

# SANDLER REIFF

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**RECEIVED**

*By OGC-CELA at 3:40 pm, Feb 05, 2021*

February 5, 2021

Jeff S. Jordan, Esq.  
Assistant General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

**Re: MUR 7839 – Response to Complaint - Westerleigh Press**

Dear Mr. Jordan:

This response is filed on behalf of Westerleigh Press, a printing and mailing company, to the complaints filed by Steve Daines for Montana and the National Republican Senatorial Committee (the “Complainants”) that non-express advocacy mailings (the “Mail Pieces”) by one or more of Westerleigh’s customers did not include “paid for by” and “not authorized by any candidate or candidate’s committee” disclaimers required for independent express advocacy communications under the Federal Election Campaign Act and Federal Election Commission regulations.

First, Westerleigh Press is a vendor. It is under no obligation to ensure that any of the company’s printing and mailing customers have disclaimers that may be required under the Act or Commission regulations.

Second, the Westerleigh customer(s) who sent the Mail Pieces are not federal political committees and, therefore, they are not required to include any disclaimers under the Act or Commission regulations unless the communications were coordinated with a candidate or party committee or are express advocacy communications.

Third, the Complainants provided no evidence to create any reason to believe the Mail Pieces were coordinated by the Westerleigh customers with any candidate or party committee. And Westerleigh does not have any such evidence of coordination.

Finally, the Mail Pieces are not express advocacy communications and, as a result, no disclaimers are required under the Act or Commission regulations.

For these reasons, as discussed in more detail below, the Commission should find no reason to believe a violation occurred and close this matter.

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## I. Statement of Facts

Westerleigh Press is a printing and mailing vendor that provides these services to many different customers such as for-profit companies, non-profit organizations, state and federal political committees, and state and federal candidate committees.

In this matter, none of the Westerleigh Press customers are registered as political committees with the Federal Election Commission.<sup>1</sup>

Westerleigh Press has no evidence nor any reason to believe the customers who sent the Mail Pieces acted in coordination with any candidate or party committee on the mail pieces.<sup>2</sup>

Each of the five Mail Pieces discussed issues of importance (federal government debt, U.S. trade with China, and the Second Amendment), provided information about each incumbent Senator's legislative position on the issue, and then advocated for people to call the Senators at their official U.S. Senate phone numbers to express their opinion on the specific issues:

- Call Steve Daines at 202-224-2651 and tell him to stop spending our families into government debt.<sup>3</sup>
- Call Dan Sullivan at 202-224-3004 and tell him to start standing up to China.<sup>4</sup>
- Call Lindsey Graham at 202-224-5972 and tell him to protect the Second Amendment.<sup>5</sup>

The Mail Pieces do not contain references to an election, voting, or any other electoral messages.<sup>6</sup>

## II. Legal Analysis

### A. Disclaimers are only required for limited types of communications.

Under the Act and Commission regulations, communications that require disclaimers are limited to: (1) public communications made by a political committee, (2) public communications

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<sup>1</sup> Declaration of James Glover, President, Westerleigh Press (Jan. 29, 2021).

<sup>2</sup> Declaration of James Glover

<sup>3</sup> See Complaint Ex. 1 and 2.

<sup>4</sup> See Complaint Ex. 4 and 5.

<sup>5</sup> See Complaint Ex. 6.

<sup>6</sup> See Complaint Ex. 1, 2, 4, 5, and 6.

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that expressly advocate the election or defeat of a clearly identified candidate, (3) public communications that solicit any contribution, and (4) electioneering communications.<sup>7</sup>

First, the Westerleigh Press customers that created the Mail Pieces are not political committees.<sup>8</sup> Therefore, they were not required to include the political committee disclaimer on the Mail Pieces.

Second, as discussed in detail below, the content of the Mail Pieces did not expressly advocate the election or defeat of a clearly identified candidate. Therefore, the Westerleigh Press customers were not required to have the independent expenditure disclaimer on the Mail Pieces.

Third, the Mail Pieces did not solicit contributions and, therefore, they were not required to include a solicitation disclaimer.

Finally, the Mail Pieces were not electioneering communications. The only types of communications that meet the definition of “electioneering communications” are those that are “publicly distributed by a television station, radio station, cable television system, or satellite system.”<sup>9</sup> The argument that the electioneering communication disclaimer requirements are underinclusive because they require disclaimers for broadcast advertisements but not for print, mailings, or Internet advertising was rejected by the U.S. Supreme Court. *McConnell v. Federal Election Comm'n* 124 S.Ct. 619, 697-698 (2003). Because the Mail Pieces were print, not broadcast communications, they were not required to have the electioneering communication disclaimer.

The Mail Pieces did not fall within any category of public communications under the Act or FEC regulations that required them to include a disclaimer.

**B. The Mail Pieces did not expressly advocate for the election or defeat of a candidate.**

An independent expenditure is an expenditure that expressly advocates the election or defeat of a clearly identified Federal candidate and that is not made in concert or cooperation with, or at the request or suggestion of, the candidate or his or her committee or agent, or a political party committee or its agent.<sup>10</sup>

In determining whether a communication contains express advocacy, the Commission analyzes the message under 11 C.F.R. § 100.22. A communication expressly advocates the

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<sup>7</sup> 11 C.F.R. § 110.11(a)(1)-(4)

<sup>8</sup> Affidavit of ..... (Respondent Ex. A).

<sup>9</sup> 11 C.F.R. § 100.29(a)(b)

<sup>10</sup> 52 U.S.C. § 30101(17)

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election or defeat of a clearly identified candidate under 11 C.F.R. § 100.22(a)<sup>11</sup> when it uses phrases such as “vote for the President,” “re-elect your Congressman,” or “Smith for Congress;” or “‘vote Pro-Life’ or vote Pro-Choice’ accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice” or uses campaign slogans or individual words, “which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc., which say ‘Nixon’s the One,’ ‘Carter ’76,’ ‘Reagan/Bush,’ or ‘Mondale!’”<sup>12</sup> This analysis is commonly referred to as the *Buckley* Magic Words test.<sup>13</sup>

In addition to the *Buckley* Magic Words test, FEC regulations also include a part (b) definition of express advocacy commonly referred to as the *Furgatch* test.<sup>14</sup> Under 11 C.F.R. § 100.22(b), a communication is express advocacy if:

When taken as a whole and with limited reference to external events, such as the proximity to the election, could *only* be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because –

- (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestion of *only one* meaning; and
- (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages *some other kind of action*.<sup>15</sup>

The Mail Pieces were not express advocacy under either the *Buckley* Magic Words or the *Furgatch* tests. First, as demonstrated in the content of the mailings stated about, neither mailing includes any of the *Buckley* Magic Words that have no other reasonable meaning than to urge the election or defeat of one or more clearly identified Federal candidate. Therefore, the mailings do not meet the definition of express advocacy under 11 C.F.R. § 100.22(a).

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<sup>11</sup> The term “clearly identified” means “the candidate’s name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as ‘the President,’ ‘your Congressman,’ or ‘the incumbent,’ or through an unambiguous references to his or her status as a candidate such as ‘the Democratic presidential nominee’ or ‘the Republican candidate for Senate in the State of Georgia.’” 11 C.F.R. § 100.17

<sup>12</sup> See Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35,292, 35,294-95 (July 6, 1995)

<sup>13</sup> See *Buckley v. Valeo*, 424 U.S. 1, n.52 (1976)

<sup>14</sup> Fed. Elec. Comm. v. *Furgatch*, 807 F.2d 857, 864 (9<sup>th</sup> Cir. 1987)

<sup>15</sup> 11 C.F.R. § 100.22(b)(emphasis supplied)

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Second, even with limited reference to external events, such as the proximity to an election, the Mail Pieces can only be interpreted as containing advocacy for something other than the election or defeat of a clearly identified candidate. The most reasonable interpretation of the mailings is exactly what they advocated for -- call an incumbent U.S. Senator at his official office about trade with China, the Second Amendment, or government debt.

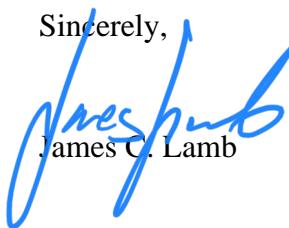
The communications also did not meet the *Furgatch* Test because there was no electoral portion of either communication that was unmistakable, unambiguous, and suggestive of *only one meaning* to vote for or against a candidate. The Mail Pieces only encouraged people to make a phone call to express their opinion about an issue to their Senator. That explicit message -- make a phone call, to this number, and deliver this message on the issue -- encourages some other kind of action than to elect or defeat a candidate. It would be unreasonable to conclude the Mail Pieces expressly advocated for the election or defeat of a candidate. The Mail Pieces also did not meet the part (b) definition of express advocacy under 11 C.F.R. § 100.22.

The Mail Pieces did not expressly advocate for the election or defeat of a clearly identified federal candidate, therefore, they did not constitute independent expenditures.

### III. Conclusion

The Mail Pieces did not contain express advocacy or fall within any other category of communication that would require them to include a disclaimer. As a result, there is no reason to believe Westerleigh Press or its customers violated the Act or Commission regulations. We respectfully request that the Commission dismiss this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "James C. Lamb".

James C. Lamb

**Federal Election Commission****MUR 7839****Respondents, Westerleigh Press****DECLARATION OF JAMES GLOVER**

My name is James Glover. The following statements are based on my personal knowledge:

1. I am the President of Westerleigh Press.
2. Westerleigh Press printed and mailed the five mail pieces for customers (the "Customers") that are at issue in MUR 7839.
3. On or about January 18, 2021, I searched the Federal Election Commission political committee on-line database and confirmed the Customers are not on the list of registered political committees.
4. I have no knowledge, information or belief that the Customers acted in coordination with any candidate, candidate's committee or party committee.

I declare, under penalty of perjury, that these statements are true and correct to the best of my present knowledge, information, and belief.



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JAMES GLOVER

Date: January 29, 2021