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VIA EMAIL

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

Re: MUR 7726

Dear Mr. Jordan:

We write as counsel to Media Matters for America ("Media Matters" or "MMFA"), American Bridge 21st Century Foundation ("AB Foundation"), AB PAC and Rodell Mollineau in his official capacity as Treasurer of AB PAC, Correct the Record ("CTR") and Elizabeth Cohen in her official capacity as Treasurer of CTR, and David Brock (collectively, "Respondents"), as well as Hillary for America ("HFA") and Jose Villarreal in his official capacity as Treasurer of HFA (collectively "Interested Parties"),[1] in response to the complaint filed by The Patriots Foundation on April 8, 2020 (the "Complaint").

The Complaint fails to set forth any facts which, if proven true, would constitute a violation of the Federal Election Campaign Act of 1971, as amended (the "Act"), or Federal Election Commission ("Commission" or "FEC") regulations. Instead, the Complaint relies on wide-ranging speculation, untethered to fact or law, to infer that a violation of the Act *may* have occurred. Because the Complaint fails to set forth sufficient facts which, if proven true, would constitute a violation of the Act or Commission regulations, the Commission should find no reason to believe, dismiss the Complaint, and close this matter.

Legal Analysis

Commission regulations require that a valid complaint contain "a clear and concise recitation of . . . facts which describe a violation of a statute or regulation over which the Commission has jurisdiction."[2] In interpreting this provision, the Commission has held that it "may find 'reason to believe' *only if* a complaint sets forth sufficient *specific facts*, which, if proven true, would

[1] The Interested Parties were not named as respondents in the Complaint, but Commission staff chose to notify them of the Complaint on April 13, 2020 and afforded them an opportunity to respond. Though not respondents in this matter, because the Commission has granted them an opportunity to respond to the allegations in the Complaint, they have chosen to do so in this combined response.

[2] 11 C.F.R. § 111.4(d)(3).

constitute a violation of the [Act]."[3] Moreover, "unwarranted legal conclusions from asserted facts" and mere speculation will not be accepted as true.[4]

The Complaint alleges three primary violations of the Act. First, it alleges that Media Matters made prohibited in-kind contributions to HFA and unreported in-kind contributions to AB PAC and CTR. Second, it alleges that AB Foundation made unreported in-kind contributions to AB PAC. And third, it alleges that AB PAC and CTR made prohibited in-kind contributions to HFA.

Each of these allegations is rooted in speculation and a misreading of the law rather than in evidentiary support. Further, any evidence that the Complaint has provided both fails to indicate that any violation of the Act has occurred and, in some cases, originates from materials stolen and published by foreign actors attempting to interfere in the 2016 presidential election. Because the Complaint provides no evidence or specific facts which, if proven true, would indicate that a violation of the Act has occurred, this Complaint should be dismissed.

A. The Complaint does not present facts or evidence indicating that Media Matters made in-kind contributions to HFA, CTR, or AB PAC.

The Complaint first alleges that Media Matters made impermissible in-kind contributions to HFA and unreported in-kind contributions to CTR and AB PAC. However, as explained below, it provides no facts to support this assertion.

For example, to demonstrate that Media Matters made impermissible in-kind contributions to HFA, the Complaint points to two pieces of "evidence." First, it cites to a July 2015 HFA strategy memorandum, which mentions the campaign's plan to "[w]ork[] with MMFA to highlight examples of when the press won't cover the same issues with Republicans."[5] It further cites to an email from one HFA staffer to another, indicating that Media Matters was ready to push back on a *Vanity Fair* article about HFA vice chair Huma Abedin.[6] As proof that this plan was carried out, the Complaint cites to a blog post published on Media Matter's own website the day after the email was sent.[7]

[3] MUR 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory Committee, *et al.*), Statement of Reasons, Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas at 1 (Dec. 21, 2000). (emphasis added).
[4] *Id.* at 2; *see also* MURs 6789/6852 (Special Operations for America, *et al.*), Statement of Reasons, Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 4 (May 28, 2019) ("We do not authorize Commission investigations based on mere speculation").
[5] *See* Compl. at 3.
[6] *Id.*
[7] *See id.* at 4.

Contrary to the Complaint's assertion, neither of these activities amounted to an in-kind contribution from Media Matters to HFA because these activities were all conducted to directly support free internet communications.

The Act provides that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate."[8] Expenditures made for communications are governed by 11 C.F.R. § 109.21, which establishes a three-part test to determine whether a communications expenditure constitutes a coordinated communication, and therefore, an in-kind contribution to a federal campaign or party committee.[9] The regulation provides that the "content prong" of the test will only be satisfied by (1) an "electioneering communication" or (2) a "public communication" that republishes campaign materials, contains express advocacy or its functional equivalent, or refers to federal candidates or party committees at certain times before an election.[10]

With regard to internet communications, Commission regulations only include within the definition of "public communications" "communications *placed for a fee on another person's Web site*."[11] The definition, therefore, excludes internet communications which are not placed for a fee on another person's website, including communications posted or transmitted for free or posted on an entity's own website. This is often referred to as the "internet exemption" to the Act. The Commission has explained that its "general exclusion of internet communications from treatment as coordinated communications (and thus as in-kind contributions) is deliberate,"[12] and was made because the Commission recognized the internet as a "unique and evolving mode of mass communication and political speech that is distinct from other media" and "warrants a restrained regulatory approach."[13]

Since the promulgation of the internet exemption in 2006, the Commission has consistently interpreted it to encompass expenses directly incurred to produce exempted internet communications.[14] This applies even when the direct input costs for a covered communication, such as for email lists and data licenses, direct production expenses, and staff time associated with the creation of the communication, are significant.[15]

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[8] 52 U.S.C. § 30116(a)(7)(B)(i).
[9] 11 C.F.R. § 109.21.
[10] *Id.* § 109.21(c).
[11] *Id.* § 100.26 (emphasis added).
[12] MURs 6940, 7097, 7146, 7160, 7193 (Correct the Record, *et al.*), Statement of Reasons, Vice Chairman Matthew S. Petersen & Commissioner Caroline C. Hunter at 11 (Aug. 21, 2019).
[13] Internet Communications, 71 Fed. Reg. 18589 (April 12, 2006).
[14] Statement of Reasons, *supra* note 12, at 12 n.60 (citing to previous Commission decisions excluding production costs from the definition of contribution).
[15] While a U.S. District Court reviewing the controlling Statement of Reasons in MURs 6940, 7097, 7146, 7160, 7193 has cast doubt on the expansiveness of the Commission's reading of the internet exemption, it confirmed that input costs directly related to the creation of free internet communications are covered by the internet exemption and are

Here, the Complaint has presented no evidence that the activities described in the stolen campaign materials released by WikiLeaks were engaged in for any purpose other than to produce Media Matters' free internet communications.[16] The stolen campaign memorandum merely refers to "[w]ork[ing] with MMFA to highlight examples of when the press won't cover the same issues with Republicans." There is no evidence that Media Matters highlighted the press hypocrisy of interest to HFA by any means other than through free internet communications, such as through posts on social media or on Media Matter's website, communications channels Media Matters uses every day to further its stated mission of highlighting press bias. Similarly, the Complaint points to an internal campaign communication indicating that Media Matters was ready to push back on a magazine article concerning a campaign staffer, but as evidence that Media Matters did in fact push back on the story, the Complaint highlights only *a blog post on Media Matters' own website*, a communication explicitly covered by the internet exemption, even if coordinated with HFA. Because the Complaint fails to "set[] forth sufficient specific facts, which, if proven true, would constitute a violation of the [Act]," the allegation that Media Matters made impermissible in-kind contributions to HFA must be dismissed.

The Complaint's allegation that Media Matters made unreported in-kind contributions to AB PAC and CTR—simply because Media Matters, like AB PAC and the CTR, engaged in activities supportive of the Clinton campaign and because it shares office space with AB PAC and CTR—is similarly baseless. Indeed, it is not even an allegation—the Complaint merely states that it would be "reasonable to infer" that such a violation occurred.[17] As explained above, mere speculation that a violation may have occurred, without facts to support the allegation, is not sufficient to yield a reason to believe finding. As such, the allegation that Media Matters made unreported in-kind contributions to AB PAC and CTR should also be dismissed.

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not regulated under the Act. *See Campaign Legal Ctr. v. Fed. Election Comm'n*, No. 19-2336 (JEB), 2020 WL 2996592 at *11 (D.D.C. June 4, 2020).

[16] It should be noted that the only evidence concerning Media Matters included in the Complaint originated from materials stolen through the Russian government's hack of the Clinton campaign's computer systems and published on WikiLeaks. The Commission has already indicated its reluctance to rely on such materials in enforcement actions. *See* Statement of Reasons, *supra* note 12, at 2 n.4 ("Some of the complaints in these matters rely on information that was illegally obtained by Russian intelligence officers through hacking operations that targeted computers and networks used by Hillary for America and thereafter published on WikiLeaks. . . . We believed that it would be inappropriate for the Commission to consider such information. Accordingly, we excluded from our deliberations the material stolen and disseminated by the Russian government. We were joined by one of our colleagues in voting against OGC's Factual and Legal Analyses incorporating stolen information.") (internal citations omitted); MURs 6940, 7097, 7146, 7160, 7193 (Correct the Record, *et al.*), Statement of Reasons, Chair Ellen L. Weintraub at 6 (Sept. 20, 2019) ("Moreover, the Respondents objected to the complaints' reliance on facts that were disseminated in connection with Russia's interference in the 2016 U.S. presidential election. CTR and HFA urged the Commission to disregard the information contained within the hacked materials disseminated by the Russians through Wikileaks. This suggestion is well taken. The Commission is not in the business of rewarding foreign adversaries that hack American campaigns and interfere with U.S. elections."). There is no basis to treat the stolen materials in this matter any differently than similarly stolen materials were treated in these prior enforcement actions.

[17] Compl. at 12.

B. The Complaint does not present facts or evidence indicating that AB Foundation made in-kind contributions to AB PAC or that AB PAC misreported its activity.

The Complaint next alleges that AB Foundation may have made unreported contributions to or received unreported contributions from AB PAC because AB Foundation does "not have a formal agreement relating to the allocation of expenses between" itself and AB PAC and because AB Foundation's payments to AB PAC for expenditures such as salary and rent were based on budget estimates. [18] The Complaint argues that "[t]o the extent that AB Foundation's reimbursements to AB PAC are based on estimates and not actual costs, the amounts are not accurate,"[19] and points to the fact that the amounts AB Foundation transferred to AB PAC to cover salary, rent, and other expenses fluctuated from year to year to indicate that the amounts were somehow tabulated incorrectly.[20]

The Complaint provides no evidence that the budget estimates used by AB PAC and AB Foundation actually yielded incorrect reporting by AB PAC on its FEC reports. Rather, just as with its allegations against Media Matters, it infers a violation of the Act when there is no evidence of one. Such an inference, without more, is insufficient to support a reason to believe finding by the Commission. As such, this allegation must be dismissed.

C. The Complaint does not present facts or evidence indicating that CTR and AB PAC made in-kind contributions to HFA.

Finally, the Complaint alleges that CTR and AB PAC made impermissible in-kind contributions to HFA without presenting any evidence whatsoever to support its assertion.

First, the Complaint argues that, to the extent that CTR made expenditures unrelated to its communications activities in support of Secretary Clinton's candidacy, such expenditures would be in-kind contributions to HFA. That may be so, but the Complaint provides no evidence that any such expenditures were made. Instead, it highlights a vague reference from David Brock, the founder of CTR, that the committee had served as the "surrogate arm" of HFA.[21] An entity could very easily serve as a "surrogate arm" of a campaign by making only free internet communications in support of the campaign, and there is no indication that Mr. Brock was referring to anything other than free internet communications when he made this statement. Without more from the Complaint, there is no basis for the Commission to find reason to believe that CTR made an in-kind contribution to HFA.

[18] *Id*. at 5.
[19] *Id*. at 13.
[20] *Id.* at 6.
[21] *Id.* at 13.

Second, the Complaint asserts that AB PAC did not operate independently of CTR because the two committees shared staff. By extension, the Complaint alleges, it can be inferred that AB PAC did not operate independently of the Clinton campaign and that any money it spent on independent expenditures in support of Secretary Clinton were in fact in-kind contributions to HFA.

Once again, this allegation has no evidentiary backing. First, the Complaint never alleges that AB PAC financed communications that met the "content prong" of 11 C.F.R. § 109.21 with regard to Secretary Clinton, nor does it point to any specific communication that meets the content prong. Second, while the Complaint points to seven individuals who were compensated by CTR and AB PAC during overlapping periods, it provides no evidence indicating that HFA had any material involvement in decisions concerning any AB PAC communications or that any of the seven individuals listed in the Complaint had substantial discussions with HFA about its plans, projects, activities, or needs and that that information was material to the creation, production, or distribution of any AB PAC communications.[22] Indeed, the Complaint does not even allege that these individuals were in any way involved in the creation, production, or distribution of AB PAC communications, thereby compromising the independence of AB PAC's independent expenditures. Because the Complaint presents no evidence that AB PAC financed any communication meeting the content prong with regard to Secretary Clinton that was coordinated in any way with HFA, this allegation must be dismissed.

Third, the Complaint alleges that AB PAC provided free research services to campaign committees, which would amount to impermissible in-kind contributions to those campaigns. However, the Complaint provides no evidence that AB PAC ever provided research services to a campaign committee for free, let alone any evidence of *which* campaign committee might have received such services. As explained above, mere allegations, unsupported by facts, are insufficient to yield a reason to believe finding. As such, this allegation must also be dismissed.

Conclusion

As explained above, the Complaint presents a series of allegations based on speculation and inference. Because the Complaint fails to allege specific facts which, if true, would constitute a violation of the Act or Commission regulations, the Commission should dismiss the Complaint and promptly close this matter.

[22] *See* 11 C.F.R. § 109.21(d)(2), (3) (describing ways that a communication can meet the conduct prong).

Very truly yours,

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