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Re: MUR 7618

Dear Mr. Jordan:

We write as counsel to Dan McCready, McCready for Congress (the "***Committee***"), and Holly Giarraputo in her official capacity as Treasurer of the Committee, (collectively, "***Respondents***"), regarding the complaint filed by the Patriots Foundation dated June 14, 2019 (the "***Complaint***").

The Complaint alleges that the Committee knowingly accepted legal services from Double Time Capital, LLC ("***DTC***") and, as a result, violated 52 U.S.C. §§ 30118(a), 30125(e) of the Federal Election Campaign Act of 1971, as amended (the "***Act***") and Federal Election Commission ("***FEC***" or "***Commission***") regulations. These allegations are without merit. Accordingly, the FEC should find no reason to believe that a violation has occurred and dismiss this matter.

I. Factual Background

Dan McCready is a candidate for the Ninth Congressional District in North Carolina for the 2019 special election. His campaign committee is "McCready for Congress." Mr. McCready was also a candidate in the 2018 general election for the same congressional district. The 2019 special election was called when the North Carolina State Board of Elections unanimously determined that the 2018 general election was tainted by systemic election fraud.[1]

Perkins Coie has represented the Committee since Mr. McCready launched his first congressional campaign in May 2017. According to the FEC's website, the Committee has paid Perkins Coie LLP $261,062.05 for legal services from May 2017 through June 30, 2019. Perkins Coie's representation of McCready for Congress has been in the public spotlight. In October 2018, Congressional Leadership Fund ("***CLF***"), a Super PAC, aired an attack ad accusing Mr.

[1] Amy Gardner, *In N.C., a surprise: In the end, everyone agreed it was election fraud*, WASH. POST (Feb. 23, 2019), https://www.washingtonpost.com/politics/in-nc-a-surprise-in-the-end-everyone-agreed-it-was-election-fraud/2019/02/22/52e9f226-36c5-11e9-854a-7a14d7fec96a_story.html.

McCready of opposing middle class tax cuts, an attack that as deemed "false" by PolitiFact.[2] Perkins Coie penned a letter to television stations urging that the ads be removed from the airwaves for being false and defamatory. Perkins Coie lawyers Marc E. Elias and Jonathan S. Berkon represented the Committee and Mr. McCready during the post-election dispute over election fraud.[3] From May 28, 2019 to June 14, 2019 – the relevant period in question, according to Complainant – Perkins Coie billed the Committee more than $16,000 for legal services. Robinson Bradshaw & Hinson, P.A. ("***Robinson Bradshaw***"), the firm that sent the letters to CLF and the National Republican Congressional Committee ("***NRCC***"), is not counsel to the Committee.[4] And Perkins Coie is not counsel to DTC.

In May 2019, Fox News published an article that included damaging allegations about Double Time Capital, the solar energy company that Mr. McCready co-founded along with fellow Iraq War veteran, Rye Barcott. The article read, in part:[5]

> McCready is the co-founder and Managing Partner at Double Time Capital, holding reportedly between $1 and $5 million in assets from the company, according to the financial disclosure statement filed in April.
>
> The company has heavily invested in utility-scale solar farms in North Carolina and nearly 40 projects that produce about 10 percent of the state's solar power. Most of the investment went to Strata Solar, the State's largest solar company, according to Charlotte Business Journal.
>
> Yet Strata Solar has been working with Huawei, the embattled Chinese technology company, since at least 2016 despite repeated warnings that the company may pose a national security risk to the U.S.

In the ensuing days, CLF made even more serious allegations regarding DTC. Through a spokesperson, CLF charged that "'[d]espite repeated warnings,' @McCreadyForNC's companies built their solar farms using inverters exclusively from a Chinese congolmerate (sic) 11 Senators were concerned posed national security risks to the American power grid."[6] CLF alleged that McCready "used dodgy parts at his solar plants that 11 U.S. Senators said are a grave risk to

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[2] Paul Specht, *Attack ad distorts McCready's position on tax cuts,* POLITIFACT NORTH CAROLINA, (Oct. 17, 2018), https://www.politifact.com/north-carolina/statements/2018/oct/17/congressional-leadership-fund/attack-ad-distorts-mccreadys-position-tax-cuts/.
[3] Joe Bruno, @JoeBrunoWSOC9 (Dec. 24, 2018), https://twitter.com/joebrunowsoc9/status/1077225416795004929.
[4] In 2018, Robinson Bradshaw provided legal services to McCready for Congress solely in connection with cyber security. This representation is completely unrelated to the legal services in question in this Complaint.
[5] Luke Mikelionis, *North Carolina Dem Candidate Vows to 'Get Tough' with China - Despite Investing in Company That Outsourced to China*, FOX NEWS (May 28, 2019), https://www.foxnews.com/politics/north-carolina-democrat-dan-mccready-china-outsource.
[6] Calvin Moore, @CalvinMoore_ (May 28, 2019), https://twitter.com/CalvinMoore_/status/1133357017022832641.

national security."[7] CLF also claimed that McCready "built his solar farms using parts 11 Senators warned posed grave national security risks to the American power grid."[8] The NRCC made similar charges, accusing McCready's actions of "threatening our national security."[9]

For candidates, these run-of-the-mill attacks on social media are part of the everyday hum of campaign life. They barely draw notice from actual voters, who tune out most of the back-and-forth insults. For risk-averse companies, however, allegations like these can cause sustained reputational damage and threaten the bottom line, if left unanswered. In the 1990s, for example, years of attacks on the Rose Law Firm – where Hillary Clinton once worked – severely damaged the firm's reputation and financial prospects. In a 1994 article titled "Rose Law Firm, Arkansas Power, Slips as It Steps Onto a Bigger Stage," the New York Times reported that "[t]he Rose firm, which made itself a dominant power in its home state, is now suffering under the unforgiving glare of publicity."[10] Thirteen years later, in 2007, Politico reported that "[t]he aftermath of the spotlight cast by those scandals has been tough to overcome for the oldest law firm west of the Mississippi. These days, sources say, Rose is a paranoid shell of its former self. According to a legal directory, Rose employed 32 lawyers this year, down from the 53 that were listed in 1991, when then-Gov. Bill Clinton launched his presidential bid."[11]

It is no surprise that, in recent years, companies have been more aggressive in publicly defending themselves from attacks launched in the heat of political campaigns. In 2012, after being the subject of millions of dollars in negative television ads, Bain Capital sent a letter to investors defending its business reputation from political attacks.[12] When Mary Burke challenged Governor Scott Walker in 2014, her family's bicycle company faced withering attacks from Walker's campaign. The company fought back publicly. A Wisconsin newspaper reported that Trek's president (and the candidate's brother) "said he hadn't planned to publicly comment on the governor's race but felt the need to speak up after seeing 'Trek being raked over the coals for things that are false.'"[13] In 2012, now-Congressman Greg Gianforte sued the Montana

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[7] Cong. Leadership Fund, @CLFSuperPAC (May 28, 2019), https://twitter.com/CLFSuperPAC/status/1133402133456412672.
[8] Cong. Leadership Fund, @CLFSuperPAC (May 28, 2019), https://twitter.com/CLFSuperPAC/status/1133362634470907904.
[9] Camille M. Gallo, @CamilleGallo (May 29, 2019), https://twitter.com/camillegallo/status/1133757970137980928.
[10] Stephen Labaton, *Rose Law Firm, Arkansas Power, Slips as It Steps Onto a Bigger Stage*, N.Y. TIMES (Feb. 26, 1994), https://www.nytimes.com/1994/02/26/us/rose-law-firm-arkansas-power-slips-as-it-steps-onto-a-bigger-stage.html.
[11] Suzi Parker, *Is the Bloom off the Rose Law Firm?*, POLITICO (June 23, 2007), https://www.politico.com/story/2007/06/is-the-bloom-off-the-rose-law-firm-004617.
[12] Greg Roumeliotis, *Bain Capital defends business in face of Romney attacks*, REUTERS (Mar. 13, 2012), https://www.reuters.com/article/us-bain-romney/bain-capital-defends-business-in-face-of-romney-attacks-idUSBRE82D07H20120314.
[13] *Trek president slams Scott Walker campaign ad,* CHIPPEWA HERALD (June 18, 2014), https://chippewa.com/trek-president-slams-scott-walker-campaign-ad/article_e0719739-127a-5111-a9c4-e8b8d650c8db.html.

Democratic Party for ads attacking candidate (and now Senator) Steve Daines' stint at Gianforte's company, RightNow Technologies.[14]

In response to CLF's public statements about DTC, its counsel Robinson Bradshaw sent CLF a cease-and-desist letter. The letter states that CLF "made multiple false and defamatory statements regarding Double Time Capital."[15] The letter then identifies the statements that DTC believes to be false and defamatory. The letter puts CLF on notice that the news story on which CLF's claims are based contains "multiple inaccuracies, specifically regarding Double Time Capital's relationship with Strata Solar" and that CLF "may not rely on what Fox News advances as factual representations or statements of fact in its story."[16]

The letter then notifies CLF that, even if the Fox News story was accurate, "it does not support the claims that CLF made" regarding DTC.[17] The nub of DTC's objection is CLF's unsupported claim that DTC employed inverters from Huawei on its solar farms. Huawei is a controversial Chinese company that has been identified as a "threat to national security" by high-ranking U.S. government officials and that is on a U.S. government blacklist that "bans U.S. companies from doing business with that entity."[18] It is obvious why any business would aggressively dispute claims of a direct association with a highly controversial foreign entity that is restricted from doing business with U.S. companies. Particularly when the company believes the claims to be utterly false, as the letter to CLF pointed out:[19]

> Here are the facts: not one of the solar farms receiving investments from Double Time Capital utilizes Huawei inverters: Double Time Capital does not build or operate solar farms and has never had any role whatsoever in the design, engineering, or equipment selection for any solar farm. Further, the equipment procurement for all projects in which Double Time Capital invested was completed before Huawei even began selling its invertors in the United States in late 2016. By attributing the purported actions of a

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[14] Whitney Bermes, *Bozeman businessman sues Montana Democratic Party over 'false' statements*, BOZEMAN DAILY CHRONICLE (Oct. 25, 2012), https://www.bozemandailychronicle.com/news/politics/elections/bozeman-businessman-sues-montana-democratic-party-over-false-statements/article_b07dd2ee-1e59-11e2-93a9-0019bb2963f4.html.

[15] Letter from John R. Wester, Robinson, Bradshaw, & Hinson, P.A., to Dan Conston, Cong. Leadership Fund (June 5, 2019), https://www.congressionalleadershipfund.org/wp-content/uploads/2019/06/McCreadys-Letter-to-CLF.pdf ("CLF Wester Letter").

[16] *Id.*

[17] *Id.*

[18] John Eggerton, *FCC's Pai to Senate: Huawei is National Security Threat*, MULTICHANNEL NEWS (May 8, 2019), https://www.multichannel.com/news/fccs-pai-to-senate-huawei-is-national-security-threat; Zak Doffman, *U.S. Senators Target Huawei With 'Death Sentence' Law To Block Trump's Backtrack*, FORBES (June 16, 2019), https://www.forbes.com/sites/zakdoffman/2019/07/16/u-s-senators-introduce-huawei-death-sentence-bill-to-put-blacklisting-into-law/#292278157867.

[19] CLF Wester Letter.

> different company to Double Time Capital without any factual basis – and by using that claim to argue that Double Time Capital is endangering our nation's security – you have falsely and deliberately defamed Double Time Capital.

The letter also warns CLF that its allegation that DTC "outsourced" jobs is false. Citing to North Carolina statutory law, the letter then demands that CLF retract its statements; publish a statement on its website acknowledging the claims were false; disseminate the statement to any persons who distributed the original post; and preserve all documents in anticipation of potential litigation.[20] The letter to NRCC is similar, except that it responds to the specific nature and style of NRCC's claims, namely its attacks on Mr. McCready's personal and business reputation as a mechanism to defame DTC itself.[21]

Notably, neither letter responds to the "political criticism" identified by the Complainant in paragraphs 17-18, namely the purported "inconsistences between Mr. McCready's campaign rhetoric and his business record" that CLF/NRCC featured as part of their political attacks.[22] The Robinson Bradshaw letter makes no reference to statements made by Mr. McCready in his congressional campaign nor does it object to CLF/NRCC's "political criticism." Its only objection is to false characterizations about that record itself.

II. Legal Analysis

The Complainant alleges that the Committee received "legal services" from DTC "to conduct quintessential campaign activity" in violation of 52 U.S.C. § 30118(a) and that Mr. McCready and his corporate agents "facilitate[d] in-kind corporate contributions" in violation of 52 U.S.C. § 30125(e). These allegations have no merit.

First, the Committee did not "receive" any "legal services" from DTC during the period in question. North Carolina's Rules of Professional Conduct define "legal services" as "services (other than professional fiduciary services) rendered by a lawyer ***in a client-lawyer relationship***."[23] A law firm does not provide "legal services" where no attorney-client relationship exists or where such services exceed the scope of the agreed-upon representation.[24] Whereas DTC and Robinson Bradshaw had an attorney-client relationship that covered the legal services in question, the Committee and Robinson Bradshaw did not. Accordingly, the legal

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[20] *Id.*
[21] Letter from John R. Wester, Robinson, Bradshaw, & Hinson, P.A., to Parker Poling, National Republican Congressional Committee (June 6, 2019), https://www.nrcc.org/wp-content/uploads/2019/06/DTC_Ltr-to-Parker-Poling-and-NRCC.pdf ("NRCC Wester Letter").
[22] Compl. at 17-18.
[23] N.C. Rules of Professional Conduct R. 1.15-1(l) (emphasis added).
[24] *Id.* R. 1.2(c) ("The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client.").

services in question were provided by Robinson Bradshaw to DTC, not to the Committee. In fact, the Committee paid Perkins Coie a considerable sum of money for legal services rendered during the same period. Complainant cites to no legal authority suggesting that a campaign committee can "receive" free legal services from a law firm when no attorney-client relationship has been established with respect to the services in question. Nor does the plain language of the Act support such a reading, as the legal services at issue here were not provided "to a political committee" within the meaning of 52 U.S.C. § 30101(8)(A)(ii).

Second, Complainant offers no evidence that the legal services provided by Robinson Bradshaw to DTC were "for the purpose of influencing any election for federal office" or "in connection with an election," which are the threshold showings required under sections 30118(a) or 30125(e).[25]

To tease an election-influencing motive out of DTC's commercial activity, Complainant notes that CLF and NRCC attacked Mr. McCready for "inconsistencies between Mr. McCready's campaign rhetoric and his business record" and argues that "it was through Double Time Capital that these [political] criticisms were answered."[26] The record does not support this allegation. The two Robinson Bradshaw letters cited by Complainant do not respond to CLF/NRCC's "political criticism" that Mr. McCready's campaign rhetoric differs from his business record. In fact, the two Robinson Bradshaw letters do not refer to Mr. McCready's campaign rhetoric at all. Nor do they mention any election, candidacy, political party, opposing candidate, or voting by the general public.[27] The letters are standard cease-and-desist notices that identify third-party statements believed to be false and defamatory; provide factual backup to demonstrate the falsity of the statements; demand a written retraction and correction; and issue a preservation notice in anticipation of potential litigation.

Perhaps most tellingly, the letters were sent privately to CLF and NRCC. It was the recipients of

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[25] While such showings are *necessary* under the Act, they are *not* sufficient. The letters cited by the Complainant are "communications" that are *not* "public communications" under 11 C.F.R. §§ 100.26, 100.27 (defining "public communication" to include "mass mailings," but treating mailings as "mass mailings" only where there are "more than 500 pieces of mail matter."). Accordingly, they are not "coordinated communications" under 11 C.F.R. § 109.21. The FEC has consistently dismissed complaints alleging that communications qualify as in-kind contributions, unless the complainant can show that the communications in question are "coordinated communications" under 11 C.F.R. § 109.21. *See* FEC Matter Under Review 6477 (Right Turn USA), First General Counsel's Report (Dec. 27, 2011); FEC Matter Under Review 6502 (Nebraska Democratic Party), First General Counsel's Report (May 17, 2012); FEC Matter Under Review 6522 (Lisa Wilson-Foley for Congress), First General Counsel's Report (Feb. 5, 2013); FEC Matter Under Review 6657 (Akin for Senate), First General Counsel's Report (May. 16, 2013); FEC Matter Under Review 6722 (House Majority PAC), First General Counsel's Report (Aug. 6, 2013). Because these communications are not "coordinated communications," they are not "contributions" under the FEC's regulations.

[26] Compl. at 17-18.

[27] CLF Wester Letter; NRCC Wester Letter.

those letters – CLF and NRCC – and *not* the senders that made the correspondence public. The fact that DTC did not respond publicly to the false allegations undermines Complainant's charge that the "McCready offloaded the task of responding to political criticisms to a corporation instead of expending campaign resources."[28] When a campaign decides it is necessary to "respond to political criticism," it communicates its response to the press and/or the public. It does not limit its response to the so-called "critics," as DTC did here.

Therefore, far from being "quintessential campaign activity," as Complainant alleges, these letters are standard *commercial* correspondence that companies regularly send when their business interests are threatened. The letters focus solely on statements about the company and eschew electoral discussions altogether; they were sent privately to the offenders and not disseminated to the press; and they make concrete demands backed by threat of legal action. Simply put, they were not made "to influence an election" or "in connection with an election."

Third, this is precisely the type of legal matter – a potential litigation arising from business conduct that predated candidacy and that is unrelated to compliance with the Act – for which the Commission has traditionally *restricted* the use of campaign funds and *permitted* the use of funds left unregulated by the Act.

The dispute (and any potential litigation) between DTC and CLF/NRCC concerns business conduct that occurred before Mr. McCready became a candidate for office. The Commission has opined that "[o]rdinarily, legal expenses associated with refuting or responding to allegations about one's private business ventures (whether merely contemplated or actually conducted), or regarding one's personal association with others facing criminal prosecution, would be considered personal in nature, since, standing alone, such matters are unrelated to campaign or officeholder activity."[29] And, of course, federal law strictly prohibits a campaign from using its funds to pay for expenses that are personal in nature.[30] The Commission has created a limited carve-out to allow campaigns to pay *50 percent* of legal fees that arise from pre-candidacy conduct *if* the officeholder or candidate "needs to provide substantive responses to the press regarding such activities."[31] Accordingly, if the Committee *needed* to provide substantive responses to the press regarding such activities, the Committee arguably could have paid up to 50 percent of the legal fees associated with the underlying matter. As the Complainant notes, however, the Committee did not feel a need to respond publicly or to the press regarding these allegations, which it makes it highly unlikely that the Committee could have permissibly paid

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[28] Compl. at 17. As noted earlier, the reference in the letter to the NRCC to "Dan McCready's personal and business reputation" is in response to NRCC's tactic of maligning DTC, in part, through attacks on its co-founder's business conduct. Notably, the letter does not reference Mr. McCready's *political* reputation or make any reference to any election, candidacy, political party, opposing candidate, or voting by the general public.
[29] FEC Adv. Op. 1997-12 (Costello).
[30] 11 C.F.R. § 113.1(g).
[31] FEC Adv. Op. 1998-1 (Hilliard).

any of Robinson Bradshaw's fees. Had the Committee paid for all of these legal fees, as Complainant suggests it should have, it likely would have violated the personal use ban.

On the other hand, the Commission has repeatedly held that litigation costs associated with certain types of lawsuits are *not* "contributions" or "expenditures," and may be paid with funds outside of the Act, *even when the committee itself is a party to the case* (which, of course, it would not be here if the dispute between DTC and CLF/NRCC resulted in litigation). In one advisory opinion, the Commission considered whether a former Senate candidate could establish a legal defense fund to defend against a defamation lawsuit arising out of statements that he made at a press conference, and whether that fund could accept "any contribution given by any individual or corporation … [not] subject to the limitations or prohibitions of the Act."[32] The Commission concluded that "because the fundraising activity for Mr. Moss is exclusively connected with, and strictly for the purpose of, paying the costs of his legal defense, such activity is outside the purview of the Act, and nothing in the Act or the Commission's regulations would limit or prohibit the fund from receiving donations from [otherwise prohibited] sources … or require[] [the fund] to register or file disclosure reports under the Act or Commission regulations."[33] The Commission has reaffirmed this holding on multiple occasions.[34] And in 2003, the Commission confirmed that these opinions remained good law even after passage of the Bipartisan Campaign Reform Act and section 30125(e) cited by Complainant.[35]

Commission precedents, therefore, would support DTC paying for legal expenses incurred *by the Committee* in connection with litigation or threatened litigation. They certainly support DTC paying for the legal expenses associated with its dispute with CLF/NRCC, when DTC – and not the Committee – would be the party to the litigation.

III. Conclusion

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[32] FEC Adv. Op. 1981-13 (Moss).
[33] *Id.*
[34] *See, e.g.* FEC Adv. Op. 1981-16 (Carter-Mondale Presidential Committee) (allowing unregulated fund to pay for expenses associated with litigation where committee would be party, because subject matter was unrelated to compliance with Act). For a full discussion of these precedents, *see* Request by Robin Carnahan for Senate, FEC Adv. Op. 2011-01 (Jan. 5, 2011).
[35] FEC Adv. Op. 2003-15 (Majette) ("The Commission concludes that 2 U.S.C. § 441i(e)(1)(A) does not change this result. There is no indication in the legislative history of BCRA that Congress intended section 441i(e)(1)(A) to change an area that is both well-familiar to members of Congress and subject of longstanding interpretation through statements of Congressional policy and Commission advisory opinions … Because this lawsuit is not 'in connection with' a Federal election for purposes of section 441b, it should not be considered "in connection with" a Federal election for purposes of 2 U.S.C. § 441i(e)(1)(A)."); FEC Adv. Op. 2010-3, n. 3 (Nat'l Democratic Redistricting Trust) ("[N]ot all activities that may have some indirect effect on elections are encompassed by the 'in connection with' standard of BCRA."); Concurring Statement for FEC Adv. Op. 2011-1 from Commissioners Hunter, McGahn, and Petersen (Carnahan) ("activities that are not 'in connection with' a Federal election are beyond the Commission's jurisdiction.").

As described herein, the Complaint does not state any facts, which, if proven true, would constitute a violation of the Act. Accordingly, the Commission should reject the Complainant's request for an investigation, find no reason to believe that a violation of the Act or Commission regulations has occurred, and immediately dismiss this matter.

Very truly yours,

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Emma Olson Sharkey
Counsel to Respondents