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Jeff S. Jordan
Assistant General Counsel
Complaints Examination & Legal Administration
Federal Election Commission
1050 First Street, NE
Washington, DC 20463

VIA EMAIL: cela@fec.gov

Re: MUR 7432: Response to Complaint from John James for Senate, Inc. et al.

Dear Mr. Jordan:

We are writing this letter on behalf of John James for Senate, Inc. (the "Committee") and Timothy Caughlin, in his official capacity as Treasurer of the Committee, (collectively, the "Respondents"), in response to the Complaint filed in the above-referenced matter by Justin L. Brown, the Treasurer for Sandy Pensler, John James' primary election opponent. The Complaint was disingenuously filed for publicity, as it is based on mere speculation and inferences, and is centered around a gross misapplication of federal law. The asserted facts on their face do not support a reason to believe finding in this matter, and the Complaint should be dismissed.

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").[1] Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true.[2] Moreover, the Commission will dismiss a complaint when the allegations are refuted with sufficiently compelling evidence.[3] As explained in more detail below, the allegations made in the Complaint are both factually and

[1] *See* 11 C.F.R. § 111.4(a), (d).

[2] *See* MUR 4960, Commissioners Mason, Sandstrom, Smith and Thomas, Statement of Reasons (Dec. 21, 2001).

[3] *See id.*

legally flawed and do not support a reason to believe finding in this matter. The Complaint should be immediately dismissed.

Factual Background

John James is a candidate for U.S. Senate in Michigan. The Committee maintains a "John James" YouTube channel with approximately 100 publicly available video clips. On July 10, 2018, the Committee posted a video titled, "Liberal Sandy Pensler Mocks President Trump Just Like a Democrat!" This 30 second advertisement contains 28 seconds of various footage and audio clips of Sandy Pensler making insulting remarks towards President Trump. Six days later, an independent expenditure-only committee called Outsider PAC (the "PAC") published a 30 second advertisement featuring 10 seconds of the publicly available footage posted by the Committee, with the remaining 20 seconds featuring positive depictions of John James.

The Complaint

The Complaint contends that the Committee and PAC violated the standard of "independence" for expenditures and that the PAC republished a Committee advertisement, resulting in a prohibited in-kind contribution to the Committee. The Complaint alleges several far-reaching and unsubstantiated reasons as to why coordination may have occurred. The Complainant's piecemeal and unfounded approach to finding coordination includes allegations that the PAC used "identical footage of candidate Pensler" along with language and graphics, the close time frame in which both advertisements were published, the use of a common vendor, Grand River Strategies, and because the Complainant's media consultant "said so."

Legal Analysis

The Commission has made clear that these allegations alone do not provide a basis to find that a communication has been "republished." Furthermore, even if the PAC did "republish" a Committee advertisement, which it did not, Respondents do not have liability under the Act unless coordination took place. Because the Complaint does not allege any facts showing that coordination took place, and because Respondents did not in fact coordinate with PAC, the Commission should dismiss the Complaint.

Under the Act, "the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or authorized agents shall be considered an expenditure."[4] Commission regulations further provide that the republication of campaign materials "prepared by the candidate, the candidate's authorized committee, or an agent of the foregoing" is considered a contribution for the purposes of

[4] 52 U.S.C. § 30116(a)(7).

contribution limitations and reporting responsibilities of the person making the expenditure.[5] However, **the candidate who prepared the materials is not considered to have received an in-kind contribution and is not required to report an expenditure, unless the republication is a coordinated communication** under 11 C.F.R. §§ 109.21 or 109.37.[6] In other words, even if an outside group has made an in-kind contribution, the candidate is not deemed to have received such contribution unless the two groups have "coordinated" the communication.

To be "coordinated," an advertisement must meet a three-part test. It must be paid for by a third party; meet at least one of the content standards in 11 C.F.R. § 109.21(c); and meet at least one of the conduct standards in 11 C.F.R. § 109.21(d).[7] This advertisement only meets the first part of the test, as it was paid for by a third party. The Complaint puts forth no concrete examples of coordination, and fails to describe any specific conduct between the PAC and the Committee that satisfies the conduct prongs of the coordination standard as required under 11 C.F.R. § 109.21(d) beyond the use of a common vendor, and the similar publicly available video footage.

Many campaigns and committees utilize common vendors under the Commission's safe harbor. The Commission provides that none of the conduct standards are met if the vendor "has established and implemented a firewall" that is "designed and implemented to prohibit the flow of information between employees or consultants providing services for the person paying for the communications and those employees or consultants currently or previously providing services to the candidate.[8] In this case, Grand River Strategies has a firewall policy in place, which is designed to prevent the flow of information between its employees and agents who work separately for the Committee and other outside entities. Thus, the Complainant's argument fails, as the utilization of a common vendor does not automatically result in coordination, and the Complaint sets forth no examples of conduct which would result in coordination under the Act.

Conclusion

In presenting factually and legally unsubstantiated arguments, Mr. Brown has failed to demonstrate that the Respondents have violated any provision of the Act or the Commission's regulations. There are no facts alleged in the Complaint that constitute the conduct prong for a coordinated public communication, and the Commission has dismissed similar cases where a third party used some portion of publicly available campaign materials in a public communication paid for by the third party. We therefore respectfully request that the Commission recognize the legal and factual insufficiency of the Complaint on its face and immediately dismiss it.

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[5] 11 C.F.R. § 109.23(a).

[6] 11 C.F.R. § 109.23(a)(emphasis added).

[7] 11 C.F.R. § 109.21(a).

[8] 11 C.F.R. § 109.21(h).

Thank you for your prompt consideration of this matter, and please do not hesitate to contact me directly at (202) 572-8663 with any questions.

Respectfully submitted,

Charles R. Spies
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Counsel to John James for Senate, Inc.