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April 7, 2023

VIA E-MAIL

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

Re: Matter Under Review 8075 (People for Patty Murray)

Dear Mr. Luckett:

We write as counsel to People for Patty Murray (the "***Campaign***") and Jay Petterson (collectively, the "***Respondents***"), in response to the complaint filed by Smiley for Washington, Inc. ('***Complainant***") in MUR 8075 (the "***Complaint***"). Complainant alleges that The Seattle Times (the "***Newspaper***") made a prohibited corporate contribution to People for Patty Murray by attempting to enforce its intellectual property rights against Complainant in 2022 and not taking similar action against the Campaign in 2016.[1]

Although the Office of General Counsel notified Respondent of the Complaint in MUR 8075, the Complaint does not allege any wrongdoing by Respondent and thus should be dismissed as to Respondent. Moreover, the Complaint does not provide any support for a claim that the Newspaper made, or the Campaign accepted, a prohibited in-kind contribution. Without any consultation or coordination with the Newspaper, the Campaign *briefly* and *minimally* used Newspaper intellectual property pursuant to the fair use doctrine. It is not the Campaign's fault, much less an actionable violation of the Federal Election Campaign Act of 1971, as amended (the "***Act***"), that in the viewpoint of the Newspaper, the Complainant in its advertisement went beyond fair use and violated the Newspaper's intellectual property rights. The Federal Election Commission (the "***Commission***") has long recognized that when a corporation takes action for bona fide commercial reasons it does not make a contribution under the Act. Here, it is absolutely the proper commercial role of the Newspaper, and not the Commission, to determine when a use of its intellectual property violates its rights and harms its commercial interests. And the Complaint presents no evidence that suggests the Newspaper did not send the cease and desist to Complainant for bona fide commercial reasons. Accordingly, the Complaint fails to allege any facts that, if true, would constitute a violation the Act. We urge the Commission to dismiss this frivolous complaint immediately.

[1] Compl. at 2.

FACTUAL BACKGROUND

In 2022, Senator Murray was a candidate for re-election for the U.S. Senate in Washington.[2] Her Republican opponent was Tiffany Smiley.[3]

During the 2022 election, Complainant ran a thirty second television advertisement that prominently featured The Seattle Times corporate masthead (the "***Logo***") for 11 seconds – nearly half the advertisement.[4] The Logo was featured in the center-right of the advertisement directly above two different Newspaper headlines.[5] No other news organization was cited in the advertisement.[6] Apart from a brief flashing of the candidate's name, the Logo was the only on-screen text displayed until the final four seconds when the required FEC and FCC disclaimers come on screen.[7]

As Complainant states, in 2016, the Campaign used the Logo in two advertisements. The first advertisement features the Logo at the bottom of the screen, below a Newspaper headline.[8] The Logo and headline were featured for three seconds during the one minute and forty-seven second advertisement.[9] The second advertisement features the Logo at the bottom of the screen, below a quoted sentence clause of a Newspaper story.[10] The Logo and sentence clause were featured for three seconds during the thirty second advertisement; seven other news organizations are also cited on screen in the second advertisement.[11]

According to the Complaint, during the 2022 election, the Newspaper sent Complainant a cease-and-desist letter for the unauthorized use of the Logo and the two headlines.[12] The letter noted that the content is protected by copyright and trademark and is the exclusive property of the Newspaper.[13] On September 27, 2022, Complainant responded to the cease-and-desist letter, claiming the unlicensed use of the content was permissible and stated Complainant had no intention of removing the Logo or the headlines from the advertisement.[14]

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[2] Patty Murray, FEC Form 2: Statement of Candidacy (February 9, 2017, https://docquery.fec.gov/pdf/157/201702100200071157/201702100200071157.pdf.
[3] Tiffany Smiley, FEC Form 2: Statement of Candidacy (April 14, 2021), https://docquery.fec.gov/pdf/959/202104149443321959/202104149443321959.pdf.
[4] *Cup of coffee*, Smiley for Washington, Inc., YouTube (Sept. 20, 2022), https://www.youtube.com/watch?v=B6kGg6py6xc.
[5] *Id.*
[6] *Id.*
[7] *Id*.
[8] *Patty Murray – First 2016 Ad*, People for Patty Murray, YouTube (July 22, 2016), https://www.youtube.com/watch?v=XGQCPp1Mpgc.
[9] *Id*.
[10] *Senator Patty Murray Gets Things Done*, YouTube (Oct. 10, 2016), https://www.youtube.com/watch?v=W478Alr-ZCM.
[11] *Id*.
[12] Compl. at 5, Exhibit A.
[13] *Id*.
[14] Compl. at 13, Exhibit B.

To the best of the Campaign's knowledge, the Campaign did not receive a cease-and-desist letter from the Newspaper related to the two advertisements in 2016.

LEGAL DISCUSSION

Corporations are prohibited from making a contribution to a candidate's committee, and candidates are prohibited from knowingly accepting or receiving a prohibited contribution.[15] A "contribution" includes "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office."[16] "Anything of value" includes in-kind contributions, such as the provision of goods or services without charge or at a charge that is less than the usual and normal charge.[17] The Commission has long considered activity engaged in for bona fide commercial reasons not to be "for the purpose of influencing an election," and thus, not a contribution or expenditure under the Act.[18] This is true even if a candidate benefitted from the commercial activity.[19]

Here, the Complaint alleges that the Newspaper "provide[d] its resources" to the Campaign and denied the same to Complainant, and therefore provided a prohibited in-kind contribution to the Campaign.[20] However, the Newspaper did not directly permit, authorize or have any communication with the Campaign about the Campaign's limited use of the Newspaper's resources in 2016.[21] The Newspaper's decision to take preliminary action to defend its intellectual property interests in some circumstances does not imply consent of every other use, at every other time, in every other format.

Even assuming the Newspaper was aware of the 2016 Campaign advertisements using its resources, the Newspaper had a bona fide commercial interest in attempting to enforce its copyright and trademark rights with Complainant's specific use. While Complainant featured the Newspaper logo prominently for over a third of its advertisement, both Campaign advertisements

[15] *See* 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b), (d).
[16] 52 U.S.C. § 30101(8)(A)(i).
[17] *See* 11 C.F.R. § 100.52(d)(1).
[18] *See*, e.g., Factual & Legal Analysis ("F&LA") at 10, MUR 7991 (Google, LLC, et al.) (finding Google's spam filter was in place for commercial rather than electoral purposes and no in-kind contribution occurred despite affecting Republican and Democratic emails in disparate ways); F&LA at 4, MUR 6586 (World Wrestling Ent., Inc.) (finding that WWE acted with the "sole intent to defend its business reputation" and not for the purpose of influencing an election when WWE's senior vice president sent a letter to a newspaper seeking a retraction of a negative article about Senate candidate Linda McMahon, who owned and served as CEO of WWE).
[19] F&LA at 6, MUR 7024 (Van Hollen for Senate, et al.) (opining that the "question under the Act is whether the legal services were provided for the purpose of influencing a federal election, not whether they provided a benefit to Van Hollen's campaign," and concluding there was no contribution given the "absence of any objective or subjective indication" respondents acted for the purpose of influencing the election).
[20] Compl. at 1-2; *see* 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2.
[21] The Commission has previously determined that a corporation's name, trade name, trademarks, and service marks are things of value owned by the corporation, and that authorizing a committee to use them may constitute an in-kind contribution. *See* Factual and Legal Analysis at 6, MUR 7508 (Friends of Sherrod Brown, et al.)("F&LA") (citing F&LA at 4, MUR 7302 (Tom Campbell for North Dakota, et al.), Advisory Op. 2007-10 (Reyes); F&LA at 7, MUR 6542 (Mullin for Congress); F&LA at 10-11, MUR 6110 (Obama Victory Fund)).

only featured the Newspaper logo at the bottom of the screen for a total of three seconds per advertisement.

Both the Campaign and Complainant took the position that the use of Newspaper resources in the advertisements did not infringe on the Newspaper's intellectual property rights. But the Newspaper has every right to determine that one use constituted an infringement while another use did not. As Kati Erwert, a Seattle Times senior vice president, clearly explained " . . . [W]e try to be very cognizant of fair use . . . [i]n this instance specifically, [Complainant] is using it for an inferred endorsement of her campaign, which violates the policy and is the reason for the cease and desist."[22] Further, Complainant's attempts to quantify the alleged in-kind contribution have no basis in reality. Complainant acknowledges the difficulty in ascertaining a cost value of being "denied" Newspaper resources, but still attempts to do so and cites an estimated $5,000 of production cost for updating an advertisement.[23] However, Exhibit B of the Complaint contradicts this, suggesting Complainant did not actually incur *any* costs because Complainant unequivocally rejected the Newspaper's cease-and-desist demand. Even if Complainant did decide to change its advertisement, that is a cost Complainant brought upon itself by improperly using the intellectual property of a third party.

Put simply, it is the Newspaper's right to determine, in light of its commercial interests, when it believes that a use of its intellectual property violates its rights and when it does not. That right falls squarely with the Newspaper, not with the Commission, the Campaign or the Complainant. The Newspaper's independent decision to exercise that right in the matter at hand amounts to nothing more than it acting in the ordinary course of business for bona fide commercial reasons. And the Complaint does not present any evidence to the contrary. The sending of the cease-and-desist letter does not constitute an attempt to influence a federal election and no corporate in-kind contribution occurred.

Finally, in several prior matters, the Commission has exercised its discretion and dismissed allegations that the presence of a corporate logo or image in a campaign advertisement resulted in an in-kind contribution, either because the value of the contribution was *de minimis* or too difficult to calculate.[24] Even if the Commission concluded the Newspaper's inaction in 2016

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[22] Gutman, David. *WA Senate candidate Tiffany Smiley criticizes Seattle Times, Starbucks, Seahawks*, Seattle Times (Oct. 1, 2022), https://www.seattletimes.com/seattle-news/politics/wa-senate-candidate-tiffany-smiley-criticizes-seattle-times-starbucks-seahawks/.

[23] Compl. at 2.

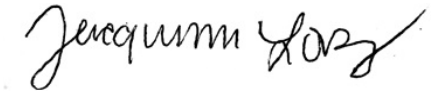
[24] *See* First Gen. Counsel's Rpt. at 20, MUR 6110 (Obama Victory Fund) (dismissed use of corporate names and logos to solicit contributions in connection with joint fundraising concert where the companies did not contribute directly to the committee or pay costs of the event, the event was modest, and the value of the names and logos was not substantial). *See also* MUR 7302 (Tom Campbell for North Dakota); MUR 6542 (Mullin for Congress) (dismissal of allegations that the committee accepted prohibited in-kind corporate contributions where committee paid for video advertisements that featured name and logo of the candidate's business); MUR 6322 (Tommy Sowers) (Commission examined use of a corporate logo on a fundraising invitation for an event that served as both a campaign event for the candidate and a product launch for a corporation that was unrelated to the candidate, but dismissed allegations as a matter of prosecutorial discretion); MUR 5691 (Whalen) (finding no in-kind contribution to Whalen's committee from his restaurant chain because an advertisement created by the company failed to meet

resulted in an in-kind contribution to the Campaign, the Commission should follow its precedent and dismiss the allegations.

CONCLUSION

Based on the foregoing, there is no reason to believe that Respondent violated the Act and the Commission should dismiss this matter against Respondent immediately.

Very truly yours,



Jacquelyn Lopez
Zachary Morrison
Counsel to Respondent

the content prong of the coordination test, even though it used images of Whalen and themes similar to those used by his campaign, but failed to expressly advocate Whalen's election). MURs 6287, 6288, and 6297 (Liberatore for Congress); MUR 6331 (Comm. to Elect Shirley Gibson for Congress).