

## KELLOGG, HANSEN, TODD, FIGEL &amp; FREDERICK, P.L.L.C.

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May 14, 2018

*Via First-Class Mail and Electronic Mail*

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Federal Election Commission  
Office of Complaints Examination and Legal Administration  
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*Re: MUR 7351, Ms. Rebekah Mercer*

Dear Mr. Jordan:

We respectfully submit this response on behalf of our client, Ms. Rebekah A. Mercer, to the letter requesting that she respond to a complaint in the above-referenced matter under review. For the reasons stated below, there is no reason to believe that Ms. Mercer committed any violation of the Federal Election Campaign Act of 1971, as amended (the "Act"), and accordingly no basis for proceeding with an investigation of Ms. Mercer.

**Introduction and Summary**

By letter dated March 30, 2018, the Commission wrote to Ms. Mercer,<sup>1</sup> stating that the Commission had "received a complaint that indicates you may have violated the Federal Election

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<sup>1</sup> The letter was addressed to Ms. Mercer at "Cambridge Analytica LTD" in London, England. Ms. Mercer does not work at or have any involvement in that firm, and she did not receive the letter until someone forwarded it to her on or about April 13, 2018. In light of these facts, the Commission granted Ms. Mercer and her counsel until May 14, 2018, to make this

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Campaign Act of 1971.” Letter from J. Jordan to R. Mercer, Re: MUR 7351, at 1 (Mar. 30, 2018). The letter did not describe any such possible violation. It attached a complaint filed by the organization Common Cause against two foreign corporations (Cambridge Analytica LTD<sup>2</sup> and SCL Group Limited), four named foreign individuals, and “unknown foreign nationals” identified only as “John Doe(s).”

The Common Cause complaint does *not* name Ms. Mercer as a respondent and mentions her only in passing. The complaint alleges, in essence, that certain foreign persons affiliated with the two foreign corporations participated unlawfully in the decision-making of U.S. political campaigns and committees which had hired the corporations to provide services. But it does not provide *any* basis for proceeding against Ms. Mercer – a U.S. citizen who had no role in the alleged activities. *See* pp. 3-4, *infra*. The media reports on which the complaint is expressly and entirely based likewise do not provide any reason to believe that Ms. Mercer violated the Act. *See* pp. 5-6, *infra*. Ms. Mercer did have investments and loans of approximately \$6 million in a U.S. company (Cambridge Analytica LLC, or “CA”) that was formed in 2013 to provide data analytics to commercial and political clients. She had limited and high-level interactions with the company’s operational leadership regarding potential clients and other strategic business considerations. But she had no role whatsoever in the hiring of CA employees or the staffing of CA projects; she relied on the company’s CEO, Alexander Nix, and its Vice President, Stephen Bannon, to properly and lawfully manage the affairs of CA and in particular to comply in all respects with the Act. To ensure that they did so, she requested and obtained careful and correct legal advice from respected election law expert Laurence Levy. She was assured that the advice was followed by CA. She was never informed of any deviations from or failures to follow the sound advice of Mr. Levy. *See* pp. 6-7, *infra*.

Throughout the time period covered by the complaint (late 2013 through 2016) Ms. Mercer was an at-home mother of four small children, whom she home-schools, as well as an active citizen engaged as a board member, major contributor, and operating executive of more than ten significant charitable, public policy, and political organizations. CA was not a focus for

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submission. *See* Letter from C. Dennis to D. Bird, Re: MUR 7351 (Apr. 18, 2018) (granting extension).

<sup>2</sup> Cambridge Analytica LTD. appears to be a U.K. entity owned by Alistair and Anne Macwillson, two individuals unknown to Ms. Mercer. *See* United Kingdom Companies House Database, Cambridge Analytica LTD, *available at*: <https://beta.companieshouse.gov.uk/company/09154503>. Public records also indicate that there is a U.K. entity apparently associated with SCL Group Limited and the U.S. entity Cambridge Analytica, LLC: Cambridge Analytica (UK) Ltd. *See* United Kingdom Companies House Database, Cambridge Analytica LTD, *available at*: <https://beta.companieshouse.gov.uk/company/09375920>. Ms. Mercer also has no knowledge of or involvement with Cambridge Analytica (UK) Ltd.



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Ms. Mercer. It was merely one of the many activities she supported during this time. *See* pp. 7-8, *infra*. Under no valid theory can she be held liable for the activities of *other* persons she did not hire, supervise, or even know. Because nothing in the complaint, or in the media reports on which the complaint is based, provides any reason to believe that Ms. Mercer may have violated the Act, the matter should be closed as to her.

### The Complaint

According to the complaint, two foreign corporations<sup>3</sup> and four named foreign individuals “participated in the decision-making of U.S. political committee clients . . . regarding expenditures and disbursements.” Compl. ¶ 63. The individual foreign defendants supposedly embedded themselves in U.S. campaigns and crossed over the line of permissible involvement.

But the complaint makes no such allegations against Ms. Mercer. In fact, the complaint mentions Ms. Mercer just **five times**. *See* Compl. ¶¶ 16, 23, 24, 25, 26. The first four references to Ms. Mercer are in connection with a legal memorandum prepared by Laurence Levy, shareholder at the firm Greenberg Traurig and a recognized expert in federal election law.<sup>4</sup> *See* Compl. ¶¶ 16, 23, 24, 25. Mr. Levy is a longtime advisor to Ms. Mercer with respect to federal election-law matters. He provided this guidance to CA at her request. The memorandum itself – which apparently was leaked to the press by a self-styled whistleblower, former employee Christopher Wylie – is a careful, judicious, and entirely correct summary of the relevant legal principles. That Ms. Mercer provided this guide to CA management demonstrates that she was acting appropriately and that she intended for CA and its employees to comply with the Act. It certainly provides no grounds for commencing an *investigation* of her.

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<sup>3</sup> The complaint alleges that a Cambridge Analytica entity was incorporated in Delaware. *See* Compl. ¶ 5. As discussed below, Cambridge Analytica LLC is a Delaware limited liability company that was formed in December 2013. It had offices in New York and Virginia. Ms. Mercer expects that Cambridge Analytica, LLC will file bankruptcy proceedings as early as this week.

<sup>4</sup> Mr. Levy’s legal career spans over four decades and includes service as Special Counsel to three New York City Mayors. His practice focuses on political law and campaign finance matters at the federal and state levels. Prior to joining Greenberg Traurig, and at the time he drafted the July 2014 memorandum, Mr. Levy was a partner with Bracewell & Giuliani LLP. *See* Profile of Laurence A. Levy, Greenberg Traurig, *available at* <https://www.gtlaw.com/en/professionals/l/levy-laurence-a>.

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The fifth and final reference to Ms. Mercer in the complaint is a passing, unsupported assertion that, along with CA's operating executives (Messrs. Nix and Bannon), Ms. Mercer ignored the advice contained in the Levy memo. *See* Compl. ¶ 26.<sup>5</sup>

There is literally nothing in the complaint to support this sweeping assertion, at least as to Ms. Mercer. It does not describe *how* she supposedly ignored the advice, what information she had that CA employees were acting improperly (assuming they were in fact acting improperly, which has not been established), or what steps she took or did not take in response to any such information. She is simply swept in with Messrs. Nix and Bannon who, as operating executives of CA, possibly directed what CA employees did or did not do in their U.S. campaign work for U.S. political campaigns. Ms. Mercer had no such role, no such knowledge, and no reason to doubt that the employees of CA were following the detailed and correct guidance that Mr. Levy had provided at her insistence.

### The Law

The Act prohibits a "foreign national"<sup>6</sup> from making "a contribution or donation of money or other thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a Federal, State, or local election." 52 U.S.C. § 30121(a)(1)(A). It also proscribes the solicitation, acceptance, or receipt of a contribution or donation from a foreign national. 52 U.S.C. § 30121(a)(2). The Commission has promulgated a related regulation stating that foreign nationals may not "direct, dictate, control, or directly or indirectly participate in the decision-making process" of any persons, political committees, or political organizations, including "decisions concerning the making of contributions, donations, expenditures, or disbursements." 11 C.F.R. § 110.20(h)(2)(i).

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<sup>5</sup> The *only* basis the complaint offers for that allegation is a "March 23 *NBC News* article," Compl. ¶ 26, but that article says only that Ms. Mercer received Mr. Levy's memorandum, and does not support any claim that Ms. Mercer took any action much less action in defiance of Mr. Levy's advice. *See* Anna Schechter, "Wylie: Foreigners worked for Cambridge Analytica on NC Senate campaign," *NBC News*, March 23, 2018, *available at* <https://www.nbcnews.com/politics/elections/wylie-foreigners-worked-cambridge-analytica-nc-senate-campaign-n859526>.

<sup>6</sup> The statute defines "foreign nationals" as foreign governments, foreign corporations (or similar associations or organizations), or any individuals who are neither U.S. citizens nor lawful permanent residents. *See* 52 U.S.C. § 30121(b).



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### Discussion

#### **A. The Media Reports on Which the Complaint is Based Make No Factual Allegations Against Ms. Mercer**

The complaint relies entirely on press reports featuring what are reported to be self-aggrandizing comments of certain former CA employees, who have sought to take credit for various political campaigns during the 2014 and 2016 election cycles – with indignant refutations from officials actually responsible for the campaigns. They have in several instances ridiculed the claims of the former CA employees as inflated and fictional.<sup>7</sup>

It is thus likely that the former CA employees who have been quoted in the media, and in particular Messrs. Wylie and Nix, have overstated their roles, that they did not in fact participate in the decision-making of the campaigns for which they claim to have worked, and that their *involvement* in campaigns was entirely proper. For example, it was proper for foreign CA employees perform the services that CA typically contracted to provide: amassing and even analyzing data, for use by others, in campaigns. *See, e.g.*, FEC Advisory Opinion 2007-22 at 2-3 (concluding that petitioner could employ Canadian nationals on his campaign, provided they “would not hold supervisory or management positions”).

There has been nothing in the press to suggest that any of the foreign employees of CA, including Messrs. Nix and Wylie, had any experience or competence in U.S. campaign strategy, and it is inconceivable that these neophytes would have been given significant substantive roles in any campaign decision-making. They were hired to provide and to analyze data, so that others in the campaign could set the strategy. To Ms. Mercer’s knowledge, this was the limit of CA’s competence and the only service it provided. But even if Messrs. Nix or Wylie or any other CA foreign employees did participate in campaign decision-making – contrary to the instructions of Mr. Levy – that would not in any way support a claim against *Ms. Mercer* or provide a basis to investigate her. No one has alleged that Ms. Mercer had any role in assigning or supervising CA employees, or that she had any awareness of what the foreign CA employees were doing. She did not direct any such individuals to participate – indeed through Mr. Levy she directed them

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<sup>7</sup> For example, Brad Parscale, the Trump Campaign’s head of digital operations said of CA’s data analytics product, “I just don’t think it works.” Parscale disputed the notion that CA played a major role in the Trump campaign. *See Cloak and Data: The Real Story Behind Cambridge Analytica’s Rise and Fall*, Mother Jones (May/June 2018 issue), available at <https://www.motherjones.com/politics/2018/03/cloak-and-data-cambridge-analytica-robert-mercero/>. Staffers with the Cruz campaign expressed similar skepticism regarding the efficacy of CA’s services. *See id.* No one – other than the self-promoting CA employees themselves – has supported the claim that they had a role in campaign decision-making.

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*not* to participate – nor did she have any knowledge that CA foreign employees *were* participating in U.S. election decision-making.

**B. Ms. Mercer Had Only Limited Involvement in Cambridge Analytica, and No Involvement in or Awareness of Its Staffing for Work on U.S. Campaigns**

Ms. Mercer met Alexander Nix through mutual acquaintances in mid-2012. He presented himself as the CEO of SCL, a firm comprised of experts in “data analytics” that had been involved in a variety of political and commercial campaigns around the world (but not in the U.S.). SCL purported to have the ability to take large quantities of data, available from public sources, and analyze it for use in communicating with potential customers (commercially) and voters (politically). Ms. Mercer was intrigued and thought that a U.S. company with such capabilities could be useful both to commercial customers and political clients, such as PACs and campaigns. She was concerned that groups on the left-leaning end of the spectrum, and even commercial ventures such as Google and Facebook, were using data analytics to “micro-target” voters to the benefit of liberal candidates for office. There was no firm on the other side of the ideological spectrum that was available to provide this potentially valuable service.

Ms. Mercer asked Mr. Bannon, with whom she had been associated in other public policy and commercial ventures, to travel to London for “due diligence” on SCL. In late summer or early fall of 2013, Mr. Bannon met with SCL in London to assess its capabilities. He reported back to Ms. Mercer that SCL was an impressive company with smart employees and competence in the field of data analytics. She then proposed to invest in such a venture and asked Mr. Bannon, who had been a Goldman Sachs banker and presumably had expertise in corporate matters, to establish a U.S. company that would have access to the intellectual property that SCL had developed. She left all the details to Mr. Bannon. He was asked to form the company and establish its ownership and governance structure, to negotiate with Mr. Nix over licenses, and to work with Mr. Nix in hiring employees and setting up offices.

Mr. Bannon chose the name “Cambridge Analytica.” He proceeded to install Mr. Nix as CA’s CEO, set up offices for CA in New York City and Alexandria, Virginia, and hire numerous employees including both U.S. citizens and foreign citizens.

CA was formed in December 2013. A few months later, for reasons not known to Ms. Mercer, CA was reorganized by Mr. Bannon and the lawyers working under his direction. A holding company (Cambridge Analytica Holdings LLC) was created. Ms. Mercer was installed as a non-managing member of that new company. She paid little attention to the corporate reorganization and left this, along with all aspects of CA’s day-to-day activities, to Messrs. Bannon and Nix.

Ms. Mercer’s involvement was, from the outset, at a high level. She made introductions to some of her friends and acquaintances, whom she believed to be potentially interested in the data analytic capabilities CA could offer, and she discussed with Mr. Nix strategic business



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considerations regarding clients and potential clients. Ms. Mercer also developed a friendship with Mr. Nix and communicated with him. But she did not involve herself in any of the details regarding the management of CA's business. She had no office at CA, no substantive contact with CA employees other than Messrs. Nix and Bannon, and no operational responsibilities.

Beginning in 2014, CA was retained to provide data analytic services to certain U.S. political campaigns and organizations. Ms. Mercer was generally aware of the firm's U.S. clients, and aware that CA employed some non-U.S. citizens (such as Mr. Nix). To ensure that CA followed all applicable U.S. election laws, Ms. Mercer requested that her longtime election law advisor, Mr. Levy, advise the company. Among other things, Mr. Levy prepared written guidance as to what CA could and could not do under U.S. law. Ms. Mercer received a copy of that written guidance in July 2014.

Throughout the 2014 and 2016 election cycles, Ms. Mercer consulted regularly with Mr. Levy with respect to her many projects involving electoral issues. She insisted that Messrs. Bannon and Nix also consult regularly with Mr. Levy, to ensure that CA's activities complied with U.S. law. And they did so – Mr. Levy routinely provided advice to CA about myriad aspects of election law relevant to vendors for political campaigns and related entities. At no point did anyone bring to Ms. Mercer's attention any potential legal issue regarding any aspect of CA's work. No one ever stated, suggested, or implied to Ms. Mercer that CA had embedded foreign employees in U.S. campaigns to participate in decision-making (Mr. Wylie's apparent allegation), or was otherwise violating U.S. election laws. Ms. Mercer was similarly never told or given any reason to believe that CA had "end to end" responsibility for the Trump campaign (the boastful, self-aggrandizing comments Mr. Nix purportedly made).

**C. Ms. Mercer Was Primarily Engaged in Other Activities During the Relevant Period**

It is important to note that CA was merely one of at least a dozen different civic, philanthropic, commercial, and political activities in which Ms. Mercer was involved from 2013 through the 2016 election cycle. More important, she was (and is) a stay-at-home mother of four small children (now 7 to 13 years old) whom she home-schools, and to whom she devotes most of her waking hours. She paid little attention to CA, and when it did have her attention, it was only at a very high level.

Ms. Mercer's contemporaneous commitments included:

*Mercer Family Foundation:* Rebekah Mercer and her father, Robert Mercer, started the Mercer Family Foundation in 2004 to support causes important to the family.

*Reclaim New York:* Founded in 2012 by Ms. Mercer, Reclaim New York is a 501(c)(3) organization focused on rooting out corruption in the state and improving the state's financial

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stability through government transparency and consumer awareness. In addition to being the group's founder, she is also its Chairman, Director, and Treasurer.

*Media Research Center:* The Media Research Center ("MRC") was founded in 1987 as a media watchdog group to promote neutral, objective viewpoints in media. Ms. Mercer has been a board member of MRC since 2008. As part of MRC, Ms. Mercer was also involved in the development and growth of *For America*, a 501(c)(4) organization.

*American Museum of Natural History:* During the period 2013-2016, Ms. Mercer served as a board member of The American Museum of Natural History, located in New York City, one of the largest museums in the world.

*The Heritage Foundation:* During the period 2013-2016, Ms. Mercer served as a board member of the Heritage Foundation, a prominent organization that supports research and education in public policy matters.

*Moving Picture Institute:* During the period 2013-2016, Ms. Mercer served as a board member of the Moving Picture Institute, a 501(c)(3) organization.

*Young Americas Foundation:* During the period 2013-2016, Ms. Mercer, was involved with this public policy organization.

*The Heartland Institute:* During the period 2013-2016, Ms. Mercer, was involved with this public policy organization.

*The Coolidge Foundation:* During the period 2013-2016, Ms. Mercer served as a board member of this organization.

*The Goldwater Institute:* During the period 2013-2016, Ms. Mercer, was involved with this public policy organization.

During this period Ms. Mercer also, along with her two sisters, owned a bakery. In light of these many commitments and demands on her time, Ms. Mercer gave only very limited attention to CA. She had no role in day-to-day management, did not spend time at CA offices, did not have substantive interaction with CA employees (other than Messrs. Bannon and Nix), did not regularly receive written materials regarding CA's work, and often did not even read emails on which she was copied or materials that were sent to her, including legal documents relating to ownership and governance. She trusted the competence and integrity of the people who founded CA and ran its day-to-day operations: Messrs. Bannon and Nix.



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**D. As a Matter of Law, Ms. Mercer Cannot Be Held Liable for Any Violations of the Act Committed by Cambridge Analytica Employees**

The complaint asserts that foreign employees of Cambridge Analytica and SCL Group violated 52 U.S.C. § 30121(a)(1) and 11 C.F.R. § 110.20(i) because they “directly or indirectly participated in the decision-making process” of how their American clients expended or disbursed money “in connection with elections for any federal office in 2014 and 2016.” Compl. ¶ 64. Ms. Mercer is not a foreigner involved in U.S. election decision-making. Nor is there any hint or suggestion that Ms. Mercer solicited donations from foreign nationals on behalf of any campaign or political organization. Accordingly, she cannot possibly have directly violated the Act.

As a matter of law, Ms. Mercer cannot be secondarily liable for any violations by CA employees (assuming that there were any, which is dubious). The Act does not provide for secondary liability or “aiding and abetting.” The absence of statutory support for secondary liability is dispositive. Congress knows how to impose secondary liability when it wants to. That it chose not to do so here means that the Act does not create secondary liability. *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176 (1994) (holding that Section 10(b) of the Securities Exchange Act does not provide for aiding and abetting liability because the statute was silent as to this type of liability); *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 689 (7th Cir. 2008) (en banc) (“statutory silence on the subject of secondary liability means there is none”). The Commission has never taken the position that the Act creates secondary liability for the conduct of foreign nationals, *see* 11 C.F.R. § 110.20, nor could it given the lack of statutory support.

There is accordingly no justification for investigating Ms. Mercer here, because the only conceivable basis for proceeding would be based on potential secondary liability: holding Ms. Mercer responsible for the actions of Messrs. Nix and Wylie, and perhaps others. That theory has recently been rejected by the courts. *See Fed. Election Comm’n v. Swallow*, No. 2:15-CV-439-DB, 2018 WL 1725429, at \*4 (D. Utah Apr. 6, 2018). In *Swallow*, the FEC contended that Swallow helped his co-defendant make contributions in the name of a third person. *Id.* The relevant provision of the Act stated, “No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.” 52 U.S.C. § 30122. The FEC promulgated a regulation under the Act that “declared that ‘no person shall knowingly help or assist any person in making a contribution in the name of another.’” *Swallow*, 2018 WL 1725429, at \*2 (quoting 11 C.F.R. § 110.4(b)(1)(iii)).

The district court dismissed the action because the Commission’s regulation exceeded the scope of the statute, and the Commission “had no authority to write a regulation that went beyond the Act itself.” *Id.* Specifically, the court explained that because the statute did not contemplate liability for secondary actors, the regulation “intrud[ed] into the realm of law-

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making,” which Article I, Section 1 of the Constitution vests solely in Congress, not any independent agency. *Id.* at \*4.

Here, as in *Swallow*, the FEC lacks statutory authority to proceed against secondary actors such as Ms. Mercer. Whatever the CA employees may or may not have done, she cannot be liable under the Act for that conduct. Her own conduct, as an owner of CA with no involvement in the operations referenced in the complaint, is likewise not a valid subject for investigation because there has been no suggestion that she personally did anything that might have violated the Act, and indeed as a U.S. citizen she could *not* have violated the Act as alleged in the Common Cause complaint.

### Conclusion

Ms. Mercer is not alleged to have violated the Act, did not violate the Act, was unaware of any violations by CA employees, and cannot as a matter of law be held accountable for the actions of CA employees. We ask that the Commission close this matter as to Ms. Mercer as quickly as possible.

Sincerely,

A handwritten signature in black ink that reads "Mark C. Hansen". To the right of the signature, the letters "INKC" are handwritten.

Mark C. Hansen