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April 4, 2022

VIA E-MAIL

Roy Q. Luckett, Esq., Acting Assistant General Counsel
 Trace Keeys, Paralegal
 Federal Election Commission
 Complaints Examination & Legal Administration
 1050 First Street, NE
 Washington, DC 20463
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Re: MUR 7960 (Casten for Congress; Michelle M. Scheffki, Treasurer)

Dear Mr. Luckett:

We write as counsel to Casten for Congress (the “Campaign”) and Michelle M. Scheffki in her official capacity as Treasurer of the Campaign (collectively, “Respondents”) in response to the February 14, 2022, complaint filed by Kerri Barber (the “Complaint”). The Campaign is the authorized campaign committee of Representative Sean Casten (the “Candidate”), who represents Illinois’s sixth congressional district.¹

The Complaint alleges that the Campaign violated the Federal Election Campaign Act of 1971, as amended (the “Act”), and Federal Election Commission (the “Commission” or “FEC”) regulations by impermissibly coordinating on communications disseminated by SunshinePAC² (the “Committee”), an independent expenditure-only committee, resulting in impermissible in-kind contributions from the Committee to the Campaign. In particular, the Complaint alleges that in 2018, the Campaign’s campaign manager, Michael Garton, lived at the same address as Tom Casten, the Candidate’s father and the Committee’s primary funder, and argues that for that reason alone, the Commission should find reason to believe that the Committee’s independent expenditures were coordinated with the Campaign.

The accusation that the Campaign and the Committee impermissibly coordinated on the Committee’s communications based solely on the fact that Mr. Garton and Mr. Casten lived at the same address is baseless. This fact alone does not prove coordination. As such, the Complaint fails to allege sufficient facts which, if proven true, would indicate that the Campaign and the

¹ See Statement of Organization, FEC Form 1, Casten for Congress (amended Jan. 19, 2022).

² According to its Statements of Organization, SunshinePAC changed its name to My Committee on March 15, 2018, and then changed its name back to SunshinePAC on June 16, 2018. See Statement of Organization, FEC Form 1, My Committee (amended March 15, 2018); Statement of Organization, FEC Form 1, My Committee (amended June 16, 2018).

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Committee impermissibly coordinated on the Committee’s independent expenditures. The Complaint provides no details beyond a statement about Mr. Garton’s residency to prove that he shared nonpublic information about the Campaign’s plans, projects, activities, or needs with Mr. Casten, or that Mr. Casten shared any such information with the Committee or its agents or employees. Nor does the Complaint provide any facts that would indicate that if such information was shared, it was material to the creation, production, or distribution of the Committee’s communications. And finally, the Complaint does not allege that Mr. Casten was an agent or employee of the Committee or the Campaign. In short, the Complaint does not allege a single fact to indicate that the conduct prong of the coordinated communication rules was met.

For these reasons, the Commission should find no reason to believe that a violation of the Act occurred and promptly close this matter.

FACTUAL BACKGROUND

During the 2018 Democratic primary election, Michael Garton served as the Campaign’s campaign manager. During that time, Mr. Garton was registered to vote at 8 E Third Street, Hinsdale, Illinois, the home of Rep. Casten’s father, Tom Casten.

The Committee disclosed the receipt of two contributions from Tom Casten in March 2018. The Committee also disclosed making independent expenditures opposing Kelly Mazeski, one of Rep. Casten’s 2018 primary opponents. One of the independent expenditures appears to have been for printed materials, and another appears to have been for a telephone bank. The Complaint relies on the Committee’s publicly available FEC reports and does not otherwise describe the Committee’s expenditures or provide copies of their contents.

LEGAL ANALYSIS

Communications are only considered in-kind contributions to candidates and their authorized committees if the communications qualify as “coordinated communications” under the three-pronged test set forth in Commission regulations.³ The “payment prong” is satisfied if an individual or entity other than the candidate or candidate’s committee pays for the communication.⁴ The “content prong” is satisfied if, for example, the communication expressly advocates for the election or defeat of a clearly identified federal candidate.⁵ The Complaint does not describe the communications at issue, but instead refers to them as electioneering communications and recites the Committee’s descriptions of the communications in its FEC

³ See 11 C.F.R. §109.21(b).

⁴ Id. § 109.21(a)(1).

⁵ Id. § 109.21(c)(3).

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reports.⁶ Without more information about these communications, the Campaign cannot opine on whether these communications satisfied the content prong, though the Committee’s reports suggest that they did.

The “conduct prong” is satisfied if the outside spender and the campaign, or their employees or agents, engage in one or more of six clearly defined “conduct standards.”⁷ Here, the Complaint alleges that the conduct prong was satisfied through “substantial discussion” between the Committee and an agent of the Campaign, as set forth in 11 C.F.R. § 109.21(d)(3). It does not allege that the Committee or the Campaign engaged in any other activity that would meet one of the other five conduct standards, and as such, Respondents do not address those standards in this response.

The substantial discussion standard is satisfied if a “communication is created, produced, or distributed after one or more substantial discussions about the communication between the person paying for the communication, or the employees or agents of the person paying for the communication, and 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.”⁸ A discussion is “substantial” only “if information about the candidate’s or political party committee’s campaign plans, projects, activities, or needs is conveyed to a person paying for the communication, *and* that information is material to the creation, production, or distribution of the communication.”⁹ The substantial discussion standard is not satisfied if “the information material to the creation, production, or distribution of the communication was obtained from a publicly available source.”¹⁰

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.”¹¹ 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 constitute a violation of the [Act].”¹² Moreover, “[a]t the reason-to-believe stage, [the

⁶ The Complaint’s description appears to be incorrect, as the Committee disclosed these expenditures as independent expenditures and the regulations specifically exclude independent expenditures reported under the Act from the definition of electioneering communications. *Id.* § 100.29(c)(3).

⁷ *Id.* § 109.21(d).

⁸ *Id.* § 109.21(d)(3).

⁹ *Id.* (emphasis added).

¹⁰ *Id.*

¹¹ 11 C.F.R. § 111.4(d)(3).

¹² MUR 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory Committee, et al.), Statement of Reasons, Comm’rs Mason, Sandstrom, Smith & Thomas at 1 (Dec. 21, 2000) (emphasis added).

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Commission] cannot proceed to authorize an investigation based upon ‘[u]nwarranted legal conclusions from asserted facts or mere speculation.’”¹³

Here, the Complaint does not allege sufficient specific facts—or really, any facts—which, if proven true, would indicate that substantial discussion coordination between the Campaign and the Committee occurred. For four main reasons, this Complaint fails to meet its burden at this reason to believe stage.

First, the Complaint does not allege that Mr. Garton shared nonpublic information about the Campaign’s plans, projects, activities, or need with Mr. Casten or with anyone associated with the Committee. Instead, the Complaint states, without evidence, that there was an “intimate relationship between Mr. Garton and Tom Casten” and that there was no “firewall” between them, “strongly imply[ing] satisfaction of” the substantial discussion standard.¹⁴

These allegations, without more facts or details, do not meet the complainant’s burden at the reason to believe stage. For one, the Commission has found that mere familial relationships between a candidate and a contributor to an independent expenditure-only committee supporting that candidate are not sufficient, without more facts, to find reason to believe that coordination occurred.¹⁵ Here, the Complaint alleges that a substantial discussion must have occurred because a campaign employee (Mr. Garton) and a contributor to an independent expenditure-only committee (Mr. Casten) resided at the same address. The Complaint alleges, without basis or support, that this arrangement resulted in an “intimate relationship” between Mr. Garton and Mr. Casten but fails to include any facts to suggest that Mr. Garton shared with Mr. Casten any nonpublic information regarding the Campaign’s plans, projects, activities, or needs.

Second, the Complaint fails to allege that, even if Mr. Garton shared with Mr. Casten any nonpublic information regarding the Campaign’s plans, projects, activities, or needs, that Mr. Casten shared that information with anyone at the Committee responsible for the creation, production, or distribution of the Committee’s independent expenditures. Instead, it simply concludes that Mr. Garton and Mr. Casten’s living arrangement resulted in coordination. However, “merely making a contribution to a committee is insufficient to support an inference

¹³ MUR 7868 (Twitter), Supplemental Statement of Reasons, Vice Chair Dickerson & Comm’r Trainor at 4 (Sept. 13, 2021) (quoting MUR 4960 (Clinton), Statement of Reasons, Comm’rs Mason, Sandstrom, Smith, and Thomas at 2 (Dec. 21, 2000)); *see also* MURs 6789/6852 (Special Operations for America, et al.), Statement of Reasons, Vice Chairman Petersen & Comm’r Hunter at 4 (May 28, 2019) (“We do not authorize Commission investigations based on mere speculation”).

¹⁴ Compl. at 4-5.

¹⁵ *See, e.g.*, MUR 6668 (Jay Chen for Congress), Factual and Legal Analysis at 8 (Nov. 26, 2013); *see also* MUR 7139 (Amie Hoeber for Congress), Commission Certification ¶ 1 (Jan. 28, 2021).

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that the contributor had material involvement with, or substantial discussions about, the committee’s communications.”¹⁶

The Complaint provides no information to support the inference that Mr. Casten engaged in substantial discussions about the Committee’s communications with any employee or agent of the Committee. As such, even if Mr. Garton had conveyed nonpublic information about the Campaign’s plans, projects, activities, or needs to Mr. Casten—something the Complaint fails to allege—there is no indication that Mr. Casten, as a mere funder of the Committee, conveyed that information to the Committee. Without any evidence that such information was conveyed to the Committee, the Commission cannot find reason to believe that the substantial discussion conduct standard was satisfied.

Third, there is no indication that such nonpublic information, if it was conveyed to the Committee, was material to the creation, production, or distribution of the independent expenditures. The Complaint neither alleges what information was conveyed, nor how such hypothetical information was used to further the Committee’s independent expenditures. Indeed, the Complaint does not even describe any relevant details concerning the communications at issue, other than the fact that they are reported to have opposed Kelly Mazeski. Without facts showing that nonpublic information was conveyed by the Campaign to the Committee and that such information was material to the Committee’s communications, the Commission cannot find reason to believe that the substantial discussion conduct standard was satisfied.

Finally, the Complaint does not allege that Mr. Casten was an agent or employee of the Campaign or the Committee. The substantial discussion standard will only satisfy the conduct prong if “the person paying for the communication, or the employees or agents of the person paying for the communication” engage in a substantial discussion with the candidate or their campaign, their opponent’s candidate or campaign, or a political party committee, or an agent of the forgoing.¹⁷ Here, there is no indication that Mr. Casten had actual authority, express or implied, to engage in any of the activities listed in 11 C.F.R. 109.3(b) on behalf of the Candidate or the Campaign. Simply being the Candidate’s father does not turn Mr. Casten into an agent of the Campaign. Further, there is no allegation that Mr. Casten fits within the definition of an “employee[] or agent[] of the person paying for the communication” (here, the Committee). Mr. Casten made two contributions to the Committee and his contributions, without more, do not turn him into an agent of the Committee. Without such facts to support the allegation, the Complaint fails on its face to allege that the substantial discussion conduct standard was satisfied.

For the reasons set forth above, the Commission should find no reason to believe that a violation occurred and promptly close this file.

¹⁶ MUR 7139 (Amie Hoeber for Congress), Statement of Reasons, Chairman Dickerson & Comm’rs Cooksey and Trainor (Feb. 14, 2022).

¹⁷ 11 C.F.R. §§ 109.1, 109.21(d)(3).

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Very truly yours,

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

Rachel L. Jacobs

Andrea T. Levien

Counsel to Respondents