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October 25, 2022

Via Email

Roy Q. Luckett
Acting Assistant General Counsel
Federal Election Commission
Office of Complaints Examination & Legal Administration
Attn: Christal Dennis, Paralegal
1050 First Street, NE
Washington, DC 20463
cela@fec.gov

Re: MUR Complaint No. 8075, Complaint from Smiley for Washington, Inc.

Dear Mr. Luckett:

This firm represents *The Seattle Times* ("Times"), which publishes a daily newspaper, in connection with MUR 8075 ("Complaint"), filed by U.S. Senate Candidate Tiffany Smiley and Smiley for Washington, Inc. ("Campaign"). For reasons explained below, the Complaint is frivolous and retaliatory; the Commission should take no action other than to dismiss.

The Campaign submitted the Complaint after the Times objected to its use of Times intellectual property in a television advertisement broadcast throughout the State of Washington beginning in September 2022.[1] The Times asked that the Campaign stop using the Times logo (which is protected by the Lanham Act) and the content of two news articles (which are protected by the Copyright Act). The Campaign responded by complaining to this Commission.

At bottom, the Complaint is a baseless attempt to mischaracterize a run-of the-mill intellectual property dispute as a campaign finance matter. The gist of the Complaint – that the Times has *not* asserted that other uses of its intellectual property are infringing – raises no plausible FEC Act violation. The Commission should disregard the Complaint because, in brief, (1) it fails to identify any act or forbearance by the Times that could be construed as an actionable "contribution"; and (2) the Complaint's unprecedented theory would require the

[1] Smiley for Washington, *New TV AD: Smiley Takes Murray to Task for "Reckless Policies" Fueling Crime Surge*, Sept. 2022, https://www.smileyforwashington.com/post/new-tv-ad-smiley-takes-murray-to-task-for-reckless-policies-fueling-crime-surge.

Commission to police matters that are outside its purview – namely, whether a particular unauthorized use of intellectual property is or is not an infringement. Federal law leaves enforcement of copyright and trademark rights to the property owner and, ultimately, the federal courts. There is no issue here for the Commission to address.

As an initial matter, the Complaint fails to identify *any* allegedly actionable "contribution." The only advertisements referred to in the Complaint are two campaign ads that Ms. Smiley's opponent, Senator Patty Murray, ran in 2016. *See* Complaint, n.8. But even if the Times' alleged failure to object to those six-year old ads could be construed as "contributions" (and, as explained below, it cannot), they would not be actionable. *See* 52 U.S.C. § 30145 (five-year limitations on campaign violations). The Complaint identifies no act, or failure to act, that could be the subject of timely action by the Commission.

More fundamentally, the Complaint rests on the untenable assumption that a copyright or trademark owner's assessment of whether and when to enforce its intellectual property rights can be construed as a "contribution." No authority supports this view. That is unsurprising: determining whether a particular cease-and-desist demand is warranted would require evaluating whether the underlying copyright or trademark use is infringing – a determination Congress left to the exclusive jurisdiction of the federal courts, not the Commission. *See* 28 U.S.C. § 1338.

Like any intellectual property owner, the Times has a right, and perhaps an obligation, to protect its work against perceived infringements. *See, e.g.*, *Grupo Gigante Sa De CV v. Dallo & Co. Inc.*, 391 F.3d 1088, 1102 (9th Cir. 2004) ("Companies expecting judicial enforcement of their marks must conduct an effective policing effort."); 17 U.S.C. § 501 (providing cause of action for copyright infringement). The Times sends cease-and-desist requests to third parties, including campaign committees (regardless of party affiliation, and even to candidates it has endorsed) when it learns of a use that it believes infringes the Times' rights, or uses its intellectual property in a misleading manner. Other news publishers routinely do the same.[2]

The fact that the Times does *not* formally object to a particular campaign ad that uses its intellectual property does not mean that it supports the candidate, or believes the candidate's use is not infringing. It may simply reflect that the Times was unaware of the use; or that it believes that the particular use is de minimis, or a fair use, or poses no risk of confusing or misleading its readers.[3] In none of these instances can the Times' forbearance be considered a "contribution."

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[2] *See, e.g.*, *CNN sends Trump campaign cease-and-desist letter for misleading ad*, CNN, May 4, 2020; *NBC, Tom Brokaw Ask Romney to Take Down Ad Made with News Footage*, The Hill (Jan. 28, 2012); *FOX [News] Sends Cease & Desist to McCain Web Operator*, AdWeek (Oct. 11, 2008).

[3] For example, the Times may not object to a candidate who it has in fact editorially endorsed from accurately depicting the endorsement in a campaign ad. Subjecting the press to liability for allowing candidates to accurately inform voters of the newspaper's editorial position about a

Among other things, a newspaper's decision regarding whether to assert that its copyright or trademark is being infringed requires a fact-specific assessment of the particular use, and how likely it is to be found actionable. Making this assessment is a "normal function[] of a press entity," and thus falls within the FEC Act's press exemption. *See FEC v. Phillips Pub., Inc.*, 517 F. Supp. 1308, 1313 (D.D.C. 1981), citing 52 U.S.C. § 30101(9)(B)(i).

Furthermore, the Complaint rests on the assertion that the Campaign had a right to appropriate the Times logo and copyrighted material because its use "falls squarely within the Copyright Act's fair use doctrine," and there is no "likelihood of confusion." Complaint p. 3. The Times disagrees. Political ads are not immune from infringement liability. *See, e.g.*, *Hill v. Pub. Advocate*, 35 F. Supp. 3d 1347 (D. Colo. 2014) (rejecting infringement defendant's argument that use of copyrighted photograph in political flyer was fair use); *Browne v. McCain*, 612 F. Supp. 2d 1125 (C.D. Cal. 2009) (denying motion to dismiss copyright infringement and Lanham Act false association claims based on Presidential campaign's use of plaintiff's song in political ad). And "fair use" is not a *right* to use another's copyright; it is "an affirmative defense requiring a case-by-case analysis." *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985).

Here, the Campaign's advertisement uses the Times intellectual property in deceptive ways, including by altering the appearance and placement of the Times logo and headlines in a manner that falsely suggested the Times (i) ran both articles as lead stories and (ii) endorsed the views expressed in the ad, including the Campaign's interpretation of the articles. Given this misleading presentation, the Times believes it was appropriate – in order to protect its editorial integrity and its credibility with its readers – to ask that the Campaign cease its unauthorized use of Times intellectual property.

The Times believes the Campaign's use of its intellectual property would not qualify as a fair use, and has the potential to confuse the public. That the Campaign disagrees does not make the Times' cease-and-desist demand, or its alleged decision to not pursue similar demands against unspecified other ads, a campaign finance violation. Whether the Campaign is or is not an infringer would be an issue for a court to decide. It is not a matter for the FEC.

For all of these reasons, the Campaign's Complaint lacks merit and the Commission should take no further action. If further communication on this matter is necessary or would be helpful to the Commission, please feel free to contact me directly.

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candidate would run afoul of the FEC Act's press exemption (52 U.S.C. § 30101(9)(B)(i)), as well as the First Amendment's prohibition against banning dissemination of accurate political speech. *See Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 229 (1989) (regulation limiting candidate endorsements violated First Amendment because it "burdens political speech while serving no compelling governmental interest").

Very truly yours,

Davis Wright Tremaine LLP

Eric M. Stahl
Counsel to The Seattle Times

FEDERAL ELECTION COMMISSION
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STATEMENT OF DESIGNATION OF COUNSEL

Provide one form for each Respondent/Witness

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AR/MUR/RR/P-MUR# 8075

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The above-named individual and/or firm is hereby designated as my counsel and is authorized to receive any notifications and other communications from the Commission and to act on my behalf before the Commission.

10/25/22 Alan Fisco President

Date (Signature - Respondent/Agent/Treasurer) Title

Alan Fisco

(Name – Please Print)

RESPONDENT: Seattle Times Company

(Please print Committee Name/ Company Name/Individual Named in Notification Letter)

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This form relates to a Federal Election Commission matter that is subject to the confidentiality provisions of 52 U.S.C. § 30109(a)(12)(A). This section prohibits making public any notification or investigation conducted by the Federal Election Commission without the express written consent of the person under investigation.

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