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June 24, 2021

Mr. Charles Kitcher
Acting Associate General Counsel – Enforcement
Federal Election Commission
1050 First Street, NE
Washington, DC 20463

Re: MUR 7906 (Conklin Company, Inc.)

Dear Mr. Kitcher:

We represent the Conklin Company, Inc. (the “Conklin Company”) in the above-captioned matter. We have reviewed Ms. Laura Wigley’s complaint filed on May 17, 2021 (the “Complaint”) alleging that the Conklin Company, its affiliate Herbster Farms, and its owner and chief executive officer, Mr. Charles Herbster, violated the Federal Election Campaign Act of 1971, as amended (“FECA”), and Federal Election Commission (“FEC” or “Commission”) regulations by failing to register as a political committee, file independent expenditure reports, and include a disclaimer in connection with a magazine advertisement disseminated five years ago.

The Complaint’s allegations focus on a two-page advertisement that appeared in the July 2016 edition of *Progressive Cattleman* magazine. According to the Complaint, Herbster Farms placed the advertisement, but it featured Mr. Herbster and mentioned the Conklin Company. The Complaint contends that the advertisement contains express advocacy and therefore was an independent expenditure, triggering political committee registration, independent expenditure reporting, and public communications disclaimer requirements. The Complaint estimates the cost of the advertisement to be approximately \$9,000.

The Complaint also notes that the alleged conduct took place “[n]o later than July of 2016,” yet Ms. Wigley sat on the allegations and waited five years to initiate this matter with the Commission. While the exact publication date of the July 2016 edition of *Progressive Cattleman* is unknown, the latest possible date would be July 31, 2016. As explained below, the five-year statute of limitations in this matter has either expired or will expire in a matter of days. Accordingly, this matter is time-barred under the statute of limitations and should be promptly dismissed.

I. The statute of limitations has run, and the Commission lacks authority to pursue this matter further.

The five-year statute of limitations set forth in 28 U.S.C. § 2462 has either already expired or has effectively expired and the Commission lacks authority to pursue this matter any further. Assuming that the claim accrued on July 31, 2016, the latest possible publication date for the July 2016 edition of *Progressive Cattleman*, the five-year statute of limitations would expire no later than July 31, 2021—a mere 75 days after the Complaint was filed and only 37

days from the date of this response.¹ As the Commission is aware, the agency's enforcement process often takes months and sometimes years to complete. During the probable cause phase of enforcement, which is a prerequisite for filing a civil enforcement action, FECA mandates that a respondent be given 15 days to respond to the Office of General Counsel's probable cause brief and that the Commission attempt conciliation with the respondent for a minimum of 30 days.² These two statutorily required steps take at least 45 days; the statute of limitations expires in 37 days, if not sooner.³ Accordingly, it is mathematically impossible for the Commission to commence a civil enforcement action in this matter before the statute of limitations expires, if it has not expired already.

We note that the Office of General Counsel recently took the position that the five-year statute of limitations "does not prevent the Commission from pursuing equitable remedies, including requiring disclosure" ⁴ However, this theory is legally tenuous at best. Courts disagree on whether Section 2462 bars the Commission from seeking equitable relief and under what circumstances the doctrine of concurrent jurisdiction applies.⁵ Moreover, the Supreme Court's decision in *Kokesh v. Securities and Exchange Commission* further calls into question whether the equitable remedies typically sought by the Commission (*i.e.*, declaratory judgment, disgorgement, injunctive relief) nevertheless constitute "penalties" subject to Section 2462's limitations. The Court explained that the "hallmarks of a penalty" are: (1) the remedy seeks to redress a public wrong, such as the violation of a public law, rather than a private wrong; and (2) the remedy is imposed for punitive purposes as a deterrent rather than to compensate an

¹ Section 2462's five-year statute of limitations applies to any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise" and runs "from the date when the claim first accrued." 28 U.S.C. § 2462. In the context of FECA, courts have held that a claim first accrues on the date that the alleged violation occurs. See *Fed. Election Comm'n v. Christian Coalition*, 965 F.Supp. 66, 70 (D.D.C. 1997).

² 52 U.S.C. § 30109(a)(3), (a)(4)(A)(i).

³ See also Fed. Election Comm'n, Directive No. 68: Enforcement Procedures (eff. Dec. 14, 2017) (requiring accelerated processing of statute of limitations-sensitive enforcement matters, which involves assigning an enforcement attorney within 15 days of the respondent's response and presenting a First General Counsel's Report to the Commission 30 days later).

⁴ MURs 6917 and 6929 (Scott Walker, *et al.*), General Counsel's Notice to the Commission Following the Submission of Probable Cause Brief, at 2 (July 7, 2020).

⁵ See, e.g., *Fed. Election Comm'n v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996) (holding that "because the claim for injunctive relief is connected to the claim for legal relief, the statute of limitations applies to both"); *Fed. Election Comm'n v. Nat'l Right to Work Comm.*, 916 F.Supp. 10, 14-15 (D.D.C. 1996) (holding that "injunctive relief is both unnecessary and unwarranted at this time" and "will not be granted against something merely feared as liable to occur at some indefinite time" (citation omitted)); *Fed. Election Comm'n v. Christian Coalition*, 965 F. Supp. 66, 71 (D.D.C. 1997) (interpreting *Cope* to permit the Commission to pursue equitable relief); *CREW v. Fed. Election Comm'n*, 236 F.Supp.3d 378, 392 (D.D.C. 2017) (noting that "both parties agree that there is a split of authority on whether the FEC actually retains this power under the statute").

aggrieved party for its loss.⁶ As one Commissioner recently explained, “[t]his suggests remedies to enforce campaign-finance law are more akin to penalties.”⁷

Given that the statute of limitations has either already expired or has effectively expired, the Commission lacks jurisdiction to pursue this matter further and should promptly dismiss the Complaint as time-barred.

II. Alternatively, the Commission should exercise its prosecutorial discretion and dismiss this matter pursuant to *Heckler v. Chaney*.

Should the Commission decline to dismiss this matter strictly on statute of limitations grounds, it alternatively should dismiss this matter as an exercise of its prosecutorial discretion pursuant to *Heckler v. Chaney*.⁸

Given the agency’s current enforcement backlog, the Commission has recently dismissed several matters in which the expiration of the statute of limitations was either imminent or had already passed. For example, in MUR 7395 (*Heller for Senate, et al.*), the Commission voted 5-0 to dismiss the matter under *Heckler v. Chaney*. Chair Broussard and Commissioner Weintraub cited the approaching statute of limitations as one reason for their votes, acknowledging the statute of limitations would “begin to run in July 2021.”⁹ Vice Chair Dickerson and Commissioners Cooksey and Trainor similarly noted the “impending” statute of limitations and explained “[w]ith an eye toward our existing backlog of enforcement matters, we believe that the Commission is better served prioritizing other investigations.”¹⁰ The Complaint in this matter not only involves conduct older than that in MUR 7395, but it also was filed three years after the complaint in MUR 7395.

Several other factors warrant the exercise of discretionary dismissal here. First, the alleged amount in violation is modest, particularly when compared to the amount of Commission resources that would be required to pursue this matter. Second, the alleged violation—an unreported independent expenditure in a niche trade magazine—had little or no impact on the 2016 election, as demonstrated by the fact that no one bothered to file a complaint until five years later. Third, the Complaint’s allegations do not raise any complex legal issues, nor do they involve any recent developments in the law that would warrant Commission resources to address. Finally, and as explained above, the Commission’s ability to ultimately seek equitable remedies in this matter is uncertain at best and would create substantial litigation risk.

⁶ *Kokesh v. S.E.C.*, 137 S. Ct. 1635, 1642 (2017).

⁷ MURs 6917/6929 (*Scott Walker, et al.*) and MURs 6955/6983 (*John Kasich, et al.*), Supplemental Statement of Reasons of Commissioner Sean J. Cooksey, at 3 (Apr. 29, 2021).

⁸ *Heckler v. Chaney*, 470 U.S. 821 (1985).

⁹ MUR 7395 (*Heller for Senate, et al.*), Statement of Reasons of Chair Shana M. Broussard and Commissioner Ellen L. Weintraub (May 7, 2021).

¹⁰ MUR 7395 (*Heller for Senate, et al.*), Statement of Reasons of Vice Chair Allen Dickerson and Commissioners Sean J. Cooksey and Jame E. “Trey” Trainor, III (Apr. 27, 2021).

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CONCLUSION

For all the foregoing reasons, the Commission should promptly dismiss the Complaint as either time-barred or as an exercise of the agency's prosecutorial discretion.

Respectfully Submitted,

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