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May 18, 2022

Federal Election Commission
Office of Complaints Examination & Legal Administration
Attn: Kathryn Ross, Paralegal
1050 First Street, NE
Washington, DC 20463
cela@fec.gov
VIA EMAIL ONLY

Re: MUR 7987 – Response to Complaint of Kean for Congress, Inc.

Dear Ms. Ross:

This firm represents Phil Rizzo for Congress and David Satterfield, in his official capacity as its Treasurer (collectively, the “Rizzo Campaign”), in connection with the complaint filed in the above referenced matter.

The Rizzo Campaign acknowledges that the autocal described in the complaint constituted a “public communication,” was sponsored by the Rizzo Campaign, and did not include the disclaimer required by 52 U.S.C. § 30120(a)(1) and 11 C.F.R. § 110.11. For three reasons, however, the Commission should dismiss the complaint in the exercise of its prosecutorial discretion. *See generally Heckler v. Chaney*, 470 U.S. 821 (1985).

First, the omission of the disclaimer was attributable to the error of a third party vendor, and was in no way a purposeful decision of the Rizzo Campaign. To the contrary, the call script prepared by the Rizzo Campaign’s general consultant and transmitted to the vendor contained the necessary disclaimer—*i.e.*, “Paid for by Phil Rizzo for Congress.” For reasons that remain unclear, however, the vendor failed to include a voiceover disclaimer in the actual recording, which was not presented to the Rizzo Campaign for review prior to its dissemination. The Rizzo Campaign has since permanently terminated its use of the vendor’s call services.

When, as here, a missing disclaimer is the product of an inadvertent error and the respondent committee has taken corrective action, the Commission customarily has chosen not to invest time and resources in an investigation. Indeed, the Commission previously dismissed in its discretion a complaint featuring a substantively identical constellation of facts—*i.e.*, a vendor’s omission of a disclaimer that had been included in the original call script. *See* MUR 6690 (Sobhani for Maryland), Factual & Legal Analysis (Dec. 16, 2014); *see also* MUR 6846 (DeFazio for Congress), Factual & Legal Analysis (Feb. 10, 2017) (noting that “the Commission has not typically pursued matters when the respondent has shown that a missing disclaimer was due to a vendor’s inadvertent omission”); MUR 7489 (Diehl for U.S. Senate), Enforcement Priority System Dismissal Report (Apr. 19, 2019) (recommending dismissal of complaint alleging disclaimer violation that respondent campaign averred was “inadvertent and unintentional” and that was accompanied by corrective

action);¹ MUR 7644 (Matt Prosch for Congress), Enforcement Priority System Dismissal Report (Dec. 11, 2019) (recommending dismissal of disclaimer violations arising out of vendor error); MUR 7046 (Matthew Evans for Congress), Enforcement Priority System Dismissal Report (Nov. 10, 2016) (recommending dismissal of allegations arising out of mistaken omission of disclaimer from campaign website).

Second, the mistaken exclusion of a disclaimer from the call referenced in the complaint was an isolated infraction. The Rizzo Campaign's public communications have consistently contained clear, conspicuous and compliant disclaimers; the complaint does not allege otherwise. *See* MUR 7289 (Take Back the Tenth), Enforcement Priority System Dismissal Report (Jan. 11, 2018) (recommending dismissal of disclaimer violation, in part because it was an "oversight" and "appears to be an isolated incident").

Third, the Rizzo Campaign never misrepresented or affirmatively concealed its sponsorship of the call. The call did not purport to originate from a third party and contained no content or features that would have induced a listener to believe that it was paid for by someone other than the Rizzo Campaign.² Indeed, as the complaint itself attests, the phone number associated with the call was easily traceable to the Rizzo Campaign, and the complaint alleges that Mr. Rizzo himself personally recorded the message. Further, the website to which listeners of the call were directed (www.realtomkean.com) has always included a disclaimer disclosing that it is "Paid for by Phil Rizzo for Congress." To be clear, the Rizzo Campaign acknowledges that these features are not a legally sufficient substitute for a compliant disclaimer. But the absence of any deceptive or misleading attributes favors dismissal. *See, e.g.*, MUR 7459 (Citizens for Turner), Enforcement Priority System Dismissal Report (Nov. 20, 2018) (recommending dismissal, given "the unlikeliness the general public would have been confused as to whether the television ads were authorized by [the candidate]"); MUR 6835 (Lesli Gooch for Congress), Factual & Legal Analysis (Nov. 18, 2014) at p. 3 (dismissing complaint concerning mailer that lacked disclaimer but included "some identifying information . . . which linked it to the Committee").

For the foregoing reasons, the Rizzo Campaign submits that the Commission should dismiss the complaint in the exercise of its prosecutorial discretion and take no further enforcement or investigatory actions.

Please do not hesitate to contact me should you require any additional information.

Respectfully,

/s/ Thomas Basile

Thomas Basile

¹ Because of the inherently ephemeral nature of a one-time telephone call, it obviously is not possible for the Rizzo Campaign to retrospectively supply the missing disclaimer, but the Commission should consider its permanent termination of the vendor's call services as a good faith curative action.

² The complaint proffers a conclusory pronouncement that the call would "annoy and confuse potential primary voters," but contains no concrete allegations delineating who was "confused" and with respect to what facts. While a few of the emails from third parties appended to the complaint evince a belief that the call originated from Tom Kean's campaign, any such inference was unreasonable, given that the call consisted largely of content that was overtly critical of Kean.