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VIA FACSIMILE AND U.S.P.S.

Thomasenia Duncan
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463
Fax No.: (202) 219-3923

Re: Ronald Kirkland, Treasurer and Kirkland for Congress
MUR # 6277

Dear Ms. Duncan:

On behalf of Ronald Kirkland, Treasurer (Dr. Kirkland) and Kirkland for Congress (the Committee) (together referred to as the "Respondents"), this letter is submitted in response to the Complaint the Federal Election Commission (FEC) has designated Matter Under Review (MUR) #277. The Complaint alleges coordination between the Respondents and Robert Kirkland in the 2010 Republican Primary in the Eighth Congressional District of Tennessee.

Summary of the Complaint

The Complaint, filed by John D. Stevens (the Complainant) on April 20, 2010, erroneously contends that radio ads, television ads, and a website paid for by Robert Kirkland constitute improper coordination under 11 CFR 109.21. Highlighting the lack of evidence in the Complaint, the coordination allegation is based only on a "close familial tie" between Robert Kirkland and Ronald Kirkland that "insinuates the radio ads, television ads and/or website were created with material involvement and/or substantial discussion by Kirkland or the Committee." (See Complaint, fifth unnumbered page, emphasis added). Aside from the insinuation of coordination, the only facts submitted in support of the Complainant's allegations are Robert Kirkland's use of the words "proven, trusted, conservative;" two e-mails sent by Robert Kirkland soliciting funds on behalf of the Committee, sent well before filing an NEC Form 3 Report of Independent Expenditures Made and Contributions Received; and a statement attributed to Dr. Kirkland's campaign manager in a media report. None of these facts prove sufficient to create a "reason to believe" the Respondents have violated the Federal Election Campaign Act of 1971. Further, the testimony provided in the attached affidavits establishes unequivocally that no coordination occurred between the Respondents and Robert Kirkland.

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The Facts

On January 13, 2010, the Committee filed an FEC Form 1 Statement of Organization and Dr. Kirkland filed an FEC Form 2 Statement of Candidacy to run for Congress in the Eighth Congressional District of Tennessee. (See Affidavit of Ronald Kirkland ¶¶ 2-3 attached hereto as Exhibit A). The Republican primary will be held on August 5, 2010. During the course of the campaign, Dr. Kirkland's brother, Robert Kirkland, produced and paid for the website "voteconservative.com" and television and radio ads supporting the election of Ronald Kirkland to Congress. According to documentation provided in the Complaint, the "voteconservative.com" website was registered to Robert Kirkland on March 22, 2010. Additionally, according to forms obtained by the Complainant, Robert Kirkland paid for radio ads on March 22, 2010, and television ads on April 6, 2010. The website and ads appear to carry the proper disclaimers clearly identifying them as independent expenditures. According to a form filed with the FEC on April 5, 2010, it is clarified that the radio ads and website paid for by Robert Kirkland were publicly disseminated on March 28, 2010.

The website, television, and radio ads were produced completely independent of the Respondents. As testified to by Dr. Kirkland, neither he nor anyone acting on his behalf ever requested or suggested to Robert Kirkland that communications should be produced and distributed on behalf of Dr. Kirkland's campaign. (See Affidavit of Dr. Kirkland attached hereto as Exhibit A ¶ 8; Affidavit of Joel McElhannon ¶ 7 attached hereto as Exhibit B; and, Affidavit of Brent Leatherwood ¶ 5 attached hereto as Exhibit C). Further, at no time did Robert Kirkland or anyone acting on his behalf request or suggest the production and distribution of these ads to the Respondents. (See Exhibit A ¶ 9, Exhibit B ¶ 8, and Exhibit C ¶ 6). Television ads produced by and paid for by the Respondents were developed by Joel McElhannon, President of South, LLC and the campaign website was developed by Stoneridge Group, neither of which has been involved in any way with Robert Kirkland's independent effort. (See Exhibit B ¶¶ 14-18).

Initially, as any brother would, Robert Kirkland took an interest in supporting Dr. Kirkland's campaign for Congress. Early on, in January 2010, the Kirkland brothers would discuss how the fledgling campaign was proceeding. (See Exhibit A ¶ 5). As stated in the Complaint, Robert Kirkland sent out an "enthusiastic" e-mail on February 8, 2010, from his personal e-mail account soliciting financial contributions to the Committee and declaring his brother was "gonna win." (See Complaint, Attachment 3). A subsequent e-mail sent on February 10, 2010, is a forward of the February 8, 2010, e-mail and originated from the e-mail address [The February 10, 2010 e-mail appears to have been erroneously attributed to Robert Kirkland. After early February, Dr. Kirkland's brother, Robert Kirkland, became distant. (See Exhibit A ¶ 6). Unbeknownst to the Respondents, Robert Kirkland had decided to make independent expenditures in support of Dr. Kirkland's congressional campaign. The first in a series of radio ads began airing on March 22, 2010, and the website "voteconservative.com" was registered that same day.

The Kirkland brothers still speak on occasion. Dr. Kirkland has advised his older

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brother regarding some health issues since the independent expenditure effort began. (See Exhibit A ¶ 12). Importantly, Dr. Kirkland has not had any conversations with Robert Kirkland in which material information about the Committee's plans, projects, activities, or needs were conveyed. (See Exhibit A ¶ 11).

Additionally, while not addressed in the Complaint, Brad Greer was a campaign volunteer who accompanied Dr. Kirkland around the district and introduced him to potential supporters in January 2010. Mr. Greer was never employed by the Committee; in early February Mr. Greer abruptly stopped volunteering to help the Dr. Kirkland campaign. (See Exhibit B ¶ 11). It is the understanding of the Respondents, from various media reports, that Mr. Greer is now employed by Robert Kirkland and is assisting with the independent expenditure effort. Dr. Kirkland has not had any communications with Mr. Greer in which material information about the Committee's plans, projects, activities or needs were conveyed. (See Exhibit A generally).

The website, radio and television ads produced and paid for by Robert Kirkland have utilized the words "proven, trusted, conservative" to describe Dr. Kirkland. As stated previously, the website was registered on March 22, 2010, and the radio ads began airing the same day. The television ads began airing on April 6, 2010. While it is unknown to the Respondents when the television ads were produced, it was presumably at least a few days before they began airing. The Respondents have also utilized the words "proven, trusted, conservative" in campaign communications. The words first appeared in a fundraising letter mailed by the Committee on February 26, 2010. (See Exhibit B ¶ 15). The official campaign website "votekirkland.com" was launched on April 5, 2010, and prominently displays the words "proven, trusted, conservative." (See Exhibit B ¶ 16).

There was no coordination between the Respondents and Robert Kirkland with regard to the use of the words "proven, trusted, conservative" in campaign communications. (See Exhibit A, Exhibit B and Exhibit C generally). The words "proven, trusted, conservative" are generic terms commonly used in political campaigns. The exact same words or close variations of the phrase have been used by multiple campaigns for public office. (See examples attached hereto as Exhibit D). Mr. McElhannon developed the "proven, trusted, conservative" language for the Committee and has used variations of the words on previous political campaigns for which he has consulted for. (See Exhibit B ¶ 17).

Law and Analysis

A coordinated communication is defined as a communication "made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or a political party committee or any agent of any of these entities." 11 CFR 109.20. FEC regulations establish a three-prong test to determine whether a communication is coordinated. These three prongs include (1) the payment prong; (2) the content prong; and, (3) the conduct prong. *Id.* 109.21 (a).

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The payment and content prong are not at issue in this matter. The conduct standard is at issue and requires that certain conduct must be established in order to show coordination. A communication satisfies the content prong if any one of these five standards is met:

1. The communication is at the request or suggestion of the campaign or its agents. 11 CFR 109.21(d)(1).
2. The communication is disseminated with the material involvement of the campaign or its agents. 11 CFR 109.21(d)(2).
3. The communication is created, produced or distributed after substantial discussion with the campaign or its agents. 11 CFR 109.21(d)(3).
4. The campaign and person creating the communication share a common vendor. 11 CFR 109.21(d)(4).
5. The person creating the communication has previously been an employee or an independent contractor of the campaign. 11 CFR 109.21(d)(5).

The Complaint baldly concluded that the use of the words "proven, trusted, conservative" in communications paid for by Robert Kirkland are the dissemination, distribution or republishing of campaign materials prepared by the Respondents. A simple "Google" search, however, will show that these words are nothing more than generic examples of commonly used campaign language already in the public domain. (See Exhibit D). The Respondents have never requested or suggested to Robert Kirkland that communications be created, produced or distributed on their behalf in the Eighth Congressional District of Tennessee. (See Exhibit A ¶ 8, Exhibit B ¶ 7, and Exhibit C ¶ 5).

Furthermore, Robert Kirkland was never given authority by the Respondents to create the website, radio and television ads for which he has paid. (See Exhibit A, Exhibit B and Exhibit C generally). The Respondents have in no way assented to these communications paid for by Robert Kirkland. In an effort to create an aura of assent, the Complaint references an April 7, 2010, news article in The Commercial Appeal in which Dr. Kirkland's campaign manager, Brent Leatherwood, when asked about the independent expenditures speculated:

"[c]ertainly, Robert decided that he wanted to do an independent effort....He wanted to do it to level the playing field, probably wanted to do that because of all the special interest and Washington insider money that is going to be backing our opponents."

(See Complaint, Attachment 8).

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Mr. Leatherwood was hired as Dr. Kirkland's campaign manager on March 15, 2010. He had no knowledge of the independent expenditure effort beginning until his began airing on March 26, 2010, and has never met or communicated with Robert Kirkland. (See Exhibit C ¶ 3). Mr. Leatherwood was merely responding to an inquiry from the press about the radio ads that were airing in the congressional district, basing his response on an assumption about why Robert Kirkland may have chosen to make those independent expenditures. Mr. Leatherwood's quote in the article in no way shows that the Respondents authorized the communications paid for by Robert Kirkland. The Respondents did not request or suggest these communications or assert to the suggestion of such communications. Thus, 11 CFR 109.21(d)(1) has not been violated.

The Complaint states that the "close familial tie" between the Kirkland brothers "insinuates" that the website, radio and television ads were created by Robert Kirkland with the material involvement of the Respondents. Further, the Complaint suggests Robert Kirkland's "enthusiastic" support for his brother's campaign indicates material involvement. Under the law, it is irrelevant whether a person paying for a communication is related to a candidate. There is material involvement in a communication when information is exchanged regarding content, intended audience, means or mode of communication, specific media outlet used, or the timing or frequency of use or prominence of a communication. 11 CFR 109.21(e)(2). Neither Dr. Kirksland, the Committee, nor any of its agents had any material involvement in Robert Kirkland's communications in the Eighth Congressional District; therefore, there is no reason to believe 11 CFR 109.21(d)(2) was violated. (See Exhibit A, Exhibit B and Exhibit C generally).

A substantial communication under 11 CFR 109.21(d)(3) is defined as one in which a candidate's plans, projects, activities, or needs is conveyed to a person paying for the communication, and that information is material to the creation, production, or distribution of the communication. As previously discussed, Dr. Kirkland continues to speak with Robert Kirkland from time to time regarding health issues. (See Exhibit A ¶ 12). In early February, Robert Kirkland became ill and ceased communications with Dr. Kirkland regarding his campaign. (Exhibit A ¶ 8). From early February on, Dr. Kirkland has not had any discussions with Robert Kirkland or anyone acting on his behalf in which he conveyed his campaign's plans, projects, activities or needs. (Exhibit A ¶ 11).

The Complaint further alleges that the use of the words "proven, trusted, conservative" by both Robert Kirkland and the Respondents show that the Respondent's campaign plans, projects, activities, or needs were conveyed to Robert Kirkland. Again, these words or variations of these words are publically available and commonly used in political campaigns. The prominent display of these words in the Committee's communications was initiated by Mr. McElhannon and was done independent of Robert Kirkland's effort. (See Exhibit B ¶ 17). Indeed, Mr. McElhannon has never met or communicated with Robert Kirkland, or anyone acting on his behalf for the purposes of the independent expenditure effort, and had no knowledge of the independent expenditure effort prior to the ads airing. (See Exhibit B ¶¶ 5-10). Thus, 11 CFR 109.21(d)(3) was not violated.

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While not alleged in the Complaint, there have been no common vendors. The Committee was contracted with Smith, LLC for the purpose of hiring staff and vendors for the campaign. (See Exhibit B ¶ 12). Neither staff nor vendors hired by the Committee have been employed by or independently contracted with Robert Kirkland for the purposes of his independent expenditure effort. (See Exhibit B ¶¶ 12-13). Therefore, neither 11 CFR 109.21(d)(4) nor 11 CFR 109.21(d)(5) were violated.

Finally, the mere fact that Dr. Kirkland and Robert Kirkland are brothers does not show any coordination. The Complainant, without any proof, is hoping the perception created by a family member funding an independent expenditure on behalf of another family member is enough to warrant an investigation. The facts bear out that no coordination has taken place in the Eighth Congressional District of Tennessee between the Respondents and Robert Kirkland. The Complaint is in error both legally and factually and should be dismissed.

Conclusion

As testimony provided makes clear, the Respondents did not coordinate with Robert Kirkland regarding the content, timing, or any other aspect of communications paid for by Robert Kirkland. Since the website, radio and television ads paid for by Robert Kirkland were independent expenditures, it is respectfully requested that the Commission find no reason to believe the Respondents violated the Federal Election Campaign Act of 1971 and dismiss the Complaint.

Very truly yours,

WALDROP & HALL

By


Charles M. Purcell
Jay G. Bush

CMP/JGB/rdg

Enclosures

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EXHIBIT A

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EXHIBIT B

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EXHIBIT C

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EXHIBIT D

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