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December 6, 2018

Federal Election Commission
 Office of Complaints Examination
 & Legal Administration
 Attn: Kathryn Ross, Paralegal
 1050 First Street, NE
 Washington, DC 20002

2018 DEC 10 AM 11:13
 OFFICE OF
 GENERAL COUNSEL

Re: MUR 7510

Dear Ms. Ross,

This response is submitted by the undersigned counsel on behalf of Katie Arrington, Katie Arrington for Congress, and Kathleen Randall, in her capacity as Treasurer of Katie Arrington for Congress, in connection with MUR 7510.

The Complainant alleges that Fix Our Flooding, Inc. produced and distributed a television advertisement that qualified as a coordinated communication with respect to the Respondents. As explained below, the Complaint should be dismissed with respect to the Respondents because no “conduct” prong of the coordinated communications test was satisfied. In the alternative, the Commission should find that Katie Arrington for Congress did not knowingly accept an impermissible corporate contribution and dismiss the Complaint.

Factual Background

Katie Arrington previously served as a South Carolina State Representative and was a candidate in the 2018 general election for the U.S. House of Representatives in the 1st District of South Carolina. (Ms. Arrington lost this election to Joe Cunningham.) Ms. Arrington lives near Charleston, South Carolina, where coastal and inland flooding is a serious and recurring issue. On June 22, 2018, Ms. Arrington was involved in a near-fatal car accident. Following this accident, Ms. Arrington strongly advocated for flooding solutions and explained publicly that she likely would not have survived if first responders had been unable to get her to the hospital due to flooding in what is known as the “hospital district” of Charleston.

This issue became a key element of Ms. Arrington’s public advocacy that she addressed whenever possible, including in many interviews with a variety of outlets. One such interview

was given to individuals associated with Fix Our Flooding, Inc. in August 2018. Fix Our Flooding reached out to Ms. Arrington and requested that she sit down with them to tell her story. Ms. Arrington viewed this as an opportunity to discuss an issue she feels very strongly about with a local organization. As she noted on her Facebook page, “when a non-profit group dedicated to fixing the flooding problems around MUSC asked me to sit down and tell my story on camera – I didn’t hesitate.” *See* Complaint at ¶ 16. As was previously reported,

Arrington campaign spokesman Andrew Boucher said Arrington sat for the interview with the nonprofit because she is passionate about the flooding issue

But Boucher insisted Arrington had no idea that the interview would be featured in a TV ad, let alone that it would air before the election.

Fix Our Flooding founder Matthew Eby confirmed that the group did not tell Arrington how the interview would be used.¹

At no time did Ms. Arrington or any representative of Fix Our Flooding discuss how the videotaped footage of Ms. Arrington’s interview would be used. *See* Affidavit of Katie Arrington at ¶ 3. Ms. Arrington did not request or suggest that Fix Our Flooding produce any advertisements or other promotional material using footage of her. *Id.* at ¶ 5. Ms. Arrington did not discuss any of her campaign’s non-public plans, projects, activities, or needs with any representative of Fix Our Flooding. *Id.* at ¶ 4.

The Fix Our Flooding advertisement that is the subject of this Complaint aired on or about August 23, 2018. As the news article referenced in the Complaint notes, Mr. Eby “tried to pull the ad before it aired,” but the ad “ended up airing anyway.” The advertisement aired only briefly. Ms. Arrington and her campaign first learned of the ad *after* it was already aired and, to the best of their knowledge, had been taken down by the sponsor. *See* Affidavit of Katie Arrington at ¶ 10. Ms. Arrington did sit for an interview with Fix Our Flooding representatives but had no involvement whatsoever with the advertisement at issue, did not ask, request, or suggest its creation, and never authorized or approved the advertisement.

Legal Analysis

The advertisement at issue would constitute a coordinated communication only if one of the conduct prongs was satisfied. Ms. Arrington affirms in her affidavit that she did not request that Fix Our Flooding produce the advertisement or suggest the advertisement to Fix Our Flooding. *See* Affidavit of Katie Arrington at ¶ 5. Ms. Arrington also affirms that she did not have substantial discussions about the advertisement with Fix Our Flooding. In fact, she had no discussions with Fix Our Flooding about the advertisement. *See* Affidavit of Katie Arrington at ¶ 3, 7.

¹ Jaime Lovegrove, *Flooding advocacy group pulls TV ad featuring Katie Arrington ahead of election*, Post and Courier (Aug. 23, 2018), https://www.postandcourier.com/politics/flooding-advocacy-group-pulls-tv-ad-featuring-katie-arrington-ahead/article_d310ef68-a25f-11e8-84ea-33ed7e3cd0ad.html.

The Complainant, however, contends that the “material involvement” standard is met, not simply because Ms. Arrington is featured in the ad, but because the Complainant believes “[t]here is clear and convincing evidence that Arrington and her principal campaign committee were materially involved in numerous decisions regarding the advertisement’s creation, production, and distribution.” See Complaint at ¶ 25, 26. As explained below, the Complainant is incorrect.

Under the “material involvement” standard, the question is whether the candidate or her authorized committee was “materially” involved in decisions regarding the content of the communication, the intended audience, the means or mode of the communication, the specific media outlet used, the timing or frequency of the communication, or its overall duration. 11 C.F.R. § 109.21(d)(2). The Explanation and Justification makes clear that the term “material involvement” has no precise meaning and overlaps with the “substantial discussion” standard. The “material involvement” standard “does not provide a ‘bright-line’ because its operation is necessarily fact-based.” Final Rule on Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 433 (Jan. 3, 2003). The Commission provided the following guidance:

[A] candidate, authorized committee, or political party committee is considered “materially involved” in the decisions enumerated in paragraph (d)(2) after *sharing information about plans, projects, activities, or needs* with the person making the communication, but only if this information is found to be material to any of the above-enumerated decisions related to the communication. Similarly, a candidate or political party committee is “materially involved in decisions” if the candidate, political party committee, or agent *conveys approval or disapproval of the other person’s plans*. The candidate or representatives of an authorized committee or political party committee need not be present or included during formal decisionmaking process but need only participate to the extent that he or she assists the ultimate decisionmaker, much like a lawyer who provides legal advice to a client is materially involved in a client’s decision even when the client ultimately makes the decision.

Id. at 434.²

² The Commission also included the following hypothetical:

Candidate A reads in the newspaper that the Payor Group is planning an advertising campaign urging voters to support Candidate A. Candidate A faxes over her own ad buying schedule to Payor Group, hoping that Payor Group will plan its own ad buying schedule around Candidate A’s schedule to maximize the effect of both ad campaigns. The Payor Group subsequently runs ads that are all on NBC and ABC during the 6:00 news hour and during the most expensive weekday timeslot on NBC, whereas Candidate A’s ads are run on CBS during the 6:00 news hour and during the most expensive time slot on CBS. When asked, Payor Group acknowledges that it received the fax from Candidate A, but says only that its plans for the timing of the campaign were in flux at the time they received the fax. The analysis under the “materially involved” conduct standard focuses on whether the fax constituted material involvement by the candidate in a decision regarding the timing of the Payor Group communications.

Id. at 434. Again, neither Ms. Arrington nor her campaign committee did anything remotely similar to providing an outside organization with (presumably) non-public media schedule information.

Neither Ms. Arrington nor her campaign committee did any of these things. Ms. Arrington sat for an interview; she did not share any non-public campaign plans and strategies. She did not convey approval or disapproval of the other person's plans; she was completely unaware of the other person's plans.

Instead, the Complainant contends that the material involvement standard is met because Ms. "Arrington looked directly into the camera." Complaint at ¶ 26. This is not evidence of material involvement; this is simply what happens when someone is interviewed. The Complainant also claims Ms. Arrington "appeared to read scripted lines." *Id.* This is also incorrect; Ms. Arrington was not reading a script. The Complaint suggests that because the press conference was held before the ad was released, this must have been some sort of signal regarding "the timing of the advertisement's release." Complaint at ¶ 29. As explained above, Ms. Arrington and her campaign had no knowledge of the advertisement until after it had already aired.

The Complainant cites Advisory Opinions 2003-25 (Weinzapfel) and 2004-01 (Bush/Kerr) in support of its "material involvement" theory. Advisory Opinion 2003-25 involved a proposed advertisement in which a federal candidate would appear on-screen to endorse a non-federal candidate and the non-federal candidate's campaign would pay to distribute the advertisement. The request assumed that the federal candidate would review the script in advance. The Commission characterized this script review as the federal candidate approving the content of the advertisement and indicated that this would constitute "material involvement." The Commission also opined, "Given the importance of and potential campaign implications for each public appearance by a Federal candidate, it is highly implausible that a Federal candidate would appear in a communication without being materially involved in one or more of the listed decisions regarding the communication." Advisory Opinion 2003-25 (Weinzapfel) at 6.

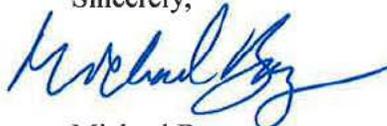
Advisory Opinion 2004-01 (Bush-Kerr) involved a proposed ad that would feature President Bush endorsing Alice Forgy Kerr in a special election. As in Advisory Opinion 2003-25, the endorsing candidate would review the final script in advance of his appearance in the advertisement. The Commission again indicated that prior script review and approval would constitute "material involvement."

In the context of endorsement advertisements, the Commission noted that it was "highly implausible" that a federal candidate could appear in an advertisement without being materially involved. The facts of the present matter, however, make clear that it is entirely possible that a candidate can sit for an interview about coastal flooding policy without having any knowledge that the footage would later be used in a pre-election advertisement. Ms. Arrington did not participate in any decisions regarding the creation, production, airing, or removal of the advertisement. She was unaware that Fix Our Flooding would use the interview footage about flood policy for any such communication and learned of the communication only after it aired. Any use of Ms. Arrington's interview footage in the Fix Our Flooding advertisement was without her knowledge, approval, or consent. At no time did Ms. Arrington knowingly or willingly participate in the inception or development of any such advertisement, nor was it her intention or understanding that Fix Our Flooding would produce any such advertisement.

Conclusion

Under the present facts, the “material involvement” standard is not met and the Fix Our Flooding advertisement does not constitute a coordinated communication. In the alternative, the Commission should dismiss the Complaint with respect to the Respondents as an exercise of prosecutorial discretion. As explained above, Ms. Arrington was unaware of how Fix Our Flooding would use the interview footage and in no way collaborated with Fix Our Flooding for the purpose of producing a pre-election television advertisement. The advertisement aired for only a very brief period and did not reference Ms. Arrington as a federal candidate. Finally, Ms. Arrington was unsuccessful in the general election. Taken together, the Commission’s resources are better devoted elsewhere.

Sincerely,

A handwritten signature in blue ink, appearing to read "Michael Bayes", with a long, sweeping underline.

Michael Bayes

Christine Fort

*Counsel to Katie Arrington and
Katie Arrington for Congress*

Attachment

AFFIDAVIT OF KATIE ARRINGTON

PERSONALLY came and appeared before me, the undersigned Notary, the within named KATIE ARRINGTON, and makes this her Statement and General Affidavit upon oath and affirmation of belief and personal knowledge that the following matters, facts and things set forth are true and correct to the best of her knowledge:

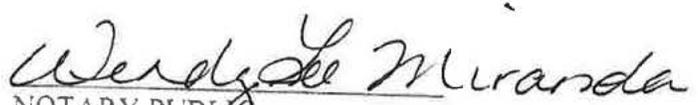
1. I am Katie Arrington. I am a resident of South Carolina and was a candidate for election to the U.S. House of Representatives in 2018.
2. Individuals who represented themselves as associated with an organized named Fix Our Flooding, Inc. requested to interview me in August 2018. It was my understanding at the time that Fix Our Flooding, Inc. was an organization working to find solutions to South Carolina's coastal flooding problems. I agreed to sit for this interview.
3. At no time did I discuss with any representative of Fix Our Flooding, Inc., how the videotaped interview footage would be used.
4. I did not discuss any of my campaign's non-public plans, projects, activities, or needs with any representative of Fix Our Flooding, Inc.
5. I did not request or suggest that Fix Our Flooding, Inc. produce any public communication using the videotaped interview footage
6. I had no knowledge of the creation, production, or distribution of the Fix Our Flooding advertisement before it was publicly distributed.
7. I had no discussions with any representative of Fix Our Flooding, Inc. regarding the Fix Our Flooding advertisement.
8. I did not authorize or approve the Fix Our Flooding advertisement.
9. I did not view the Fix Our Flooding advertisement until after it was publicly broadcast.
10. I first learned of the Fix Our Flooding advertisement after the advertisement first aired. It is my understanding that the Fix Our Flooding advertisement had already stopped airing at the time I first learned of it.
11. I had no involvement in the decision to stop airing the advertisement.

Notarized signature on following page

DATED this the 6 day of December, 2018


Signature of Affiant, Katie Arrington

SWORN to and subscribed before me, this 6th day of December, 2018


NOTARY PUBLIC

My Commission Expires:
February 28, 2022

