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December 3, 2018

Jeff S. Jordan
Assistant General Counsel
Federal Election Commission
Office of Complaints Examination & Legal Administration
1050 First Street, NE
Washington, DC 20463

Re: MUR 7508

Dear Mr. Jordan:

We write as counsel to Friends of Sherrod Brown (the "Committee") and Judith Zamore, Treasurer of Friends of Sherrod Brown, (collectively, "Respondents"), in response to a complaint filed by Robert Secaur dated October 1, 2018 (the "Complaint").

The Complaint alleges that a campaign advertisement paid for by the Committee resulted in a corporate contribution from Whirlpool Corporation ("Whirlpool") to the Committee in violation of the Federal Election Campaign Act of 1971, as amended (the "Act"), 52 U.S.C. § 30101, *et seq.* and Federal Election Commission ("FEC" or "Commission") regulations.[1] This allegation is based on incorrect assumptions presented as relevant facts and improper reliance on inapplicable legal standards. The Complaint, in fact, does not present any facts that would constitute a violation of the Act. As the Commission has repeatedly found in advisory opinions and enforcement matters, the type of advertisement and activity at issue here is not a violation of the Act; it is completely consistent with the Act and Commission regulations and does not result in any type of prohibited contribution.[2] Accordingly, the FEC should find no reason to believe that a violation has occurred and dismiss this matter immediately.[3]

[1] Complaint at 1-2.

[2] *See, e.g.*, Ad. Op. 1984-43 (Brunswick), 2 (Sept. 14, 1984), https://www.fec.gov/files/legal/aos/1984-43/1984-43.pdf; MUR 5578 (Wetterling), First General Counsel's Report, 6 (Feb. 15, 2006), https://www.fec.gov/files/legal/murs/5578/0000515E.pdf.

[3] The Act requires that the Commission find "reason to believe that a person has committed, or is about to commit, a violation" of the Act as a predicate to opening an investigation into the alleged violation. 52 U.S.C. § 30109(a)(2). The Commission should *only* find "reason to believe" in cases "where the available evidence in the matter is at least sufficient to warrant conducting an investigation, and where the seriousness of the alleged violation warrants either further investigation or immediate conciliation." 72 Fed. Reg. 12,545, 12,545 (Mar. 16, 2007).

I. Factual Background

On September 25, 2018, the Committee began airing an advertisement that focused on Senator Brown's job creation record in Ohio. The advertisement included testimonials about Senator Brown's work on behalf of the people of Ohio from individuals who are employed by Whirlpool. These individuals identified themselves as Whirlpool employees and noted their personal support for Senator Brown by stating that "no one has fought harder to protect our jobs" and that "Sherrod Brown helped create hundreds of new jobs this year."[4] The Committee paid for all expenses associated with this advertisement.

The individuals who appeared in the advertisement all did so voluntarily. They taped their testimonials over a weekend, during hours that they typically were not at work. Their endorsement of Senator Brown was made in their individual capacity and not on behalf of their employer, Whirlpool. As the Complaint itself notes, at the request of Whirlpool after the advertisement began airing, the Committee agreed to include a disclaimer stating that Whirlpool itself was not endorsing Senator Brown.

All of the footage shot for the advertisement was done on public property. No portion of the advertisement was shot on Whirlpool property. The footage included in the advertisement of what appears to be a Whirlpool plant was taken from publicly available footage.[5] The logo visible in the footage was simply in the background of the shots filmed on public property.

II. Legal Analysis

The Complaint alleges that "[i]n releasing an advertisement containing corporate logos and resources, Friends of Sherrod Brown has accepted an illegal corporate contribution."[6] This allegation is simply incorrect. The advertisement was appropriately paid for by the Committee and no such contribution was made or accepted for the reasons set forth below.

The Commission has consistently found that it is permissible for corporate employees, even corporate leadership, to appear in political advertisements, identify where they work, and talk about what a federal candidate has done for their company.[7] Under Commission regulations, the term "contribution" does not include "the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee."[8] The

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[4] Friends of Sherrod Brown, *Disheveled TV Advertisement* (Sept. 25, 2018), https://www.youtube.com/watch?v=kHS5LUZw5x4&feature=youtu.be.
[5] *See* Whirlpool Corporation, *Clyde, Ohio Whirlpool Corporation Video* (Jan. 24, 2018), https://www.youtube.com/watch?v=RweVhAybrAI.
[6] Complaint at 2.
[7] *See* Ad. Op. 1984-43 (Brunswick), 1-2 (Sept. 14, 1984).
[8] 11 C.F.R. § 100.74.

Commission has specifically determined that, in the context of a campaign advertisement, "a statement that merely identifies [a corporate employee] as a corporate official would not implicate the company in a prohibited contribution or expenditure."[9] The Commission assumed in reaching this conclusion that the corporate employee was volunteering his time, that he was participating during non-work hours or as was otherwise permitted during work hours under Commission regulations, and that the campaign committee paid for all expenses related to the advertisement.[10]

The facts in this case are indistinguishable and, therefore, warrant the same conclusion. The expenses for the advertisement were wholly paid for by the Committee, and the Complaint does not provide any facts to suggest otherwise. While the individuals who participated in the advertisement were Whirlpool employees, and identified themselves as such in the advertisement, they each participated in their individual capacity as volunteers for the Committee. They each did so during non-work hours. Furthermore, the Commission has even approved situations where corporate leadership endorsed federal candidates in their individual capacity, finding that it did not result in a contribution from the company.[11] Here, the individuals who participated were simply Whirlpool employees, rather than corporate leadership. Accordingly, their participation in the advertisement did not result in a contribution from their employer to the Committee.

The Complaint further alleges that the mere fact that the Whirlpool logo appears in the background of the advertisement means that a contribution was made from Whirlpool to the Committee. This allegation is at odds with the Commission's guidance and must fail for that reason.

Notably, the Commission previously considered a rule that would have regulated the use of corporate logos, trademarks, and letterhead in political advertisements, but ultimately chose not to adopt a regulation on this type of use.[12] Consequently, as acknowledged by the Commission, the aforementioned-advisory opinions "provide the most direct guidance on the use of corporate names, logos, or personalities in campaign advertisements."[13] These advisory opinions make clear that the identification of an individual as an employee of a company in an advertisement does not result in a corporation contribution. The Commission's acknowledgement that these advisory opinions apply also to the use of a corporate logo in an advertisement is the only rational conclusion; there is no meaningful distinction between the identification of a corporation

[9] Ad. Op. 1984-43 (Brunswick), 2 (Sept. 14, 1984), https://www.fec.gov/files/legal/aos/1984-43/1984-43.pdf; *see also* Ad. Op. 1978-77 (Aspin), (Oct. 20, 1978), https://www.fec.gov/files/legal/aos/1978-77/1978-77.pdf.
[10] *See* Ad. Op. 1984-43 (Brunswick), 1-2 (Sept. 14, 1984).
[11] *Id.*
[12] *See* 60 Fed. Reg. 64,260, 64,268-64,269 (Dec. 14,1995).
[13] MUR 5578 (Wetterling), First General Counsel's Report, 6 (Feb. 15, 2006), https://www.fec.gov/files/legal/murs/5578/00005E5E.pdf.

by name and the inclusion of that corporation's logo in an advertisement. Accordingly, the mere inclusion of the Whirlpool logo in the advertisement did not result in a contribution from Whirlpool to the Committee.

Furthermore, in MUR 5578, the Commission again confirmed that "the use of endorsers who are identified by their corporate positions in campaign-funded advertisements [do] not violate [the Act] provided that the corporate employee volunteers his or her time and the campaign pays for all advertisement expenses."[14] In that case, John Walsh, host of America's Most Wanted, appeared in an advertisement for a federal candidate.[15] In this advertisement, Mr. Walsh was identified on-screen as "John Walsh, Host, AMERICA'S MOST WANTED."[16] In concluding that the corporation did not give "anything of value" to the federal committee, the essential fact for the Commission was that Walsh had acted in his individual capacity and that his inclusion in the advertisement did not indicate that America's Most Wanted was endorsing the candidate itself.[17] The relevant facts here are indistinguishable: the individuals who participated in the advertisement did so in their individual capacity, were simply identified as being Whirlpool employees, and their inclusion did not indicate that Whirlpool itself was endorsing Senator Brown. In fact, a disclaimer making that clear was included in the advertisement. The Whirlpool sign in the background was simply used to identify the employees as Whirlpool employees, just as "America's Most Wanted" was used to identify John Walsh. The facts here are indistinguishable from every other example that the Commission has already approved.[18]

Moreover, all footage in the advertisement that appears to be in a Whirlpool plant is footage from a publicly available video on YouTube.[19] As the Commission has consistently found, the use of videos that are freely available on YouTube does not constitute a prohibited contribution in violation of the Act or Commission regulations, even if the videos may have been posted on the YouTube account of a source whose contributions would otherwise be impermissible.[20] Thus, the use of this footage in the advertisement also failed to result in a contribution from Whirlpool to the Committee.

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[14] *Id.*
[15] *Id.* at 4.
[16] *Id.*
[17] *Id.* While in that case the advertisement did not include the actual corporate logo for America's Most Wanted, at no point did the Commission indicate that the use of a corporate logo would be violation of the Act. In fact, as noted above, the Commission pointed out that it had previously considered and chose not to adopt a regulation on this type of use. *See* 60 Fed. Reg. 64,260, 64,268-64,269 (Dec. 14,1995).
[18] MUR 5578 (Wetterling), First General Counsel's Report, 6 (Feb. 15, 2006), https://www.fec.gov/files/legal/murs/5578/0000515E.pdf.
[19] *See* Whirlpool Corporation, *Clyde, Ohio Whirlpool Corporation Video* (Jan. 24, 2018), https://www.youtube.com/watch?v=RweVhAybrAI.
[20] *See* MUR 6218 (Ball4NY), Factual and Legal Analysis (June 22, 2010), https://www.fec.gov/files/legal/murs/6218/10044273088.pdf.

Finally, the Complaint relied on Advisory Opinion 2007-10 in concluding that "the names, trademarks, and service marks of corporations are considered to be valuable corporate resources."[21] However, the facts and Commission's conclusion in that advisory opinion are clearly distinguishable from the circumstances at issue here. In that case, a campaign asked the Commission whether it was permissible to "display the corporate names, trademarks, or service marks to increase participation in [a federal committee] fundraiser."[22] In prohibiting this activity, the Commission stated "by allowing the committee to use the corporation's resources – in effect, by lending the corporation's resources to the committee – the corporation is using its resources to facilitate contributions to the [federal committee]."[23] The opinion was entirely focused on whether a federal committee could use corporate resources *to facilitate corporate contributions*, and did not consider at all the issue raised in the Complaint regarding the use of a corporate name or logo in a political advertisement.[24] In fact, the Commission's own acknowledgement in the opinion demonstrates that the Complaint's reliance on it is misplaced; the Commission specifically noted that it had previously approved corporate officials' involvement in political advertisements where there was no "reported use of corporate resources *to facilitate contributions* to a political committee."[25] Here, the Complaint does not even attempt to allege, nor could it, that the advertisement was made to facilitate contributions. Accordingly, any reliance on Advisory Opinion 2007-10 in the Complaint is inappropriate.

II. Conclusion

As described herein, the Complaint does not state any facts, which, if proven true, would constitute a violation of the Act. Accordingly, the Commission should reject the Complaint's request for an investigation, find no reason to believe that a violation of the Act or Commission regulations has occurred, and immediately dismiss this matter.

Very truly yours,

Marc E. Elias
Danielle E. Friedman
Emma Olson Sharkey
Counsel to Respondents

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[21] Complaint at 2.
[22] Ad. Op. 2007-10 (Reyes), 2 (Aug. 21, 2007), https://www.fec.gov/files/legal/aos/2007-10/2007-10.pdf.
[23] *Id.* at 2-3.
[24] *Id.*
[25] *Id.* at 3 (emphasis in original).