

SANDLER REIFF

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December 4, 2020

Mr. Jeff S. Jordan
Assistant General Counsel
Office of Complaints Examination
and Legal Administration
Federal Election Commission
Attn: Christal Dennis, Paralegal
1050 First Street, N.E.
Washington, D.C. 20463

VIA E-mail to CELA@fec.gov

Re: MUR 7813

Dear Mr. Jordan:

The undersigned serves as counsel to the Iowa Democratic Party and Ken Sagar, in his official capacity as Treasurer (“the Party”). This letter responds on behalf of the Party to the Commission’s notification that it received a complaint (the “Complaint”) alleging that the Committee violated the Federal Election Campaign Act (the “Act”) and Federal Election Commission (the “Commission”) regulations.

Background

The Complaint alleges that the Party and Theresa Greenfield for Senate (the “Campaign”) solicited and accepted an illegal contribution through a coordinated communication disseminated by Senate Majority PAC (“SMP”). For the reasons described below, the Commission should find that there is no reason to believe a violation occurred and should dismiss this matter.

On September 17, 2020, the Party issued a press release and background document detailing several criticisms of Iowa Senator Joni Ernst.¹ A staff member for the Party also tweeted out a link to the same press release on the same day.² The press release and background document contained several criticisms of Sen. Ernest, including:

1. After promising in her first campaign not to move to Washington, D.C. and “buy a big, fancy house”, Senator Ernst bought a luxury condo in D.C. in January 2016.

¹ See, Press Release (<https://iowademocrats.org/hear/>); Background Document (<https://iowademocrats.org/wp-content/uploads/2020/09/Sen.-Ernst-has-Changed-on-the-Issues-That-Matter-Most-to-Voters.pdf>).

² See, <https://twitter.com/JeremyCBusch/status/1306679093937799168>

2. Sen. Ernst's 2014 campaign paid the largest civil penalty ever levied by the Commission against an Iowa politician after having been found to knowingly accept excessive and prohibited contributions.
3. Sen. Ernst accepted nearly \$600,000 from Big Pharma and the Insurance Industry.

Many of these criticisms of Sen. Ernst were well known and had been previously used in communications by the Campaign and SMP prior to the September 17, 2020 press release.³ The Complaint contends that the Party used "smoke signals" to make a request or suggestion in the press release through two phrases: "During her last campaign, Joni Ernst said **(in her own words)** . . .," and "Voters need to hear from Iowans **in their own words.**"⁴ The Complaint goes on to allege that SMP made an ad buy for television and digital ads using the same attacks on Sen. Ernst and makes hay out of the fact that the SMP ad depicts Sen. Ernst and Iowans speaking in their own words in the advertisement as if that was a novel tactic in political ads.⁵ In fact, the Party, Campaign, and SMP had all published ads featuring Sen. Ernst or Iowans speaking in their own words *prior* to the September 17, 2020 press release.⁶ The Complaint does not allege any other communications made by the Party requesting or suggesting that SMP make an ad with any specific content and the Party hereby confirms that no such communications occurred.

As described below, the facts asserted in the Complaint do not support an allegation of coordination by the Party, Campaign, or SMP and the Commission should dismiss this matter.

³ Campaign: See, Campaign Tweet from September 13, 2020 and August 30, 2020 attacking Sen. Ernst for accepting illegal contributions from corporations:

<https://twitter.com/GreenfieldIowa/status/1305285534927982594?s=20>;

<https://twitter.com/GreenfieldIowa/status/1300223209413971975?s=20>

See, Campaign Tweet from August 26, 2020 criticizing Sen. Ernst for accepting money from Big Pharma:

<https://twitter.com/GreenfieldIowa/status/1298802568425082882?s=20>

SMP: See, SMP Tweet from July 24, 2020 attacking Sen. Ernst for knowingly accepting illegal contributions and paying the largest fine ever for an Iowa politician. <https://twitter.com/i/status/1286657076022751232>.

See, "Polly" posted on YouTube by SMP on September 11, 2020 criticizing Sen. Ernst for accepting over \$500,000 from drug & insurance interests: https://www.youtube.com/watch?v=5fHnJ9z_kV0&feature=youtu.be.

⁴ Complaint at 1 (emphasis in Complaint, but not in original Party press release).

⁵ Notably, the Complaint does not provide a copy of the advertisement at issue.

⁶ Campaign: See, Tweet from September 2, 2020 with Iowa resident speaking about Sen. Ernst:

<https://twitter.com/i/status/1301140652261019650>.

Party: See, Tweets from August 26, 2020 and Aug. 3, 2020 with Sen. Ernst speaking in her own words:

<https://twitter.com/i/status/1298642609020305410>; <https://twitter.com/i/status/1290296102546051072>

SMP: See, "Polly" posted on YouTube by SMP on September 11, 2020 with Iowa resident speaking about Sen. Ernst: https://www.youtube.com/watch?v=5fHnJ9z_kV0&feature=youtu.be.

Legal Analysis

Under the Act, an expenditure made by any person “in cooperation, consultation, or concert, with, or at the request or suggestion of” a candidate or party committee is a contribution to that candidate or party committee subject to the Act’s contribution limits and source restrictions.⁷ The Commission’s regulations provide a three-pronged test to determine when a communication is “coordinated” with a candidate or party committee such that it constitutes an in-kind contribution:

1. The communication is paid for by a person other than the candidate or party committee;
2. The communication satisfies one of the four the content standards; and
3. The communication satisfies the six conduct standard.⁸

Assuming the ad in question exists as described and was paid for by SMP, two facts not established by the Complainant, the first two prongs are likely met here, but the conduct standard has not been met and therefore no coordination between the Respondents has been demonstrated.

To be considered a coordinated communication, and thus an in-kind contribution to the Party, the facts alleged must support that the Party and SMP engaged in one of the six conduct standards in the Commission’s regulations. The Complaint alleges that the communication meets the first conduct standard: request or suggestion. To be considered a “request or suggestion”, one of the following must have occurred:

1. The advertisement was created, produced, or distributed at the request or suggestion of the Campaign or the Party; or
2. The advertisement was created, produced, or distributed at the suggestion of SMP and the Campaign or the Party assented to the suggestion.⁹

The Complaint alleges that the September 17, 2020 tweet and press release linked to the background document were a “request or suggestion” that “communications be created to include specific content — namely, that the communications contain the content and language on IDP’s website and that both Senator Ernst and Iowa voters are depicted in the ad ‘in her/their own words.’”¹⁰ The Commission has explicitly disagreed with this analysis stating that the request or suggestion standard is:

“intended to cover requests or suggestions **made to a select audience, but not those offered to the public generally**. For example, a request that is posted on a web page that is available to the general public is a request to the general public and **does not trigger the conduct standard in paragraph (d)(1)**, but a request posted through an intranet service or sent via electronic mail directly to a discrete

⁷ 52 U.S.C. § 30116(a)(7)(B).

⁸ 11 C.F.R. § 109.21.

⁹ 11 C.F.R. § 109.21(d)(1).

¹⁰ Complaint at 4.

group of recipients constitutes a request to a select audience and thereby satisfies the conduct standard in paragraph (d)(1).”¹¹

The Commission reiterated its stance in 2014 when a similar complaint was filed against the Democratic Senatorial Campaign Committee (the “DSCC”), Shaheen for Senate, and SMP alleging that the DSCC and Shaheen for Senate communicated a request or suggestion to SMP through posts made on the Shaheen for Senate website and DSCC twitter page.¹² In that matter, Shaheen for Senate posted on its campaign website a series of attacks against her opponent and the DSCC posted a message on Twitter with a link that “echoed the same themes as the Shaheen Committee website.”¹³ SMP then aired a television advertisement using some of the same attacks against Shaheen’s opponent. The Commission voted 5-1 to find no reason to believe a violation occurred in that matter stating that the “Commission has expressly stated ... that a communication resulting from a general request to the public or use of publicly available information, including information contained on a candidate’s website, does not satisfy the conduct standards.”¹⁴ Moreover, the Commission affirmed that “thematic similarities of the two communications at issue and their rough temporal proximity do not give rise to a reasonable inference that any of the conduct standards were satisfied ... particularly where no other information suggest that the Respondents engaged in any of the activities outlined in the relevant conduct standards.”¹⁵

The same analysis should be applied to this matter. The Complaint alleges that a tweet and press release by the Party describing attacks against Sen. Ernst, as part of the Party’s ongoing effort to defeat Sen. Ernst in the upcoming election, amounts to a request or suggestion that SMP make an ad portraying those same attacks. As previously explained by the Commission, this does not satisfy the “request or suggestion” standard and coordination cannot be established on those facts. First, the content posted publicly online does not even contain a request or suggestion — it merely sets out a series of criticisms against Sen. Ernst, many of which are simply reiterations of attacks that had already been made against Sen. Ernst.¹⁶ There is no request or suggestion that a communication be made or distributed. Second, *even if the Party had made a request or suggestion* in its posts, the Commission has been very clear that a request or suggestion made to the general public on a website — as opposed to being directed to a select audience or discrete group of people — does not constitute a “request or suggestion”. This is precisely what occurred here: the Party posted information directed at the general public on

¹¹ Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003) (explanation and justification) (emphasis added).

¹² MUR 6821 (Shaheen for Senate, *et al*).

¹³ *Id.*, Factual and Legal Analysis at 2.

¹⁴ *Id.* at 8 (citing Coordinated and Independent Expenditures, 68 Fed. Reg. 421,432 (Jan. 3, 2003) (explanation and justification); Coordinated Communications, 71 Fed. Reg. 33,190, 33,205 (Jun. 8, 2006) (explanation and justification).

¹⁵ *Id.* at 8.

¹⁶ *See supra*, note 3.

Twitter and its website. That is simply not coordination under the law and Commission precedent.

To be sure, as established in the Shaheen matter, coordination cannot be established based purely on overlapping themes and the close timing of communications distributed by candidates, party committees, and independent spenders where no other conduct is alleged. The Complaint in this matter is based purely on a tweet and website posting with no allegations of any other actions that would meet one of the six conduct standards and is unquestionably insufficient to establish any reason to believe a violation of the Act has occurred. The Commission should vote to dismiss this matter and close the file.

If you have any questions regarding this Response, my daytime number is (202) 479-1111. My email address is reiff@sandlerreiff.com.

Sincerely,

A handwritten signature in blue ink, appearing to read "N. Reiff".

Neil P. Reiff
Erin Tibe
Counsel to Iowa Democratic Party, and Ken
Sagar, Treasurer