PAC. (Identify sponsor on line 6.)

Joint Fundraising Representative:

- (g) ☐ This committee collects contributions, pays fundraising expenses and disburses net proceeds for two or more political committees/organizations, at least one of which is an authorized committee of a federal candidate.
- (h) ☐ This committee collects contributions, pays fundraising expenses and disburses net proceeds for two or more political committees/organizations, none of which is an authorized committee of a federal candidate.

Committees Participating in Joint Fundraiser

1.	<input type="text"/>	FEC ID number	<input type="text"/>
2.	<input type="text"/>	FEC ID number	<input type="text"/>
3.	<input type="text"/>	FEC ID number	<input type="text"/>
4.	<input type="text"/>	FEC ID number	<input type="text"/>

20180112020001295

Write or Type Committee Name

McSally for Senate, Inc.**6. Name of Any Connected Organization, Affiliated Committee, Joint Fundraising Representative, or Leadership PAC Sponsor****MCSALLY FOR CONGRESS**

Mailing Address

PO BOX 19128

TUCSON

CITY

AZ

STATE

85731-9128

ZIP CODE

Relationship: ☐ Connected Organization ☒ Affiliated Committee ☐ Joint Fundraising Representative ☐ Leadership PAC Sponsor**7. Custodian of Records:** Identify by name, address (phone number -- optional) and position of the person in possession of committee books and records.

Full Name

Kilgore, Paul, , ,

Mailing Address

824 S Milledge Ave, Ste 101

Athens

CITY

GA

STATE

30605

ZIP CODE

Title or Position

Treasurer

Telephone number

8. Treasurer: List the name and address (phone number -- optional) of the treasurer of the committee; and the name and address of any designated agent (e.g., assistant treasurer).Full Name
of Treasurer

Kilgore, Paul, , ,

Mailing Address

824 S Milledge Ave, Ste 101

Athens

CITY

GA

STATE

30605

ZIP CODE

Title or Position

Treasurer

Telephone number

201801120200001296

Full Name of
Designated
Agent

Mailing Address

Title or Position

Telephone number

CITY

STATE

ZIP CODE

9. **Banks or Other Depositories:** List all banks or other depositories in which the committee deposits funds, holds accounts, rents safety deposit boxes or maintains funds.

Name of Bank, Depository, etc.

Wells Fargo

Mailing Address

420 Montgomery St

San Francisco

CA

94104

CITY

STATE

ZIP CODE

Name of Bank, Depository, etc.

United Bank

Mailing Address

PO Box 393

Charleston

WV

25322

CITY

STATE

ZIP CODE

26786112626661267

Exhibit B

RECEIVED
 SECRETARY OF THE SENATE / 1
 PUBLIC RECORDS

2018 JAN 11 PM 4:39

FEC FORM 2

STATEMENT OF CANDIDACY

1. (a) Name of Candidate (in full) McSally, Martha, . .			2. Candidate's FEC Identification Number		
(b) Address (number and street) PO Box 19128			<input type="checkbox"/> Check if address changed		
(c) City, State, and ZIP Code Tucson AZ 85731			3. Is This Statement <input checked="" type="checkbox"/> New (N) OR <input type="checkbox"/> Amended (A)		
4. Party Affiliation REPUBLICAN PARTY		5. Office Sought Senate		6. State & District of Candidate AZ 00	

DESIGNATION OF PRINCIPAL CAMPAIGN COMMITTEE

7. I hereby designate the following named political committee as my Principal Campaign Committee for the 2018 election(s).
 (year of election)

NOTE: This designation should be filed with the appropriate office listed in the instructions.

(a) Name of Committee (in full) McSally for Senate, Inc.		
(b) Address (number and street) PO Box 19128		
(c) City, State, and ZIP Code Tucson AZ 85731		

DESIGNATION OF OTHER AUTHORIZED COMMITTEES

(Including Joint Fundraising Representatives)

8. I hereby authorize the following named committee, which is NOT my principal campaign committee, to receive and expend funds on behalf of my candidacy.

NOTE: This designation should be filed with the principal campaign committee.

(a) Name of Committee (in full)		
(b) Address (number and street)		
(c) City, State, and ZIP Code		

I certify that I have examined this Statement and to the best of my knowledge and belief it is true, correct and complete.

Signature of Candidate 	Date 11/10/18
---	------------------

NOTE: Submission of false, erroneous, or incomplete information may subject the person signing this Statement to penalties of 2 U.S.C. §437g.

FL							
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201801120200001235

Digitally signed
by Kathryn RossDate:
2018.06.14
16:45:24 -04'00'**VENABLE** LLP600 MASSACHUSETTS AVE., NW WASHINGTON, DC 20001
T 202.344.4000 F 202.344.8300 www.Venable.com

June 12, 2018

James E. Tyrrell III

T 202.344.4522
F 202.344.8300
JETyrrell@venable.com**BEFORE THE FEDERAL ELECTION COMMISSION
STATEMENT OF DESIGNATION OF COUNSEL****MUR # 7303****Name of Counsel:** James E. Tyrrell III
Venable LLP
600 Massachusetts Ave. NW
Washington, DC 20001**Telephone:** (202) 344-4522
Fax: (202) 344-8300

The above-named individual and/or firm is hereby designated as my counsel and is authorized to receive any notifications and other communications from the Commission and to act on my behalf before the Commission.

6-12-18

Date



Respondent/Client Signature

Treasurer

Title

Respondent/Client: Paul Kilgore
Treasurer
McSally for Congress
P.O. Box 19128
Tucson, AZ 85731**Telephone - Business:** (706) 534-7780 X1

Information is being sought as part of an investigation being conducted by the Federal Election Commission and the confidentiality provisions of 52 U.S.C. 30109(a)(12)(A) apply. This section prohibits making public any investigation conducted by the Federal Election Commission without the express written consent of the person under investigation.