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01/14/2011 03:40 PM

To
cc
bcc

Subject MUR 6411 - Response by CSS Action Fund, Inc. and
Citizens for Strength and Security

Kerry -

Attached please find the responses for CSS Action Fund, Inc. and Citizens for
Strength and Security in MUR 6411. Will you please send me a
receipt-confirmation when you have a minute.

Thank you,

Jim

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MUR 6411 - CSS Action Fund.PDF MUR 6411 - Citizens for Strength and Security.PDF

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SANDLER, REIFF & YOUNG, P.C.

January 14, 2011

Jeff S. Jordan, Esq.
Office of the General Counsel
Federal Election Commission
999 E. Street, NW
Washington, DC 20463

RECEIVED
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Re: MUR 6411
Respondent CSS Action Fund, Inc.

Dear Mr. Jordan:

I am responding on behalf of CSS Action Fund, Inc. ("CSS Action Fund"), a non-profit social welfare corporation operating under Section 501(c)(4) of the Internal Revenue Code, to a frivolous complaint filed by Cleta Mitchell and Colin Hanna.

Ms. Mitchell and Mr. Hanna incorrectly allege that when CSS Action Fund ran a television advertisement on September 30, 2010 that clearly identified U. S. Senator Patty Murray shortly after some members of the U.S. House of Representatives complained publicly about the amount of third-party spending for Democratic House candidates that the Senator Murray advertisement was coordinated with the House Members. They are wrong on the facts and the law.

CSS Action Fund exercised their Constitutional right to speak on issues of importance in close proximity to an election and did so without coordinating with any candidate, campaign committee, or party committee in full compliance with the requirements set forth in the Federal Election Campaign Act of 1971, as amended (2 U.S.C. §431 *et seq.*) (the "Act"), and Federal Election Commission ("FEC") regulations.

We respectfully request that the Commission find "no reason to believe" there was a violation and close this matter with respect to CSS Action Fund for the reasons stated below.

1. Factual Background

CSS Action Fund was organized for the purpose of promoting public policies that will support job creation in the United States. On September 30, 2010 CSS Action Fund ran a television advertisement that met the Act's definition of an electioneering communication. CSS Action Fund filed FEC Form 9 for the communication titled "Strengthen" and reported that the name of the Federal candidate clearly identified in the communication was U.S. Senator Patty Murray (the "Senator Murray Ad").

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CSS Action Fund made three other electioneering communications in 2010 that were reported to the Commission: (1) an October 7 communication that named U.S. Senator Michael Bennet, (2) an October 14 communication that named U.S. Senate candidate Joe Manchin, and (3) an October 14 communication that named Congressman Scott Murphy.¹

Material decisions related to the Senator Murray Ad and CSS Action Fund's three other electioneering communications in 2010 were made independently – not in cooperation, consultation or concert with, or at the request or suggestion of any candidate, candidate's authorized committee, political party committee, or any agents acting on behalf of any candidate, candidate committee, or a party committee.² None of CSS Action Fund's communications were made in response to statements made by any person in the *Roll Call* or *Politico* Stories relied upon as "evidence" of scorning by Ms. Mitchell and Mr. Hanna.³

2. Legal Analysis

The primary issue in this matter is whether CSS Action Fund's September 30, 2010 electioneering communication were coordinated with, and thus resulted in an excessive contribution to, a Federal candidate.⁴ Under the Act, a payment for a communication that is made by any person "in cooperation, consultation, or concert, with or at the request or suggestion of" a candidate or his or her agent constitutes an in-kind contribution to that candidate.⁵

Ms. Mitchell and Mr. Hanna's complaint alleges that the September 30, 2010 Senator Murray Ad was made in response to statements made by House Members in the *Roll Call* and *Politico* Stories.

The Commission's regulations provide a three-prong test to determine whether a communication is coordinated: (1) payment for communication must be made by a person other than a candidate committee, (2) the communication must meet the "content" standard, and (3) the parties must engage in activity that meets the "conduct" prong.⁶ All three prongs of the test must be satisfied for a coordinated communication to occur.⁷

The payment prong and the content prongs of the test were satisfied but the conduct prong was not. The payment prong of the test was satisfied because the communications were paid for by a person, CSS Action Fund, other than a Federal candidate, the candidate's authorized

¹ See CSS Action Fund's Form 9s at <http://query.nictusa.com/cgi-bin/locimg/TC30001713>

² See Van Es Decl. at 7

³ See Van Es Decl. at 4. The two articles relied upon by Ms. Mitchell and Mr. Hanna are Anna Palmer, *Democrats Angry that Liberal Groups Aren't Helping*, *Roll Call* (Sep. 17, 2010) and Jonathan Miller, *Dems Lag Badly in Outside Spending*, *Politico* (Sep. 22, 2010). (the "*Roll Call* and *Politico* Stories")

⁴ 2 U.S.C. §441a(a)(7)(B)(D); 11 C.F.R. §109.21(b)(1)

⁵ 2 U.S.C. §441a(a)(7)(B)(D); 11 C.F.R. §109.21(b)(1)

⁶ 11 C.F.R. §109.21(a)

⁷ 11 C.F.R. §109.21(a)

committee, or political party committee, or any agent of the foregoing.⁸ The "content" prong of the test was also satisfied because CSS Action Fund's Senator Murray Ad and three other October advertisements were electioneering communications.⁹

The conduct prong, however, was not met. The conduct prong requires that the parties engage in at least one of six conduct standards.¹⁰ In this matter, the alleged improper conduct is that CSS Action Fund made communications at the request or suggestion of a candidate, his or her authorized committee, a political party or any agent of any of the foregoing.¹¹

Ms. Mitchell and Mr. Hanna incorrectly assert that the *Roll Call* and *Politico* Stories "clearly establish that Representatives Pelosi and Larson 'requested' that outside organizations spend on behalf of Democratic candidates, while unnamed aides reiterated the requests and added retaliatory threats."¹² They do not claim that any of the other conduct standards required under 11 C.F.R. §109.21(d) were met.

In this matter, the parties did not engage in activity that met the conduct prong of the coordination test. First, none of CSS Action Fund's electioneering communications were made at the request or suggestion of a candidate, his or her authorized committee, a political party or any agent of any of the foregoing.¹³ In his declaration, Mr. Van Ess confirmed that all material decisions related to CSS Action Fund's communications were made independently of any candidate, their authorized committee, a party committee or any of their agents.¹⁴

Second, the persons who made the material decisions related to CSS Action Fund's Senator Murray Ad and the three other electioneering communications did not learn about the statements made in the September *Roll Call* and *Politico* Stories until receiving Ms. Mitchell and Mr. Hanna's complaint in November 2010. Mr. Van Ess did not even read the stories before CSS Action Fund made its communications so it is not possible that they were made in response to the articles.¹⁵

Third, general public requests by a candidate do not fulfill the conduct prong of the coordination regulations. The Commission stated in its Explanation and Justification for the coordination regulations that:

The "request or suggestion" conduct standard in paragraph (d)(1) is intended to cover requests or suggestions made to a select

⁸ 11 C.F.R. §109.21(a)(1)

⁹ 11 C.F.R.

¹⁰ 11 C.F.R. §109.21(d)(1)-(6)

¹¹ 11 C.F.R. §109.21(d)(1)

¹² Complaint at 6

¹³ See Van Ess Decl. at 8

¹⁴ See Van Ess Decl. at 7

¹⁵ See Van Ess Decl. at 5

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audience, but not those offered to the public generally. For example, a request that is posted on a web page that is available to the general public is a request to the general public and does not trigger the conduct standard in paragraph (d)(1), but a request posted through an intranet service or sent via electronic mail directly to a discrete group of recipients constitutes a request to a select audience and thereby satisfies the conduct standard in paragraph (d)(1). Similarly, a request in a public campaign speech or a newspaper advertisement is a request to the general public and is not covered, but a request during a speech to an audience at an invitation-only dinner or during a membership organization function is a request to a select audience and thereby satisfies the conduct standard in paragraph (d)(1).¹⁶

All of the statements found in the *Roll Call* and *Politico* Stories relied upon by Ms. Mitchell and Mr. Hanna to support their complaint against CSS Action Fund are general public statements that do not satisfy the conduct prong of the FEC regulations. Since no one materially involved with CSS Action Fund's communications had, or received, any private or discrete communications with or from Representative Pelosi, Representative Larson, any candidate, or their agents regarding CSS Action Fund's communications then all of the information found in the *Roll Call* and *Politico* Stories are general public statements with regard to CSS Action Fund. And, as noted above, Mr. Van Ess did not even read the stories before CSS Action Fund ran the communications.

Finally, the Complaint does not include any allegation or evidence that Representative Pelosi or Larson were agents with "actual authority, either express or implied" to act on behalf of any other candidate.¹⁷ As a result, even if Representative Pelosi or Larson did request or suggest that some third party organization create, produce, or distribute a communication in the candidate's district it would not result in coordination. The Commission explained:

Where Candidate A requests or suggests that a third party pay for an ad expressly advertising the election of Candidate B, and the third party publishes a communication with no reference to Candidate A, no coordination will result between Candidate B and the third party payer. However, if Candidate A is an agent for Candidate B ... then the communication would be coordinated.¹⁸

¹⁶ FEC, Explanation and Justification, Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003)

¹⁷ 11 C.F.R. §109.3

¹⁸ FEC, Explanation and Justification, Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 431 (Jan. 3, 2003)

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CSS Action Fund did not have any communications with Representative Pelosi or Larson concerning the Senator Murray Ad or its three other electioneering communications. Therefore, the "conduct" prong could not be met even if Representatives Pelosi or Larson were acting as agents for another candidate.

Contrary to the assertions made in the complaint, CSS Action Fund's electioneering communications were not made at the request or suggestion of any candidate, party committee, or their agents. CSS Action Fund did not engage in any activity that satisfied the required "conduct" prong of the Commission's coordination test. Therefore, CSS Action Fund's electioneering communications cannot be deemed coordinated communications under the Commission's regulations.

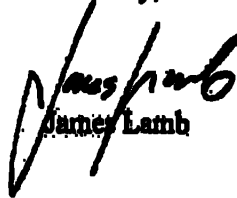
3. Conclusion

CSS Action Fund's Senator Murray Ad was not made in coordination with any members of the U.S. House of Representatives.

Material decisions related to CSS Action Fund's Senator Murray Ad and the three other electioneering communications were made independently – not in cooperation, consultation or concert with, or at the request or suggestion of any candidate, candidate's authorized committee, political party committee, or any agents acting on behalf of any candidate, candidate committee, or party committee. CSS Action Fund's communications were not made in response to the *Rail Cost and Political Stories*.

CSS Action Fund respectfully requests that the Commission find no reason to believe that it violated the Act or Commission regulations and that it close this matter promptly.

Sincerely,


James Lamb

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