

**CITY OF ALBUQUERQUE
BOARD OF ETHICS AND CAMPAIGN PRACTICES**

Eric Shimamoto,

Complainant,

v. **BOE NO. 08-2019**

Brook Bassan,

Respondent.

RESPONSE TO COMPLAINT
THE BASSAN COMPLAINT SHOULD BE DISMISSED

Patrick J. Rogers, LLC (Pat Rogers), counsel for the Respondent Brook Bassan, files this Response to the Complaint filed by Eric Shimamoto. The Complaint against Brook Bassan fails to state a violation and should be dismissed. The Complaint must be based on personal knowledge, information other than hearsay, or unfounded speculation. 2019 Regulation of the Albuquerque City Clerk for Election Code, Part I 1(b)(i)(8); Part I 1(b)(viii); Part I 1(b)(x).

A. UNHINGED SPECULATION IS NOT EVIDENCE

The Complainant, a practicing attorney, “swore and affirmed under penalty of perjury . . . that each factual contention is supported by evidence.” The operative paragraph, however, begins “Upon information and belief” and proceeds to speculate about coordination with the Republican Party of Bernalillo County (“RPBC”) based upon the RPBC’s support for Brook Bassan. The charges are improper, false, and entirely speculative. The Complaint lacks “evidence” or any basis (even hearsay) for the speculation.

The Board of Ethics dismisses complaints if they are based on “speculation.” Exhibit A, Order of Dismissal, December 21, 2017, BOE 15-2017, *Johnson v. Keller*. Mayor Keller’s counsel argued that the evidence presented, the \$15,000 payments to a vendor for “research” by both the

Keller Campaign and the “independent” Measure Finance Committee (supporting Mayor Keller) did not establish coordination. Mayor Keller’s counsel successfully argued the Keller campaign’s payment of \$15,000 for “research” to the out-of-state vendor and the “independent” Measure Finance Committee’s payment of the same amount (\$15,000) to the same entity for the same purpose (“research”) was “too speculative to state a complaint [for coordination] and should be dismissed.” *See* Exhibit A.

The attorneys for Mayor Keller argued that the allegations concerned (only) “parallel conduct.” Further, “A single allegation of parallel conduct is insufficient to plausibly suggest coordination between the two.” Exhibit B at 7-8. The failure to require “sufficient factual allegations to support a finding that a violation of the Ethics Code occurred.” BOE Rules § 6(D)(2). A failure to dismiss “invites speculative and baseless complaints filed against candidates for public office purely to generate media attention in an attempt to influence an election.” *Id.* at 9, fn. 3.

In this case, the single suggestion of “evidence” of coordination referenced by the Complaint from Brook Bassan actually says nothing about coordination. It is only a general invitation (to the world) to assist her in her campaign. The Complaint provides only this single “factual” allegation (out of 13) from Brook Bassan concerning a single Facebook invitation to any Facebook reader to help with the campaign: “The other thing that I wanted to let you know, in addition to walking tomorrow, please message us if you want to meet. We’re going at 10 AM.”

From this single factual allegation that does not evidence any coordination with RPBC or anyone, the Complaint leaps to the claims that Brook Bassan has “accepted in-kind contributions from RPBC in the form of its compiling an absentee voter mailing list, purchasing postcards and postage, producing content for mailers, ending campaign materials to voters in Bernalillo County,

purchasing campaign software, generating walk-lists for canvassing and canvassing . . .” The Complaint is not “based on personal knowledge or information other than hearsay.” 2019 Regulation of the Albuquerque City Clerk for the Election Code, Part I 1(b) (viii).

In fact, the Complaint does not even suggest any source for the hearsay, a separate basis to dismiss. 2019 Regulation of the Albuquerque City Clerk for Election Code, Part I 1(b) (x). It is simply made up. This sort of speculation is completely contrary to the statement and actual evidence required of the Complainant and it is contrary to the rules currently in effect.

B. ABSENTEE MAILERS

The heart of the Complaint concerns mailers the Republican Party of Bernalillo County apparently circulated to voters who requested absentee ballots. From public information, it appears that the Party sent these mailers on behalf of multiple candidates in several races during the November election for both local and state offices. These mailers cannot be considered in-kind contributions, as neither Brook Bassan nor her campaign requested or coordinated these mailings. In fact, Brook Bassan was not even aware of the mailings until they were already printed and being put in circulation. At no time did Brook Bassan’s campaign or campaign volunteers assist in the preparation and mailing of these postcards, even after the campaign became aware of them. This was something RPBC was doing on its own for several candidates.

In further support of this position, the Brook Bassan campaign was engaged in the exact same activity – sending its own campaign mailers to absentee voters. It defies logic that the campaign – operating on a very limited budget – would have undertaken these duplicative efforts if it were aware in advance that another entity would be doing that.

Due to the lack of control and coordination or even knowledge, any mailings fit squarely within the definition of an “independent expenditure,” as defined in the “2019 Regulations of the

Albuquerque City Clerk for the Election Code.” Independent expenditures are not in-kind contributions by definition. If that were the case, Bassan’s opponent and this Complainant would both be in violation of the law. Brook Bassan’s opponent received tens of thousands of dollars’ worth of mailers from outside groups, including the very group the Complainant is assisting. If the mailers in question in this instant Complaint are to be considered in-kind contributions, then Bassan’s opponent has egregiously broken the law and blown the spending cap many times over by accepting and failing to report approximately \$100,000 worth of “in-kind” expenditures from outside groups, including the Complainant’s “non-profit” “non-partisan” entity.

C. REPORTING VOLUNTEER ACTIVITY

Brook Bassan was told by the City Clerk “the issue” was her failure to value (at least at minimum wage) and report the activity of the volunteers of the Republican Party of Bernalillo County. *See* Exhibit C, email dated December 19, 2019. It is true that the RPBC (without the request or knowledge of Brook Bassan) invited volunteers to join Brook’s canvassing efforts (or as the invitation stated “the Book [sic]) campaign’s canvassing efforts”), the fact remains that these are strictly volunteer activities.

Volunteer activity is specifically excluded as an in-kind contribution under the election regulations which states that an in-kind contribution “...*does not include the value of services provided without compensation or unreimbursed travel or other personal expenses of individuals who volunteer a portion or all of their time on behalf of a candidate or political committee.*” (2019 Regulations of the Albuquerque City Clerk for the Election Code; Parts A; Definition of In-Kind Contribution). In short, even the RPBC does not have to invent a wage for volunteers and report the activities of its volunteers. Requiring Brook Bassan to invent a wage and report the activities of RPBC volunteers is not based on any current rule.

Respectfully, the possibility the former City Clerk was contemplating new regulations to make candidates value and report the contributions of volunteers that are not supervised or controlled by the candidates proves only that any claimed violation of existing rules must be dismissed on the most rudimentary Constitutional Due Process, First Amendment, and common sense grounds. *See* Exhibit C, email from Brook Bassan dated December 19, 2019. A rule that does yet exist cannot be violated.

D. CONFIRMATION FROM THE CITY CLERK

Brook Bassan inquired of the City Clerk as soon as she was aware of any possible suggestion of coordination and received confirmation that supporters' expenditures that were not solicited or coordinated did not constitute coordination. *See* Exhibit D, July 26, 2019, Brook Bassan letter to City Clerk; Exhibit E, emails from City Clerk.

E. MAILING LISTS, SOFTWARE, WORK LISTS

The complaint, again without even hearsay evidence, speculates that Brook Bassan accepted in-kind contributions for the following:

1. Absentee voter mailing list;
2. Purchasing campaign software;
3. Generating walk lists for canvassing.

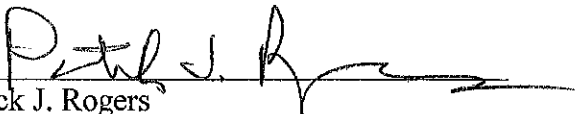
These allegations are all without citation to any evidence, including hearsay because they are false. The campaign receives the absentee voter mailing list directly from the New Mexico Secretary of State. The campaign has properly and publicly reported the in-kind contribution of the campaign software (see 2019 Financial Disclosure; Brook L. Bassan; Statement 7), and the campaign generates the walk lists from the software.

F. CONCLUSION

The Complaint should be dismissed because it lacks any actual evidence of coordination and fails to identify even any hearsay evidence to support the speculation. And no rule or reason exists to attempt to value – at minimum wage or otherwise – the work of volunteers from the Republican Party of Bernalillo County.

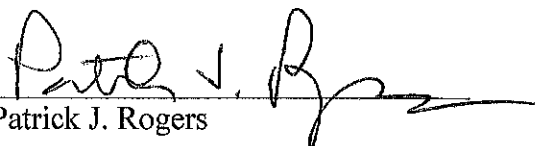
Respectfully submitted,

PATRICK J. ROGERS, LLC


Patrick J. Rogers
20 First Plaza Center NW, Suite 725
Albuquerque, NM 87102
(505) 938-3335
patrogers@patrogerslaw.com

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of December, 2019, I filed the foregoing via email with the City Clerk's office. I further certify that I emailed a copy to Mr. Shimamoto.


Patrick J. Rogers

CITY OF ALBUQUERQUE
BOARD OF ETHICS AND CAMPAIGN PRACTICES

2017 DEC 21 AM 8:26

RECEIVED
ALBUQUERQUE CITY CLERK

WAYNE JOHNSON,

Complainant,

vs.

BOE Case No. 15-2017

TIM KELLER,


Respondent.

ORDER OF DISMISSAL

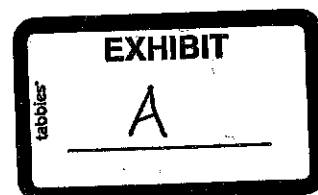
THIS MATTER came before the Board for a properly and timely noticed preliminary hearing on December 19, 2017. The Board, having considered the Complaint and the presentations on behalf of Complainant and Respondent, FINDS that the Complaint fails to contain sufficient factual allegations to support a finding that a violation of the Election Code occurred.

IT IS THEREFORE ORDERED that the Complaint is dismissed with prejudice.

Dated this 19th day of December, 2017.



Andrew G. Schultz
Chair, Board of Ethics and Campaign Practices



**CITY OF ALBUQUERQUE
BOARD OF ETHICS AND CAMPAIGN PRACTICES**

WAYNE JOHNSON,

Complainant,

v.

Case No. BOE 15-2017

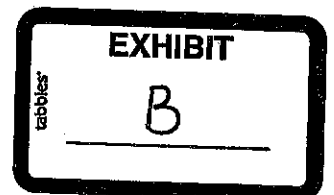
TIM KELLER,

Respondent.

**RESPONDENT TIM KELLER'S RESPONSE TO WAYNE JOHNSON'S
COMPLAINT AND MOTION TO DISMISS**

The Board should dismiss Wayne Johnson's complaint. Johnson asserts that Mayor Tim Keller violated several provisions of the Election Code, Charter of the City of Albuquerque, art. XIII §§ 1-15 (1975, as amended 1993); the Open and Ethical Elections Code ("OEEC"), Charter of the City of Albuquerque, art. XVI, §§ 1-21 (2005, as amended 2009); and 2011 Regulations of the Albuquerque City Clerk for the Open and Ethical Elections Code ("2011 OEEC Regulations"). Specifically, Johnson asserts that Keller and ABQ Forward Together—the Measure Finance Committee ("MFC") that supported his election—coordinated expenditures and that ABQ Forward Together contributed to Keller's campaign. Johnson stacks all the Charter violations he alleges on a single factual predicate that he gleaned from publicly-available campaign finance reports: On July 10, 2017, ABQ Forward Together paid \$15,000 to one office of GBA Strategies for research. The next day, Keller paid \$15,000 to another office of GBA Strategies, also for research.

But this sole factual allegation—which the Board takes as true in the motion to dismiss posture (and which is true)—does not establish any Charter violation. It does not establish that Keller and ABQ Forward Together coordinated their expenditures for research from GBA



Strategies. And it does not establish that, by purchasing research from GBA Strategies, ABQ Forward Together somehow made a contribution to Keller. The only thing that Johnson offers to suggest that Keller and ABQ Forward Together coordinated their expenditures, or that ABQ Forward Together's expenditure somehow contributed to Keller, is *pure speculation*. Because Johnson's complaint does not "contain[] sufficient factual allegations to support a finding that a violation of the Election Code occurred," it must be dismissed. *See* Rules and Regulations of the Board of Ethics and Campaign Practices for the Election Code of the City Charter ("BOE Rules") § 6(D)(2).

The Board should also dismiss the Complaint because it is brought with a purpose to harass Keller. Johnson's counsel stated to Chief Hearing Officer Stanley Harada that "[l]ittle purpose would be served by a hearing and determination [on the Complaint's assertions] after the election." Yet, Johnson doggedly pursues the claims solely to explore "communications and correspondence involving the Keller Campaign and the Keller [*sic*] MFC," which, according to Johnson, "if produced and reviewed, will likely indicate additional illegal coordination and additional violations of the reporting obligations." 9/29/17 Compl. at 1. Complaints that are factually insufficient, grounded only on speculation, acknowledged to be purposeless, and openly declaring themselves to be fishing expeditions are, quintessentially, complaints brought with a purpose to harass. The Board should dismiss.

I. BACKGROUND

Keller is Albuquerque's Mayor. Johnson ran for Mayor, appearing on the ballot in the October 3, 2017 City of Albuquerque Primary Election.¹ Days before the primary election, on September 29, 2017, Johnson filed with the City Clerk a "Complaint for Additional Violations of

¹On December 1, 2017, the Governor appointed Johnson as State Auditor.

the Open and Ethical Elections Code and the 2011 Regulations of the Albuquerque City Clerk for the Open and Ethical Elections Code” (“9/29/17 Compl.”), in which he asserts several violations of both the Election Code, the OEEC, and the 2011 OEEC Regulations.

After Johnson filed his Complaint with the City Clerk, the City Clerk forwarded the Complaint to the Board. On October 2, 2017, the Board, acting through its Chairman, dismissed the Complaint without prejudice, because “[t]he document does not comply with the mandatory requirements set forth in the Board’s Rules and Regulations.” Ex. A, October 2, 2017, Letter from Andrew G. Schultz to Patrick J. Rogers. After dismissal, Johnson did not resubmit the Complaint with the Board “in a manner specified by the Board’s Rules and Regulations.” *Id.* Rather, on October 4, 2017, Johnson’s counsel, Mr. Rogers, sent an *ex parte* email communication to Mr. Schultz, Chairman of the Board; Ms. Natalie Howard, the City Clerk; Ms. Lucinda Montoya; and Mr. Eric Locher, expressing his belief that “the appointment of a City Hearing Officer appears mandatory” Ex. B, October 4, 2017, Letter from Patrick J. Rogers to Andrew J. Schultz, et al.

On October 18, 2017, the City Clerk transmitted Johnson’s Complaint to Mr. Stanley Harada, Chief Hearing Officer, Office of Administrative Hearings. On October 23, 2017, Mr. Rogers sent Chief Hearing Officer Harada an *ex parte* letter via email, requesting a hearing and decision on the Complaint before the mayoral runoff election on November 14, 2017. *See* Ex. C, October 23, 2017, Letter from Patrick J. Rogers to Stanley Harada, at 1. In his *ex parte* letter to Chief Hearing Officer Harada, Mr. Rogers emphasized that “[l]ittle purpose would be served by a hearing and determination after the election.” *Id.* at 1 (emphasis added). On October 24, 2017, the Albuquerque City Clerk filed Mr. Rogers’s October 23 letter to Chief Hearing Officer Harada.

On October 30, 2017, Chief Hearing Officer Harada held a Pre-Hearing Conference. *See* Ex. D, *Johnson v. Keller*, Order at 1 (City of Albuquerque Office of Admin. Hearings., October 31, 2017). After the October 30, 2017 Pre-Hearing Conference, Chief Hearing Officer Harada held that he did not have jurisdiction over Johnson’s Complaint, because “[o]riginal jurisdiction of alleged violations of the [OEEC] and any campaign finance matters is granted to the Board of Ethics by the City Charter.” *Id.* ¶ 11, at 2. Chief Hearing Officer Harada granted Keller’s motion to dismiss for lack of jurisdiction. *See id.* at 3.

On November 2, 2017, Johnson refiled the Complaint with the Board of Ethics—only five day shy of the expiration of the 120-day limitations period. *See* BOE Rules § 6(A)(3) (“The Board will not set for hearing any complaint charging a campaign violation alleged to have occurred more than one hundred and twenty [120] days prior to the date the complaint is filed . . .”). The Board set a preliminary hearing on the Complaint for December 19, 2017.

II. THE COMPLAINT

In his complaint, Johnson alleges that Keller violated several provisions of the Election Code, the OEEC, and the 2011 OEEC Regulations.

First, Johnson alleges that Keller and ABQ Forward Together coordinated an expenditure and, as a result, Keller violated Election Code § 2(j), OEEC § 3(K), and 2011 OEEC Regulations Part A. *See* Compl. ¶ 3, at 1. In defining “Coordinated Expenditure,” the 2011 OEEC Regulations Part A provides that “[a]ny expenditure that is coordinated within the meaning of this paragraph is an In-Kind contribution to the candidate . . . with whom . . . it was coordinated and the candidate must report the Coordinated Expenditure as an In-Kind Contribution.” Based on his allegation that Keller and ABQ Forward Together coordinated an expenditure, Johnson alleges that Keller failed to report ABQ Forward Together’s expenditure as

an in-kind contribution and that, upon receiving the alleged in-kind contribution, Keller exceeded the limit that OEEC § 3(K) imposes on single in-kind contributions at 5% of the annual mayoral salary—*i.e.*, \$5,193. *See* 9/29/17 Compl. at 1.

Second, Johnson alleges that ABQ Forward Together made a contribution to Keller and, consequently, Keller violated Election Code § 4(c)(1)(A), which requires that a mayoral candidate disclose “all contributions received,” and OEEC § 8(B), which prohibits publicly financed candidates from accepting “contributions or loans from any other source”—*i.e.*, any source other than the “money distributed to that Participating Candidate from the Fund plus any collected Seed Money.” OEEC § 8(B). *See* Compl. ¶ 3, at 1.

Each of Johnson’s alleged violations is grounded on a single factual predicate: On July 10, 2017, ABQ Forward Together paid \$15,000 to GBA Strategies, at 1901 L St. NW., Washington, D.C. 20036, directed to Jim Gerstein, a GBA Principle for “research fees.” *See* Compl. Ex. B, ABQ Forward Together, 2017 Campaign Finance Report for Measure Finance Committee (reporting period: 5/1/16 – 7/13/17). On July 11, 2017, Keller paid \$15,000 to GBA Strategies, at 2901 Girard Blvd. NE, Albuquerque, NM 87107, directed to Michael Bocian, for research. *See* Compl. Ex. C, Tim Keller, 2017 Campaign Finance Report for Candidates (reporting period: 4/1/17 – 7/13/17). There is no secret that both ABQ Forward Together and Keller bought research from GBA Strategies’ offices. Both disclosed these expenditures on their respective campaign-finance reports.

III. STANDARD OF REVIEW

In the preliminary hearing posture, the Board must determine “whether the complaint contains sufficient factual allegations to support a finding that a violation of the Election Code occurred.” BOE Rules § 6(D)(2). “The Board’s decision shall be based on findings that the

factual statements made in the complaint, taken as being true, establish that Respondent has violated the provision or provisions of the Election Code or the[] Rules and Regulations that are cited in the complaint.” BOE Rules § 6(D)(1). The Board should dismiss a complaint if “[t]he conduct alleged in the complaint, if true, would not constitute a violation of the Election Code.” BOE Rules § 6(D)(3)(c). The Board should also dismiss a complaint if the Board concludes that the complaint is “brought for the purpose of harassment.” BOE Rules § 6(D)(3)(d).

IV. THE BOARD SHOULD DISMISS THE COMPLAINT

The Board should dismiss the Complaint, for two reasons: The Complaint lacks sufficient factual allegations to establish a Code violation. *See* BOE Rules § 6(D)(3)(c). Worse, it is brought with a purpose to harass. *See* BOE Rules § 6(D)(3)(d).

A. The Board should dismiss the Complaint because its factual allegations are insufficient to support a finding that Keller violated the Election Code, the OEEC, or the 2011 OEEC Rules.

It is true that Keller and ABQ Forward Together each made \$15,000 expenditures to GBA Strategies (although directed to different GBA offices in Albuquerque and Washington D.C.) on July 11th and July 10th, respectively. Each publicly disclosed these expenditures in the campaign finance reports filed with the City Clerk. It is not true, however, that Keller and ABQ Forward Together coordinated their respective expenditures or that, by paying GBA Strategies \$15,000 for research, ABQ Forward Together somehow made a contribution to Keller.

Moreover, and most significant for the purposes of this Response, Johnson provides the Board with *nothing other than pure speculation* to support his assertion that ABQ Forward Together and Keller coordinated their expenditures or that ABQ Forward Together made a contribution to Keller. The OEEC Regulations define when an expenditure is coordinated for the OEEC’s purposes. A “Coordinate Expenditure” is an “expenditure made with the cooperation, consultation or coordination, or at the request or suggestion of, a candidate” 2011 OEEC

Regulations Part A. Further, by defining coordinated expenditures as in-kind contributions, the 2011 OEEC Regulations makes clear that, to be a coordinated expenditure, the expenditure must somehow redound to the candidate's benefit. *See id.*

Johnson provides *no* factual allegation to support (1) that Keller requested or suggested that ABQ Forward Together purchase research from GBA Strategies; (2) that Keller and ABQ Forward Together cooperated in ABQ Forward Together's purchase of research from GBA Strategies; or (3) that, somehow, ABQ Forward Together's purchase of research from GBA Strategies benefited Keller, for example, by defraying the price for research that Keller would have had to otherwise pay.

All Johnson alleges is publicly-available, parallel conduct: on one day, ABQ Forward Together purchases research from a third-party vendor; the following day, Keller purchases research from a different office of the same third-party vendor. But this sole allegation, which the Board takes as true (and is true), is insufficient to establish a Code violation. Johnson's sole allegation of parallel conduct cannot establish either that Keller and ABQ Forward Together coordinated their research purchases, or that, by buying research from GBA Strategies, ABQ Forward Together somehow contributed to Keller.

There are not many vendors of political opposition research and polling data that focus on New Mexico municipal elections. When such a vendor, like GBA Strategies, produces their research product, the fact that interested parties purchase that product in quick succession does not establish that these buyers somehow coordinated their purchases, or somehow contributed to each other. Parallel conduct does not establish either coordination or a contribution.²

²A general example illustrates the point: the *New Yorker* is a fine magazine. The fact that opposing counsel might purchase it on a Tuesday while undersigned counsel purchases it on a

This case is the New Mexico, municipal analogue to *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)—the most significant Supreme Court case applying the federal motion to dismiss standard, which the Board’s motion to dismiss standard mirrors. *Compare Rocha v. CCCF Admin.*, 408 F. App’x 141, 144 (10th Cir. 2011) (“The correct standard applicable to Rule 12(b)(6) motions [to dismiss a complaint], again, is whether the complaint alone contains sufficient factual allegations to state a plausible claim for relief”), *with* BOE Rules § 6(D)(2) (in the motion to dismiss posture, the Board must determine “whether the complaint contains sufficient factual allegations to support a finding that a violation of the Election Code occurred”). In *Twombly*, the plaintiffs asserted an antitrust conspiracy in violation of the Sherman Act, and, in support, they alleged identical conduct by the defendants in inflating charges for telephone services and refraining from entering each other’s respective markets. *See* 550 U.S. at 550–51. The Supreme Court held that the complaint must be dismissed, because “an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy.” 550 U.S. at 556–57; *see also id.* at 570 (requiring “enough facts to state a claim to relief that is plausible on its face”). The Supreme Court concluded, “[b]ecause the plaintiffs here have not nudged their claims across the line from the conceivable to the plausible, their complaint must be dismissed.” 550 U.S. at 570.

Just as allegations of parallel conduct by the telephone companies were insufficient to plausibly suggest conspiratorial agreement in *Twombly*, a single allegation of parallel conduct on the part of Keller and ABQ Forward Together is insufficient to plausibly suggest coordination between the two. Apart from the fact that both Keller and ABQ Forward Together purchased research from different offices of GBA Strategies on sequential days—purchases, again, that

Wednesday in no way establishes that we coordinated our *New Yorker* purchases, or that undersigned counsel defrayed the price that opposing counsel would have otherwise paid.

Keller and ABQ Forward Together respectively disclosed—Johnson offers the Board *no factual allegation* to suggest that this parallel conduct is the result of any coordination between Keller and ABQ Forward Together, or that ABQ Forward Together’s purchase somehow benefited Keller so as to be a contribution. In *Twombly*’s formulation, which is relevant because the Board’s motion to dismiss standard is patterned after the federal standard, Johnson offers no factual allegation nudge his suggestion over the line separating the conceivable from the plausible. *See Twombly*, 550 U.S. at 570. The Board should dismiss the Complaint as factually insufficient to establish a Code violation.³

B. The Board should dismiss the Complaint because it is brought for the purpose of harassment.

The Board should dismiss the Complaint for the additional reason that it is brought for the purpose of harassing Mayor Keller. In his October 23, 2017 *ex parte* letter to Chief Hearing Officer Harada, Mr. Rogers urged that “[l]ittle purpose would be served by a hearing and determination after the [November 14, 2017] election.” Ex. C, October 23, 2017, Letter from Patrick J. Rogers to Stanley Harada, at 1. Yet, after the election was soundly decided in Keller’s favor, Johnson pursues his speculative claims. Further, Johnson openly declared that the 9/29/17 Complaint, which is now before the Board, is a fishing expedition into Keller’s communications. In his Complaint, based purely on publicly available campaign finance reports, Johnson alleges: “In addition, the communications and correspondence involving the Keller Campaign and the

³It is important that the Board enforce its motion to dismiss standard requiring “sufficient factual allegations to support a finding that a violation of the Election Code occurred.” BOE Rules § 6(D)(2). Otherwise, the Board will invite speculative and baseless complaints filed against candidates for public office purely to generate media attention in an attempt to influence an election. The Board has no equivalent to Rule 11 of the Federal Rules of Civil Procedure, which allows a federal court to sanction an attorney for filing a harassing or obviously baseless complaint. Accordingly, it is imperative that the Board enforce its motion to dismiss standard. This is a case in which it should do so.

Keller [*sic*] MFC, if produced and reviewed, will likely indicate additional illegal coordination and additional violations of the reporting obligations.” 9/29/17 Compl. at 1.

Thus, the Board has before it a speculative Complaint, alleging only what Keller and ABQ Forward Together publicly disclosed, conceded by opposing counsel to be purposeless, and openly acknowledging itself to be a fishing expedition into Keller’s communications. This is quintessentially a complaint that is brought for the purposes of harassment. The Board should recognize it as such and, accordingly, dismiss it under BOE Rules § 6(D)(3)(d).

C. Johnson’s position as State Auditor complicates his prosecution of this Complaint.

Finally, Keller observes that Johnson’s assumption to the Office of State Auditor complicates his prosecution of this Complaint. State Auditor is an executive office created by Article V, Section 1 of the New Mexico Constitution. The State Auditor has “the power, duty and authority to examine and pass upon the activities of state officers and agencies who, by law, receive and expend public moneys.” *Thompson v. Legislative Audit Comm’n*, 1968-NMSC-184, ¶ 11, 79 N.M. 693, 448 P.2d 799. NMSA 1978, § 12-6-12 contemplates that the State Auditor conduct the duties of his or her office “in accordance with general accepted auditing standards” and “promulgate reasonable regulations” to effectuate that goal. One of such regulation, NMCA 2.2.2.10(B), requires the State Auditor to conduct audits in accordance with American Institute of Certified Public Accountants (AICPA) standards. Rule 102 of the AICPA Code of Professional Conduct⁴, in turn, requires that an auditor be free of conflicts of interest. Keller observes that, to the extent that Johnson pursues this Complaint, any future audit by Johnson in his capacity as State Auditor, of either the City of Albuquerque or of this Board, may engender a conflict of interest in violation of 2.2.2.10(B) NMCA.

⁴ See <http://pub.aicpa.org/codeofconduct/ethicsresources/et-cod.pdf>, at 27.

CONCLUSION

For the foregoing reasons, Mayor Keller respectfully requests that the Board dismiss the Complaint.

Respectfully submitted: December 8,
2017,

**FREEDMAN BOYD HOLLANDER
GOLDBERG URIAS & WARD, P.A.**

/s/ Jeremy D. Farris

David H. Urias

Jeremy D. Farris

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molly@ginlawfirm.com

From: Brook Bassan <brookfordistrict4@gmail.com>
Sent: Thursday, December 19, 2019 4:27 PM
To: Duhigg, Katy; Diemer, Miriam J.
Subject: Conversation Recap

Good afternoon,

I would like to recap the conversation we had last Friday. You asked about any additional thoughts on whether I would consider voluntary compliance regarding the complaint filed against me. I remain concerned because I quoted to you section 5(b) "Other In-Kind Contributions" of the 2019 Regulations of the Albuquerque City Clerk for the Election Code: "Volunteer Services vs. Paid Assistance. Individuals are permitted to provide their services for free to the campaign as volunteers. However, if the volunteer provides their services with the knowledge of their employer during their paid work-time, then the employer has made a Contribution to the campaign." I did confirm that the two individuals associated with Bernalillo County Republican Party are not paid for their time but strictly volunteers. You indicated although they are volunteers, they still have value and it would be appropriate to assign that value with a dollar amount of New Mexico minimum wage. But that does not seem consistent with the rules or the practices of the other candidates and the Democratic Party.

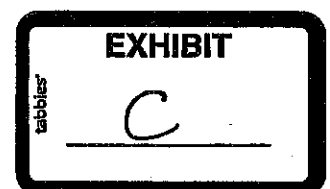
The recently issued order in an Ane Romero complaint does not seem to follow the suggestion to me. I have done (already) what the order proposes of Ms. Romero.



As we discussed you were thinking about some updates and clarifications use some updates and had you continued on as City Clerk, you planned on suggesting amendments to clarify this concept. Although the intention was to someday amend the Code, it is not currently written as such and I do not think it should apply to the complaint. You replied that the Board of Ethics might agree with me as well but that would depend on them. It was at this point that I confirmed I was not interested in settling this complaint through voluntary compliance as I do not believe I have done anything out of compliance already.

Please forward this to the Clerk and also let me know if there is any information in this recap that is different in your recollection as this is how I recall the conversation.

Thank you,

Brook Bassan
District 4 City Councilor Elect
505-238-2418
www.brookfordistrict4.info
@Brook4District4
#Brook4District4



Brook Bassan  

Phone Discussion


To: Duhigg, Katy, Cc: Diemer, Miriam J., Bcc: Mcmillan, Megan A

July 26, 2019 at 5:23 PM



Details

 Siri found updated contact info in this email: Brook Bassan brookfordistrict4@gmail.com

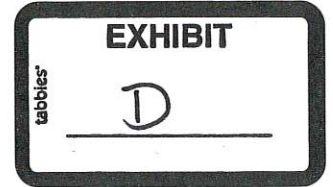
update... 

Katy,

Thank you for discussing the Facebook post that was forwarded to me today. Today, I was sent a text message from a friend who wanted to alert me there was a post on Facebook which I find worrisome as it may imply coordination when there in fact is none. I am attaching the post below. I want to ensure that this is not something that will get me in trouble as I am very concerned with running the City Council race fairly and ethically. I have not contacted Bernalillo County Republican Party since our phone conversation just a bit ago. I would like to avoid ANY communication with them unless it is recommended.

I appreciate your guidance.

Brook Bassan
District 4 City Council Candidate
505-238-2418



Duhigg, Katy



August 5, 2019 at 4:07 PM



RE: Phone Discussion

Details

To: Brook Bassan, Cc: Diemer, Miriam J.

Siri found new contact info in this email: Katy Duhigg kduhigg@cabq.gov

add to Contacts...

Hi Brook,

I understand from this email that you are affirmatively stating that you are not coordinating with the Republican Party of Bernalillo Party. You should review the coordination rule, Part C of the 2019 Election Code Rules (below). Assuming that neither you nor anyone associated with your campaign is coordinating with the Party, then I do not think it's necessary for you to contact them, although asking someone not to make expenditures to promote or support you, or to oppose or defeat your opponent, does not itself constitute coordination.

I will inform all of the political parties of this, but if any of them are making independent expenditures on candidates' behalves, they need to include required disclaimer language, and, if the expenditure is more than \$100, file financial reports.

Katy

ONE
ALBUQUE city clerk
QUE

KATY DUHIGG

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