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April 2, 2020

Jeff S. Jordan
Assistant General Counsel
Complaints Examination &
Legal Administration
Federal Election Commission
Attn: Christal Dennis, Paralegal
999 E Street, NW
Washington, DC 20463
VIA EMAIL: CELA@fec.gov

Re: MUR 7686 – Response to Complaint from Victoria Sachs

Dear Mr. Jordan,

We write in response to your “late notice” to our client, Victoria Sachs (“Ms. Sachs”), regarding Matter Under Review (“MUR”) 7686. Ms. Sachs was served with MUR 7686 on March 18, 2020, nearly six weeks after Better Future Michigan received notice of MUR 7686. The “late notice” letter stated she was not previously served due to an “administrative oversight.”

Ms. Sachs, however, is not named as a respondent in the complaint, and we believe she was improperly added six weeks after Better Future Michigan was served with MUR 7686 when an over-eager intake clerk in the Commission’s Office of General Counsel took it upon him or herself to include Ms. Sachs as a respondent.

Because Ms. Sachs is not a named respondent in the complaint that initiated MUR 7686, we trust that this will be the end of the matter as it pertains to Ms. Sachs. For your reference, however, we have attached an updated copy of the response we submitted on behalf of Better Future Michigan on February 20, 2020, which is hereby incorporated by reference as Ms. Sachs’s response to MUR 7686.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'R. Avers'.

Robert Avers
Jessica Brouckaert
Counsel to Victoria Sachs



FEDERAL ELECTION COMMISSION
Washington, DC 20463

Statement of Designation of Counsel

Provide one form for each Respondent/Witness
 Note: You May E-Mail Form to: CELA@fec.gov

CASE: All Matters

Name of Counsel: Robert Avers, Jessica Brouckaert

Firm: Dickinson Wright PLLC

Address: 1825 I Street, NW Suite 900, Washington, DC 20006

Telephone: () Robert: 734-623-1672
Jessica: 202-659-6932 **Fax:** () 844-6 70-6009

The above named individual and/or firm is hereby designated as my counsel and is authorized to receive any notifications and other communications from the Commission and to act on my behalf before the Commission.

4/2/2020 [Signature]
Date **Signature** **Title**

RESPONDENT: Victoria Sachs
 (Committee Name/Company Name/Individual Named In Notification Letter)

MAILING ADDRESS:

Telephone:(H): **(W):**

This form relates to a Federal Election Commission matter that is subject to the confidentiality provisions of 52 U.S.C. § 30109(a)(12)(A). This section prohibits making public any notification or investigation conducted by the Federal Election Commission without the express written consent of the person receiving the notification or the person with respect to whom the investigation is made.



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Re: MUR 7686 – Response to Complaint from Victoria Sachs and dBetter Future Michigan

Dear Mr. Jordan,

We represent Victoria Sachs and Better Future Michigan, a non-profit social welfare organization formed under Section 501(c)(4) of the Internal Revenue Code which is dedicated to educating and informing Michiganders on important policy issues. We write to you in response to the complaint dated January 27, 2020, and designated MUR 7686 (“Complaint”), filed against our clients, among others, by End Citizens United (“Complainant”), a Super PAC ironically trying to eliminate Super PACs.¹

The Complaint provides no evidence or proof that Respondents violated the Federal Election Campaign Act of 1971, as amended (the “Act”), and relies completely on conjecture and innuendo. The Complainant’s gross misunderstanding of the Act, upon which this bogus Complaint relies, results in a waste of the Commission’s time and taxpayer resources. We are not surprised, however, by Complainant’s confusion on federal coordination laws given their own rocky history navigating the same laws about which they now cry foul.² This Complaint is a ham-handed political maneuver aimed to divert attention from substantive issues impacting Michigan voters. Accordingly, Better Future Michigan respectfully requests that the Commission dismiss the Complaint for the reasons further stated below.

I. Factual Background

¹ Our client’s registered agent received the Complaint on February 5, 2020.

² Sam Pohl, Republican Party of Texas files FEC Complaint Against End Citizens United, Texas GOP (Sep. 21, 2018), <https://www.texasgop.org/republican-party-of-texas-files-fec-Complaint-against-end-citizens-united/>. The Commission dismissed this Complaint (MUR 7505) due to failure to establish the conduct prong of the coordination test.

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Victoria Sachs (“Ms. Sachs”) worked as an employee of John James for Senate, Inc. (“the Committee”). Following the November 2018 election, Ms. Sachs assisted in shutting down campaign operations. In early 2019, the Committee retained Ms. Sachs as an independent contractor from January to May 3, 2019 to serve as an advisor to Mr. James as he analyzed his options for the future. Ms. Sachs consulted with Mr. James to help him evaluate whether he should run again and, if so, for what office.

Ms. Sachs’s independent contractor relationship with the James campaign terminated on May 3, 2019; at that time, Mr. James had not decided whether he would again run for office. The May 3, 2019 payment from the James campaign to Ms. Sachs referenced in the Complaint was a payment made in arrears for services rendered prior to that date; that payment was not, as alleged by Complainant, made to “cover the entire month of May.”³ Moreover, Ms. Sachs was not privy to strategic planning for Mr. James’ 2020 Senate campaign because her relationship with the James campaign terminated before 2020 campaign strategy was developed.

On June 6, 2019, John James filed a Statement of Candidacy with the FEC for U.S. Senate.

Better Future Michigan was incorporated on June 12, 2019. Ms. Sachs has served as Executive Director of Better Future Michigan since its founding.

To date, Better Future Michigan has not produced or disseminated a single express advocacy advertisement. Better Future Michigan has produced and disseminated three (3) issue advocacy advertisements: “Eliminate”, “Falling in Line”, and “Radical Washington Liberals.”⁴ We encourage the Commission to watch these advertisements to see they do not constitute express advocacy.

II. No Express Advocacy, No Coordination

The Complainant asserts our client violated the Act’s coordination rules and consequently made an impermissible in-kind contribution to the Committee.⁵ These conclusory allegations are meritless because, as explained below, the advertisement at issue (and all advertisements issued by Better Future Michigan as of this writing) constitute issue advocacy communications—not express advocacy communications, and Better Future Michigan otherwise complied with all applicable laws.

Under the Act, no person may make a contribution, including an in-kind contribution, totaling more than \$2,800 in the aggregate per election to a Federal candidate or their authorized campaign committee. The Act defines an in-kind contribution as, among other things, expenditures by any person “in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate,

³ Compl. at 3.

⁴ “Eliminate”, Facebook (July 30, 2019),

<https://www.facebook.com/BetterFutureMichigan/videos/3110393848985658/>.

“Falling in Line”, Facebook (Dec. 11, 2019), <https://www.youtube.com/watch?v=pfAv5r4trHE&feature=youtu.be>.

“Radical Washington Liberals”, Facebook (Dec. 16, 2019),

<https://www.facebook.com/BetterFutureMichigan/videos/213820236408004/>.

⁵ Compl. At 4, 5.

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his authorized political committees, or their agents...”⁶ A communication is considered coordinated if it meets a three-part test: 1) payment by a third party (“payment prong”); 2) satisfaction of one of four “content” standards (“content prong”); and 3) satisfaction of one of six “conduct” standards (“conduct prong”). Each element of the three-part test must be met to establish a communication was coordinated.⁷ These limitations, however, do not apply to persons disseminating *issue advocacy* communications.

To meet the “content prong” the communication must be express advocacy or the functional equivalent thereof. Express advocacy requires the communication includes a message that unmistakably urges the viewer to support the election or defeat of a clearly identified candidate. There are two tests for determining whether an advertisement qualifies as express advocacy: 1) the use of “magic words” of express advocacy such as “vote for” or “vote against”; or 2) the reasonable interpretation test, which applies to advertisements that do not contain words of express advocacy but nonetheless are unmistakable, unambiguous and suggestive of only one meaning—that being the election or defeat of a clearly identified candidate.⁸ When applying the reasonable interpretation test, courts consider a number of factors, including: 1) whether the advertisement encourages action to elect or defeat a clearly identified candidate; 2) timing of the advertisement in relation to the election; and 3) whether the advertisement unambiguously calls for the election or defeat of a clearly identified candidate.⁹

While the Complainant asserts that “available facts *suggest*...“Eliminate” satisfies all three prongs of the coordinated communication test,” the Complainant is clearly wrong.¹⁰ Indeed, “Eliminate” does not urge the viewer to vote for or against a candidate, but rather educates the viewer on a policy issue—Medicare for All, and communicates the stance that Senator Gary Peters—an *elected official*—has taken on that issue. Courts have consistently found that this type of communication, often referred to as “issue advocacy,” is neither express advocacy nor the functional equivalent thereof.¹¹

⁶ 11 C.F.R. § 109.20(a).

⁷ 11 C.F.R. § 109.21(a)(1)-(3).

We do not contest the fact that Better Future Michigan paid for “Eliminate.”

⁸ 11 C.F.R. § 109.21(c)(5)

⁹ 11 C.F.R. § 100.22(b).

¹⁰ Compl. at 4.

¹¹ See, e.g. *FEC v. Survival Education Fund, Inc.*, 65 F.3d 285 (2nd Cir. 1995) (letters criticizing Reagan Administration’s military involvement in Central America are not express advocacy); *FEC v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45 (2nd Cir. 1980) (en banc) (bulletin criticizing a congressman for his record on taxes and government spending is not express advocacy); *FEC v. Christian Action Network*, 100 F.3d 1049 (4th Cir. 1997) (ads criticizing a presidential candidate for positions on gay rights is not express advocacy). See also Statement of Reasons for Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 2, MUR 7416 (Unknown Respondents) (“The mailer informs readers as to the candidates’ positions on a variety of issues on which the American public hold differing views. This is precisely the sort of activity the express advocacy construct was meant to exclude from Commission jurisdiction.”). See also Statement of Reasons for Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 2, MUR 7416 (Unknown Respondents), citing *FEC v. Freedom’s Heritage Forum*, 1999 WL 33756662 (W.D. Ky. 1999) (mailer comparing candidates’ positions and which portrayed one candidate “in an unfavorable light” and the opposing “in a favorable one” not express advocacy because the “reader is left to draw her own conclusions.”).

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Furthermore, the timing of the “Eliminate” clearly indicates that the advertisement was not express advocacy. To that end, “Eliminate” was promoted on Facebook more than one year in time before even the primary election in the applicable state.

Meanwhile, the only “evidence” cited by Complainant in support of their claim that “Eliminate” is express advocacy is the presence of “ominous background music, dramatic jump cuts and darkly tinted scenes.”¹² Neither Courts nor the Commission, however, have ever considered these stylistic and subjective factors when resolving a coordination case. Consequently, “Eliminate” is not express advocacy, the “content prong” of the three-part coordination test has not been satisfied, and the Commission should therefore dismiss the Complaint.

III. No Facts, Just Speculation

Because the Complainant has clearly failed to satisfy the content prong of the coordination test, the Commission should immediately dismiss the Complaint. Nonetheless, and despite the dispositive nature of Complainant’s failure to satisfy the content prong, we will still address the Complainant’s shoddy attempt to establish the conduct prong, which, like the rest of the Complaint, relies entirely on speculation. Indeed, the entire Complaint is built on quicksand—use of speculative language and inferences like “strongly suggest” “suggest” “likely” “potentially” “presumably” “if” “almost impossible to believe” “appears” and “apparent” prove nothing and do not replace facts.¹³ Further, the FEC does not authorize investigations based on speculation.¹⁴

Setting aside the completely speculative nature of the allegations in the Complaint, the underlying claim is meritless because the “conduct prong” remains unsatisfied. To that end, the conduct prong is satisfied only upon the demonstration of one of the following applicable standards:

- If the communication is created, produced or distributed at the request or suggestion of a candidate or his agents, or the communication is created, produced or distributed at the suggestion of the group paying for the communication and the candidate, or his or her agents, assent to the suggestion;
- If the candidate or his agents are materially involved in decisions regarding the content, intended audience, means or mode of the communication, specific media outlet used, the timing or frequency or size or prominence of a communication;
- If the communication is created, produced or distributed after one or more substantial discussions about the communication between the group paying for the communication and the candidate, the candidate’s committee, the candidate’s opponent or opponent’s committee, or a party committee; or

¹² Compl. at 5.

¹³ *Id.* at 1, 3, 4, 6, 7.

¹⁴ *FEC v. Machinists Non-partisan League*, 655 F.2d 380, 388 (D.C. Cir. 1981) (footnote omitted) (“[M]ere ‘official curiosity’ will not suffice as the basis for FEC investigations...”). *See also* Statement of Reasons of Commissioners Mason, Sandstrom, Smith, and Thomas at 1, MUR 4960 (Hillary Clinton for Senate Exploratory Committee), https://www.fec.gov/files/legal/murs/6852/6852_1.pdf.

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- If the communication is paid for by a person or by the employer of a person who was an employee or independent contractor of the candidate during the previous 120 days and the candidate or his opponent is clearly identified in the communication and the former employee or independent contractor conveyed non-public information about the plans or needs of the candidate material to the creation, production or distribution of the communication.¹⁵ This is often referred to as the “former employee” standard.

The Complainant relies on the “former employee” standard in a listless attempt to prove the conduct prong. The Complainant states, “If Ms. Sachs used or conveyed any material, non-public information...the conduct prong is clearly met,” but provides no evidence that Ms. Sachs actually conveyed such information—which she did not because Ms. Sachs was never privy to such information.¹⁶

The Complainant’s theory is essentially that because Ms. Sachs controlled the funding of Better Future Michigan, coupled with her former independent contractor relationship with the Committee, this constitutes coordination *per se*. But the legal definition of “coordination” in this First Amendment protected context is not a “we know it when we see it” standard, and Commission regulations require far more than an “if” to establish that an entity’s independent expenditure communications are coordinated with a candidate or his or her campaign.

The entire Complaint submitted by End Citizens United lacks substance and relies solely on false speculation and innuendo. Based upon the foregoing, we respectfully ask the Commission to dismiss the Complaint and close the file.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. Avers', with a stylized flourish at the end.

Robert Avers
Jessica Brouckaert
Counsel to Victoria Sachs & Better Future Michigan

¹⁵ 11 C.F.R. § 109.21(d).

¹⁶ Compl. At 6.