

FEDERAL ELECTION COMMISSION
FIRST GENERAL COUNSEL'S REPORT

MUR: 7661

DATE COMPLAINT FILED: Nov. 7, 2019

DATE OF NOTIFICATIONS: Nov. 13, 2019

LAST RESPONSE RECEIVED: Dec. 19, 2019

DATE ACTIVATED: Feb. 4, 2020

EXPIRATION OF SOL: Sept. 10, 2024

ELECTION CYCLE: 2020

COMPLAINANT:

J. McCauley Brown

RESPONDENTS:

Matt Jones for Kentucky Exploratory Committee
and Andrew Jefferson, in his official capacity as
treasurer

Matt Jones

Kentucky Sports Radio, LLC

iHeartMedia, Inc.

Simon & Schuster, Inc.

**RELEVANT STATUTES
AND REGULATIONS:**

52 U.S.C. § 30101(9)(B)(i)

52 U.S.C. § 30104(b)

52 U.S.C. § 30118(a)

11 C.F.R. § 100.73

11 C.F.R. § 100.132

11 C.F.R. § 110.1(g)

11 C.F.R. § 114.2(b)

**INTERNAL REPORTS
CHECKED:**

Disclosure Reports

AGENCIES CHECKED:

None

I. INTRODUCTION

The Complaint in this matter alleges that Matt Jones, a popular Kentucky radio host who once contemplated a run for the U.S. Senate, accepted corporate contributions from iHeartMedia, Inc. (“iHeart”) for carrying his radio show, as well as from publisher Simon & Schuster, Inc. (“Simon & Schuster”) in connection with an alleged book tour. The Response from iHeart provides details of its agreement with Jones and claims that its conduct is protected by the

MUR 7661 (Matt Jones for Kentucky Exploratory Committee, *et al.*)

First General Counsel's Report

Page 2 of 13

Commission's press exemption. The Response from Simon & Schuster similarly includes details about its contract with Jones and argues that the contract was an arms-length commercial transaction not subject to regulation by the Commission.

The available information indicates that neither iHeart nor Simon & Schuster made political contributions as defined by the Federal Election Campaign Act of 1971, as amended (the "Act"), because iHeart's payments for airing Jones's radio program satisfied the press exemption and Simon and Schuster's payments for Jones's book constituted *bona fide* commercial activity. Accordingly, we recommend that the Commission dismiss the allegations that iHeart or Simon & Schuster made, and that Matt Jones and his exploratory committee accepted, prohibited corporate contributions in violation of 52 U.S.C. § 30118(a). Because we recommend dismissing the allegations involving prohibited corporate contributions, we also recommend dismissing the Complaint's related allegation that the exploratory committee failed to disclose those contributions. In addition, we recommend that the Commission dismiss the allegations against Kentucky Sports Radio, LLC because the available information suggests that it is an entity unconnected to Jones's radio show, and therefore not implicated by the Complaint's allegations.

II. FACTUAL BACKGROUND

Matt Jones is the host of a popular syndicated radio program called "Kentucky Sports Radio" ("KSR"), which began in 2010 and is now carried by 38 stations across the Commonwealth of Kentucky.¹ KSR is primarily about University of Kentucky sports, but also routinely covers a wide range of political and non-political topics.² In 2019, Jones began

¹ Resp. of iHeart at 2 (Dec. 19, 2019).

² See generally *id.* at 2-4, Matt Jones Aff. ¶ 6 (Nov. 26, 2019).

discussing on KSR the possibility of running for U.S. Senate against incumbent Senator Mitch McConnell. For example, he made the following statements:

- April 16, 2019: “I think [McConnell] has been in office too long . . . I mean, term limits would do so many good things for this country. . . . So that to me is the one, even if you like him, you’ve got to agree. Nobody should be in office for 36 years.”
- May 7, 2019: “I will keep doing the show no matter what . . . this would be the daily communication, I think it would be fascinating. Right? Like as we’re tracking . . . yes, we would keep doing the show, uh, all the way through the campaign.”
- May 7, 2019: “So yeah, I think the chance, look, the chance of winning would not be high. But I will say this, I’m the only person I think who can win.”
- July 9, 2019: “I thought my reasoning was very simple because I think Mitch McConnell does not stand up for the average Kentuckian, the kind of person that’s here.”³

In this same time period, Jones also contracted with publishing house Simon & Schuster to write a book critical of McConnell for release in 2020. Jones met with a publishing executive in June 2019, and on August 15, 2019, he explained on KSR that the book would be “about the state of Kentucky and how I think we’ve had a really powerful Senator in Mitch McConnell who’s ignored the state of Kentucky.”⁴ Jones further described the book as “a love letter to Kentucky” and said the book was “really about the state.”⁵ The idea behind the book would be: “What if I told the story, one story in each county, all 120 [counties in Kentucky], to showcase how I feel like Senator McConnell has kind of forgotten about his state. . . .”⁶ Jones, clarified,

³ Compl. at n.10.

⁴ Resp. of Simon & Schuster at Attach. 1 (Dec. 10, 2019).

⁵ *Id.*

⁶ *Id.*

1 however, that the book “is not a precursor to anything. I’m doing this whether I run or not.”⁷
 2 Jones signed a contract with Simon & Schuster to write “Mitch, Please!” on September 4, 2019,⁸
 3 which specified that Jones would be paid an advance of \$90,000 in three installments.⁹ Simon
 4 & Schuster claims these payment terms are similar to the agreements it makes with other authors,
 5 both political and non-political.¹⁰

6 On September 10, 2019, Jones filed a Statement of Candidacy and registered an
 7 exploratory committee with the Commission for the stated purpose of “testing the waters” for a
 8 potential Senate run.¹¹ According to the Respondents, Jones and iHeart set ground rules about
 9 what Jones could say about his testing-the-waters effort on KSR. On August 29, 2019, Jones
 10 told his listeners on KSR:

11 The radio station [has] asked one thing: I not use the show to promote the
 12 exploratory committee. And I think that’s totally reasonable and I agree.
 13 Over the next seven or eight weeks I’m going to be on the road so I’m
 14 going to be in some of these places and I’ll talk about being in those
 15 places, but I won’t talk about the committee and all that because I think
 16 that’s a fair request by iHeart.¹²
 17

⁷ *Id.*

⁸ The book was released on March 31, 2020.

⁹ Resp. of Simon & Schuster at Attach. 2.

¹⁰ *Id.* at 11.

¹¹ Matt Jones, Statement of Candidacy (Sept. 10, 2019); Matt Jones for Kentucky Exploratory Committee, Misc. Rept. (Sept. 10, 2019) (“Today, Matt Jones filed FEC Form 2 to designate Matt Jones for Kentucky Exploratory Committee as a principal campaign committee for ‘testing-the-waters’ purposes only. Mr. Jones is not a candidate for federal office and is only engaging in ‘testing-the-waters’ activities at this time.”).

¹² Resp. of iHeart at 5; *see also* Jones Aff. ¶ 7 (“After announcing the formation of the exploratory committee, I did not further discuss the activities of the exploratory committee, seek to raise funds for the exploratory committee, or ask anyone to support any potential candidacy on the radio show.”).

1 The Complaint nonetheless alleges that Jones used KSR to promote his candidacy. For
 2 example, the Complaint points out that on October 9, 2019, Jones said on KSR: “Here’s one of
 3 the things. Every place I go in this state, one of the questions I ask is when is the last time Mitch
 4 McConnell has been here? And they say never, or they say it’s been ten years.”¹³ The
 5 Complaint also alleges that Jones used money from Simon & Schuster to pay for a book tour that
 6 was just an excuse to promote his candidacy, stating that “[a]fter launching his campaign,
 7 Mr. Jones began his tour across the state, which upon information and belief is being financed at
 8 least in part by Simon & Schuster.”¹⁴ Jones and Simon & Schuster both deny that the publisher
 9 financed any pre-publication book tour.¹⁵

10 Jones ultimately decided not to run for office.¹⁶ On November 25, 2019, Jones
 11 announced that he had reached an agreement with iHeart to continue KSR for another five
 12 years.¹⁷

¹³ Compl. at n.10.

¹⁴ *Id.* at 6 (the Complaint does not include any information to support its assertion).

¹⁵ Resp. of Matt Jones at 2 (Nov. 27, 2019); Resp. of Simon & Schuster at 6.

¹⁶ Resp. of iHeart at 6 (*citing* Sarah Ladd, “Matt Jones Coming Back on Kentucky Sports Radio, Re-Signs with iHeart Media,” LOUISVILLE COURIER J. (Nov. 25, 2019)); Jones Aff. ¶ 1. The Complaint and the Responses disagree about whether Jones ever triggered candidacy under the Act. There are many reasons to conclude he did not — his public statements from this time period consistently discuss merely exploring a candidacy and state that he had not made up his mind to run. Even assuming that Jones *was* a candidate, however, we recommend dismissal based on the reasons that follow.

¹⁷ Resp. of iHeart at 6.

1 **III. LEGAL ANALYSIS**

2 **A. The Press Exemption Appears to Apply to KSR**

3 The Act defines “contribution” and “expenditure” to include the gift of “anything of
 4 value” for the purpose of influencing a Federal election.¹⁸ The term “anything of value” includes
 5 all in-kind contributions.¹⁹ Corporations are prohibited from making contributions to a candidate
 6 for Federal office,²⁰ and committees are prohibited from knowingly accepting contributions from
 7 corporations.²¹

8 The Act however exempts from the definition of “contribution” and “expenditure” “[a]ny
 9 cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting
 10 station . . . unless the facility is owned or controlled by any political party, political committee,
 11 or candidate.”²² This exclusion is generally referred to as the “press exemption” or “media
 12 exemption.”²³ A communication subject to the press exemption is also exempt from the Act’s
 13 disclosure, disclaimer, and reporting requirements.²⁴

14 To determine whether the press exemption applies, the Commission uses a two-part
 15 test.²⁵ First, it asks whether the entity that engaged in the activity is a “press entity” as described

¹⁸ 52 U.S.C. § 30101(8)(A)(i), (9)(A)(i).

¹⁹ 11 C.F.R. §§ 100.52(d)(1), 100.111(e)(1).

²⁰ 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b).

²¹ 52 U.S.C. § 30118(a); 11 C.F.R. §§ 110.1(g), 114.2(b).

²² 52 U.S.C. § 30101(9)(B)(i); 11 C.F.R. §§ 100.73, 100.132.

²³ Advisory Op. 2010-08 (Citizens United) at 3 (“AO 2010-08”).

²⁴ *Id.* at 7.

²⁵ *Id.* at 4; Advisory Op. 2005-16 (Fired Up!) at 4 (“AO 2005-16”).

by the Act and regulations.²⁶ Second, if the entity is a press entity, the exemption will apply so long as it (a) is not owned or controlled by a political party, political committee, or candidate, and (b) is acting within its “legitimate press function” in conducting the activity.²⁷ A press entity is not acting within its “legitimate press function” when a person pays it to air the communication in question and maintains control over the content of the communication.²⁸

First, there appears to be no dispute that iHeart is a press entity for purposes of the media exemption. Although neither the Act nor Commission regulations define “press entity,” the Commission has explained that “when determining whether the term applies to a particular entity, the Commission has focused on whether the entity in question produces on a regular basis a program that disseminates news stories, commentary, and/or editorials.”²⁹ The Response from iHeart notes that it is “a leading global media and entertainment company” that “delivers music, news, talk, sports and other content.”³⁰ The Complaint similarly describes iHeart as “a mass media corporation that, among other activities, provides syndication of radio programming.”³¹

²⁶ AO 2010-08 at 4; AO 2005-16 at 4.

²⁷ *Reader's Digest Ass'n, Inc. v. Fed. Election Comm'n*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981).

²⁸ Factual & Legal Analysis at 6-9, MUR 7073 (Meluskey for U.S. Senate) (“F&LA”) (“The Commission concludes that the press exemption does not apply to “The Alex Meluskey Show” because Meluskey (or organizations he owned) owned and controlled the show while he was a candidate and Meluskey (or an entity he owned) paid to air the show.”); F&LA at 6, MUR 6089 (People with Hart Inc.) (“We conclude that the radio station is a press entity but that it is not acting as a press entity when it airs the Program because another entity pays for the airtime and maintains control over the content of the show.”); *id.* at 7 (stating that MUR 5297 (Wolfe) found that “the station was not acting as a press entity but as an entrepreneur when it aired a show hosted by Wolfe because Wolfe paid for the airtime and maintained complete control over the content of the show”).

²⁹ AO 2010-08 at 5.

³⁰ Resp. of iHeart at 2.

³¹ Compl. at 2.

The Commission has previously considered iHeart, under its previous name, Clear Channel Communications, a press entity.³²

Second, with respect to the ownership prong of the test, the Complaint alleges that Jones owns and controls KSR through a limited liability company, Kentucky Sports Radio LLC, registered with the commonwealth of Kentucky.³³ Under such an ownership arrangement, the media exemption would arguably not apply because the alleged candidate, Jones, would own or control the program.³⁴ Respondents, however, state that the Complaint is mistaken and that Kentucky Sports Radio LLC does not own or control KSR at all, and that it is instead an entity connected to Jones's website.³⁵ Both iHeart and Kentucky Sports Radio LLC explain that iHeart owns KSR, Jones is an employee of iHeart, and iHeart pays Jones directly for his on-air talent.³⁶ In his affidavit, Jones also states that iHeart is his employer.³⁷ This arrangement, where an established media company employs a radio host, is analogous to numerous instances in which the Commission has found that the press exemption applied,³⁸ and distinguishes it from the precedent

³² See Resp. of iHeart at 9 (citing First General Counsel's Report at 6, MUR 6936 (Geoff Charles) (noting that the Commission had previously recognized Clear Channel as a press entity and recommending same)); see F&LA at 5-6, MUR 6242 (J.D. Hayworth 2010) (finding media exemption applied to a Clear Channel broadcast).

³³ Compl. at 4 (Nov. 7, 2019).

³⁴ See, e.g., F&LA at 6-9, MUR 7073 (Meluskey for U.S. Senate).

³⁵ Resp. of Kentucky Sports Radio, LLC at 1 (Dec. 2, 2019).

³⁶ *Id.*; Resp. of iHeart at 2.

³⁷ Jones Aff. ¶ 5; Resp. of Matt Jones at 1. None of the Responses, however, include documents such as contracts or pay stubs that could verify these claims.

³⁸ See F&LA at 5, MUR 6242 (J.D. Hayworth 2010) ("Commission decisions on past MURs involving radio talk show hosts who later became candidates have never found that a host/candidate 'owned or controlled' the entity for purposes of the press exemption on the basis that the host/candidate had a role in determining program content.") (citing MUR 5555 (Friends of Dave Ross) and MUR 4689 (Robert Dornan)).

1 cited in the Complaint.³⁹ Because the Complaint does not cite any evidence beyond its “information
2 and belief,”⁴⁰ which is rebutted by numerous respondents, the available information is insufficient to
3 establish that Jones owned or controlled KSR.

4 In looking at the next prong of the test — whether the entity is acting within its “legitimate
5 press function” — the Commission has examined whether the entity’s materials are available to
6 the general public and whether they are comparable in form to those ordinarily issued by the
7 entity.⁴¹ The mere existence of political advocacy within a program does not disqualify it from
8 the media exemption.⁴² In this case, there appears to be no question that KSR was available to
9 the general public; the show was publicly broadcast in Kentucky, and archives are available in
10 podcast form online to anyone in the world. KSR has been on the air since 2010, and the
11 Response from iHeart cites numerous articles describing the show as a mix of political and non-
12 political coverage years before Jones considered his run.⁴³ Our own review of the show also
13 confirms that KSR occasionally ventured into political discussion prior to Jones exploring a
14 candidacy. And although Jones was critical of Senator McConnell, we conclude that the
15 Complaint’s handful of quotes are not representative of a shift in the program’s overall focus.

16 Based on the circumstances described above, we recommend that the Commission
17 dismiss the allegation that iHeart violated 52 U.S.C. § 30118(a) by making corporate

³⁹ See F&LA at 6-9, MUR 7073 (Meluskey for U.S. Senate).

⁴⁰ Compl. at 4.

⁴¹ See F&LA at 5, MUR 6242 (J.D. Hayworth 2010) (citing AO 2005-16).

⁴² See AO 2005-16 at 6 (“The Commission notes that an entity otherwise eligible for the press exception would not lose its eligibility merely because of a lack of objectivity in a news story, commentary, or editorial, even if the news story, commentary, or editorial expressly advocates the election or defeat of a clearly identified candidate for Federal office.”).

⁴³ Resp. of iHeart at 2-3 (citing articles from 2015-2018).

contributions, and that Matt Jones, Matt Jones for Kentucky Exploratory Committee and Andrew Jefferson in his official capacity as treasurer violated 52 U.S.C. § 30118(a) by accepting corporate contributions. We therefore also recommend that that the Commission dismiss the allegation that Matt Jones for Kentucky Exploratory Committee and Andrew Jefferson in his official capacity as treasurer violated 52 U.S.C. § 30104(b) by failing to report corporate contributions from iHeart. Finally, because there is no information indicating that Kentucky Sports Radio, LLC, has any connection to KSR, we also recommend that the Commission dismiss the allegation that Kentucky Sports Radio, LLC, violated 52 U.S.C. § 30118(a) by making corporate contributions.

B. Simon & Schuster's Book Deal with Jones Appears to Constitute *Bona Fide* Commercial Activity

Under the Act and Commission regulations, an individual or entity does not make a contribution if they provide goods and services at the usual and normal charge.⁴⁴ Thus, the Commission has concluded that a "corporation's *bona fide* commercial activity" is not a contribution subject to regulation under the Act.⁴⁵ In Advisory Opinion 2014-06 (Ryan), the Commission was presented with facts similar to the ones in this case: a federal candidate published a book containing political material. According to the submission, "Representative Ryan's agreement with the Publisher provides for the payment to Representative Ryan of royalties based on what the request describes as an industry-standard percentage of net sales revenue."⁴⁶ The Commission concluded that "the Publisher's costs and expenses for the publication and promotion of Representative Ryan's

⁴⁴ 11 C.F.R. §§ 100.52(d), 100.110(e).

⁴⁵ Advisory Op. 2014-06 (Ryan) ("AO 2014-06"); *see also* Advisory Op. 1994-30 (Conservative Concepts).

⁴⁶ AO 2014-06 at 2.

book are not subject to the Act's regulation because they are *bona fide* commercial activity," further noting that the "publication, promotion, and sale [of Ryan's book] — especially as conducted by a long established and prominent publisher that publishes a wide variety of different types of books, both political and non-political — are genuine commercial activity on their face."⁴⁷

The facts in this case are virtually indistinguishable. Simon & Schuster is a prominent publisher that was founded 95 years ago; according to its Response, Simon & Schuster publishes about 2,000 titles every year, which include a variety of non-political books as well as political books from members of different parties.⁴⁸ Moreover, the contract between Jones and Simon & Schuster appears to be a standard arrangement.⁴⁹ There is no indication that Simon & Schuster funded a speaking tour, as alleged in the Complaint. Jones states in his affidavit that Simon & Schuster funds were not used for the tour and that he personally funded it.⁵⁰ Similarly, Simon & Schuster denies funding the tour.⁵¹ There is also no information to suggest that Jones used his payment from Simon & Schuster to fund the tour — though under Commission regulations, doing so would likely be

⁴⁷ *Id.* at 9 (internal citation and quotation marks omitted). In addition, the media exemption may apply to the contract between Jones and Simon & Schuster. The Commission has applied that exemption to similar payments by publishers on behalf of candidate-authors. *See, e.g.*, F&LA at 8-12, MUR 6989 (Dr. Ben Carson) (dismissing allegations that a candidate accepted prohibited corporate contributions in connection with a book tour under the media exemption). However, because we recommend that the Commission dismiss on the grounds that the contract between Simon & Schuster and Jones was a *bona fide* commercial transaction, the Commission need not determine whether these activities would also qualify for the media exemption. *See* AO 2014-06 at n.4.

⁴⁸ Resp. of Simon & Schuster at 11.

⁴⁹ The Complaint repeatedly attempts to frame the money paid to Jones as an improperly premature book tour. *See* Compl. at 14-15. However, the contract between Jones and Simon & Schuster makes clear that Jones was merely paid a flat fee to deliver a manuscript. *See* Resp. from Simon & Schuster at Attach. 2. Since the Complaint and Responses were filed in this matter, Simon & Schuster has published "Mitch, Please!" Under the terms of the contract, all installments of the advance to Jones should now have been paid out. The actual contents of the book, as well as the way the book was envisioned when originally pitched, are not relevant to the question of whether this agreement was a *bona fide* commercial transaction.

⁵⁰ Jones Aff. ¶¶ 14-15.

⁵¹ Resp. of Simon & Schuster at 6.

1 permissible.⁵² We therefore recommend that the Commission dismiss the allegation that Simon &
 2 Schuster violated 52 U.S.C. § 30118(a) by making corporate contributions, and that Matt Jones,
 3 Matt Jones for Kentucky Exploratory Committee and Andrew Jefferson in his official capacity as
 4 treasurer violated 52 U.S.C. § 30118(a) by accepting corporate contributions. We therefore also
 5 recommend that that the Commission dismiss the allegation that Matt Jones for Kentucky
 6 Exploratory Committee and Andrew Jefferson in his official capacity as treasurer violated 52
 7 U.S.C. § 30104(b) by failing to report a corporate contributions from Simon & Schuster.

8 **IV. RECOMMENDATIONS**

- 9 1. Dismiss the allegation that Matt Jones for Kentucky Exploratory Committee and
 10 Andrew Jefferson, in his official capacity as treasurer, and Matt Jones violated
 11 52 U.S.C. § 30118(a) by accepting prohibited corporate contributions;
- 12 2. Dismiss the allegation that iHeart Media, Inc., Simon & Schuster, Inc., and Kentucky
 13 Sports Radio, LLC, violated 52 U.S.C. § 30118(a) by making prohibited corporate
 14 contributions;
 15
- 16 3. Dismiss the allegation that Matt Jones for Kentucky Exploratory Committee and
 17 Andrew Jefferson in his official capacity as treasurer violated 52 U.S.C. § 30104(b)
 18 by failing to report corporate contributions;
 19
- 20 4. Approve the attached Factual and Legal Analysis;
- 21 5. Approve the appropriate letters; and
- 22 6. Close the file.

23 Lisa J. Stevenson
 24 Acting General Counsel
 25

26 Charles Kitcher
 27 Acting Associate General Counsel
 28 for Enforcement
 29
 30
 31

⁵² See 11 C.F.R. § 100.33(b)(1) (a candidate's "personal funds" include "earned income that the candidate earns from bona fide employment").

MUR 7661 (Matt Jones for Kentucky Exploratory Committee, *et al.*)

First General Counsel's Report

Page 13 of 13

June 3, 2020

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