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April 2, 2020

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

Re: MUR 7714 – Response to Complaint from Victoria Sachs and Better 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 in response to the complaint dated March 2, 2020, and designated MUR 7714 (“Complaint”), filed against our client, among others, by American Democracy Legal Fund (“Complainant”), a self-styled campaign accountability group largely funded by the ultra-progressive opposition research firm, American Bridge 21st Century PAC, which touts itself as the “opposition research engine of the Democratic party.”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 from an article published by a beltway gossip column. Complainant’s gross misunderstanding of the Act, upon which this poorly written and reasoned Complaint relies, results in a total waste of the Commission’s time and taxpayer resources. This Complaint is a ham-handed political maneuver aimed to divert attention from real-world issues such as the disastrous consequences of the Medicare for All proposal. Accordingly, Victoria Sachs and Better Future Michigan respectfully requests that the Commission dismiss the Complaint for the reasons further stated below.

¹ American Democracy Legal Fund Contributors, OpenSecrets, https://www.opensecrets.org/527s/527cmtedetail_contribs.php?ein=471750779&cycle=2018, last updated April 3, 2019.

American Bridge 21st Century PAC Home Page, <https://americanbridgepac.org/>.

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I. Factual Background

Victoria Sachs (“Ms. Sachs”) worked as an employee of the 2018 John James for Senate, Inc. campaign (“the Committee”). Following the November 2018 election, Ms. Sachs assisted in shutting down campaign operations. The Committee then 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’ 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.² Moreover, Ms. Sachs was not privy to strategic planning for Mr. James’ 2020 Senate campaign because her relationship with the James campaign terminated before any 2020 Senate campaign strategy was developed by the Committee.

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 promoted conservative policy solutions and 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.”³ We encourage the Commission to watch these advertisements to see they do not constitute express advocacy.

Complainant is correct that Better Future Michigan uses Del Cielo Media to place its issue advocacy advertisements. They are also correct that the James campaign used Del Cielo Media to place their advertisements in the 2018 Senate race—a *previous election cycle*.

iMGE did create Better Future Michigan’s website and according to Federal Election Commission reports was also paid by the James campaign for media placement.⁴ Better Future Michigan’s contract with iMGE, however, expressly requires the vendor adhere to internal safeguards

² Compl. at 1.

³ “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=pfAv5r4trHF&feature=youtu.be>.

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

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

⁴ Federal Election Commission data,

https://www.fec.gov/data/disbursements/?committee_id=C00651208&two_year_transaction_period=2020&data_type=processed&recipient_name=imge.

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to ensure that nobody working on the campaign account was involved with the Better Future Michigan project, and protect against impermissible coordination.

II. No Express Advocacy, No Coordination

Complainant asserts our client violated the Act's coordination rules through either:

1. Ms. Sachs' alleged failure to comply with the 120 day cooling off period;
2. An unidentified individual who placed media buys for the James campaign in 2018 through the common vendor standard; and/or
3. Alleged sharing of a common vendor in iMGE.

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 complied with all other applicable laws as well.

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, his authorized political committees, or their agents...”⁵ 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.⁶ These limitations, however, do not apply to persons disseminating *issue advocacy* communications.

The “content prong” is not satisfied here because the advertisements at issue constitute issue advocacy communications—not express advocacy or its functional equivalent. Indeed, to meet the “content prong,” the communication must be express advocacy or the functional equivalent thereof. To constitute express advocacy, the communication must include 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.⁷ When applying the reasonable interpretation test, courts consider a number of factors, including: 1) whether the advertisement encourages action to elect or defeat a

⁵ 11 C.F.R. § 109.20(a).

⁶ 11 C.F.R. § 109.21(a)(1)-(3); Better Future Michigan does not contest that it paid for “Eliminate.”

⁷ 11 C.F.R. § 109.21(c)(5)

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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.⁸

Complainant makes no claims that Better Future Michigan produced or disseminated any express advocacy advertisements, but instead relies on propaganda assertions published by a rumor mill “news” outlet as evidence such advertisements exist. To date, Better Future Michigan has not produced any express advocacy advertisements. If Complainant believes otherwise, they should have stated this in their complaint. Instead, they refer to Better Future Michigan as an “independent expenditure organization[s]” but cite no evidence to support this claim.⁹ Complainant’s failure to allege violations of the content prong with sufficient specificity for the respondents to even respond to those allegations in a meaningful way is alone grounds to dismiss the complaint. Notwithstanding the shortcomings of those allegations, courts have consistently found that “issue advocacy” is neither express advocacy nor the functional equivalent thereof,¹⁰ and this matter should therefore be dismissed because the advertisements run by Better Future Michigan constitute issue advocacy—not express advocacy or the functional equivalent thereof.

III. No Facts, Just Speculation

Because Complainant 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 still address Complainant’s shoddy attempt to establish the conduct prong, which, like the rest of the Complaint, relies entirely on speculation. The FEC does not authorize investigations based on speculation.¹¹ Further, the Commissioners have stated on several occasions that the probative value of complaints based on speculative allegations in news articles is inherently limited.¹²

⁸ 11 C.F.R. § 100.22(b).

⁹ Compl. at 1.

¹⁰ 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.”).

¹¹ *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.

¹² See Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline Hunter MUR 6928 (Richard John “Rick” Santorum, et. al.) at 9 (footnote 62), https://eqs.fec.gov/eqsdocsMUR/6928_2.pdf; Statement of Reasons of Matthew S. Petersen and Caroline C. Hunter, MURs 6470, 6482, 6484 (Romney, et al.); Statement of Reasons

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A. Ms. Sachs Had No Material Information to Convey

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
- 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.¹³ This is often referred to as the “former employee” standard.

Complainant relies on the “former employee” standard in a listless attempt to prove the conduct prong. To that end, Complainant references yellow journalism claiming that Ms. Sachs’ relationship with Better Future Michigan coupled with the timing of her last payment from the James campaign “is a clear violation of the 120 cooling off period.” Complainant, however, *fails to even allege* that Ms. Sachs conveyed material information from the 2020 campaign, which she did not and could not have because Ms. Sachs was never privy to such information.

We have taken the liberty to assume Complainant’s theory is essentially that, because Ms. Sachs controlled the funding of Better Future Michigan, coupled with her former independent contractor

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.”); 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.”).

¹³ 11 C.F.R. § 109.21(d).

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relationship with the Committee, Complainant presumably and impliedly alleges that those facts somehow give rise to coordination *per se*. But those facts alone do not constitute coordination because they fail to satisfy the “former employee” standard. Indeed, 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.

B. Del Cielo Media and Smart Media Group ≠ Common Vendors

Complainant alleges coordination occurred because the “same individual” who places *issue ads* for Better Future Michigan also placed ads for the James campaign *in the 2018 cycle*. Again, issue advocacy and activities from a previous election cycle are not relevant to the situation at hand. Still, even if express advocacy advertisements were placed for both the James campaign and Better Future Michigan this cycle—which is not true because Better Future Michigan has not issued any express advocacy advertisements, Del Cielo Media and Smart Media Group are not common vendors.

First, the Commission has repeatedly rejected Complainant’s again non-asserted allegation that Better Future Michigan engaged in coordination through an alleged common employee of Del Cielo Media and Smart Media Group. For example, the complainant in MUR 7006 alleged that two vendors, Crimson Public Affairs and In the Field Consulting, should be treated as common vendors because they shared a common owner.¹⁴ The Commission, however, dismissed MUR 7006, reasoning that common ownership is not the equivalent of common vendors. As a result, and just as in MUR 7006, the fact that Del Cielo Media and Smart Media Group share an owner does not make them common vendors.

Second, *even if* Del Cielo Media and Smart Media Group were common vendors, the activities at issue do not satisfy the common vendor coordination standard. Because Complainant failed to even address the common vendor standard in their weak and absurdly underdeveloped complaint based entirely on speculation and sourced from a tabloid, we have laid out the relevant elements below:

To establish coordination through a common vendor, the Commission must find each of the following elements:

- The person paying for the communication contracts with, or employs, a “commercial vendor” to create, produce or distribute the communication;
- The commercial vendor, including any officer, owner or employee of the vendor, has a previous or current relationship with the candidate or political party committee that puts the commercial vendor in a position to acquire information about the campaign plans, projects, activities or needs of the candidate or political party committee. This previous relationship is defined in terms of nine specific services related to campaigning and campaign communications. *These services, however, would have to had been*

¹⁴ Statement of Reasons for Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 3-4, MUR 7006 (Heaney for Congress, *et. al*).

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rendered within 120 days before the purchase or public distribution of the communication to satisfy this element; and

- The commercial vendor uses or conveys information about the campaign plans, projects, activities or needs of the candidate or political party committee, or information previously used by the commercial vendor in serving the candidate or political party committee, to the person paying for the communication, and that information is material to the creation, production or distribution of the communication.¹⁵

Complainant offers no evidence that either Del Cielo Media or Smart Media Group rendered services to the James campaign within 120 days before Better Future Michigan used Del Cielo Media to place an issue advocacy advertisement. The last payment Smart Media Group received from the James campaign occurred on October 31, 2018, 224 days before Better Future Michigan even existed.¹⁶ Additionally, Complainant makes no claim that the “same individual” had or conveyed material information. Therefore, Complainant failed to allege coordination through a common vendor, the complaint should be dismissed and MUR 7714 should be closed.

C. iMGE Has a Firewall

Complainant alleges there is “overlap” between Better Future Michigan and the James campaign through iMGE, a digital marketing agency.¹⁷ According to public records, iMGE provided services to the James campaign.¹⁸ iMGE created Better Future Michigan’s website, an online platform dedicated to educating Michiganders on important policy issues. We encourage the Commission to visit www.betterfuturemichigan.com to see the site does not and has never contained any express advocacy. Again, to establish coordination, the content prong must be satisfied and, again, Complainant falls short of even properly alleging coordination, not to mention satisfying the necessary elements.

However, even if Better Future Michigan’s website met the content prong, pursuant to language in their contract with iMGE, iMGE has a firewall policy in place to prevent impermissible coordination. The contract provides in pertinent part:

“Contractor further agrees that it is knowledgeable of Client’s compliance and legal obligations pursuant to Section 501(c)(4) of the Internal Revenue Code, and agrees to comply with all applicable laws in respect to the performance of its duties under this Agreement and to consult with Client’s legal counsel in the event it has questions

¹⁵ 11 C.F.R. § 109.21(d)(4).

¹⁶ FEC.gov, Search of Disbursements to Smart Media from John James for Senate, Inc. in 2017-2018, https://www.fec.gov/data/disbursements/?committee_id=C00651208&two_year_transaction_period=2018&data_type=processed&recipient_name=smart+media.

¹⁷ Compl. at 1.

¹⁸ FFEC.gov, Search of Disbursements to iMGE from John James for Senate, Inc. in 2019-2020, https://www.fec.gov/data/disbursements/?committee_id=C00651208&two_year_transaction_period=2020&data_type=processed&recipient_name=imgc.

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regarding the application of any provision of Federal or state law to its work for Client. Contractor acknowledges that Client will not coordinate its activities with any candidate, candidate's committee, or political party committee. To that end, Contractor shall implement appropriate internal safeguards to ensure that Services rendered to Client pursuant to this Agreement shall not be coordinated with any candidate, candidate's committee, or political party committee."¹⁹

The Commission provides safe harbor from coordination violations when an entity has a firewall in place.²⁰ Per their contractual obligation, iMGE has an internal firewall policy in place to protect confidential client information and prevent illegal coordination.

IV. No Facts, Just Speculation

The entire Complaint submitted by American Democracy Legal Fund lacks substance and relies solely on false speculation and innuendo from an article published by a beltway gossip column—an article which, incidentally, clearly states that all activities by Ms. Sachs, Better Future Michigan and the Committee are legal.²¹ Based upon the foregoing, we respectfully ask the Commission to dismiss the Complaint and close the file.

Respectfully submitted,



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

¹⁹ Better Future Michigan obtained permission from iMGE to release this provision of their confidential contract to the Commission.

²⁰ 11 C.F.R. § 109.21(h).

²¹ Lachlan Marchay, *Shady, Cozy and Legal: How a Top GOP Recruit is Getting His Dark-Money Cash*, The Daily Beast (Feb. 28, 2020), <https://www.thedailybeast.com/how-a-top-gop-recruit-is-getting-his-dark-money-cash>.