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BY MESSENGER AND ELECTRONIC MAIL

Jeff. S. Jordan, Esq.
Assistant General Counsel
Complaints Examination & Legal Administration
Federal Election Commission
1050 First Street, N.E.
Washington, D.C. 20463

Re: MUR 7670

Dear Mr. Jordan:

We write on behalf of Hickenlooper for Colorado (the "Senate Campaign") and Mark Turnage in his official capacity as treasurer (collectively, "Respondent") in response to the complaint in MUR 7670 (the "Complaint"). The Complaint alleges that the Senate Campaign violated 11 C.F.R. § 110.3(d) by including in its launch video brief clips of publicly available footage that Putnam Partners, LLC ("Putnam Partners") created for Governor Hickenlooper's 2014 campaign for Governor of Colorado (the "Gubernatorial Campaign") and hosted on its (Putnam Partners') website. These allegations are baseless. The footage in question is owned by Putnam Partners, not the Gubernatorial Campaign. Moreover, under the "fair use" doctrine, any organization – including any campaign committee – could have used short clips of the footage from Putnam Partners' website without a license. Accordingly, the use of these short clips did not constitute a "contribution" from the Gubernatorial Campaign or Putnam Partners. The Complaint should be dismissed.

FACTUAL BACKGROUND

During the 2014 gubernatorial election, the Gubernatorial Campaign paid Putnam Partners as an independent contractor to create multiple television ads, including two thirty-second spots entitled "Restaurant" and "Hot Seat."[1] There is no record of the Gubernatorial Campaign and Putnam Partners executing a contract for this work. As the creator of the footage, Putnam Partners retained copyright and ownership of it under federal copyright law.[2]

[1] *See John Hickenlooper for Governor*, PUTNAM PARTNERS LLC, http://www.putnampartners.net/case-study/john-hickenlooper-governor (last visited Feb. 7, 2020) ("Restaurant/Hot Seat Videos").
[2] Federal law provides that a copyright "vests initially in the author or authors of the work." 17 U.S.C. § 201(a). However, "[i]n the case of a work made for hire, the employer or other person for whom the work was prepared is

As part of Governor Hickenlooper's Senate campaign announcement, the Senate Campaign prepared a 90-second launch video. The video included two seconds of footage from "Restaurant" and four seconds of footage from "Hot Seat."[3] The Senate Campaign used clips from Putnam Partners' publicly available website and edited the images, altering the framing of the clips so that they could serve as b-roll in the launch video.[4] The Senate Campaign published the launch video on August 22, 2019 on its website and on social media.[5]

LEGAL ANALYSIS

The Federal Election Commission ("FEC" or "Commission") may find "reason to believe" only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the Federal Election Campaign Act of 1971, as amended (the "Act"), or Commission regulations.[6] The Complaint here fails to make that showing.

Section 110.3(d) of the Commission's regulations prohibits "[t]ransfers of funds or assets from a candidate's campaign committee or account for a nonfederal election to his or her principal campaign committee or other authorized committee for a federal election."[7] The footage in question, however, was not an "asset" of the Gubernatorial Campaign. Under federal copyright law, Putnam Partners owns the copyright in the 2014 campaign advertisements. The Gubernatorial Campaign has no ownership interest in the footage and, as a result, the footage is not an "asset" of the Gubernatorial Campaign.[8]

Nor did Putnam Partners make a "contribution" to the Senate Campaign. Putnam Partners made the advertisements publicly available on its website. Respondent used two seconds of footage from "Restaurant" and four seconds of footage from "Hot Seat," re-edited the frames, and included the images as b-roll in the launch video. Respondent's use of the publicly available footage in this fashion falls squarely within the doctrine of "fair use." The doctrine, codified in federal copyright law, provides that a party can use a small portion of a publicly-available work owned by another person without violating that person's copyright when certain factors are

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considered the author for purposes of this title, and . . . owns all of the rights comprised in the copyright." *Id.* § 201(b). In the absence of an employer-employee relationship, a work is "made for hire" only "if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire." *Id.* § 101. Here, because there was no employer-employee relationship and no record of a contract between the Gubernatorial Campaign and Putnam Partners, Putnam Partners has the copyright to the 2014 advertisements.

[3] *Compare Not Done Fighting*, YOUTUBE, https://www.youtube.com/watch?v=-63689Ahyuk (published Aug. 22, 2019) ("Launch Video"), *with* Restaurant/Hot Seat Videos, *supra* note 1.

[4] *See* Restaurant/Hot Seat Videos, *supra* note 1. *Compare id., with* Launch Video, *supra* note 3.

[5] *See* Launch Video, *supra* note 3; Jonathan Ellis, *John Hickenlooper will Run for Senate in Colorado, a Key Target District for Democrats*, N.Y. TIMES (Aug. 22, 2019), https://www.nytimes.com/2019/08/22/us/politics/john-hickenlooper-senate-2020.html (noting that the video appeared on Governor Hickenlooper's campaign website).

[6] 52 U.S.C. § 30109(a)(2).

[7] 11 C.F.R. § 110.3(d).

[8] *See* 17 U.S.C. §§ 101, 201(a)-(b).

present.[9] Federal courts have found that fair use applies, for example, when a political committee includes pieces of an existing political ad in its own ad,[10] and when a political committee makes use of a photographer's copyrighted picture of a candidate in its mailer.[11] Where fair use applies, the party using a fragment of the copyrighted materials may use those materials without paying the owner for the rights. In other words, the snippets or clips have a fair market value of $0, because they are available to all for free for "fair use." And where an object is not something "of value," it cannot be a contribution.[12]

Indeed, the FEC has long recognized this principle. The Commission has reviewed scores of advertisements that incorporate news clips from corporate media outlets or materials from opponents' advertisements (which were likely created by commercial vendors like Putnam Partners), and it has never found that any ad sponsor either unlawfully accepted or failed to report a contribution from the creator of the original work.[13] In the so-called b-roll MURs, for example, the Commission has never held that the Super PAC incorporating short clips of publicly available campaign footage has received an in-kind contribution from a campaign committee. Respondent has done nothing different than all those committees in pulling a few frames of footage from a publicly-available source for inclusion in a campaign ad.[14] The

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[9] *See* 17 U.S.C. § 107. Under federal statute, the fair use factors are: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." *Id.* Courts also consider whether the use was "transformative." *Peterman v. Republican Nat'l Comm.*, 369 F. Supp. 3d 1053, 1060 (D. Mont. 2019).

[10] *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957 (D.N.H. 2019).

[11] *Peterman*, 369 F. Supp. 3d 1053.

[12] *See* 52 U.S.C. § 30101(8)(a) (stating that a "contribution" is "any gift, subscription, loan, advance, deposit of money or *anything of value* made by any person for the purpose of influencing any election for Federal office" (emphasis added)); 11 C.F.R. § 100.52(d) (stating that the value of an in-kind contribution is the usual and normal charge).

[13] *See, e.g.*, Gen. Counsel's Rpt., MUR 7198 (Ron Johnson for Senate, Inc.) (examining an advertisement, still available at https://www.youtube.com/watch?v=iPuHYv1qyVg, that has clips of a candidate sitting for interviews on two news shows); Factual & Legal Analysis ("F&LA"), MURs 7169, *et al.* (DCCC, *et. al.*) (examining several ads and noting the inclusion of news footage from Donald Trump's campaign events and a recording from Access Hollywood); F&LA, MUR 7124 (Katie McGinty for Senate) (examining an advertisement, still available at https://www.washingtonpost.com/news/fact-checker/wp/2016/04/27/emily-lists-sleazy-attack-ad-in-the-pennsylvania-senate-race/, that has clips from Fox News and MSNBC); *see also* 11 C.F.R. § 109.23(b)(1) (acknowledging the common scenario of one candidate using an opposing candidate's campaign materials in his or her advertisements).

[14] Using 4 seconds of a 30-second ad and 2 seconds of another within a 90-second video is well within the percentage of repurposed b-roll the Commission has allowed in the republication context. *See* Statement of Reasons ("SOR") of Comm'rs Hunter, McGahn & Petersen, MUR 6357 (American Crossroads) (dismissing a republication allegation where 10-15 seconds of a 30-second ad were pulled from a candidate's video, which the campaign made available online); SOR of Comm'rs Hunter, McGahn & Petersen, MUR 5879 (DCCC) (dismissing a republication allegation where the DCCC's 30-second ad included 15 seconds of candidate b-roll footage); *see also* SOR of Petersen, Hunter & Goodman at 2, MURs 6603, *et al.* (Ben Chandler for Congress, *et al.*) ("[R]epublication requires

Commission should not reverse course now and find that free and fair use of such materials is a violation of the Act. That decision would mean that virtually every federal political committee airing advertisements is failing to report contributions, which would be an absurd result.

Further, even if the Commission were to assign value to the clips and find Respondent in violation of the Act, the alleged contribution would be *de minimis* and would warrant dismissal as a matter of prosecutorial discretion.[15] The relevant footage totaled only six seconds, was over five years old, and was degraded in quality because it was pulled from an Internet copy. Furthermore, Respondent incorporated the footage into an ad that it disseminated only on digital platforms. The value of the footage, and the end product that included it, would be negligible. The Commission should immediately dismiss the Complaint.[16]

CONCLUSION

Consistent with the doctrine of fair use and based on decades of Commission history, Respondent included a few seconds of publicly-available video footage in Governor Hickenlooper's Senate launch video. As demonstrated herein, the allegation that Respondent's use of the footage amounted to acceptance of an unlawful contribution is completely without merit. The footage had no monetary value, as it was publicly available to all for "fair use." Accordingly, the Commission should reject the Complaint's request for an investigation, find no reason to believe that a violation of the Act or Commission regulations has occurred, and immediately close this matter.[17]

Very truly yours,

Marc E. Elias
Jonathan S. Berkon
Shanna M. Reulbach

Counsel to Respondent

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more than respondents creating and paying for advertisements that incorporate as background brief segments of video footage posted on publicly available websites.").

[15] *See Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).

[16] *See* SOR of Comm'rs Walter, Petersen, Bauerly, Hunter & Weintraub, MUR 5964 (Schock for Congress) (dismissing as a matter of prosecutorial discretion for the low amount in violation a complaint alleging that a congressional campaign did not pay fair market value for footage developed by a vendor for the candidate's former state campaign committee).

[17] Respondent has also plainly demonstrated that the Complaint's alternate allegations—that Respondent stole the video footage from Putnam Partners (which is an allegation outside of the FEC's jurisdiction) or received the footage as a contribution from Hickenlooper's gubernatorial campaign committee—are meritless.