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ARIZONA OFFICE OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF TOM HORNE, individually; Tom Horne for Attorney General Committee (SOS Filer 2010 00003); KATHLEEN WINN, individually; Business Leaders for Arizona (SOS Filer 2010 00375).	No. 14F-001-AAG **YAVAPAI COUNTY ATTORNEY'S CLOSING ARGUMENT REBUTTAL BRIEF** **(The Honorable Tammy Eigenheer)**

The Yavapai County Attorney's Office ("YCAO") hereby submits its Closing Argument Rebuttal Brief. YCAO respectfully requests that this tribunal uphold YCAO's Order Requiring Compliance against Tom Horne ("Horne"), the Tom Horne for Attorney General Committee, Kathleen Winn ("Winn"), and Business Leaders for Arizona ("BLA") (collectively "Appellants").

I. Overview

The evidence presented in this case shows by a preponderance of the evidence that Horne and Winn coordinated to produce BLA's political message.

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YCAO's Closing Argument Brief explains the evidence and why the alternative theories advanced by Horne and Winn do not plausibly rebut the circumstantial evidence of coordination on October 20, 2010. YCAO's Closing Argument Brief also describes the coordination on October 27, 2010. This Rebuttal does not repeat that analysis, but instead addresses the specific points raised by Appellants in their closing arguments.

II. The Law of Coordination

Both Appellants rely heavily on the FEC guidelines to define what coordinated expenditures are. YCAO agrees that those guidelines can be informative, but this case is under Arizona law. A.R.S. § 16-901(14) provides in relevant part that an expenditure loses its independence if:

> (b) There is any arrangement, coordination or direction with respect to the expenditure between the candidate or the candidate's agent and the person making the expenditure, including any officer, director, employee or agent of that person.
>
> . . . .
>
> (d) The expenditure is based on information about the candidate's plans, projects or needs, or those of his campaign committee, provided to the expending person by the candidate or by the candidate's agents or any officer, member or employee of the candidate's campaign committee with a view toward having the expenditure made.

A.R.S. § 16-901(14)(b) & (d). That statute was and remains the basis for the consequences in YCAO's Order Requiring Compliance. The following subsections

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analyze some particular legal issues raised in Appellants' closing arguments.

a. Contributions, Expenditures and Materiality

Both appellants state that A.R.S. § 16-901(14) and the corresponding federal guidelines do not apply to contributions, only expenditures. Their point, therefore, is that Horne's October 27, 2010 e-mail with the instruction "[t]ry again for the hundred k" only concerns fundraising. (YCA-15). YCAO agrees that A.R.S. § 16-901(14) and the FEC guidelines prohibit or penalize coordinated expenditures rather than coordinated fundraising. However, the distinction is not as black and white as Appellants suggest. A particular communication could include a request to raise funds in order to expend them to accomplish a particular objective. Although such a communication could be characterized as being about "fundraising," it is also relevant to the corresponding expenditure.

Similarly, Appellants argue that a candidate's ideas or input must be *material* to the actual television commercial that ran. They argue that because the final commercial was similar to Brian Murray's original concept, Horne could not have materially contributed to it. (Horne Closing Argument Brief pages 2-3, Winn Closing Argument Brief pages 16-20). Again YCAO does not disagree that a candidate's *involvement* must be material for a communication to be coordinated. However, that does not necessarily mean that a candidate has to contribute material *information* that is used in the final version of an advertisement.

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11 C.F.R. § 109.21(d)(2) contemplates a candidate being "materially involved in decisions regarding" an advertisement's content, audience, means, or other details. That standard does not require the candidate to *change* any of those things, but merely to *assent* to them. For example, if an "independent" committee produced a commercial and then showed it to a candidate, that candidate could have been materially involved in producing it by approving its final message. A candidate can also be materially involved in the production process by approving changes to a commercial's script, even if someone else actually makes those changes.

b. Public Sources

Horne's closing argument takes the position that YCAO "must prove that the material provided by Kathleen [Winn] to Brian Murray *was not available* from a public source." (Horne Closing Argument Brief page 1) (emphasis added). That is a misstatement of the law. A communication is not coordinated if "the information material to the creation, production, or distribution of the communication *was obtained* from a publicly available source." 11 C.F.R. §109.21(d)(2) (emphasis added); *see also* 11 C.F.R. §109.21(d)(3) (same language).

The difference between information being *available* from a public source and actually being *obtained* from a public source is fundamental to this case and coordination in general. If Horne's description were accurate, an "independent"

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expenditure committee could design an entire commercial at a candidate's direction and not coordinate so long as the individual pieces were taken from the candidate's website. A candidate could even send an independent expenditure committee a copy of his existing advertisement and *tell* them to rebroadcast it without coordinating.

The "publicly available source" exception is not so broad. It shields expenditures containing information that is *actually obtained* from public sources, not information that *could have conceivably been obtained* from public sources. It does not allow a candidate to direct an "independent" expenditure so long as his direction is based upon his publicly-available materials. Properly framed, the exception is not applicable to this case.

III. October 20, 2010

Appellants' closing arguments spend many pages attacking the inferences upon which the October 20, 2010 "coordination event" is proven. YCAO's closing argument addresses most of those points. Two issues, however, merit additional discussion.

a. Voice-Over File

From approximately 2:19 p.m. to 2:27 p.m., Horne and Winn spoke by telephone. (YCA-7 at 000022). While they spoke, at 2:24 p.m., Murray e-mailed Winn the unedited voice-over file of the BLA commercial. (YCA-8 at 000041-

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000042). At 2:29 p.m., Winn e-mailed Murray the "several masters" e-mail regarding the number of times Rotellini's name was mentioned. (YCA-8 at 000041).

Horne's closing argument takes issue with the inference that Horne and Winn spoke about BLA's commercial during their telephone call because it was an audio file. Therefore, the argument goes, she could not have quickly read it and "would have to turn on the sound and listen to it." (Horne Closing Argument Brief page 7). Horne and Winn apparently take the position that her e-mail was in response to the earlier script rather than the voice-over file. However, this theory completely discounts the possibility that Winn could have played the voice-over file to Horne while they talked.

Similarly, Horne's closing argument notes that there is no e-mail from Winn to Horne containing a draft of the commercial's script. (Horne Closing Argument page 8). It then claims that "[i]t defies credibility to think that Horne would have been used to help reduce the length of the ad by eleven words, and then five words, an extremely detailed editing process, without having been sent a copy of the draft ad." (Horne Closing Argument pages 8–9). Again, however, Winn could have played the voice-over file or read the script through her phone.

b. Materiality

Section II.A, above describes how a candidate can materially contribute to an

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expenditure even if he does not actually contribute specific information that is included in the final version of the expenditure. The evidence shows that that is exactly what happened in this case.

As of 2:29 p.m. on October 20, 2010, Winn (and the "we") did "not like that [Rotellini's] name [was] mentioned 4 times and no mention for Horne." (YCA-8 at 000041). By 3:11 p.m., However, Winn had "prevailed" so there would be "no mention of Tom" based on what Murray said. (YCA-6 at 000018–000019).

Murray's original draft of the advertisement had no mention of Horne. The final version had no mention of Horne. From that lack of ultimate change, Appellants claim that Horne was not materially involved with the advertisement's production. But during the afternoon of October 20, 2010, Winn (and Horne) were *considering* changes to the script. The fact that they eventually decided not to make those changes does not change the fact that a decision was made. The evidence shows that Horne was materially involved in making that decision.

IV. October 27, 2010

Appellants argue that Horne's October 27, 2010 e-mail had no effect on BLA's activities because the money from Richard Newman was already on its way and BLA simply used that money to buy more broadcasting time for its existing advertisement. That is a simplistic view of the situation.

One of the pieces of strategic advice from Ryan Ducharme that Horne e-

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mailed to Winn was the recommendation to characterize Rottelini as someone "behind in the polls trying to hide from her record (SB1070, ties to unions calling for AZ boycott, etc.)." (YCA-15). BLA's existing advertisement effectively accomplished that goal by highlighting her record. The commercial mentions that Rottelini "openly opposes SB 1070" and "took money from labor unions and special interest groups who boycott Arizona." (YCA-23).

Had Horne himself wanted to run a similar advertisement, he would have needed to design and produce it. That process would have added cost and delayed the advertisement. Instead, he communicated his need of such an attack to BLA, which already had a suitable advertisement ready. Whether or not Horne knew about the additional one hundred thousand dollars from Richard Newman, Horne wanted BLA to raise an additional one hundred thousand dollars *and expend that money* on its advertisement.

V. Sharon Collins

Horne's closing argument takes issue with Special Agent Grehoski's testimony about Sharon Collins's role in assisting BLA's fundraising effort. YCAO does not argue that Collins's participation directly shows coordination between Horne's campaign and BLA, but her participation does impeach Kathleen Winn's credibility.

It is undisputed that Collins did, in fact, put Kathleen Winn in touch with

contributor Charles Diaz. (Horne Closing Argument page 18; Horne-Winn-16). Yet Winn's second affidavit claims that she "chose from whom to raise money without any input." (YCA-4 ¶ 3(b)(1)). Winn's credibility is fundamental to this case, and Collins' involvement casts doubt upon it.

VI. Conclusion

As YCAO has explained throughout this case, in its Closing Argument Brief and this Rebuttal, Horne and Winn coordinated to produce BLA's political message during the 2010 general election. YCAO respectfully requests that this Court uphold its Order Requiring Compliance.

RESPECTFULLY SUBMITTED this 21st day of March, 2014.

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