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Federal Election Commission
1050 First Street NE
Washington, DC 20463
VIA E-MAIL: CELA@fec.gov

Re: MUR 7714 – Response to Complaint from John James and John James for Senate, Inc.

Mr. Jordan,

We write on behalf of John James, John James for Senate, and Timothy Caughlin in his official capacity as Treasurer (collectively “the Campaign”) in response to a complaint alleging that Mr. James and the Campaign violated the Federal Election Campaign Act of 1974, as amended (“FECA” or “the Act”) by coordinating communications with Better Future Michigan (“BFM”), a 501(c)(4) organization. Specifically, the Complaint, relying solely on a *Daily Beast* article, alleges that the Campaign and BFM coordinated on BFM’s advertisement, “Eliminate”, which discusses the healthcare positions of Mr. James’ opponent, Senator Gary Peters. The Complaint alleges that this was possibly done in three different ways. First, the Complaint alleges that the Campaign could have coordinated with BFM through the Campaign’s former consultant, Victoria Sachs, who later became Executive Director of BFM. Second, the Complaint alleges that coordination could have occurred through an unknown individual who supposedly signed media buys for the 2018 Campaign through Smart Media LLC (“Smart Media”) and BFM through Del Cielo Media (“Del Cielo”), which happens to be a subsidiary of Smart Media. It also suggests that Smart Media and Del Cielo should be considered a common vendor by the Commission when making this allegation. Third, the Complaint alleges that both the Campaign and BFM worked with IMGE, LLC, which could be considered a common vendor under coordination regulations.

The Complaint is purely speculative and relies on so-called “evidence” provided by the *Daily Beast*, which is just as conclusory. The Commission may find “reason to believe” only if a Complaint sets forth *sufficient specific facts*, which, if proven true, would constitute a violation of the FECA or Commission regulations.¹ The *facts* here demonstrate that no law of any kind

¹ Statement of Reasons of Commissioners Mason, Sandstrom, Smith and Thomas at 1, MUR 4960.

has been violated by the Campaign. Therefore, we ask the Commission to dismiss this Complaint, and promptly close the file.

I. Factual Background

Mr. James is the Republican candidate challenging incumbent Senator Gary Peters for U.S. Senate in Michigan. Mr. James filed his Statement of Candidacy on June 6, 2019, designating John James for Senate as his principal campaign committee. Victoria Sachs was Mr. James' campaign manager for his 2018 campaign. In early 2019, she continued as an independent contractor to assist with 2018 vendor issues, 2018 donor maintenance, and Mr. James' 2020 testing-the-waters process to decide whether to run for office again, and if so, for what office. Ms. Sachs' role ended on May 3, 2019, which was before Mr. James decided to run for Senate and well before any planning for that campaign began. Approximately one month after Ms. Sachs ceased her role with the James committee, she became Executive Director for the BFM organization.

Mr. James' 2018 Campaign contracted with Smart Media for media buying services. That contract was terminated after the election was over. The 2020 Campaign has no relationship (contractual or otherwise) with Smart Media. Additionally, neither Mr. James nor any of his campaign committees have ever had a relationship (contractual or otherwise) with Del Cielo. We also have no information regarding the signor of the 2018 Campaign's media buys on behalf of Smart Media.

The Campaign is currently in a contractual relationship with IMGE for media buying services. While the Campaign does not have access to IMGE's internal corporate documents, including their firewall policy, the Campaign's contractual agreement with IMGE requires IMGE to implement a firewall policy to prevent the Campaign's plans, projects, activities, and needs from being shared with any of IMGE's other clients.²

II. Legal Analysis

Relying solely on rhetoric in a February 28 *Daily Beast* article, the Complaint makes three separate coordination allegations: (1) the Campaign and BFM coordinated communications

² Section 12 of the Committee's (represented as "Client") contract with IMGE (represented as "Contractor") states, "Contractor agrees that in carrying out its duties and responsibilities under this Agreement, it will neither undertake nor cause, nor permit to be undertaken, any activity which either, (i) is illegal under any laws, decrees, rules or regulations in effect in any country, or (ii) would have the effect of causing Client to be in violation of any laws, decrees, rules or regulations in effect in any country. Contractor further represents to the Client that it is knowledgeable of the Client's potential compliance and legal obligations pursuant to the Federal Election Campaign Act of 1971, as amended ("FECA"), and agrees to comply with all applicable laws in respect to the performance of the Services under this Agreement and to consult with the Client's legal counsel in the event Contractor has questions regarding the application of any provision of Federal law to the Contractor's Services for the Client. Contractor shall not coordinate with any political committee, entity, or individual in violation of FECA or Federal Election Commission regulations. **Contractor shall implement and strictly adhere to an internal firewall policy that will safeguard and ensure that Contractor does not facilitate the conveyance of the Client's plans, projects, activities, or needs, that could be material to the creation, production, or distribution of any public communication, to any of Contractor's other clients, or to any political party committee, independent expenditure-only committee, or 501(c)(4) social welfare organization.**" (emphasis added).

through the Campaign’s former consultant, Victoria Sachs; (2) the Campaign and BFM coordinated communications through an employee of Del Cielo and Smart Media (which, the Complaint claims, provides evidence that Smart Media and Del Cielo are a “common vendor” under Commission regulations); and (3) the Campaign and BFM coordinated communications through a common vendor, IMGE. The Complaint is throwing the kitchen sink at the Commission, but nothing sticks because as the *Daily Beast* article concludes, the Campaign has not done anything illegal.³ We address each allegation below.

A. Relevant Law

“Coordination” is defined as something “made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate’s authorized committee, or a political party committee.”⁴ A communication is considered coordinated if it meets a three-part test: (1) the communication is paid for by an entity other than the campaign (“payment prong”); (2) it must satisfy any one of an enumerated list of content standards (“content prong”); and (3) it must satisfy any one of an enumerated list of conduct standards (“conduct prong”).⁵ The appearance of one prong being violated does not constitute coordination under the law. **All three must be established for a communication to be considered coordinated.**

B. The “Eliminate” Advertisement by BFM is Pure Issue Advocacy and Not Subject to Coordination Regulations.

We have already addressed this issue in a previous Response to the Commission, but it is worth repeating.⁶ The “content prong” of the Commission’s coordination regulations only apply to “express advocacy” or the “functional equivalent” of express advocacy. An advertisement is considered the functional equivalent of express advocacy only when it is “susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.”⁷

When watching the advertisement, it is abundantly clear that it is issue advocacy, and not subject to the Commission’s coordination regulations. “Eliminate” was released in July 2019, well before the November 3, 2020 election date, and explains that Senator Gary Peters (who, of course, is an elected official), plans to eliminate private health insurance in favor of Medicare for All. Commenting on a hotly-debated policy issue has consistently been found to not be express

³ We also would like to add that even Brendan Fischer, the Director of Campaign Legal Center and a frequent filer of dubious complaints with the Commission, stated that there was no illegal activity occurring between the Campaign and BFM. See Lachian Markay, *Shady, Cozy, and Legal: How a Top GOP Recruit is Getting His Dark-Money Cash*, THE DAILY BEAST (Feb. 28, 2020).

⁴ 11 C.F.R. § 109.20(a).

⁵ *Id.* at § 109.21(a)(1)-(3).

⁶ See Response of John James and John James for Senate, Inc. at 2, MUR 7686.

⁷ 11 C.F.R. § 109.21(c)(5). When determining whether an ad is the functional equivalent of express advocacy, the Commission has previously considered various factors, including the timing of the advertising, whether the communication is unambiguous, and whether the advertisement encourages actions to elect or defeat a clearly identified candidate. 11 C.F.R. § 100.22(b)

advocacy.⁸ This advertisement is not calling for Senator Peter’s defeat; it is providing factual information about Senator Peters’ position on an important issue (healthcare) to Michigan voters and allowing them to draw their own conclusions.⁹ Please note that the context of this advertisement was Bernie Sanders’ Medicare for All proposal, which was being criticized as bad public policy by Sanders’ primary opponents such as Mayor Buttigieg for the same reasons that BFM emphasized Peters’ support for the extreme policy was harmful.

C. There was No Coordination between the Campaign and Better Future Michigan on the “Eliminate Advertisement.”

Assuming *arguendo* that the communication at issue satisfies the first two parts of the coordination test, the Complaint nonetheless provides zero evidence that the Campaign violated the conduct prong. The Complaint points to two sections of the conduct prong, the former employee (Victoria Sachs) and the common vendor (Smart Media/Del Cielo, IMGE) provision, to establish a potential coordination violation. However, both sections require evidence that information about the Campaign’s plans, projects, activities, or needs of the campaign were being conveyed to BFM,¹⁰ which neither the Complaint, nor the *Daily Beast* article it relies on, provide.

i. Ms. Sachs was Not Privy to Any Plans, Projects, Activities, or Needs of the 2020 Campaign

First, the Complaint asserts that BFM and the Campaign are coordinating through the 2018 Campaign’s former consultant, Victoria Sachs. The Complaint states Ms. Sachs “clear[ly] violat[ed]” the 120-day “cooling off” period. However, the Complaint is not reading the full language of the law. The former employee prong is satisfied when 1) the communication is paid for by an individual who was employed by the campaign during the previous 120 days; **and** 2) information about the campaign’s plans, projects, activities, or needs of the campaign is conveyed to the payor of the communication that is material to the creation, production, or distribution of the communication.¹¹

The Campaign’s plans, projects, activities, or needs were never shared to BFM through Ms. Sachs, because she was never privy to any information regarding the 2020 Campaign. Ms.

⁸ 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 not express advocacy); *FEC v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45 (2nd Cir. 1980) (en banc) (bulletin criticizing congressman for his record on taxes and government spending not express advocacy); *FEC v. Christian Action Network*, 100 F.3d 1049 (4th Cir. 1997) (ads criticizing presidential candidate for positions on gay rights 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.”).

⁹ See 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.”)).

¹⁰ 11 C.F.R. §§ 109.21(d)(4)(iii)(A), 109.21(d)(5).

¹¹ 11 C.F.R. § 109.21(d)(5).

Sachs was indeed the Campaign Manager of the 2018 John James for Senate campaign. In early 2019, she continued as an independent contractor to assist with 2018 vendor issues, 2018 donor maintenance, and Mr. James' 2020 testing-the-waters process to decide whether to run for office again, and if so, for what office. However, Ms. Sachs' role ended on May 3, before Mr. James decided to run for Senate, and during her tenure, she was never involved in any strategy for the 2020 U.S. Senate Campaign. Therefore, she was not privy to any "non-public information" necessary to violate coordination regulations.

ii. Del Cielo and Smart Media are Not "Common Vendors"

The Complaint further alleges that Del Cielo and Smart Media, two separate commercial vendors, are essentially a common vendor based on an alleged common employee who signed the media buys for the 2018 Campaign (through Smart Media) and BFM (through Del Cielo). This interpretation of the common vendor standard is not only absurd, but has also already been rejected by the Commission. In MUR 7006 (Heaney for Congress), the Complaint alleged that two vendors, In the Field Consulting and Crimson Public Affairs, should be treated as a "common vendor" because of a common owner, Robert Cole. The Commission dismissed the Complaint, stating that two separate vendors being considered a common vendor under Commission regulations based solely on their ownership is "problematic."¹²

Assuming *arguendo* that two separate vendors could be considered a "common vendor" under Commission regulations, it is irrelevant, because the 2020 Campaign has no relationship with either entity. The Complaint relies on the signature block for Smart Media's media buys for the 2018 Campaign and Del Cielo's media buys for BFM to imply that the signor of both media buys is the conduit for non-public information. This conclusion begs credulity because even assuming the signor is the same for both media buys,¹³ the signor's relationship is with the 2018 Campaign, not the 2020 Campaign. Like Ms. Sachs, the unknown signor has no contractual relationship with the 2020 Campaign, and thus would not be privy to any non-public information about the Campaign necessary to engage in a coordination violation.

iii. Pursuant to the Contractual Agreement Between IMGE and the Campaign, IMGE Has a Written Firewall Policy to Prevent Coordination.

Last, the Complaint states that BFM and the Campaign coordinated through a common vendor, IMGE. The Complaint further alleges that after the Campaign was asked by PAY DIRT (we are unsure what this is exactly) about the overlap of vendors, BFM removed all traces of IMGE from its website.

Regardless of BFM's business relationship with IMGE (which we are not privy to details about), pursuant to the contractual agreement signed by the Campaign and IMGE, IMGE has represented to the Campaign that it has an internal written firewall policy in place to prevent the very coordination that is alleged in the Complaint. Further, the Complaint has provided *no*

¹² Statement of Reasons for Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 3-4, MUR 7006 (Heaney for Congress, *et al.*).

¹³ The signature blocks provided by the *Daily Beast* article are completely ambiguous. There is no indication that the signature belongs to a particular individual, and if so, the identity of that individual.

evidence that non-public information about the Campaign’s plan, projects, activities, or needs was provided to BFM through IMGE or its employees.

iv. The Complaint is Based Entirely on Speculation, Which Should Not be Investigated.

The Complaint is based entirely on the speculation¹⁴ of Mr. James’ political opponents as well as the writer of the *Daily Beast* article.¹⁵ Interestingly, the Complaint deliberately excluded the part of the article that stated that the Campaign did not do anything illegal.¹⁶ Nonetheless, the Commission has consistently ruled that “unwarranted legal conclusions drawn from asserted facts based on mere speculation will not be accepted as true, and provide no independent basis for investigation.”¹⁷ The Commission has also stated that Complaints based solely on speculative news articles without any first-hand information do not warrant the use of the Commission’s already scarce resources.¹⁸

Complaints that are based on speculation have consistently been dismissed by the Commission. Recently, the Commission dismissed a Complaint that was similar in nature to the Complaint at issue here. In MUR 7314 (National Rifle Association, et. al.), the Complaint claimed that Russian sleeper agents used the NRA to help Donald Trump win the 2016 presidential election, relying solely on a *McClatchy* article alleging as such.¹⁹ In recommending the Commission to dismiss the Complaint, the Commission’s Office of General Counsel (“OGC”) found that the Complaint and the current record (including the *McClatchy* article) “d[id] not provide a sufficient factual basis to infer that alleged violations occurred.”²⁰ In particular, OGC noted that the *McClatchy* article was “vague” and “describe[d] the scheme in the broadest possible terms.”²¹ When weighing the Complaint against the NRA’s Response,

¹⁴ See generally Compl. (“[R]eporting by the Daily Beast about BFM’s conduct suggests BFM is circumventing election laws...”; “The facts outline in this report suggest illegal behavior...”).

¹⁵ See Daily Beast article (“John James has enjoyed the support of a deep-pocketed dark-money group that appears to be effectively operating as an extension of the James campaign”; “What the James campaign appears to have done here...”).

¹⁶ *Id.* “And here’s the kicker: Any coordination between the James campaign and BFM would be perfectly legal.”

¹⁷ The Commission does not authorize investigations based on mere speculation. See Statement of Reasons of Commissioners Mason, Sandstrom, Smith, and Thomas at 1, MUR 4960 (Hillary Clinton for Senate Exploratory Committee); See also Resp. of Beto for Texas at 1, MUR 7505 (End Citizens United) (quoting language from the above Statement of Reasons).

¹⁸ See First General Counsel’s Report, MUR 6907 (Huckabee, et al.), at 8 (expressing skepticism for the Complainant’s use of an unsubstantiated news article to prove a violation of the Act); First General Counsel’s Report, MUR 4960 (Hillary Clinton) (“purely speculative charges do not form an adequate basis to find reason to believe that a violation of the Act has occurred.”); Statement of Reasons of Matthew S. Petersen and Caroline C. Hunter, MURs 6470, 6482, 6484 (Romney, et al.); Statement of Reasons of Matthew S. Petersen, Caroline C. Hunter, Lee Goodman, MUR 6518 (Gingrich, et al.) at 6-7 (“As a threshold matter, we observe that unsworn news reports by authors who are not first-hand complainants or witnesses before the Commission present legal and practical problems for the Commission and respondents, and, in any event, may be of limited probative value.”).

¹⁹ Complaint, MUR 7314 (NRA, et al.)

²⁰ First General Counsel’s Report at 11, MUR 7314 (NRA, et al.) (citing Peter Stone and Greg Gordon, *FBI Investigating Whether Russian Money Went to the NRA to Help Trump*, MCCLATCHY (Jan. 18, 2020).

²¹ *Id.* at 3, 17.

OGC concluded that “there [was] not an adequate basis to conclude that [the NRA] violated [the Act] as alleged.”²²

The Complaint, like the Complaint in MUR 7314, is based purely on a vague news article that provides no specific facts other than his own conjecture about the violations alleged by the Complaint. In fact, like the authors of the *McClatchy* article,²³ the author of the *Daily Beast* article, could not establish that a violation of FECA occurred. Notably, as previously mentioned, the author of the *Daily Beast* article affirmatively stated that no illegal activity occurred between the Campaign and BFM. Pursuant to MUR 7314 precedent, as well as the treatment of many other Complaints that have relied purely on speculation,²⁴ the Commission should promptly dismiss the Complaint.

III. Conclusion

It is clear on its face that the Campaign has not engaged in any activity that would run afoul of Commission regulations. In fact, the Campaign has gone above and beyond to prevent the very activity that is alleged in this Complaint. Given Mr. James’ status as a rising star of the Republican party, Democrats, like the Complainant Brad Woodhouse,²⁵ are threatened by the success of his Campaign and are doing whatever they can to hinder it, no matter how dishonest their tactics. No doubt to their disappointment, in this case the evidence shows that there has been no violation of *any* law by the Campaign. Therefore, we ask the Commission to dismiss the case and close the file.

Respectfully submitted,



Charlie Spies
Katie Reynolds
Counsel to John James and John James for Senate, Inc.

²² *Id.* at 20.

²³ Peter Stone & Greg Gordon, *FBI Investigating Whether Russian Money Went to NRA to Help Trump*, *MCCLATCHY*, Jan. 18, 2018) (stating that “it could not be learned” whether the FBI had any evidence of wrongdoing).

²⁴ For additional cases, *see* First General Counsel’s Report, MUR 6907 (Huckabee, et al.), at 8 (expressing skepticism for the Complainant’s use of an unsubstantiated news article to prove a violation of the Act); First General Counsel’s Report, MUR 4960 (Hillary Clinton) (“purely speculative charges do not form an adequate basis to find reason to believe that a violation of the Act has occurred.”).

²⁵ The Complainant is a longtime Democratic strategist. He is currently the President of American Bridge and Americans United for Change two of the nation’s “leading progressive organizations.” Previously, he was a senior strategist for President Obama and a Communications Director for the Democratic National Committee (DNC). *See* Huffington Post Contributor Biography, available at <https://www.huffpost.com/author/brad-woodhouse>.