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April 4, 2014

**Via Federal Express Overnight Tracking No.: 7984 4696 4831**

Jeff S. Jordan, Esquire  
Supervisory Attorney  
Complaints Examination & Legal Administration  
Federal Election Commission  
Office of the General Counsel  
999 E Street, NW  
Washington, DC 20463

**Re: MUR No. 6789**

Dear Attorney Jordan:

This responds to your letter received by my clients on or after March 21, 2014. This Firm represents Zinke for Congress, its Treasurer, and Ryan K. Zinke (collectively, "Zinke"); and, we thank you for the opportunity to present this correspondence in order to demonstrate that no further action should be taken by the Commission against Zinke.

On behalf of Zinke, we affirmatively answer the complaint, as follows:

1. This answer is filed in response to the complaint filed by Campaign Legal Center and Democracy 21 against Ryan K. Zinke, a candidate for the U.S. House of Representatives, Zinke for Congress (ID# C00550871), the principal campaign committee of Ryan K. Zinke, and Lorna Kuney, Treasurer of Zinke for Congress.
2. This answer is based on information and belief that Zinke for Congress, the principal campaign committee of Ryan K. Zinke, did not accept in-kind contributions from Special Operations for America ("SOFA"), in the form of coordinated communications, in

violation of provisions of the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431, *et seq.* and Federal Election Commission Regulations.

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3. Specifically, pursuant to 11 CFR § 109.23(a) Zinke for Congress did not receive or accept an in-kind contribution as a result of the SOFA advertisements because SOFA did not finance the dissemination, distribution, or republication of campaign materials prepared by candidate Ryan Zinke, Zinke for Congress, and/or agent(s) of Ryan Zinke and/or Zinke for Congress within the meaning of 11 CFR § 109.23(a). The purported use of campaign materials by SOFA do not constitute an in-kind contribution to Zinke for Congress because the campaign materials allegedly used consist of a brief snip of material as part of the advertiser's expression of its own views under 11 CFR § 109.23(b)(4). Additionally, the alleged use of campaign materials would not constitute dissemination, distribution or republication because the materials were incorporated into communications into which the advertiser apparently added its own text, graphics, audio, and narration in order to create its own message.<sup>1</sup>
4. Additionally, pursuant to 11 CFR § 109.23(a), Zinke for Congress did not receive or accept an in-kind contribution as a result of the advertisements, and was not required to report an expenditure, because the use of campaign material was not a coordinated communication under 11 CFR § 109.21.

#### BACKGROUND

5. Earlier this year, SOFA apparently aired two fifteen second television advertisements related to Ryan Zinke's candidacy for the U.S. House of Representatives. In addition to other graphics, text, audio, and a voice over narration the advertisements contained two

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<sup>1</sup> MUR 6617 (Vilsack, , *et al.*) and MUR 6667 (Bustos *et al.*), Statement of Reasons, Commissioners Caroline C Hunter and Matthew S. Peterson at 2 (quoting MUR 6357 (American Crossroads), Statement of Reasons, Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Peterson, at 4).

still photographs of Ryan Zinke. The first photograph depicts Ryan Zinke wearing a blue blazer with a lapel pin and a blue plaid shirt with a nature scene in the background. The second photograph depicts Ryan Zinke with his family. Neither photograph contains any messages or markings from Ryan Zinke or the Zinke for Congress committee.

6. The first advertisement displays the photograph of Ryan Zinke in a blazer at about the three second mark for approximately 1 second and the photograph of Ryan Zinke with his family appears 6 seconds into the ad and remains on screen for the remainder of the advertisement.<sup>2</sup> In addition to these photos, the advertisement featured depictions of an internet search, infantry in combat, and a landscape depicting mountains and horses. During the entirety of the advertisement, a voice over narrator conveys a message regarding Ryan Zinke's qualifications for congress highlighting his military career and family ties to the State of Montana.
7. The second advertisement displays the photograph of Ryan Zinke in a blazer at about the three second mark for approximately one second and the photograph of Ryan Zinke with his family appears eight seconds into the advertisement and remains on screen for the remainder of the advertisement.<sup>3</sup> In addition to these photos, the advertisement featured the same depictions as in the first advertisement. In addition, the advertisement contains a blurred landscape of mountains with a depiction of the State of Montana superimposed over it. The voice over narration conveys a message regarding Ryan Zinke's qualifications for congress by highlighting his military career.
8. Neither Ryan Zinke, Zinke for Congress, nor any agent of Ryan Zinke and/or Zinke for Congress provided the photographs in question to SOFA or communicated with SOFA in any way regarding the advertisements in question or the use of the photographs. The

<sup>2</sup> See <http://www.youtube.com/watch?v=9xNYyK342Ks> (last visited March 31, 2014)

<sup>3</sup> See <http://www.youtube.com/watch?v=9xNYyK342Ks> (last visited March 31, 2014)

photographs of Ryan Zinke in a blazer and with his family used in the advertisements were posted to Ryan Zinke's Facebook page, which is available to the public.<sup>4</sup>

**THE USE OF THE PHOTOGRAPHS DID NOT CONSTITUTE "DISSEMINATION, DISTRIBUTION, OR REPUBLICATION OF CANDIDATE CAMPAIGN MATERIALS" UNDER FEDERAL LAW AND THEREFORE ARE NOT AN IN-KIND CONTRIBUTION TO RYAN ZINKE OR ZINKE FOR CONGRESS.**

9. 11 CFR § 109.23(a) provides:

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(a).

10. Subsection (b) of section 109.23 provides five exceptions to the general rule that the financing of the dissemination, distribution, or republication of campaign materials shall be considered a contribution by the person making the expenditure. The fourth such exception provides that the use of campaign materials does not constitute a contribution to the candidate if "the 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." 11 CFR 11 CFR § 109.29(b)(4). In MUR 5879, the Commission stated that the exemptions in subsection (b) are not exclusive, but instead "reaffirm the Commission's longstanding approach that wholesale copying of candidate material constitutes republication, but

<sup>4</sup> available at

[https://www.facebook.com/ryan.zinke.1/?fref=ts&ref=br\\_tf#!/photo.php?fbid=580242018723121&set=pb.100002119832667.-2207520000.1396294030.&type=3&theater](https://www.facebook.com/ryan.zinke.1/?fref=ts&ref=br_tf#!/photo.php?fbid=580242018723121&set=pb.100002119832667.-2207520000.1396294030.&type=3&theater) (last visited March 31, 2014);  
[https://www.facebook.com/ryan.zinke.1/?fref=ts&ref=br\\_tf#!/photo.php?fbid=580253912055265&set=pb.100002119832667.-2207520000.1396294028.&type=3&theater](https://www.facebook.com/ryan.zinke.1/?fref=ts&ref=br_tf#!/photo.php?fbid=580253912055265&set=pb.100002119832667.-2207520000.1396294028.&type=3&theater) (last visited March 31, 2014)

partial use of such materials in connection with one's own protected speech is not legally problematic."<sup>5</sup>

11. In MUR 5996, the Commission unanimously dismissed an allegation that a third party coordinated a television advertisement with a candidate where the advertisement included a photograph of the candidate obtained from the candidate's website.<sup>6</sup> The commission explained that the republication of photographs appearing on a candidate's publicly available website doesn't constitute the dissemination, distribution, or republication of campaign materials.<sup>7</sup>
12. In MUR 5743, the Commission stated that the use of a photograph downloaded from the candidate's website for use in a mailer that was paid for by a political committee as part of an independent expenditure did not constitute dissemination, distribution, or republication of candidate campaign materials.<sup>8</sup>
13. In MUR 5879, the Democratic Congressional Campaign Committee used fifteen seconds of campaign footage as background video in expressing their views about an Arizona congressional race.<sup>9</sup> The Commission noted its long interpretation of the republication provisions in the FECA as not mandating categorical treatment of the use of campaign materials as in-kind contributions.<sup>10</sup> Instead, the commission allows excerpts of campaign materials to be utilized in a speaker's independent message without

<sup>5</sup> MUR 5879 (Harry Mitchell for Congress *et al.*), Statement of Reasons of Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen, at 5

<sup>6</sup> MUR 5996 (Education Finance Reform Group *et al.*), Statement of Reasons of Vice Chairman Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn.

<sup>7</sup> *Id.*

<sup>8</sup> MUR 5743 (EMILY's List), Statement of reasons of Commissioners Hans A. von Spakovsky and Ellen L. Weintraub

<sup>9</sup> MUR 5879 (Harry Mitchell for Congress *et al.*), Statement of Reasons of Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen, at 3

<sup>10</sup> *Id.* at 5

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constituting a contribution.<sup>11</sup> The commission found that the Democratic Congressional Campaign Committee advertisement constituted an expression of their own views and thus did not constitute dissemination, distribution, or republication of campaign materials resulting in an in-kind contribution.<sup>12</sup> In addition, the Commission noted that the video footage at issue contained no discernible message.<sup>13</sup>

14. In MUR 6617 and 6667, the commission found that no republication of campaign materials occurred where a third party incorporated as background footage parts of YouTube videos posted by a candidate's authorized committee.<sup>14</sup> The Commission stated that the footage was "incorporated into communications in which the respondents added their own text, graphics, audio, and narration to create their own message"<sup>15</sup>

15. The photographs in the advertisement were obtained from a publicly available source, contained no messages from Ryan Zinke or Zinke for Congress and were used as background footage into which the advertiser incorporated text, graphics, audio and narration to convey its own message. The use of the photographs does not constitute an in-kind contribution to Zinke for Congress for two reasons. First, the use of the photographs constitutes a brief quote of campaign materials as part of a person's expression of its own views 11 CFR § 109.23(b)(4). Second, even if the use of the photographs does not meet the "brief quote" exception, the exceptions to 11 CFR § 109.23(a) are non-exclusive and the commission has regularly held that use of campaign materials as background footage used as part of an individual's expression of their own message does not constitute dissemination, distribution, or republication of campaign

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 8.

<sup>13</sup> *Id.*

<sup>14</sup> MUR 6617 (Vilsack, , *et al.*) and MUR 6667 (Bustos *et al.*), Statement of Reasons, Commissioners Caroline C Hunter and Matthew S. Peterson at 2.

<sup>15</sup> *Id.* (quoting MUR 6357 (American Crossroads), Statement of Reasons, Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Peterson, at 4).

materials.<sup>16</sup> Because the use of the photographs does not constitute dissemination, distribution, or reproduction, they are not an in-kind contribution to Ryan Zinke or Zinke for Congress.

**ZINKE FOR CONGRESS DID NOT RECEIVE OR ACCEPT AN IN-KIND CONTRIBUTION AND IS NOT REQUIRED TO REPORT AN EXPENDITURE BECAUSE THE USE OF THE CAMPAIGN MATERIALS IS NOT A COORDINATED COMMUNICATION**

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16. The financing of the dissemination, distribution, or republication of campaign materials is considered an in-kind contribution for the purposes of the person making the expenditure, however, 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 § 109.29(a).
17. The Commission's regulations concerning coordinated communications state a communication is coordinated with a candidate or an authorized committee when the communication is paid for by a person other than that candidate or authorized committee and satisfies at least one of the content standards and at least one of the conduct standards of the regulations. 11 CFR § 109.21(a).
18. A communication meets the conduct standards of the regulations if it is created at the request or suggestion of a candidate or authorized committee, or the person paying for the communication suggests the communication and the candidate or authorized committee assents to the suggestion. 11 CFR § 109.21(d)(1).
19. A communication meets the conduct standards of the regulations if the candidate or authorized committee is materially involved in the content of, intended audience for,

<sup>16</sup> *Supra* paragraphs 11-15.

means or mode of, specific media outlet for, the timing or frequency of or the size or prominence of or duration of a communication unless the information material to the creation, production, or distribution of the communication was obtained from a publicly available source. 11 CFR § 109.21(d)(2).

20. A communication meets the conduct standards of the regulation if the communication is created after substantial discussions about the communication between the person paying for the communication and the candidate or the candidate's authorized committee, unless the information material to the creation of the communication was obtained from a publicly available source. 11 CFR § 109.21(d)(3).

21. A communication meets the conduct standards of the regulations if the person paying for the communication hires a commercial vendor who provides certain services to the candidate or the candidate's authorized committee unless the information material to the communication used or conveyed by the vendor was obtained from a publicly available source. 11 CFR § 109.21(d)(4).

22. A communication meets the conduct standards of the regulations if the communication is paid for by a person or by the employer of a person who was an employee of the candidate or the candidate's authorized committee, unless the information material to the communication was obtained from a publicly available source. 11 CFR § 109.21(d)(5).

23. With regards to a communication involving the dissemination, distribution, or republication of campaign materials, the conduct standards shall only satisfy the conduct standards of 11 CFR § 109.21(d)(1)-(3) on the basis of conduct by the candidate or the candidate's authorized committee which occur after the original preparation of the campaign materials that are disseminated, distributed, or republished. 11 CFR § 109.21(d)(6).



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24. Based on the knowledge and belief of Ryan Zinke, the Treasurer, and Zinke for Congress, the photographs used in the advertisement were obtained from Ryan Zinke's Facebook page, a publicly available resource. Ryan Zinke and Zinke for Congress did not suggest the use of the photographs in the production of the advertisements or assent to their use. Ryan Zinke, the Treasurer, and Zinke for Congress were not materially involved in any decisions regarding the advertiser's use of the photographs therein. Ryan Zinke, the Treasurer, and Zinke for Congress were not involved in any substantial discussion with the advertiser regarding the use of the photographs or the creation of the advertisements. Further, it is apparent that the advertiser did not use any vendor in the use of the photographs, or the production of its advertisements that has provided services to Ryan Zinke or Zinke for Congress. None of the conduct standards of 11 CFR § 109.21(d) were met by the communication and thus the use of the photographs is not a coordinated communication under 11 CFR § 109.21(a); and the use of the photographs did not result in the receipt or acceptance by Ryan Zinke or Zinke for Congress of an in-kind contribution.

**ZINKE DID NOT RECEIVE A CONTRIBUTION SUBJECT TO THE \$2,600 LIMITATION OR REPORTING AND DISCLOSURE REQUIREMENTS**

25. Contributions by a non-multicandidate political committee to any candidate and his authorized committees may not exceed \$2,600 per election in the current election cycle. 2 U.S.C. § 441a(a)(1). This includes expenditures made by any person for coordinated communications. See 2 U.S.C. § 441a(a)(7)(b); 11 CFR § 109.21(b).
26. Contributions received by political committees are required to be reported and disclosed under federal law. 2 U.S.C. § 434(b).

27. For the reasons stated herein, the use of the photographs in the television advertisements of concern were not an in-kind contribution because they did not constitute the dissemination, distribution, or republication of campaign materials.<sup>17</sup> Additionally, the use of the photographs was not a coordinated communication within the meaning of 11 CFR § 109.21(a).<sup>18</sup> Therefore, the use of the photographs in the advertisements is not a contribution subject to inclusion in the \$2,600 limitation on contributions from a non-multicandidate political committee, and are not subject to reporting and disclosure obligations under federal law. *See* 2 U.S.C. § 434(b); 2 U.S.C. § 441a(a)(7)(b); 11 CFR § 109.21(b).

**PRAYER FOR RELIEF**

28. Whereas, there is no reason for the Commission to find reason to believe that Ryan Zinke, the Zinke for Congress committee, and its Treasurer have violated 2 U.S.C. § *et seq.*, including 2 U.S.C. § 441a as applied by 11 CFR §§ 109.21 and 109.23, and the reporting and disclosure requirements of 2 U.S.C. § 434; therefore, the Commission should dismiss the complaint filed against Ryan Zinke, Zinke for Congress committee, and its Treasurer.

Respectfully Submitted



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Vincent DeVito, Esq.  
Bowditch & Dewey, LLP  
1 International Place, 44<sup>th</sup> Floor  
Boston, MA 02110

Enclosure: Supporting Affidavits.

<sup>17</sup> *See supra*, paragraphs 9-15

<sup>18</sup> *See supra*, paragraphs 16-24

Affidavit of Lorna Kuney

2014 APR -7 11:12:09

STATE OF MONTANA

COUNTY OF Blaine

OFFICIAL

The undersigned, Lorna Kuney, being duly sworn, hereby deposes and says:

1. I am over the age of 18 and am a resident of the State of Montana. I have personal knowledge of the facts herein, and, if called as a witness, could testify completely thereto.
2. I suffer no legal disabilities and have personal knowledge of the facts set forth below.
3. The information and statement contained in Attorney DeVito's response to MUR No. 6789 are accurate and true to the best of my knowledge and belief.

I declare that, to the best of my knowledge and belief, the information herein is true, correct, and complete.

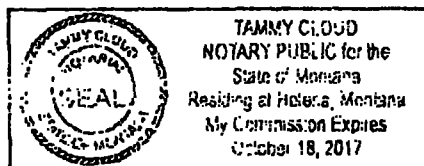
Executed this 4 day of April, 2014.

Lorna Kuney  
Lorna Kuney

NOTARY ACKNOWLEDGEMENT

STATE OF MONTANA, COUNTY OF Blaine, ss:

This Affidavit was acknowledged before me on this 4 day of April, 2014, by Lorna Kuney, who, being first duly sworn on oath according to law, deposes and says that he/she has read the foregoing Affidavit subscribed by him/her, and that the matters stated herein are true to the best of his/her information, knowledge and belief.



Tammy Cloud  
Notary Public

Public Notary  
Title

My commission expires October 18, 2017

Notary Address:

1900 9th Ave  
Helena, MT 59601

AFFIDAVIT

MUR 6789

State of MARYLAND  
County of Montgomery

BEFORE ME, the undersigned Notary, Scott Hommel [name  
of Notary before whom affidavit is sworn], on this 8<sup>th</sup> [day of month] day of  
April [month], 20 14, personally appeared Scott Hommel, known to me to be  
a credible person and of lawful age, who being by me first duly sworn, on his oath, deposes and  
says:

The statements and information in the letters I sent to the Federal Election Commission,  
regarding MUR 6789 and dated March 25, 2014 and March 31, 2014, are true and accurate to  
the best of my knowledge.

[signature of affiant]

Scott C. Hommel  
[typed name of affiant]

2460 RT 9 Malta NY 12020  
[address of affiant, line 1]

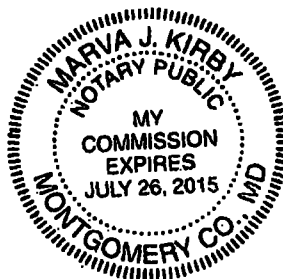
[address of affiant, line 2]

Subscribed and sworn to before me, this 8<sup>th</sup> day of April, 2014.

[Notary Seal:]

[signature of Notary]

MARVA J KIRBY  
[typed name of Notary]



NOTARY PUBLIC

My commission expires: 7/26, 20 15.

Affidavit of Ryan Zinke

STATE OF MONTANA

COUNTY OF CASCADE

2:14 PM

1:21

OFFICE

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The undersigned, RYAN ZINKE, being duly sworn, hereby deposes and says:

1. I am over the age of 18 and am a resident of the State of Montana. I have personal knowledge of the facts herein, and, if called as a witness, could testify completely thereto.
2. I suffer no legal disabilities and have personal knowledge of the facts set forth below.
3. The information and statement contained in Attorney DeVito's response to MUR No. 6789 are accurate and true to the best of my knowledge and belief.

I declare that, to the best of my knowledge and belief, the information herein is true, correct, and complete.

Executed this 6 day of April, 2014.

Ryan Zinke

NOTARY ACKNOWLEDGEMENT

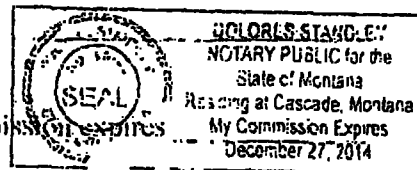
STATE OF MONTANA, COUNTY OF CASCADE SS:

This Affidavit was acknowledged before me on this 6 day of April, 2014 by Ryan Zinke, who, being first duly sworn on oath according to law, deposes and says that he/she has read the foregoing Affidavit subscribed by him/her, and that the matters stated herein are true to the best of his/her information, knowledge and belief.

Notary Public

Title

My commission expires



Notary Address:

607 River Road  
Cascade MT 59121