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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 Putnam Partners, LLC ("Putnam Partners" or "Respondent") in response to the complaint in MUR 7670 (the "Complaint"). The Complaint alleges that Respondent violated 52 U.S.C. § 30118(a) by making an in-kind contribution to Hickenlooper for Colorado (the "Senate Campaign"), Governor John Hickenlooper's principal campaign committee in his election for Colorado's Senate seat. The Complaint is baseless. Under the "fair use" doctrine and Respondents' standard business practices, 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." The Complaint should be dismissed.

FACTUAL BACKGROUND

During Hickenlooper's 2014 gubernatorial election, Hickenlooper's gubernatorial campaign committee (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] The Gubernatorial Campaign and Putnam Partners did not enter into 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 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.*

As part of Governor Hickenlooper's Senate campaign announcement, the Senate Campaign released a 90-second launch video.[3] The video included two seconds of footage from "Restaurant" and four seconds of footage from "Hot Seat."[4] The Senate Campaign used clips from Putnam Partners' publicly available website.[5]

LEGAL ANALYSIS

The Federal Election Commission (the "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.

First, Respondent did not make a contribution to the Senate Campaign because the footage the Senate Campaign used is not something "of value." Federal law recognizes the doctrine of fair use, which 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 present.[7] 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,[8] and when a political committee makes use of a photographer's copyrighted picture of a candidate in its mailer.[9] 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."[10]

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§ 101. Here, because there was no employer-employee relationship and no contract between the Gubernatorial Campaign and Putnam Partners, Putnam Partners has the copyright to the 2014 advertisements.

[3] *Not Done Fighting*, YOUTUBE, https://www.youtube.com/watch?v=-63689Ahyuk (published Aug. 22, 2019) ("Launch Video").

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

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

[6] 52 U.S.C. § 30109(a)(2).

[7] *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).

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

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

[10] *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).

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 Respondent), and it has never found that the creator of the original work made a contribution to the ad sponsor.[11] In the so-called b-roll MURs, for example, the Commission has never held that a Super PAC incorporating short clips of publicly-available campaign footage has received an in-kind contribution from a campaign committee.[12] The 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.

Second, even if the Commission were to incorrectly assign value to the six seconds of footage in the launch ad, Respondent still would not have made a contribution to the Senate Campaign. Under the Act, a "commercial vendor" is any person who provides "goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease or provision of those goods or services."[13] "Although a [vendor]'s provision of a service without charge to a candidate would ordinarily result in an in-kind contribution to that candidate under 11 C.F.R. 100.52(d), the provision of a service that is always provided without charge to every person does not fall within this general rule."[14]

Respondent, as a business practice, and in large part in recognition of the availability of the fair use defense, does not assert its copyright when a person uses a small portion of an advertisement it has made available on its website in another work. Respondent treats clients and third parties

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[11] *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).

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

[13] 11 C.F.R. § 116.1(c).

[14] Advisory Op. 2004-06 (Meetup, Inc.) at 3; *see also* Advisory Op. 1996-11 (National Right to Life Convention, Inc.) at 6; Advisory Op. 1978-60 (Sawyer) at 2.

alike in this regard. It has never asserted a copyright claim against a person for making "fair use" of its publicly-available footage. Because Respondent universally applies this policy, and treated the Senate Campaign like any other person, its failure to make a claim against the Senate Campaign for using clips from "Restaurant" and "Hot Seat" is not a contribution under the Act.

Finally, even if the Commission were to disregard precedent and find that Respondent made an unlawful contribution, the value of the contribution would be *de minimis* and warrant dismissal as a matter of prosecutorial discretion.[15]

CONCLUSION

As demonstrated herein, the Complaint's allegation that Respondent made a contribution to the Senate Campaign is completely without merit. 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.

Very truly yours,

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

Counsel to Respondent

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