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VIA E-MAIL (CELA@FEC.GOV)

Jeff S. Jordan
Assistant General Counsel
Office of Complaints Examination & Legal Administration
Federal Election Commission
1050 First Street NE
Washington, DC 20463

Re: MUR 7758 (Republican State Leadership Committee)

Dear Mr. Jordan:

We represent the Republican State Leadership Committee (“RSLC”) in the above-captioned matter.

We have reviewed the Complaint filed by Alexander Joseph Zajac on July 9, 2020 (the “Complaint”), which alleges that eight federal campaign committees and three 527 organizations, including RSLC, engaged in “improper coordination” under the Federal Election Campaign Act of 1971, as amended (“FECA” or the “Act”) and Federal Election Commission (“FEC” or “Commission”) regulations. As discussed below, the Complaint is fundamentally defective, as it fails to set forth sufficient facts to allege that a violation has occurred. Moreover, the Complaint fails to identify any RSLC communication that could qualify as a “coordinated communication.” Accordingly, the Commission should find no reason to believe that the RSLC violated the Act or Commission regulations and should promptly dismiss this matter.

FACTS

Founded in 2002, RSLC is a non-federal political organization organized under Section 527 of the Internal Revenue Code. RSLC is dedicated to electing Republicans to non-federal, state-level offices across the country. As a Section 527 political organization, RSLC is registered with and reports to the Internal Revenue Service. It also maintains affiliated state PACs in several states.

To support its state-focused mission, RSLC engages in fundraising activities that include online fundraising and email solicitations. In addition to its in-house digital team, RSLC contracts with commercial vendors to assist it with online fundraising efforts. One such commercial vendor is Targeted Victory. Targeted Victory’s services to RSLC include providing advice on how to grow RSLC’s online fundraising program and drafting RSLC email solicitations. As one of the premier digital fundraising firms for conservative organizations, Targeted Victory works with a broad variety of clients involved in federal and/or state elections. To safeguard against any inadvertent coordination, Targeted Victory has implemented a written

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firewall policy that satisfies the requirements of the Commission's safe harbor at 11 C.F.R. § 109.21(h).¹

RSLC has sought to grow its online fundraising program by sending email solicitations to rented lists. We understand that Targeted Victory works with a number of list rental vendors and pays a negotiated price for its clients to rent these lists. As is common in the political fundraising industry, these list rental vendors do not physically give a copy of their lists to the organizations which are renting the vendors' lists. Instead, these list rental vendors send the organizations' emails to the rented lists from the list rental vendors' domains and email addresses. This process protects the list rental vendors' property interest in their lists and ensures that the lists are not misappropriated or copied without authorization. We understand that the list rental vendors with which Targeted Victory works do not play any role in drafting the content of emails or selecting which list a client should use. We also understand that as an added safeguard, the Targeted Victory employees assigned to RSLC do not interact with the list rental vendors. Instead, Targeted Victory maintains a separate team of employees to interact with the list rental vendors.

The Complaint attaches a June 12, 2020 email sent by one of Targeted Victory's list rental vendors on behalf of RSLC (the "RSLC Email"). The RSLC Email is a fundraising solicitation and offers any donor contributing \$5 or more a free RSLC bumper sticker that says "Defund Antifa." The RSLC Email does not refer to any federal candidate nor any political party committee. RSLC has confirmed with Targeted Victory that the RSLC Email was created and disseminated in accordance with the process outlined above. Specifically, the Targeted Victory employees assigned to work with RSLC drafted the content of the email and selected the rental list to which the email would be sent; RSLC revised and approved the email's content; Targeted Victory formatted the email's content to meet the list rental vendor's technical requirements; Targeted Victory then transmitted the email to the list rental vendor; and the list rental vendor then disseminated the email from its own email address (info@keepingusgreat.com) to its own list at the date and time selected by Targeted Victory.

DISCUSSION

I. **The Complaint fails to meet the minimum procedural requirements for a "reason to believe" finding and should be dismissed on this basis alone.**

Commission regulations require that a complaint "contain a clear and concise recitation of the facts which describe a violation of a statute or regulation over which the Commission has jurisdiction."² The Commission may find "reason to believe" a violation has occurred "only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the FECA."³ When alleging impermissible coordination, a "[c]omplaint's inference" of

¹ Targeted Victory has made this representation to RSLC. We understand that other respondents in this matter will be submitting to the Commission a declaration from Targeted Victory as well as a copy of its firewall policy.

² 11 C.F.R. § 111.4(d)(3).

³ MUR 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory Committee), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas at 1 (Dec. 21, 2000).

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coordination is not sufficient.⁴ As the Commission has explained, “[u]nwarranted legal conclusions from asserted facts . . . or mere speculation . . . will not be accepted as true.”⁵ Moreover, “[p]urely speculative charges, especially when accompanied by a direct refutation, do not form an adequate basis to find a reason to believe that a violation of the FECA has occurred.”⁶

The Complaint alleges that RSLC and the other respondents engaged in “improper coordination” because the respondents “are sending fundraising emails from the same domain (keepingusgreat.com) and, indeed, from the same email address (info@keepingusgreat.com).” The Complaint speculates that “[t]hese emails are evidence of *at least some* coordination” among the respondents. But the Complaint fails to offer specific facts that, if proven true, would constitute a violation of the Commission’s coordinated communication regulations. The Complaint does not identify any specific RSLC communication that was allegedly coordinated with a federal candidate, authorized campaign committee, or political party committee. It is not even clear from the Complaint with whom RSLC was allegedly coordinating. To the extent the Complaint is alleging that the RSLC Email itself was a coordinated communication, this allegation fails as a matter of law and fact. As is explained below, the RSLC Email does not satisfy the content prong at 11 C.F.R. § 109.21(c) for multiple reasons. The complainant appears to be speculating that the respondents’ use of a common vendor for fundraising emails satisfies the conduct prong but neglects to allege any facts (let alone offer any evidence) demonstrating that the common vendor standard at 11 C.F.R. § 109.21(d)(4) is met. The common vendor standard in FEC regulations does not “create[] any ‘prohibition’ on the use of common vendors,” and the Commission expressly rejected a proposal to “establish[] a presumption of coordination” when common vendors are involved.⁷ At its core, the common vendor standard is intended to cover “situations in which a commercial vendor assumes the role of a conduit of information between a candidate or political party committee and the person making or paying for the communication.”⁸ The Complaint offers no such evidence here.

Put simply, the Complaint’s only purported “evidence” of a potential coordination violation by RSLC is that RSLC rented the same fundraising email lists as the other respondents, which is permissible as a matter of law. Given that the Complaint falls far short of even the rudimentary procedural requirements and specific factual predicates for a “reason to believe” finding, the Commission should promptly dismiss the Complaint against RSLC on this basis alone.

⁴ MUR 6077 (Coleman), First General Counsel’s Report at 9 (Apr. 20, 2009) (analysis incorporated into Factual & Legal Analyses sent to respondents).

⁵ MUR 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory Committee), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas at 2 (Dec. 21, 2000).

⁶ MUR 6296 (Buck), Statement of Reasons of Vice Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen at 5 (June 14, 2011) (quoting MUR 5467 (Moore), First General Counsel’s Report at 5 (July 23, 2004)).

⁷ Explanation and Justification for Final Rules on Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 437 (Jan. 3, 2003).

⁸ *Id.*

II. In any event, there is no reason to believe RSLC violated FECA by making a coordinated communication.

Although the Commission should dismiss the Complaint based on the procedural infirmities detailed above, a review of the evidence also demonstrates there is no reason to believe RSLC made a coordinated communication. For the reasons explained below, the Commission should promptly dismiss RSLC from this matter.

A. To the extent the Complaint alleges that the RSLC Email is a “coordinated communication,” this communication does not satisfy the content prong.

The Complaint identifies only one communication paid for by RSLC: the RSLC Email. The RSLC Email cannot be a coordinated communication as a matter of fact and law because it does not satisfy any of the criteria in the content prong at 11 C.F.R. § 109.21(c).

First, a communication must be either an “electioneering communication” or a “public communication” to satisfy the content prong. The RSLC Email is neither. An electioneering communication is limited to communications disseminated via broadcast, cable, or satellite.⁹ Accordingly, emails are not electioneering communications as a matter of law. A public communication is “a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.”¹⁰ Importantly, however, “[t]he term general public political advertising shall not include communications over the Internet, except for communications placed for a fee on another person’s Web site.”¹¹ The term “mass mailing” likewise “does not include electronic mail or Internet communications.”¹² Accordingly, emails are not public communications as a matter of law. Given that the RSLC Email is neither an electioneering communication nor a public communication, it does not satisfy the content prong and therefore is not a coordinated communication as a matter of law.¹³

Second, a public communication must contain certain content to satisfy the content prong. Although the RSLC Email does not satisfy the content prong because it is not a public communication, the RSLC Email further does not satisfy any of the specific content requirements. The RSLC Email does not incorporate any federal candidate campaign materials.¹⁴ The RSLC Email does not expressly advocate the election or defeat of a clearly identified federal candidate, nor does it contain the functional equivalent of express advocacy.¹⁵

⁹ 11 C.F.R. § 100.29.

¹⁰ *Id.* § 100.26.

¹¹ *Id.*

¹² *Id.* § 100.27.

¹³ See also MUR 6657 (Akin for Senate, et al.), Factual & Legal Analysis at 5 (Sept. 17, 2013) (finding no reason to believe that Senate Conservatives Fund made a coordinated communication because email communications—even when they involve costs such as renting email lists—are neither electioneering communications nor public communications).

¹⁴ 11 C.F.R. § 109.21(c)(2).

¹⁵ *Id.* § 109.21(c)(3), (5).

The RSLC Email does not even reference a clearly identified federal candidate or political party committee, let alone do so within one of the prescribed pre-election windows.¹⁶ Put simply, the RSLC Email is an issue-based, state-focused fundraising email that is devoid of any content that triggers the content prong of the Commission’s coordinated communication regulations. Having failed to satisfy the content prong as a matter of law, the RSLC Email is not a coordinated communication.

B. Even if the Complaint properly alleged that the RSLC Email is a “coordinated communication,” the communication does not satisfy the conduct prong.

The Complaint appears to speculate that RSLC made a coordinated communication through the use of a common vendor, although it is not even clear with whom RSLC was allegedly coordinating.¹⁷ The RSLC Email does not satisfy the common vendor conduct standard at 11 C.F.R. § 109.21(d)(4) for the reasons explained below.

First, it is worth noting at the outset that the common vendor conduct standard reinforces the content prong by requiring the entity paying for the allegedly coordinated communication to share a commercial vendor with “the candidate who is clearly identified in the communication, or the candidate’s authorized committee, the candidate’s opponent, the opponent’s authorized committee, or a political party committee.”¹⁸ Here, the common vendor standard cannot be satisfied because the Complaint has not identified any RSLC communication referencing a federal candidate or political party committee.

Second, the common vendor conduct standard is not satisfied with respect to Targeted Victory because Targeted Victory maintains an internal firewall that qualifies for the Commission’s safe harbor.¹⁹ Targeted Victory has represented to RSLC that it has implemented a written firewall policy that complies with the requirements of 11 C.F.R. § 109.21(h). Absent any specific information indicating that material information has been passed through Targeted Victory despite its firewall policy—and RSLC is aware of no such information—Targeted Victory qualifies for the “safe harbor” provision under Commission regulations and thus does not satisfy the common vendor conduct standard.

Finally, the list rental vendors that worked with Targeted Victory cannot be “common vendors” because they are not involved in creating, producing, or distributing communications. The Commission has previously determined that data vendors that merely sell access to their data libraries and analytical tools are not being employed to “create, produce, or distribute” a communication and, accordingly, are not common vendors.²⁰ Here, Targeted Victory creates,

¹⁶ *Id.* § 109.21(c)(4).

¹⁷ The Complaint does not actually allege any conduct by RSLC that would meet one of the six conduct standards described in 11 C.F.R. § 109.21(d). But given the Complaint’s insistence that the use of “the same domain” and “same email address” to send fundraising emails is “evidence” of coordination, it appears the Complaint may intend to allege coordination through a “common vendor” under 11 C.F.R. § 109.21(d)(4).

¹⁸ 11 C.F.R. § 109.21(d)(4)(ii).

¹⁹ *See supra* n.1.

²⁰ MUR 6888 (Republican National Committee, et al.), First General Counsel’s Report at 18-19 (Jan. 8, 2016) (analysis incorporated into Factual & Legal Analyses sent to respondents); MUR 6916

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produces, and distributes RSLC's fundraising emails. Targeted Victory assists RSLC with drafting its fundraising solicitation emails, recommends when RSLC should utilize a rented email list and selects which email list to rent, and formats RSLC's fundraising solicitation emails to meet list rental vendors' technical requirements. The list rental vendors with whom Targeted Victory works play no role in crafting RSLC's fundraising solicitation emails nor do they have the authority to make any changes to submitted content. Although it is a common industry practice for list rental vendors to send organizations' emails to their rental lists from the vendors' domains and email addresses, the list rental vendors are acting no differently than broadcast stations that disseminate television or radio advertisements, newspapers that print advertisements, or the U.S. Postal Service that delivers mass mailings. These technical roles in disseminating communications do not amount to "distribution" as contemplated in the Commission's regulations.

In light of the foregoing, the RSLC Email does not satisfy the common vendor standard of the conduct prong as a matter of law. Accordingly, the RSLC Email is not and cannot constitute a coordinated communication.

CONCLUSION

For all the foregoing reasons, the Commission should find no reason to believe that the RSLC violated the Act or Commission regulations and should promptly dismiss this matter.

Respectfully submitted,

/s/ Michael E. Toner

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Brandis L. Zehr
A. Louisa Brooks

(Democratic National Committee, et al.), First General Counsel's Report at 17-19 (Oct. 21, 2015) (analysis incorporated into Factual & Legal Analyses sent to respondents).