

PUBLIC CITIZEN LITIGATION GROUP
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BY EMAIL TO jsprague@actransit.org

September 28, 2020

Jill Andrews Sprague, Esquire
Office of the General Counsel
Alameda-Contra Costa Transit District
1600 Franklin Street
Oakland, California 94612

Dear Ms. Sprague:

I write in response to your September 24, 2020 letter. I did not find it at all persuasive. Instead of the authorities cited in your cease-and-desist letter as well as in the ordinance and the policy cited there, you now contend that you are relying on a penal provision in the California Elections Code, section 13804(a), which provides that it is a misdemeanor to “use . . . any reproduction or facsimile of the **seal** of the county or the **seal of a local government agency** in any campaign literature or mass mailing, as defined in Section 82041.5 of the Government Code, **with intent to deceive the voters.**” (emphasis added) Section 13804(b), also cited in your letter, states that “use . . . of a seal in a manner that creates a misleading, erroneous, or false impression that the document is authorized by a public official is evidence of intent to deceive.”

Nice try, but these statutes provide no support for your demands, for several reasons:

First, Fierce has no intent to deceive voters and you do not pretend to think that she has any intent to deceive. Indeed, you give no reason to believe that even a single voter in Contra Costa or Alameda County looked at the photographs on the Fierce web site and suffered the slightest confusion about whether her campaign site had been authorized by a public official. Just how easily do you think your constituents might be misled? There is a saying in trademark law that the law does not cater to a moron in a hurry. But not even someone in a hurry would think that merely showing a photograph of an AC Transit bus or route sign, in this context, indicates official support for her candidacy.

Moreover, the statute you have cited regulates the use of the “seal” of a county or local government agency, but the image in question is not a seal, and your letter defending yourself is, so far as I can see, the first time that AC Transit has tried to claim that the image that appears on its busses and on the route sign that appear on Fierce’s web site is a seal. Your demand letter described the image as a “logo,” not a seal, as do the ordinance and the policy that you cited in the letter. The

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logo in question bears no resemblance, for example, to the Great Seal of California, to the seals of Alameda and Contra Costa Counties, and to the seals of San Francisco, Oakland and other California cities, which would be covered by the Elections Code provision that you cite. The Elections Code provision thus does not apply.

Third, the Government Code provision whose definition is cited in the election code refers only to mass mailings, defined as mailings of at least 200 identical pieces of paper. Nothing in the statute refers to a web site. Considering that you are invoking a criminal statute (which you have no authority to enforce) the rule of lenity would require the narrow construction.

Finally, you try to take refuge in the fact that you have managed to deter some other candidates in this election, and in past elections, from using of the logo by sending them similar demand letters. Now, if some of the other uses were misleading, your letters could have been justified, but it is also possible that some of the candidates whom you threatened stopped using the logo, not because they thought that “the integrity of the election process” was at risk, but rather because they received a letter from a lawyer, could not afford to pay for legal advice, and were intimidated by false claims of wrongdoing.

Accordingly, I want to examine these past cases so that I can evaluate your claim of neutrality. Perhaps there are other candidates who need pro bono assistance to learn that their First Amendment rights entitle them to defy your threats. Please send me, therefore, your demand letters to other candidates since 2014, records showing the images over which the demand letters were sent, the responses from the candidates, and any other documents in your possession related to the instances of alleged misuse of the logo. Although we would certainly be seeking this information in discovery should this case end up in the courts, for now, along with this letter I will be sending you a separate request for records under the California Public Records Act.

In the meantime, seven business days remain until the deadline for retracting your demand letter.

Sincerely yours,

/s/ Paul Alan Levy
Paul Alan Levy