

FEDERAL ELECTION COMMISSION
FIRST GENERAL COUNSEL’S REPORT

MUR: 7510

DATE COMPLAINT FILED: Oct. 5, 2018

DATE OF NOTIFICATION: Oct. 12, 2018

DATE OF LAST RESPONSE: Dec. 6, 2018

DATE ACTIVATED: June 7, 2019

ELECTION CYCLE: 2018

EXPIRATION OF SOL: Aug. 23, 2023

COMPLAINANT:

Badge Humphries

RESPONDENTS:

Katie Arrington for Congress
 and Kathleen Randall
 in her official capacity as treasurer
 Katherine E. Arrington
 Fix Our Flooding, Inc.
 1st Street Foundation, Inc.
 Matthew Eby

RELEVANT STATUTES
 AND REGULATIONS:

52 U.S.C. § 30104(b)
 52 U.S.C. § 30118
 52 U.S.C. § 30120
 11 C.F.R. § 100.26
 11 C.F.R. § 109.20
 11 C.F.R. § 109.21
 11 C.F.R. § 110.11

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The Complaint alleges that Fix Our Flooding, Inc. (“FOF”) and Katie Arrington, a candidate for the U.S. House in South Carolina in the 2018 general election, and her principal campaign committee, Katie Arrington for Congress and Kathleen Randall in her official capacity as treasurer (“the Committee”), jointly produced and distributed a television advertisement featuring Arrington that qualified as a coordinated communication and resulted in a prohibited

1 in-kind contributions.¹ The ad, which aired in the Charleston, South Carolina area on August 23,
2 2018, prominently features an interview of Arrington discussing the dangers of coastal flooding.

3 Both Arrington and FOF acknowledge Arrington participated in a videotaped interview
4 with FOF, and that FOF used the footage to create the ad. But the respondents deny that
5 Arrington had any involvement with the creation of the ad after the interview was completed.²
6 FOF further asserts that it cancelled its broadcast media buy before the advertisement ever aired
7 and did not authorize or pay for placement of the ad.³

8 The factual record indicates that the FOF's advertisement constitutes a coordinated
9 communication under Commission regulations. Nevertheless, as discussed below, under the
10 circumstances of this matter where respondents discontinued the ad after it aired for one day, we
11 recommend that the Commission exercise its prosecutorial discretion to dismiss the allegations
12 that: (1) FOF and First Street made a prohibited corporate in-kind contribution in the form of a
13 coordinated communication to the Arrington campaign in violation of 52 U.S.C. § 30118(a); (2)
14 Matthew Eby consented to the making of a prohibited in-kind contribution to the Arrington
15 campaign in violation of 52 U.S.C. § 30118(a); (3) Arrington and the Committee knowingly
16 accepted a prohibited corporate in-kind contribution in violation of 52 U.S.C. § 30118(a); and (4)
17 the Committee failed to report such contribution in violation of 52 U.S.C. § 30104(b).⁴ We

¹ Compl. at 1 (Oct. 5, 2018).

² FOF Resp. at 3, 4 (Nov. 2, 2018); Arrington Resp. (Dec. 10, 2018) (citing Katie Arrington Decl. ¶ 3 (Dec. 6, 2018)).

³ FOF Resp. at 3. The Complaint also alleges that 1st Street Foundation, Inc. ("First Street") and Matthew Eby, in his capacity as Executive Director, were involved with distributing the communication. First Street states that the Complaint should be dismissed because it is a separate corporate entity from FOF and the Complaint alleges no violation of the Act as to them. *See* First Street Resp. at 1 (Nov. 8, 2018).

⁴ *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

further recommend that the Commission issue a letter of caution to respondents regarding the coordination allegations.

Finally, the Complaint also alleges that the advertisement appears to violate the disclaimer requirements.⁵ However, we lack sufficient information to determine whether the advertisement requires a disclaimer because FOF is not alleged to be a political committee, and the advertisement does not appear to contain express advocacy or solicit contributions.⁶ Accordingly, we recommend that the Commission dismiss the allegation that FOF violated 52 U.S.C. § 30120(a) by failing to include an appropriate disclaimer in its advertisement.

II. FACTUAL BACKGROUND

Katie Arrington served as a South Carolina State Representative⁷ and was a candidate in the 2018 general election for the U.S. House of Representatives in South Carolina's First congressional district.⁸ Katie Arrington for Congress is her principal campaign committee and Kathleen Randall is the committee's treasurer.⁹

FOF is a tax-exempt Delaware corporation that was incorporated on August 10, 2018.¹⁰ FOF states that it is a Section 501(c)(4) social welfare organization under the Internal Revenue Code, and its activities include "issue advocacy focused on educating citizens in coastal areas

⁵ Compl. at 12, n.33.

⁶ 52 U.S.C. § 30120(a), 11 C.F.R. §§ 110.11(b)(2), 110.11(c)(3)(iii).

⁷ See <https://www.scstatehouse.gov/member.php?code=0052272721>.

⁸ Katie Arrington, FEC Form 2, Amended Statement of Candidacy (Oct. 23, 2018). Arrington defeated Mark Sanford in the Republican primary but lost the general election to Democratic candidate Joe Cunningham. <https://www.enr-scvotes.org/SC/92124/Web02-state.222648/#/>.

⁹ Katie Arrington for Congress, FEC Form 1, Amended Statement of Organization (Oct. 23, 2018).

¹⁰ See State of Delaware, Division of Corporations, Entity Info. (Fix Our Flooding) in file for MUR 7510.

1 about sea level rise and the associated flooding, along with practical solutions that can be
 2 implemented to prevent it.”¹¹ Matthew Eby is FOF's Director.¹² Other than the ad featuring
 3 Arrington, FOF does not appear to have paid for any other communications.

4 FOF is the advocacy arm of First Street,¹³ a Section 501(c)(3) organization registered in
 5 the District of Columbia and in New York.¹⁴ First Street focuses on providing education on sea
 6 level rise.¹⁵ Eby is the Founder and Executive Director of First Street.¹⁶

7 On August 21, 2018, Arrington held a press conference with municipal, county and state
 8 leaders to announce how she would address flooding in the Lowcountry of South Carolina.¹⁷
 9 Arrington's campaign website identified infrastructure/flooding as one of nine key issues.¹⁸

10 On August 23, 2018, two days after the press conference, a 60-second television
 11 advertisement featuring Arrington aired on WTAT Fox 24, a local Charleston television station,
 12 and possibly other Charleston area stations.¹⁹ The transcript of the ad follows:

¹¹ FOF Resp. at 2.

¹² *See* Designation of Counsel for FOF (Oct. 24, 2018).

¹³ First Street Resp. at 2.

¹⁴ *Id.* First Street was incorporated in DC on October 27, 2016 and in New York on February 6, 2019. *See* DC Department of Consumer and Regulatory Affairs, Filing, 1st Street Foundation, Inc.; NYS Department of State, Division of Corporations, Entity Info. (1st Street Foundation), available in file for MUR 7510.

¹⁵ *See* First Street Resp. at 2.

¹⁶ *Id.*

¹⁷ *See* Compl. at 3 (citing Press Release, Katie Arrington for Congress, Katie Arrington Announces Lowcountry Plan (Aug. 21, 2018), available at <https://www.votekatiearrington.com/2018108121/arringtonannouncesfloodingplan/>; Heather Olinger, Katie Arrington announces Lowcountry flooding plan, V/CBD-TV News 2 (Aug. 21, 2018), available at <https://www.counton2.com/news/local-news/katie-arrington-announces-lowcountry-floodingplan/1385722824>).

¹⁸ *See* <https://www.votekatiearrington.com/2018/08/02/invest-in-critical-infrastructure/>.

¹⁹ *See* Compl. at 4-5 (citing Jamie Lovegrove, *Flooding Advocacy Group Pulls TV Ad Featuring Katie Arrington Ahead of Election*, THE POST AND COURIER, Aug. 24, 2018).

Fix Our Flooding Ad (60-second ad)²⁰

On Screen	Audio
Katie Arrington On Screen Talking Graphic next to Arrington: Katie Arrington South Carolina Representative	Katie Arrington: My friend and I were driving down to Hilton Head and we're in a head on collision with a drunk driver. Time was of the essence.
Graphic <i>The Post and Courier</i> Newspaper Headline: Katie Arrington, in critical but stable condition, to face more surgery after crash. By Schuyler Kropf, June 23, 2018 Graphic <i>The State</i> Newspaper Headline: South Carolina lawmaker Arrington had two major surgeries Sunday, but 'full recovery' expected. By Noah Feit, June 24, 2018 Images of Flooding in Charleston While Arrington is Speaking Graphic: Fix Our Flooding logo Watch Katie's full story at Fix Our Flooding.org. Paid For By Fix Our Flooding, Inc.	Katie Arrington: If that team at MUSC were not able to take us, how rapidly they were able to get to us that night, neither one of us would have survived. High tide and a decent rain I wouldn't be here. If they had to go around to avoid the cross town I wouldn't be here. This is a problem. When seconds count and you don't have that option. How do you save people's lives? We have sea levels rising. We have some of the most valuable resources on the peninsula. We have MUSC. We have Roeper. We have the VA. Literally hundreds of yards from the harbor. We need to start looking at it in a proactive manner. We don't right now. It's reactive. We need to build a sea wall. Protect the hospital district in South Carolina. It's simple. This community. The low country. Our life is worth it.

According to a news article cited by the Complaint, filings with the Federal Communications Commission ("FCC") indicate that FOF paid at least \$75,000 to air the ad from August 23 through September 6 on three different local television stations.²¹ In addition, FOF reportedly hired Push Digital, a business and political consulting firm to manage the creative aspects of the ad campaign.²² The firm also provided services to the Arrington Committee, as

²⁰ See *Fix Our Flooding Katie Arrington ad*, (Aug. 23, 2018), available at https://www.postandcourier.com/fix-our-flooding-katie-arrington-ad/video_b7525732-a712-11e8-b7a2-4f2446d5f418.html. A 30-second version of the same ad also aired. See *Issue/FixOurFlooding Katie Arrington*, Kantar Media (Aug. 23, 2018), available at http://mycmag.kantarmediana.com/KM1cmagvidbin2/ISSUE_FIXOURFLOODING_KATIE_ARRINGTON.html.

²¹ See Compl. at 5 (citing Lovegrove, *supra* note 19).

²² See *id.* at 6.

1 reflected on its disclosure reports.²³ However, FOF purportedly sought to pull the ad before it
 2 ran, but the ad ran for one day on August 23rd.²⁴ In its response, FOF admits it purchased a
 3 media buy but claims it cancelled the buy on August 22, 2018.²⁵ FOF contends that the ad was
 4 somehow “leaked.”²⁶

5 Publicly available filings from the FCC show that media buyer Tanya Renicker/GRP
 6 Buying LLC, filed an “Agreement Form For Non-Candidate/Issue Advertisements” on July 12,
 7 2018, requesting broadcast time for FOF.²⁷ Eby is listed on the form as the officer/director for
 8 FOF. Additional filings for the ad buy include contracts with various broadcasters showing
 9 contract dates from August 22nd through September 6, 2018 and cost information.²⁸ The
 10 scheduled start date for the ad campaign appears to have been changed from August 22nd to
 11 August 23rd.²⁹ A document dated August 27, 2018, five days after the ad first aired, includes an
 12 instruction to cancel the ad buy order on WCSC-TV: “Cancel Order Before Start Per Buyer’s
 13 Direction, Total is \$0, Please Confirm Thanks Emily.”³⁰ The filing does not indicate when the
 14 cancel order was confirmed and acted on.

²³ Disclosure reports filed by the Committee show a \$2,500 disbursement to Push Digital on September 7, 2017. *See* 2017 October Quarterly Report, Schedule B (FEC Form 3) at 24.

²⁴ Lovegrove, *supra* note 19.

²⁵ FOF Resp. at 4-5.

²⁶ *Id.* at 5.

²⁷ *See* FCC Filings at [https://publicfiles.fcc.gov/find/fix%20our%20flooding/page-offset-0/order-best-match/filter-\[\]/#files](https://publicfiles.fcc.gov/find/fix%20our%20flooding/page-offset-0/order-best-match/filter-[]/#files), available in file for MUR 7510.

²⁸ *Id.*

²⁹ *See supra* note 27.

³⁰ *Id.* *See* FCC filings, FOF Cancel Order, available in file for MUR 7510.

The day after the ad aired, Arrington posted a link of the advertisement on her campaign's Facebook page along with *The Post and Courier* article describing the withdrawal of the ad.³¹ In addition, Arrington posted a rebuttal to the newspaper article in which she defends her decision to provide the interview to FOF: "[s]o 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. I want to fix this problem. It's why I'm running for Congress in the first place"³²

III. LEGAL ANALYSIS

A. FOF Appears to Have Made A Prohibited In-Kind Contribution, but the Allegation Warrants Dismissal Given the Circumstances and Amount in Violation

The Act prohibits corporations from making contributions to federal candidates or their committees and corporate officers and directors from consenting to such contributions.³³ It also prohibits federal candidates or their committees from knowingly accepting corporate contributions.³⁴

Expenditures made by any person "in cooperation, consultation, or concert with, or at the request or suggestion of" a candidate or his authorized committee or agent qualify as an in-kind contribution to the candidate and must be reported as expenditures made by the candidate's authorized committee.³⁵ A communication that is coordinated with a candidate or his authorized

³¹ See Compl. at 6-7 (citing https://www.facebook.com/pg/VoteKatieArrington/posts/?ref=page_internal).

³² *Id.*

³³ 52 U.S.C. § 30118(a).

³⁴ *Id.*

³⁵ 52 U.S.C. § 30116(a)(7)(B)(i); 11 C.F.R. § 109.20(b).

committee is considered an in-kind contribution and is subject to the limits, prohibitions, and reporting requirements of the Act.³⁶ The Commission's regulations provide that a communication is coordinated with a candidate, his authorized committee, or agent of either, if it meets a three-prong test: (1) it is paid for, in whole or in part, by a person other than the candidate or authorized committee; (2) it satisfies a content standard in 11 C.F.R. § 109.21(c);³⁷ and (3) it satisfies a conduct standard in 11 C.F.R. § 109.21(d).³⁸ All three prongs must be satisfied for a communication to be considered coordinated.³⁹

1. Payment

The payment prong is likely satisfied because the ad appears to have been paid for by FOF, a third party. The ad displays the disclaimer, "Paid for by Fix Our Flooding, Inc." Further, FOF admits to creating the ad campaign,⁴⁰ and the record demonstrates that FOF incurred certain expenses as described below.

In its response, FOF disputes whether the payment prong was met, contending that while it purchased a media buy to broadcast the ad, it cancelled the buy before the ad was supposed to

³⁶ 52 U.S.C. § 30116; 11 C.F.R. § 109.21(b).

³⁷ The content standards include: (1) a communication that is an electioneering communication under 11 C.F.R. § 100.29(a); (2) a public communication that disseminates, distributes, or republishes campaign materials; (3) a public communication containing express advocacy; (4) a public communication that, in relevant part, refers to a clearly identified House or Senate candidate, is publicly distributed or disseminated 90 days or fewer before a primary or general election, and is directed to voters in the jurisdiction of the clearly identified candidate, and (5) a public communication that is the functional equivalent of express advocacy. 11 C.F.R. § 109.21(c).

³⁸ The six types of conduct between the payor and the candidate's committee, whether or not there is formal agreement or collaboration, which can satisfy the conduct prong, include: (1) a request or suggestion; (2) material involvement; (3) substantial discussion; (4) common vendor; (5) former employee or independent contractor; and (6) dissemination, distribution, or republication of campaign material. 11 C.F.R. § 109.21(d).

³⁹ 11 C.F.R. § 109.21(a); *see also* Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 453 (Jan. 3, 2003) (Explanation and Justification) ("E&J").

⁴⁰ FOF Resp. at 2.

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1 air and that “no advertisement including the Arrington Interview was publicly aired.”⁴¹ Rather,
 2 FOF claims that the ad was “leaked,” without providing any details.⁴² The contemporary press
 3 report cited by the Complaint, however, indicates that the ad actually did air publicly on WTAT
 4 Fox 24 on August 23, 2018, and records indicate the ad was pre-paid.⁴³ The same press report
 5 quotes FOF representative Eby who appears to acknowledge the ad was broadcast when he
 6 explains that the organization decided to “pull that particular video” out of concern that the ad
 7 may be viewed as electoral.⁴⁴ Arrington’s references to the ad on her Facebook account further
 8 support the notion that the ad actually did air.⁴⁵ In any event, FOF did not provide details to
 9 support its assertion that the ad never ran, and the record suggests that FOF incurred some costs
 10 given that the ad aired for one day.⁴⁶ Finally, in addition to the broadcast fees paid to the
 11 television vendors, it appears that the FOF likely paid Push Digital for the production costs of the
 12 ad, and these payments also satisfy the payment prong.

⁴¹ *Id.*

⁴² *Id.* at 3.

⁴³ See Lovegrove, *supra* n.19. FCC filings for the FOF ad buy contain the notation: “this is a cash in advance schedule.” See FCC Filings, FOF Cancel Order, available in file for MUR 7510.

⁴⁴ Lovegrove, *supra* n.19 (“Our goal was never to engage in electoral politics, which is why when we heard her specific story would be seen by some as such, we decided to pull that particular video and save it for after the election, regardless of the outcome.”).

⁴⁵ See Compl. at 6-7.

⁴⁶ Although FOF says it canceled the ad on August 22, 2018, the only document to support the cancel order is dated August 27, 2019 for WCSC TV, well after the August 23, 2018 broadcast date.

2. Content

The content prong is satisfied because the TV ad is a public communication⁴⁷ that refers to a clearly identified federal candidate for the U.S. House of Representatives, Arrington, and was publicly disseminated in the candidate's jurisdiction, the First Congressional District (Charleston area), on August 23, 2018, within 90 days of the November 6, 2018 general election. The definition of "clearly identified" includes, *inter alia*, the name or photograph of the candidate.⁴⁸ Thus, the element is satisfied if the person running for office appears in the communication.⁴⁹

FOF disputes the content standard is met because Arrington is identified in the ad as "Katie Arrington, South Carolina Representative" and her campaign for federal office is not mentioned. For purposes of this content standard, however, the communication need not reference a federal candidacy or contain any political message. In promulgating section 109.21(c)(4), the Commission emphasized that the provision was a "bright line rule" meant to "focus[] as much as possible on the face of the public communication 'to minimize' characterization of the meaning or the content of communication, or inquiry into the subjective effect of the communication on the . . . viewer"⁵⁰ Further, it does not appear that the TV ad qualifies for any of the other safe harbor provisions for coordinated communications: it is not a

⁴⁷ A public communication is a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising. 11 C.F.R. § 100.26.

⁴⁸ The term "clearly identified" means the candidate's name, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference. 52 U.S.C. § 30101(18); 11 C.F.R. § 100.17.

⁴⁹ See Factual & Legal Analysis at 3, MUR 5410 (Oberweis) (content standard met even though ad did not reference elections, voting, or the candidacy); Factual & Legal Analysis at 4, MUR 5517 (Stork)(same).

⁵⁰ See E&J, 68 Fed. Reg. at 421, 434.

response to an inquiry about legislative or policy issues;⁵¹ and does not involve candidate endorsements and solicitations,⁵² the establishment or use of a firewall in connection with a commercial vendor or former employee,⁵³ or a communication for commercial transactions.⁵⁴

3. Conduct

Both Arrington and FOF admit that Arrington agreed to participate in a 32-minute videotaped interview with FOF, and that FOF used the footage to create the ad. But respondents deny that Arrington had any involvement with the creation of the ad after the interview was completed.⁵⁵ FOF contends that the conduct prong was not met because it exercised “complete control” of the use of the footage, but this is not the standard for finding whether an advertisement was coordinated. Moreover, while Arrington denies requesting, suggesting, authorizing, approving, being materially involved in the ad in her affidavit, she does not address whether any of her agents had knowledge of or involvement in decisions regarding the ad. In

⁵¹ 11 C.F.R. § 109.21(f).

⁵² *Id.* § 109.21(g).

⁵³ *Id.* § 109.21(h).

⁵⁴ *See id.* § 109.21(i). In prior matters involving public service type announcements (“PSAs”) where the coordination standard appears to have been met, the Commission exercised prosecutorial discretion and dismissed the matters where, under the overall circumstances, further enforcement action would not be a prudent use of the Commission’s limited resources. *See* MUR 6020 (Alliance for Climate Protection) (dismissal where the candidate, Speaker of the House of Representatives Nancy Pelosi and former Speaker Newt Gingrich appeared together in ads paid for by an environmental group and disseminated before the primary election in which Pelosi was a candidate, because neither the candidate nor the committee had any input as to when the communications were disseminated and the communications’ focus was a public policy issue as opposed to her candidacy); *see also* MUR 6147 (Kansas City Chiefs Football Club, Inc.) (dismissal where the candidate appeared in a communication paid for by a third party and disseminated two days before the general election because the communication was prepared in furtherance of a tribute to military personnel and did not promote or support his candidacy).

⁵⁵ FOF Resp. at 3, 4; Arrington Resp., Arrington Decl.

fact, the available information indicates that the “substantial discussion” and “materially involved” standards of the conduct prong were met.⁵⁶

The “substantial discussion” standard is met when a communication is created, produced or distributed after one or more substantial discussions between the person paying for the communication and the candidate.⁵⁷ A discussion is “substantial” if the information about the plans, projects, activities or needs of the candidate is conveyed to the person paying for the communication, and that information is material to the creation, production or distribution of the communication.⁵⁸ This standard appears to have been met: the TV ad was created from a 32-minute private videotaped interview Arrington gave to FOF, where the subject at issue — coastal flooding — was a focus of the candidate’s campaign and the subject of a press conference the candidate held two days before the ad aired.

In addition, Arrington appears to have been materially involved in one or more decisions regarding the TV ad. This conduct standard is met where the candidate or candidate’s agent is materially involved in certain decisions regarding the communication, including the communication’s content, the means or mode of the communication, the specific media outlets to be used, and the timing or frequency of the communication.⁵⁹ A candidate, committee, or agent is “materially involved in decisions” “after sharing information about plans, projects, activities,

⁵⁶ While FOF and the Committee used the same vendor, Push Digital, that fact is insufficient, alone, to show coordination. The “common vendor” standard also requires that the commercial vendor have previously provided certain enumerated services to the candidate identified in the communication during the previous 120 days. Here, the services to the candidate appear to have been provided in September 2017, outside the 120-day period.

⁵⁷ 11 C.F.R. § 109.21(d)(3). The other conduct standards—common vendor, former employee, and republication of campaign materials do not appear to be relevant here.

⁵⁸ *Id.*

⁵⁹ *Id.* § 109.21(d)(2).

1 or needs with the person making the communication, but only if this information is found to be
2 material to any of the above-enumerated decisions related to the communication,” or if the
3 candidate, committee, or agent “conveys approval or disapproval of the other person’s plans.”⁶⁰
4 A federal candidate who appears or speaks in a communication creates the presumption that the
5 federal candidate was “materially involved” in the content of the communication and thus may
6 satisfy the conduct prong.⁶¹ As the Commission has previously observed, “[g]iven the
7 importance of and potential campaign implications for each public appearance by a Federal
8 candidate, it is highly implausible that a Federal candidate would appear in a communication
9 without being materially involved in one or more of the listed decisions regarding the
10 communication.”⁶²

11 Here, Arrington’s 30-minute interview with FOF formed the main substance of the
12 advertisement and creates the presumption that she was materially involved in the ad. Moreover,
13 coastal flooding was a key issue in Arrington’s campaign, as evidenced by the press conference
14 held two days before the scheduled launch of the TV ad. Indeed, Arrington appears to have
15 conveyed her approval of the ad given that she posted the full ad on her campaign website.

16 Although it appears that the advertisement met the coordinated communication standards,
17 we recommend that the Commission not pursue the allegations further in light of the
18 circumstances of the matter and its resources. The available information shows that FOF
19 apparently cancelled the media buy and the ad campaign in response to reports suggesting that it

⁶⁰ *Id.*

⁶¹ *See id.* § 109.21(d)(2)(i); E&J, 68 Fed. Reg. at 434; Advisory Op. 2003-25 (Weinzapfel). Further, the Commission has noted that coordinating advertising schedules could satisfy the “material involvement” conduct standard. *See* E&J, 68 Fed. Reg. at 421, 434.

⁶² Advisory Op. 2003-25 (Weinzapfel) at 6 (citing 11 C.F.R. § 109.21(d)(2)).

might be a coordinated communication. Thus, the Respondents appeared to have discontinued their activities shortly after the ad first aired. Further, the amount in violation is likely reduced due to the ad only having been aired for one day. The records show that the original contract for \$80,000 called for a run from August 23 through September 6 on three different television stations. We therefore recommend the Commission dismiss the coordination allegations,⁶³ issue a letter of caution to Respondents, and close the file.

B. The Factual Record Does Not Support a Reasonable Inference that FOF's Advertisement Required an Appropriate Disclaimer

The Act and Commission regulations require that all public communications, as defined in 11 C.F.R. § 100.26, made by a political committee include a disclaimer.⁶⁴ In addition, any person who makes a disbursement for a public communication that expressly advocates the election or defeat of a clearly identified candidate or solicits a contribution must include a disclaimer on any such communications.⁶⁵ A “public communication” includes, *inter alia*, broadcast, cable, or satellite communications.⁶⁶

If a communication, including any solicitation, is authorized by the candidate or candidate committee but paid for by another person, the communication must identify the person who paid for it and state that it was authorized by the candidate or authorized committee of a candidate.⁶⁷ If not authorized or financed by any candidate or campaign, the notice must state the communication is not authorized by any candidate or candidate's committee, identify the

⁶³ *Heckler*, 470 U.S. at 831.

⁶⁴ 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a)(1).

⁶⁵ 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a)(2), (3).

⁶⁶ 11 C.F.R. § 100.26.

⁶⁷ *Id.* § 110.11(b)(2).

entity that paid for the communication and provide at least one of the following: the payor's permanent street address, telephone number, or website address.⁶⁸ Additional requirements apply for print, television, and radio ads.⁶⁹

Here, the Complaint states without elaboration that the disclaimer in FOF's ad violates the Act and Commission regulations. However, because the advertisement does not appear to contain express advocacy⁷⁰ or solicit contributions and the available information does not indicate that FOF is a political committee, it does not appear that a disclaimer meeting the statutory and regulatory requirements was necessary. Accordingly, we recommend the Commission dismiss the allegation that FOF violated 52 U.S.C. § 30120(a) by failing to include an appropriate disclaimer.

⁶⁸ *Id.* § 110.11(b)(3).

⁶⁹ *See id.* § 110.11(c)(3), (4) (setting forth specific requirements for advertisements that are authorized by candidates and advertisements not authorized by candidates).

⁷⁰ In determining whether a communication contains express advocacy, the Commission analyzes the message under either 11 C.F.R. § 100.22(a) or § 100.22(b). A communication expressly advocates the election or defeat of a clearly identified candidate under 11 C.F.R. § 100.22(a) when it uses phrases such as those specifically enumerated in the text of the regulation (*e.g.*, "vote for the President," "re-elect your Congressman," "support the Democratic nominee") or contains campaign slogans or individual words that "in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)" 11 C.F.R. § 100.22(a). Under 11 C.F.R. § 100.22(b), a communication constitutes express advocacy if "[w]hen taken as a whole and with limited reference to external events, such as the proximity to the election, [the communication] could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because — (1) [t]he electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) [r]easonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action." 11 C.F.R. § 100.22(b).

IV. RECOMMENDATIONS

1. Dismiss the allegation that Katherine E. Arrington and Katie Arrington for Congress and Kathleen Randall in her official capacity as treasurer, violated 52 U.S.C. § 30118(a) by knowingly accepting a prohibited in-kind contribution from Fix Our Flooding and 1st Street Foundation; and Katie Arrington for Congress and Kathleen Randall in her official capacity as treasurer, violated 52 U.S.C. §30104(b) by failing to report the contribution;
2. Dismiss the allegation that Matthew Eby, as Director of Fix Our Flooding, and Executive Director of 1st Street Foundation, Inc., violated 52 U.S.C. § 30118(a) by consenting to the making of a prohibited in-kind contribution to the Arrington campaign;
3. Dismiss the allegation that Fix Our Flooding, Inc. and 1st Street Foundation, Inc. violated 52 U.S.C. § 30118(a) by making a prohibited in-kind contribution to the Arrington campaign;
4. Dismiss the allegation that Fix Our Flooding, Inc. violated 52 U.S.C. § 30120(a) by failing to include an appropriate disclaimer;
5. Approve the attached Factual and Legal Analysis;
7. Approve the appropriate letters; and
8. Close the file.

Lisa J. Stevenson
Acting General Counsel

Charles Kitcher
Acting Associate General Counsel
for Enforcement

10.15.2019
Date

Peter J. Blumberg
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