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 FEDERAL ELECTION
 COMMISSION

November 14, 2016

Jeff S. Jordan
 Supervisory Attorney
 Complaints Examination & Legal Administration
 Federal Election Commission
 999 E Street, NW
 Washington, DC 20463
 VIA FACSIMILE: (202) 219-3923

Re: MUR 7139 – Response to Complaint from Amie Hoeber, Mark Epstein, and Amie Hoeber for Congress

Dear Mr. Jordan:

We are writing this letter on behalf of our clients, Amie Hoeber, Mark Epstein, and Amie Hoeber for Congress, and Chris Marston, in his official capacity as Treasurer, in response to the Complaint filed by John K. Delaney and Friends of John Delaney (“Complainant”) dated September 22, 2016, and designated MUR 7139. This is a politically motivated Complaint filed by Hoeber’s Democratic opponent in the final weeks of the election in an attempt to divert attention from substantive issues impacting the voters of Maryland’s Sixth Congressional District. The Complainant provides no evidence or proof that Respondents violated the Federal Election Campaign Act of 1971, as amended (the “Act”), as it is based only on conjecture and innuendo. Consequently, the Complaint should be immediately dismissed.

I. Factual Background

Amie Hoeber was the Republican nominee for Maryland’s Sixth Congressional District. Hoeber’s principal campaign committee is Amie Hoeber for Congress (the “Committee”). Mark Epstein is Hoeber’s spouse. The Complainant in this matter was Hoeber’s Democratic opponent in the 2016 general election, John Delaney.

Amie Hoeber filed her Statement of Candidacy on July 26, 2015, and Statement of Organization for the Campaign on July 29, 2015. The Committee retained Chris Marston, a professional campaign finance compliance consultant and expert in FEC reporting and

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compliance, to serve as Treasurer. Epstein was listed as Assistant Treasurer and Custodian of Records during the first few months of the Committee. On October 19, 2016 the Committee amended its Statement of Organization to reflect that Epstein was no longer Assistant Treasurer. Epstein has never been paid by the Committee.

In addition to serving for a brief period as Assistant Treasurer, Epstein has made contributions to the Committee in support of his wife's candidacy. Epstein also contributed to Maryland USA, an Independent Expenditure-Only Committee registered with the Commission. His first contribution to Maryland USA was made on October 26, 2015, after he ceased serving as Assistant Treasurer to the Committee. Critically, Epstein has not been involved in any decisions regarding Maryland USA's spending or independent expenditures. Moreover, to the extent Epstein has been privy to the plans, strategies and needs of the Committee, he has not conveyed that information to Maryland USA or any other person or entity associated with Maryland USA.

The Complaint alleges that the "evidence strongly suggests" the Committee and Maryland USA must have engaged in the coordination of communications "based on communication between Maryland USA, Mr. Epstein Amie Hoeber for Congress, and Ms. Hoeber."¹ In the tradition of John Delaney's brand of politics, the complaint eschews substance and instead relies on baseless accusations in the name of furthering his political ambitions.² Such disregard for substance is clearly an issue for Delaney; it is why he has been referred to as "a typical do-nothing politician who'd rather play the blame game than work on solving problems" and it is one of the many reasons why Delaney is ill-equipped to serve the people of Maryland's Sixth District.³

The Complaint provides no evidence whatsoever, including any evidence that that such "communication" took place, and if so, what exactly this "communication" supposedly entailed. Rather, the Complaint simply assumes that because Hoeber and Epstein are married and that Epstein briefly served as Assistant Treasurer, all communications paid for by Maryland USA were made at the "request or suggestion" of the Committee, Hoeber, and/or Epstein. Further, the Complaint alleges that Epstein's "multiple roles...strongly suggest" that the communications were created with "material involvement" or "substantial discussions" between Respondents and Maryland USA. The Complaint does not claim to have "personal knowledge" of any of these alleged "communications" or "substantial discussions," nor does the Complaint identify any specific information to support that such communications or discussions ever occurred. In sum, the Complaint is based solely on false speculation and innuendo.

The Complaint also alleges that the Respondents coordinated with Maryland USA based on their use of two common vendors, Wilson Perkins Allen Opinion Research ("Wilson

¹ Compl. At 6.

² See David Dishneau, *Hoeber sharpens attack on Delaney in Maryland House race*, Chicago Tribune available at: <http://www.chicagotribune.com/news/sns-bc-md--congress-6th-district-20161026-story.html>

³ Camille Gallo, *John Delaney Plays the Blame Game*, available at: <https://www.nrcc.org/2016/07/29/john-delaney-plays-blame-game/>

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Perkins”) and i360. The Complaint is so severely lacking that it relies on its unfounded statement that there is “no indication” that Wilson Perkins and i360 established a firewall. After reading this Complaint, there is no indication that the Complainant understands what is required to support these frivolous and politically motivated allegations. As Commission regulations make clear, the use of a common vendor is not coordination *per se*, and the Complaint provides no evidence that Wilson Perkins or i360 conveyed material information regarding the Committee’s plans, strategies, or needs to Maryland USA. Despite what Complainants may believe, ignorance is not a basis for allegations.

Finally, the Complaint alleges the Committee accepted a prohibited in-kind contribution from Maryland USA based on the republication of campaign materials prepared by the Committee. As explained below, the Committee was not involved in Maryland USA’s spending decisions or independent expenditures. Any decision by Maryland USA to use footage or other materials that were publicly available on the Committee’s website or on other websites, such as YouTube, was made independently of the Committee.

Commission regulations provide that a complaint must be accompanied by an identification of the source of information which gives rise to the complainant’s belief in the truth of statements if not based upon personal knowledge.⁴ As the Commission has explained, the Commission may find “reason to believe” only if a complainant sets forth sufficient specific facts, which, if proven true, would constitute a violation of FECA. *See* MUR 4960 (Hillary Clinton), Statement of Reasons of Commissioners Mason, Sandstrom, Smith and Thomas (Dec. 21, 2001). Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true, and the Commission will dismiss a complaint if it consists of factual allegations that are refuted with sufficiently compelling evidence. *Id.* The Complaint in this matter is purely speculative, and as set forth below, without any legal merit. As such, it should be immediately dismissed.

II. Legal Analysis

Under the Act, no person may make a contribution, including an in-kind contribution, totaling more than \$2,700 in the aggregate per election to a Federal candidate or her authorized campaign committee. The Act defines an in-kind contribution as, among other things, expenditures by any person “in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents...” A communication is coordinated with a candidate, an authorized committee, a political party committee, or agent thereof if it meets a three-part test: (1) payment by a third party; (2) satisfaction of one of four “content” standards, and (3) satisfaction of one of six “conduct” standards. However, no limits apply to persons making independent expenditures in support of, or in opposition to, a candidate for Federal office.

⁴ 11 C.F.R. §111.4(d).

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The first two prongs, payment and content, are not at issue here. The conduct prong is satisfied if one of the following standards is met, in relevant part:

- If the communication is created, produced or distributed at the request or suggestion of a candidate or her agents, or the communication is created, produced or distributed at the suggestion of the group paying for the communication and the candidate, or his or her agents, assent to the suggestion.
- If the candidate or her agents are materially involved in decisions regarding the content, intended audience, means or mode of the communication, specific media outlet used, the timing or frequency or size or prominence of a communication.
- If the communication is created, produced or distributed after one or more substantial discussions about the communication between the group paying for the communication and the candidate, the candidate's committee, the candidate's opponent or opponent's committee, or a party committee.
- If the group paying for the communication employs a common vendor to create, produce or distribute the communication, and that vendor: (1) is currently providing services or provided services within the previous 120 days with the candidate that puts the vendor in a position to acquire information about the campaign's plans, projects, activities or needs of the candidate; and, (2) uses or conveys information about the plans or needs of the candidate, or information previously used by the vendor in serving the candidate, and that information is material to the creation, production or distribution of the communication.⁵

The Complaint's theory is essentially that Epstein provided the primary funding to Maryland USA, and coupled with his status as the candidate's spouse and brief tenure as Assistant Treasurer to the Committee, this constitutes coordination *per se*. However, the legal definition of "coordination" in this First Amendment protected context is not a "we know it when we see it" standard, and Commission regulations require far more to establish that an entity's independent expenditure communications are coordinated with a candidate or his or her campaign. The familial relationship between a contributor and a candidate supported by a third-party group is irrelevant to a coordination analysis.⁶ Moreover, Commission regulations specifically define an "agent" for purposes of the coordination regulations, and Complainant provides no evidence that Epstein was an agent of Hoerber or the Committee for that purpose. Finally, even if Epstein were an agent for that purpose, there is no evidence Epstein engaged in activity that would satisfy the conduct prong of the Commission's regulations.

A. Epstein's Contributions to Maryland USA are Constitutionally Protected Speech

There is no prohibition against a candidate's spouse contributing unlimited amounts to a Super PAC that may ultimately support that candidate. The Supreme Court has made clear that

⁵ 11 C.F.R. § 109.21(d).

⁶ See MUR 6668 (Jay Chen for Congress, *et al.*), Factual and Legal Analysis at 8 (stating "But the Commission has never determined that a familial relationship—standing alone—is sufficient to find reason to believe that coordination took place.).

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only certain contribution limits comport with the First Amendment. Since contributing money is a form of speech, preventing *quid pro quo* corruption or its appearance is the only governmental interest strong enough to justify restrictions on political speech.⁷ The Supreme Court has held that, as a matter of law, independent expenditures do not corrupt or give the appearance of *quid pro quo* corruption.⁸

Thus, there is no compelling argument to prohibit a candidate's spouse (or other family member) from contributing to an independent expenditure entity merely because of his or her identity as a spouse. As Justice Scalia made clear in his *Citizens United* concurrence:

The [First] Amendment is written in terms of "speech," not speakers. Its text offers no foothold for excluding any category of speaker, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals... We are therefore simply left with the question whether the speech at issue in this case is "speech" covered by the First Amendment.

Citizens United, 558 U.S. at 392-93 (Scalia, J., concurring). Thus, a candidate's spouse, family members, or even close friends are like any other contributor in the eyes of the Constitution and the Supreme Court and must be permitted to make unlimited contributions to an independent expenditure committee.

The suggestion that a spouse should be treated differently because he or she may have nonpublic information about a candidate's plans, projects, activities, or needs ignores the regulatory requirement that the spouse actually convey that information to the entity making the independent expenditures. The Complaint provides no factual evidence that Epstein or anyone else conveyed such information to Maryland USA, and as evidenced by Epstein's testimony, he did not engage in any such discussions with anyone from Maryland USA.

B. Epstein Was Not an Agent of Hoerber or the Committee for the Purposes of the Coordination Rules

The Complaint makes much ado about Epstein's "titular role[s]" as Assistant Treasurer and Custodian of Records during the first few months of the campaign. The Complaint speculates that Epstein was an "agent" of Hoerber, and therefore any discussions he may have had with Maryland USA about communications resulted in coordination. Setting aside the fact that Epstein's contributions to Maryland USA were made *after* he ceased serving as Assistant

⁷ See *Citizens United v. FEC*, 558 U.S. 310, 357-61 (2010).

⁸ *Ariz. Free Enter. Club's Freedom PAC v. Bennett*, 131 S. Ct. 2806 (2011) ("By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. The candidate-funding circuit is broken. The separation between candidates and independent expenditure groups negates the possibility that independent expenditures will result in the sort of *quid pro quo* corruption with which our case law is concerned."). *Id.* at 2826-27

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Treasurer/Custodian of Records, Epstein was not an “agent” of Hoerber or the Committee for any purpose involving the Committee’s communications.⁹ The Commission’s definition of agent under the coordination regulations requires that Epstein possess “actual authority” to engage in certain specified tasks on behalf of the Committee.¹⁰

The role of Assistant Treasurer/Custodian of Records serves an administrative function for the Committee. Campaigns appoint Assistant Treasurers in case the Treasurer is unable to perform his or her duties, and there is no indication that the Committee’s Treasurer was unable to perform those duties at any point during the campaign. Similarly, the function of the Custodian of Records is exactly as it sounds: to keep the required records of receipts, disbursements, and other records of the Committee. The Complaint provides no evidence that Hoerber or the Committee bestowed upon Epstein any authority beyond performing those duties.

C. The Conduct Prong Has Not Been Satisfied

Furthermore, Respondents did not engage in any activities that would satisfy the conduct prong of the Commission’s coordination regulations. The “request or suggestion” conduct prong is met if the person who created, produced, or distributed a communication did so at the request or suggestion of a candidate, authorized committee, or any agent thereof; or if the communication is created, produced or distributed at the suggestion of the group paying for the communication and the candidate, or his or her agents, assent to the suggestion.

Complainant does not provide any evidence that Hoerber, the Committee or Epstein requested or suggested that Maryland USA create, produce, or distribute a communication. The Complaint cites to a news article that claimed unknown “sources” told them in early September that Epstein was going to fund Maryland USA; however, the funding of an entity by a candidate’s spouse does not equate to a “request or suggestion” by the candidate or her authorized committee that the entity create or produce communications. Moreover, Epstein’s status as Assistant Treasurer/Custodian of Records did not make Epstein an “agent” for purposes of the coordination rules. Thus, even if Epstein actually told representatives of Maryland USA that he was prepared to contribute his personal funds, this, by itself, does not constitute a “request or suggestion” to Maryland USA by an “agent” of the campaign to create and produce communications.

⁹ See Mark Epstein Affidavit ¶ 2.

¹⁰ Commission regulations define “agent” for purposes of 11 C.F.R. § 109 as a “person who has actual authority, either express or implied, to engage in the following activities on behalf of” a Federal candidate:

- Request or suggest that the Committee create, produce, or distribute a communication;
- Request or suggest that any other person create, produce, or distribute a communication;
- Provide material or information to assist another person in the creation, production, or distribution of any communication;
- Be materially involved in decisions regarding a communication’s content, intended audience, means, mode, specific media outlet used, timing frequency, size prominence, or duration or

Make or direct a communication that is created, produced, or distributed with the use of material or information derived from a substantial discussion about the communication. 11 C.F.R. § 109.3.

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Moreover, neither Hoerber, Epstein, nor any agents of the Committee had any material involvement with Maryland USA concerning any independent expenditures, including the content of the communications, the intended audience, the means or mode of the communications, the specific media outlets used for the communications, the timing or frequency of the communications, or the size or prominence of any printed communications or the duration of cable or broadcast communications.¹¹ Likewise, the Respondents did not have any substantial discussions with Maryland USA about the Committee's plans, projects, activities or needs.¹² As stated earlier, these allegations are purely speculative, and the Complaint provides no information or support for these allegations beyond the relationship between Epstein and his wife—a relationship that is simply not relevant to the analysis. Thus, there is no reason to believe the conduct prong has been satisfied.

D. Use of Common Vendor

The Committee and Maryland USA apparently employed two common vendors: Wilson Perkins and i360. Under Commission regulations, the conduct prong is satisfied if a person who pays for an independent expenditure communication (1) hires a commercial vendor to create produce or distribute the communication; (2) that vendor has provided services to a candidate or authorized committee within the previous 120 days and was or is in a position to acquire information about the plans, projects, activities, or needs of the candidate's campaign; and (3) the commercial vendor conveys information about the plans, projects, activities, or needs of the candidate's campaign to the person paying for the communication and that information is material to the creation, production, or distribution of the communication.

Importantly, the conduct standard is not met if the "commercial vendor, former employee, or political committee has established and implemented a firewall" that is in writing and designed to prevent the flow of information between employees and consultants providing services to the political committee paying for the communication and those employees or consultants currently or formerly providing services to the candidate identified in the communication.¹³

Wilson Perkins implemented a written firewall policy consistent with the Commission's regulations and to our knowledge, adhered to that policy. The Complaint provides no evidence to the contrary. As the Commission has already concluded, i360 "sell[s] access to [its] data libraries and analytical tools (and administrative services relating to such access) and [is] not involved in creating, producing, or distributing communications."¹⁴ Thus, there is no reason to believe the common vendor conduct standard has is not satisfied.

¹¹ Epstein Affidavit ¶ 6.

¹² Epstein Affidavit ¶ 7.

¹³ 11 C.F.R. § 109.21(h).

¹⁴ See MUR 6888 (Republican National Committee, et al.), First General Counsel's Report at 18-19.

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**E. The Committee did not Accept In-Kind Contributions in the Form of
Republication of Campaign Materials**

The Complaint alleges Maryland USA used footage created by the Committee in videos uploaded to YouTube. The footage was allegedly obtained from an online video released by the Committee that featured Hoeber announcing her candidacy for Congress. The b-roll footage was publicly available and was obtained without direct contact with Respondents. Respondents were not aware that Maryland USA intended to use the footage, and had no involvement in Maryland USA's decisions to use the footage. Moreover, these video were uploaded and disseminated for free solely on the Internet. Thus, they are exempt from Commission regulation under the Internet exemption and the republication of any campaign materials does not constitute a contribution or expenditure under the Act.¹⁵

III. Conclusion

For the reasons set forth above, the Commission should find no reason to believe Respondents violated the Act and promptly dismiss the Complaint. Thank you for your consideration of this matter, and please do not hesitate to contact me directly at (202) 572-8663 with any questions.

Respectfully submitted,



Charles R. Spies
Elizabeth Beacham White
*Counsel to Amie Hoeber, Amie Hoeber for
Congress, and Mark Epstein*

¹⁵ See *Final Rules on Internet Communications*, 71 Fed. Reg. 18589 (Apr. 12, 2006).

BEFORE THE FEDERAL ELECTION COMMISSION

Affidavit of)
) MUR 7139
 Mark Epstein)
)

AFFIDAVIT OF MARK EPSTEIN

The undersigned, MARK EPSTEIN, being first duly sworn, on oath says that:

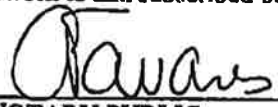
1. I am a resident of the state of Maryland, and reside in Montgomery County.
2. Between July 29, 2015 and October 19, 2015, I served as Assistant Treasurer and Custodian of Records for the Amie Hoeber for Congress committee. My role was solely administrative, and at no point in time did I act as an agent of the Amie Hoeber for Congress committee regarding the committee's plans, projects, activities or needs.
3. On October 19, 2015, I ceased all of my duties and responsibilities as Assistant Treasurer and Custodian of Records for Amie Hoeber for Congress. I had no other role, official or unofficial, with the Amie Hoeber for Congress committee before, on, or after this date.
4. On October 26, 2015, I contributed \$300,000 to Maryland USA, an independent expenditure-only political action committee duly and properly registered with the FEC.
5. At no point in time did I have any position or role, official or unofficial, with Maryland USA, nor did I act as an agent of Maryland USA at any point in time.
6. At no point in time was I materially involved in the content of any Maryland USA communications.
7. At no point in time have I communicated with Maryland USA or of its any agents regarding the Amie Hoeber for Congress committee's plans, projects, activities or needs.
8. I have personal knowledge of the facts contained in this affidavit, and declare that to the best of my knowledge, information, and belief, the information herein is true, correct, and complete.
9. Further affiant sayeth naught.



 Mark Epstein

Date: NOV 12 2016

Sworn to and subscribed before me this 12 day of November, 2016.



 NOTARY PUBLIC



My commission expires: 05/04/2023