



FEDERAL ELECTION COMMISSION
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November 15, 2016

BY ELECTRONIC MAIL

Federal Election Commission
Office of Complaints Examination and
Legal Administration
Attn: Kathryn Ross
999 E. Street, NW
Washington, D.C. 20436

Re: MUR 7139; *Mr. John K. Delaney, et al. v. Maryland USA, et al.*

Dear Ms. Ross:

On behalf of Maryland USA and its Treasurer, Joel Riter, this letter responds to the complaint filed by Mr. John Delaney and Friends of John Delaney. For the following reasons, the Commission should dismiss the complaint.

- 1. Maryland USA did not coordinate any of its public communications with the Hoeber campaign.**

The complaint alleges that Maryland USA unlawfully coordinated certain of its public communications with Amie Hoeber and her campaign committee, Amie Hoeber for Congress, in violation of 11 CFR 109.21.

The complaint contains two separate allegations of coordination. First, it alleges that Maryland USA coordinated its communications with the Hoeber campaign because the candidate's husband, Mark Epstein, made contributions to Maryland USA. While it is true that Maryland USA received contributions from Mr. Epstein, this in and of itself does not constitute coordination. The complaint asks the Commission to make the illogical leap that, because Mr. Epstein and Amie Hoeber are (allegedly) husband and wife, and because Mr. Epstein served for a brief period as the Assistant Treasurer of the Amie Hoeber for Congress committee, this "strongly suggests" that Maryland USA's public communications were coordinated with the Hoeber campaign. (Compl., at ¶B.5.)

These allegations, even if true, do not suggest (let alone “strongly suggest”) that any coordination took place. They do not suggest that any of the prohibited conduct under 11 CFR 109.21(d) occurred, *i.e.*, that the public communications at issue were made at the request or suggestion of the Hoeber campaign, after substantial discussions between the Hoeber campaign and Maryland USA, or with the material involvement of the Hoeber campaign. And even if the complaint could be construed otherwise, Maryland USA denies that any of the conduct standards in subsection (d) have been satisfied.

Second, the complaint alleges that Maryland USA and the Hoeber campaign engaged in unlawful coordination because each of them reported expenditures to the same polling firm (Wilson, Perkins, Allen) and the same data firm (i360). These facts alone, however, are insufficient to establish coordination under the “common vendor” subsection of the coordination regulation. *See* 11 CFR 109.21(d)(4). Under this subsection, for the “common vendor” conduct standard to be satisfied, Maryland USA and the Hoeber campaign not only would have had to employ the same vendor, but that vendor would have had to use or convey to Maryland USA information (i) that was material to the creation, production, or distribution of the communication at issue, and (ii) that either was about the campaign plans, projects, activities, or needs of the Hoeber campaign, or was used previously by the vendor in providing services to the Hoeber campaign. *See id.* The complaint contains no such allegations and, in any event, Maryland USA has no knowledge of any information being used, or provided to it, by the common vendors that would satisfy either of the above requirements.

Moreover, the safe harbor in 11 CFR 109.21(h) was satisfied here. To be sure, Maryland USA has confirmed that each vendor had established and implemented a firewall that prevented any information that may have been obtained from the Hoeber campaign from being used to assist Maryland USA, and vice versa. (Maryland USA is in possession of each vendor’s firewall policy and will make it available upon request.)

For the foregoing reasons, the allegations in the complaint that Maryland USA coordinated with the Hoeber campaign should be dismissed.

2. Maryland USA’s uncoordinated use of brief snippets of the Hoeber campaign’s video in its own advertisements does not constitute an unlawful contribution to the campaign.

The complaint also alleges that Maryland USA produced advertisements that contained brief snippets of footage from the Hoeber Campaign’s announcement video, and that this constitutes a “republication of campaign materials” in violation of 11 CFR 109.23.

This regulation provides that

The financing of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials

prepared by the candidate, the candidate's authorized committee, or an agent of either of the foregoing shall be considered a contribution for the purposes of contribution limitations and reporting responsibilities of the person making the expenditure. The candidate who prepared the campaign material does not receive or accept an in-kind contribution, and is not required to report an expenditure, unless the dissemination, distribution, or republication of campaign materials is a coordinated communication under 11 CFR 109.21 or a party coordinated communication under 11 CFR 109.37.

11 CFR 109.23. Notably, the complaint does not cite the applicable statute, 52 USC 30016(a)(7)(B). This is unsurprising, because 11 CFR 109.23 directly conflicts with this statute. The statute provides that "the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered to be an *expenditure* for purposes of this paragraph." *Id.* (emphasis added). The referenced "paragraph" is (7)(B), which states that "expenditures made 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, shall be considered to be a contribution to such candidate." In other words, under the statute, an *expenditure* for the republication of campaign materials by a person, such as Maryland USA, is not a contribution to the candidate who prepared the materials *unless* the person who made the expenditure coordinated with the candidate. Absent coordination, there is no contribution.

The regulation cited in the complaint conflicts with this statute. The statute says it is an expenditure, and only becomes a contribution if it is coordinated with the candidate. The regulation, however, says it is a contribution from the person making the expenditure to the candidate, regardless of whether it is coordinated with the candidate. (And the regulation separately provides that the candidate does not "receive or accept" a contribution unless it was a "coordinated communication.")

Given this conflict, the statute must prevail over the regulation. *See, e.g., Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981) (regulations "that are inconsistent with the statutory mandate or that frustrate the policy that congress sought to implement" must be rejected); *see generally* MUR 6617 and 6667 (noting in fn4 "the tension between the Act's treatment of republication as an expenditure and Commission regulations' treatment of republication as a contribution" and that "[a]ny conclusion that non-coordinated republication constitutes a contribution ... is problematic under a straightforward reading of the Act's plain language"). And, as demonstrated in section 1 above, since there was no coordination between the Hoeber campaign and Maryland USA, Maryland USA did not make an unlawful contribution to the Hoeber campaign.

Moreover, even if the regulation is not in conflict with the statute, Maryland USA's alleged republication of brief portions of campaign footage satisfies the exception under 11 CFR 109.23(b)(4), which provides that there is no contribution to the candidate if "[t]he campaign

material used consists of a brief quote of materials that demonstrate a candidate's position as part of a person's expression of its own views." *See* MUR 5879 ("wholesale copying of candidate materials constitutes republication, but partial use of such materials in connection with one's own protected speech is not legally problematic"); *see also* MUR 5743; MUR 5996; MUR 6357.

The Announcement Video posted online by the Hoeber Campaign is 189 seconds. (Compl., at ¶A10.) The complaint alleges that Maryland USA aired three videos that used content from the Hoeber Campaign's Announcement Video. (*Id.* at ¶¶ A11-A13.) In the first video, Maryland USA used 18 seconds of the 189 second video, and in the second and third videos, it used 9 seconds in each one. In other words, the amount of footage independently obtained and used by Maryland USA in each of the three videos was an incidental portion (less than 10%) of the footage posted to YouTube by the Hoeber campaign. And the snippets in the videos (which were produced independently of the Hoeber campaign and reported to the Commission as independent expenditures) were of the candidate discussing her positions, incorporated into Maryland USA's larger expression of its own views about her candidacy. Thus, Maryland USA's brief republication of campaign materials satisfies the exception in 109.23(b)(4) and thus does not constitute a contribution to the Hoeber campaign.

Based on the foregoing, the complaint against Maryland USA and its Treasurer, Joel Riter, should be dismissed.

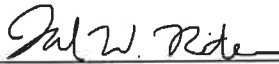
Sincerely,

LANGDON LAW LLC

By: 

David R. Langdon
Counsel for Maryland USA and
Joel Riter, Treasurer

Under 28 U.S.C. § 1746, I declare under penalty of perjury that each of the factual statements in this letter concerning Maryland USA is true and correct.


Joel Riter
Treasurer, Maryland USA