

FEDERAL ELECTION COMMISSION
FIRST GENERAL COUNSEL'S REPORT

MUR: 7686

DATE COMPLAINT FILED: January 27, 2020

DATE OF NOTIFICATIONS: January 29, 2020

LAST RESPONSE RECEIVED: April 2, 2020

DATE ACTIVATED: April 14, 2020

EXPIRATION OF SOL: June 1, 2024 (Earliest)

December 24, 2024 (Latest)

ELECTION CYCLE: 2020

COMPLAINANT:

End Citizens United PAC

RESPONDENTS:John James for Senate, Inc. and Timothy Caughlin in
his official capacity as treasurer

John James

Better Future Michigan

Victoria Sachs

MUR: 7714

DATE COMPLAINT FILED: March 6, 2020

DATE OF NOTIFICATIONS: March 12, 2020

LAST RESPONSE RECEIVED: April 2, 2020

DATE ACTIVATED: April 14, 2020

EXPIRATION OF SOL: June 1, 2024 (Earliest)

December 24, 2024 (Latest)

ELECTION CYCLE: 2020

COMPLAINANT:

American Democracy Legal Fund

RESPONDENTS:John James for Senate, Inc. and Timothy Caughlin in
his official capacity as treasurerJohn James¹

Better Future Michigan

Victoria Sachs

¹ John James was not notified of the Complaint in his individual capacity in MUR 7714, but counsel jointly responded on behalf of James, John James for Senate, and Timothy Caughlin in his official capacity as treasurer. See MUR 7714 John James and John James for Senate, Inc. Resp. at 1 (Mar. 31, 2020) ("MUR 7714 James Resp.").

MUR: 7716

DATE COMPLAINT FILED: March 9, 2020

DATE OF NOTIFICATIONS: March 12, 2020

LAST RESPONSE RECEIVED: April 2, 2020

DATE ACTIVATED: April 14, 2020

EXPIRATION OF SOL: June 1, 2024 (Earliest)

December 24, 2024 (Latest)

ELECTION CYCLE: 2020

COMPLAINANT:

Michigan Democratic Party

RESPONDENTS:John James for Senate, Inc. and Timothy Caughlin in
his official capacity as treasurer

John James

Better Future Michigan

Victoria Sachs

**RELEVANT STATUTES
AND REGULATIONS:**

52 U.S.C. § 30118(a)

52 U.S.C. § 30125(e)(1)(A)

11 C.F.R. § 109.21

11 C.F.R. § 300.2(c)(2)

INTERNAL REPORTS CHECKED: Disclosure Reports**FEDERAL AGENCIES CHECKED:** None**I. INTRODUCTION**

The Complaints in these matters allege that Better Future Michigan, Inc. (“BFM”), a non-profit corporation, made prohibited in-kind contributions to John James and John James for Senate, Inc. and Timothy Caughlin in his official capacity as Treasurer (the “Committee”), in violation of the Federal Election Campaign Act of 1971 as amended (“the Act”). The Complaints allege that within a month of leaving her employment with the Committee in May 2019, Victoria Sachs became Executive Director of BFM, which ran negative advertisements featuring Gary Peters, James’s opponent in the 2020 race for U.S. Senate in Michigan, in coordination with James and the Committee. The Complaint in MUR 7716 also alleges that James, through Sachs

1 as his agent, directly or indirectly established, financed, maintained or controlled (“EFMC’d”)
2 BFM.²

3 The Respondents deny that the advertisements satisfy the Commission’s standards for
4 coordinated communications because they do not satisfy the conduct prong. Further,
5 Respondents deny that the Committee had any involvement, directly or indirectly through Sachs,
6 in the establishment of BFM.

7 As discussed below, there is insufficient information to support the allegations that BFM
8 made communications in coordination with James and the Committee or that Sachs acted as
9 James’s agent when she became BFM’s Executive Director. Thus, we recommend that the
10 Commission: (1) dismiss the allegation that BFM made, and James and the Committee accepted,
11 a prohibited in-kind contribution in violation of 52 U.S.C. § 30118(a); and (2) dismiss the
12 allegation that James, the Committee, BFM, and Sachs violated 52 U.S.C. § 30125(e)(1) by
13 soliciting, receiving, directing, transferring, or spending funds prohibited under the Act in
14 connection with an election for federal office.

15 **II. FACTUAL BACKGROUND**

16 On June 6, 2019, James declared his 2020 candidacy for U.S. Senate in Michigan; his
17 opponent is Senator Gary Peters.³ John James for Senate, Inc., is James’s principal campaign
18 committee.⁴

² MUR 7716 Compl. at 3-5.

³ MUR 7714 James Resp. at 2; MUR 7716 John James and John James for Senate, Inc. Resp. at 2 (Apr. 1, 2020) (“MUR 7716 James Resp.”); John James, Amended Statement of Candidacy, FEC Form 2 (Sept. 11, 2020).

⁴ John James for Senate, Inc., Statement of Organization, FEC Form 1 (May 4, 2020).

1 In 2018, James also ran for U.S. Senate in Michigan against Senator Debbie Stabenow
 2 and designated the Committee as his principal campaign committee.⁵ Sachs was James's
 3 campaign manager for his 2018 candidacy. After James lost the election, Sachs began serving
 4 James as an independent contractor in January 2019 to "assist with 2018 vendor issues, 2018
 5 donor maintenance, and Mr. James [sic] 2020 testing-the-waters process to decide whether to run
 6 for office again, and if so, for what office."⁶ Sachs received her last payment from the
 7 Committee on May 3, 2019.⁷ While the Complaints allege that Sachs served the Committee for
 8 the entire month of May, Respondents contend that Sachs's independent contractor relationship
 9 with the Committee concluded the same day she received final payment.⁸

10 The next month, Sachs became the first Executive Director of BFM, which was
 11 incorporated on June 12, 2019, as a section 501(c)(4) organization established under the Internal
 12 Revenue Code.⁹ According to its Articles of Incorporation, BFM's purpose is "to educate and
 13 engage the public on the need for leadership committed to taking action to secure a better future

⁵ See John James for Senate Inc., Amended Statement of Organization, FEC Form 1 (Oct. 4, 2018); John James, Amended Statement of Candidacy, FEC Form 2 (June 6, 2018).

⁶ MUR 7686 John James and John James for Senate, Inc. Resp. at 3 (Feb. 19, 2020) ("MUR 7686 James Resp."); *see also* MUR 7714 James Resp. at 2; MUR 7716 James Resp. at 1-2; MUR 7686 Victoria Sachs and Better Future Michigan Resp. at 2 (Apr. 2, 2020) ("MUR 7686 BFM Resp."); MUR 7714 Victoria Sachs and Better Future Michigan Resp. at 2 (Apr. 2, 2020) ("MUR 7714 BFM Resp."); MUR 7716 Victoria Sachs and Better Future Michigan Resp. at 2 (Apr. 2, 2020) ("MUR 7716 BFM Resp. ").

⁷ MUR 7686 James Resp. at 3; *see also* MUR 7714 James Resp. at 2; MUR 7716 James Resp. at 1-2; MUR 7686 BFM Resp. at 2; MUR 7714 BFM Resp. at 2; MUR 7716 BFM Resp. at 2; John James for Senate, Inc., Amended 2019 July Quarterly Report at 347 (Aug. 21, 2019).

⁸ MUR 7686 Compl. at 6; MUR 7716 Compl. at 3; MUR 7686 James Resp. at 3; *see also* MUR 7714 James Resp. at 2; MUR 7716 James Resp. at 1-2; MUR 7686 BFM Resp. at 2; MUR 7714 BFM Resp. at 2; MUR 7716 BFM Resp. at 2.

⁹ MUR 7686 BFM Resp. at 2; *see also* MUR 7714 BFM Resp. at 2; MUR 7716 BFM Resp. at 2.

through strong national security, and increased economic and educational opportunities with the objective of ensuring everyone the opportunity to achieve the American Dream.”¹⁰

The Complaints and Responses identify three advertisements paid for by BFM. The Complaints focus on “Eliminate,”¹¹ which ran on Facebook from August 7-12, 2019 (within 120 days of Sachs’s departure from the Committee).¹² The Responses cite two additional advertisements – “Falling in Line”¹³ and “Radical Washington Liberals”¹⁴ – that BFM states it publicly distributed in December 2019 (more than 120 days after Sachs’s departure).¹⁵

Relying on a *Daily Beast* article, the Complaint in MUR 7714 alleges that the Committee and BFM used some of the same vendors – IMGE and Smart Media Group.¹⁶ First, the article notes that James’s largest vendor during the 2020 cycle is IMGE, a digital consulting firm. The

¹⁰ Better Future Michigan, Articles of Incorporation (June 12, 2019), *available at* https://cofs.lara.state.mi.us/CorpWeb/CorpSearch/CorpSearchFormList.aspx?SEARCH_TYPE=3. We also note the existence of Better Future MI Fund, a similarly named independent expenditure-only political committee (“IEOPC”). See Statement of Organization, FEC Form 1 (Oct. 31, 2019). We analyze the issues under the assumption that the relevant organization is the 501(c)(4), as the Complaint alleges and the records support. See *infra* nn. 11-14.

¹¹ Better Future Michigan, *Eliminate*, FACEBOOK AD LIBRARY (Aug. 7-12, 2019), <https://www.facebook.com/ads/library/?id=2470707176327256>.

¹² MUR 7686 Compl. at 5-6; *see also* MUR 7716 Compl. at 4.; *see also* Ads from Better Future Michigan, FACEBOOK, <https://bit.ly/2yQqiAi> (last accessed Sept. 22, 2020) (“Facebook Ad Library”).

¹³ Better Future Michigan, *Falling in Line*, YOUTUBE (Dec. 10, 2019), <https://www.youtube.com/watch?v=pfAv5r4trHE&feature=youtu.be>.

¹⁴ Better Future Michigan, *Radical Washington Liberals*, FACEBOOK AD LIBRARY (Dec. 17-23, 2019), <https://www.facebook.com/ads/library/?id=1009141209419973>.

¹⁵ MUR 7686 BFM Resp. at 2; MUR 7714 BFM Resp. at 2; MUR 7716 BFM Resp. at 2; *see also* Facebook Ad Library. BFM stated that it “disseminated” “Falling in Line,” which was posted to BFM’s YouTube page on December 10, 2019. See MUR 7686 BFM Resp. at 2; MUR 7714 BFM Resp. at 2; MUR 7716 BFM Resp. at 2. Although “Falling in Line” does not appear in either BFM’s Facebook Ad Library or in the Google Transparency Report, as of August 4, 2020, the “pinned” tweet on BFM’s account was to an article dedicated to BFM’s release of the ad, including its “spending \$300,000 to run the ad across the state on television and digital platforms,” and that quoted Sachs’s statement about the ad. See BetterFutureMichigan (@BetterFutureMI), TWITTER (Dec. 11, 2019), <https://twitter.com/BetterFutureMI/status/1204846944851578881?s=20> (linking to William Davis, *2020 Anxiety: Outside Groups Pour First Million into Michigan*, *Daily Caller* (Dec. 11, 2019), <https://dailycaller.com/2019/12/11/2020-liberal-groups-better-future-michigan/>).

¹⁶ See MUR 7714 Compl. at 1-2.

MURs 7686, 7714 and 7716 (John James for Senate, Inc., *et al.*)

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1 article states that BFM used IMGE to create its website and “[h]ours after [*The Daily Beast*
2 journalist] asked the James campaign about that particular case of apparent vendor overlap,
3 BFM’s website registration data was scrubbed of fingerprints tying it to IMGE.”¹⁷ Second, the
4 Complaint alleges an overlap because the Committee used Smart Media Group to place its ads in
5 2018, and BFM used Del Cielo Media, a subsidiary of Smart Media group, to place its ads.¹⁸

6 In response, BFM and the Committee both admit that they have each used IMGE. BFM
7 hired IMGE to create its website, which the non-profit described as “an online platform
8 dedicated to educating Michiganders on important policy issues.”¹⁹ The Committee hired IMGE
9 for “media buying services” shortly before James announced his candidacy; since then, the
10 Committee has disbursed \$728,566.39 to the firm through July 15, 2020.²⁰ Both respondents
11 contend that IMGE used a firewall policy to prevent its work from being shared with other
12 clients and provided excerpts of the firewall policy from their respective contracts.²¹

13 As to Smart Media Group and its subsidiary Del Cielo Media (“Del Cielo”), the
14 Committee acknowledges that it used Smart Media Group for ad placements, but states that its

¹⁷ *Id.* (quoting from *The Daily Beast* Article).

¹⁸ MUR 7714 Compl. at 1.

¹⁹ MUR 7714 BFM Resp. at 7. A case study on IMGE’s website profiles work done for “a c4 that cares about economic freedom [and] wanted to build a strong, state-wide network of activists who were passionate about free-market health care.” See *Build a Statewide Network of Issue Advocates*, IMGE, <https://imge.com/case-study/build-a-statewide-network-of-issue-advocates/> (last visited Aug. 4, 2020). The page, which features multiple images reading “Medicare for All,” states that the services provided included IMGE “us[ing] an interstitial ad network to catch locals online and drive them directly to an action center where they could contact their senator.” *Id.* IMGE reports that it “drove over 11,000 contacts to a U.S. Senator’s office from their constituents on health care policy, despite there being no urgent legislation on the topic.” *Id.*

²⁰ MUR 7714 James Resp. at 2; John James for Senate, Inc., Amended 2019 July Quarterly Report at 335 (Aug. 21, 2019) (showing disbursements to IMGE LLC beginning June 5, 2019); John James for Senate, Inc., 2020 Pre-Primary Report at 603 (July 23, 2020) (showing disbursements to IMGE as late as July 15, 2020); John James for Senate, Inc., 2019-2020 Disbursements to IMGE, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00651208&recipient_name=IMGE&two_year_transaction_period=2020.

²¹ MUR 7714 James Resp. at 2, 5-6; MUR 7714 BFM Resp. at 7-8.

contract ended after the 2018 election, more than 120 days before BFM incorporated.²² BFM acknowledges that it currently uses Del Cielo for ad placement.²³

III. LEGAL ANALYSIS

A. The Available Information Is Insufficient to Support Finding Reason to Believe That Respondents Made Coordinated Communications

Corporations are prohibited from making contributions to candidates and their authorized committees,²⁴ and federal candidates and their authorized committees may not knowingly accept such contributions.²⁵ When a person makes an expenditure in cooperation, consultation, or in concert with, or at the request or suggestion of, a candidate or the authorized committee or their agents, it is treated as an in-kind contribution.²⁶

Under the Commission's regulations, a communication is "coordinated" with a candidate, an authorized committee, a political party committee, or agent thereof, and is treated as an in-kind contribution, if the communication satisfies a three-prong test: (1) it is paid for, partly or entirely, by a person other than the candidate, authorized committee, political party committee, or agent thereof; (2) it satisfies at least one of the "content standards" at 11 C.F.R. § 109.21(c); and (3) it satisfies at least one of the "conduct standards" at 11 C.F.R. § 109.21(d).²⁷ All three prongs must be satisfied for a communication to be considered coordinated.²⁸

²² MUR 7714 James Resp. at 2; *see also* John James for Senate, Inc., 2018 Post-General Report at 856 (Jan. 24, 2019).

²³ MUR 7714 BFM Resp. at 2, 6.

²⁴ 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b).

²⁵ 52 U.S.C. § 30118(a).

²⁶ *Id.* § 30116(a)(7)(B); 11 C.F.R. § 109.20; *see also* *Buckley v. Valeo*, 424 U.S. 1, 46-47 (1976).

²⁷ 11 C.F.R. § 109.21(a); *see also id.* § 109.21(b) (describing in-kind treatment and reporting of coordinated communications).

²⁸ *Id.* § 109.21(a); *see also* Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 453 (Jan. 3, 2003) (Explanation and Justification) ("E&J").

The three advertisements in question satisfy the first prong because BFM, not James or the Committee, paid for the ads. However, they do not appear to constitute coordinated communications because they do not meet any of the conduct standards set forth at section 109.21(d).²⁹ The “conduct” prong will be satisfied if: (1) the communication was created, produced, or distributed at the request or suggestion of a candidate or his campaign; (2) the candidate or his campaign was materially involved in decisions regarding the communication; (3) the communication was created, produced, or distributed after substantial discussions with the campaign or its agents; (4) the parties contracted with or employed a common vendor that used or conveyed material information about the campaign’s plans, projects, activities or needs, or used material information gained from past work with the candidate to create, produce, or distribute the communication; (5) the payor employed a former employee or independent contractor of the candidate who used or conveyed material information about the campaign’s plans, projects, activities or needs, or used material information gained from past work with the candidate to create, produce, or distribute the communication; or (6) the payor republished campaign material.³⁰

The Complaints allege that the ads satisfy the conduct prong because: (1) Sachs joined BFM approximately a month after she had served as an advisor to James; and (2) BFM shared common vendors with the Committee.³¹

²⁹ We do not analyze whether the advertisements meet the content standards because they do not appear to satisfy any of the conduct standards, as explained below.

³⁰ See 11 C.F.R. § 109.21(d); *see also* Factual & Legal Analysis at 6, MUR 6660 (Angus King for U.S. Senate Campaign *et al*) (“F&LA”); F&LA at 5, MUR 6337 (Jay Riemersma for Congress Campaign Committee); F&LA at 5, MUR 5999 (Freedom’s Watch, Inc.).

³¹ MUR 7686 Compl. at 6-7; MUR 7714 Compl. at 1-2; *see also* MUR 7716 Compl. at 4.

1 1. Former Employee or Independent Contractor

2 Under the “former employee or independent contractor standard,” the conduct prong may
 3 be satisfied if: (1) the payor employed a person who had been an employee or independent
 4 contractor of the candidate’s authorized committee during the previous 120 days; and (2) that
 5 former employee or independent contractor conveyed to the payor material information about the
 6 campaign’s plans, projects, activities or needs, or used information gained from past work with
 7 the candidate that was material to creating, producing, or distributing the communication.³² The
 8 first part of the former employee standard is satisfied here because the Committee had an
 9 independent contractor arrangement with Sachs within 120 days of BFM creating “Eliminate,”
 10 which was the only ad of the three in question disseminated in the 120 days after Sachs left the
 11 Committee.³³

12 Regarding the second part of the standard, the Commission has explained that “campaign
 13 information must be both current and proprietary (that is, non-public) to be subject to the
 14 coordinated communications regulation.”³⁴ Similarly, when creating the standard, the
 15 Commission noted “much of the information gained working for candidates during primary races
 16 becomes largely irrelevant for general elections.”³⁵

17 Here, the Complaint does not allege, nor are we aware of, any specific facts indicating
 18 that Sachs used non-public material information in creating, producing, or distributing
 19 “Eliminate.” The campaign that Sachs managed for James in 2018 was against a different

³² 11 C.F.R. § 109.21(d)(5).

³³ Respondents assert that Sachs’s last day with the Committee was May 3, 2019. *See* MUR 7686 James Resp. at 3. According to the Facebook Ad Library, BFM distributed “Eliminate” on August 7, 2019.

³⁴ Coordinated Communications Explanation & Justification, 75 Fed. Reg. 55,947, 55,959 (Sept. 15, 2010).

³⁵ Coordinated Communications Explanation & Justification, 71 Fed. Reg. 33,190, 33,205 (June 8, 2006).

opponent – Debbie Stabenow, not Gary Peters – suggesting that whatever Sachs may have learned from her work in the 2018 race would have less value for the 2020 race. Although Sachs also advised James while he was testing the waters for his 2020 campaign, there is insufficient information to support finding reason to believe that any non-public information she may have had about the Committee's plans was actually material to the creation, development, or distribution of "Eliminate."

Instead, the Complaint posits that "[i]f Ms. Sachs used or conveyed any material, non-public information regarding the James campaign's projects, plans, activities or needs, the conduct prong is clearly met."³⁶ The Commission has previously declined to investigate matters where the allegations of coordinated conduct are similarly speculative and lacked support.³⁷ A review of the available information does not support a finding that Sachs used non-public information in providing services to James and that that same information was material to the creation, production, or distribution of "Eliminate."

2. Common Vendor

The "common vendor" conduct standard is satisfied if all of the following are true:

(1) the person paying for the communication employs a commercial vendor³⁸ to "create, produce,

³⁶ MUR 7686 Compl. at 6 (emphasis added).

³⁷ Cf. F&LA at 8-9, MUR 6358 (Jaime for Congress) (finding no reason to believe where available information did not indicate that campaign or its agents requested or suggested that third party organization "create the ad, participated in any discussion about the ad on behalf of the Committee, were materially involved in its creation or dissemination as Committee agents, or otherwise informed [organization] about the campaign's plans, projects, activities or needs."), F&LA at 5-6, MUR 5999 (NRCC, *et al.*) (finding no reason to believe where respondents rebutted allegations that former employees of party committee shared material information to create communication). We note that in prior matters, such as MURs 6368 and 5999, the Commission relied, in part, on respondents' sworn affidavits or declarations and respondents in the instant matters did not provide such statements. However, because the Complaints rely on speculation to satisfy the former employee standard, and we are not aware of information supporting the allegation, the lack of sworn statements is of less import.

³⁸ "Commercial vendor" means any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease or provision of those goods or services. 11 C.F.R. § 116.1(c).

or distribute” the communication; (2) the vendor has provided certain delineated services to the recipient of the contribution during the 120 days preceding the communication; and (3) the vendor conveys non-public information about the campaign’s “plans, projects, activities, or needs,” or services previously provided to the campaign by the vendor, and that information is material to the creation, production, or distribution of the communication.³⁹ Under a “safe harbor” provision, the common vendor conduct standard is not satisfied if a commercial vendor has established and implemented a written firewall policy that meets certain requirements, so long as material information is not shared.⁴⁰

The information does not support a finding that the Committee and BFM coordinated communications through Smart Media Group and Del Cielo. Even assuming that the parent firm and its subsidiary are a “common vendor,” their work does not satisfy the second part of the standard: providing certain delineated services to the Committee during the 120 days preceding BFM’s advertisements.⁴¹ Smart Media Group stopped providing services to the Committee more than 120 days before BFM began using Del Cielo.⁴²

IMGE, on the other hand, did provide qualifying services to the Committee within 120 days of all three of BFM’s advertisements. The Committee has used IMGE for media

³⁹ *Id.* § 109.21(d)(4)(i)-(iii).

⁴⁰ *Id.* § 109.21(h). A firewall policy satisfies this safe harbor if it (1) is designed and implemented to prohibit the flow of information between employees or consultants providing services for the person paying for the communication and those employees or consultants currently or previously providing services to the candidate who is clearly identified in the communication, or that candidate’s authorized committee, the candidate’s opponent, the opponent’s authorized committee or a political party committee; and (2) is described in a written policy distributed to all relevant employees, consultants and clients. *Id.* § 109.21(h)(1)-(2). This safe harbor does not apply if specific information indicates that, despite the firewall policy, material information about the candidate’s campaign plans, projects, activities, or needs was used or conveyed to the person paying for the communication. *Id.* § 109.21(h).

⁴¹ *See Id.* § 109.21(d)(4)(ii).

⁴² MUR 7714 James Resp. at 2; MUR 7714 BFM Resp. at 2, 6; *see also* John James for Senate, Inc., 2018 Post-General Report at 856 (Jan. 24, 2019).

placements since James announced his candidacy in June 2019,⁴³ and during that time, BFM hired IMGE to build its website.⁴⁴ There is no information in the record, however, that the first part of the common vendor standard is satisfied: there is no allegation that IMGE “create[d], produce[d], or distribute[d]” any of BFM’s three advertisements, and we are not aware of any such information.⁴⁵

In addition, the Complaint does not allege that IMGE conveyed material non-public information about the Committee’s plans, projects, activities, or needs to create, produce, or distribute the communications paid for by BFM.⁴⁶ And we are not aware of any. Rather, the Complaint relies on the fact the Committee and BFM used IMGE within the same 120 days, but such facts are insufficient to satisfy this element of the conduct prong.⁴⁷ The Commission has explained that “the mere presence of a common vendor” does not result in a presumption of coordination.⁴⁸ Thus, the available information indicates that the common vendor conduct standard has not been satisfied.

Because the record does not support a finding that the conduct standard is satisfied for any of the advertisements in question, we recommend that the Commission dismiss the allegation

⁴³ MUR 7714 James Resp. at 2; John James for Senate, Inc., Amended 2019 July Quarterly Report at 335 (Aug. 21, 2019) (showing disbursements to IMGE LLC beginning June 5, 2019); John James for Senate, Inc., 2020 Pre-Primary Report at 603 (July 23, 2020) (showing disbursements to IMGE as late as July 15, 2020); *see* 11 C.F.R. § 109.21(d)(4)(ii)(A) (“Development of media strategy, including the selection or purchasing of advertising slots”).

⁴⁴ MUR 7714 BFM Resp. at 7. Respondents also rebut the allegation by invoking the safe-harbor provision and pointing to IMGE’s internal firewall policy found in the entities’ contracts with the consulting firm. MUR 7714 James Resp. at 5; MUR 7714 BFM Resp. at 2-3, 7-8. We note that Respondents did not provide copies of the actual signed contracts or of IMGE’s firewall policy.

⁴⁵ *See* 11 C.F.R. § 109.21(d)(4)(i); MUR 7714 Compl. at 1-2.

⁴⁶ *See* 11 C.F.R. § 109.21(d)(4)(iii).

⁴⁷ *See* F&LA at 9, MUR 6477 (Huey, *et al.*) (finding no reason to believe that common vendor standard was satisfied where there was no information indicating that common vendor “used or conveyed information material to the creation, production, or distribution of the communication”).

⁴⁸ Coordinated & Independent Expenditures, 68 Fed. Reg. 421, 437 (Jan. 3, 2003).

that Respondents made or accepted a prohibited in-kind contribution in violation of 52 U.S.C. § 30118(a).⁴⁹

B. There Is Insufficient Information to Support a Reason to Believe Finding That Respondents Violated the Act's Soft-Money Provisions

The Complaint in MUR 7716 alleges that James, through his agent, Sachs, established BFM to raise and spend non-federal funds to support his election.⁵⁰ The Complaint asserts that “[i]t is nearly impossible” to believe Sachs acted of her own accord, and not as an agent of James, in helping to establish BFM because: (1) she went from the Committee directly to BFM just a few weeks later; and (2) BFM promptly ran negative advertisements featuring Gary Peters, the incumbent senator and James’s opponent.⁵¹

The Act prohibits a candidate, an agent thereof, or an entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of a candidate from soliciting, receiving, directing, transferring, or spending funds in connection with a federal election that do not comply with the limits, prohibitions, and reporting requirements of the Act.⁵² Commission regulations provide that an agent is “any person who has actual authority, either express or implied,” to solicit, receive, direct, transfer, or spend funds in connection with any election.⁵³

⁴⁹ In addition, none of the remaining conduct standards appear to be satisfied. The available information does not indicate that BFM created, produced, or distributed the relevant ads at the request or suggestion of James or the Committee. Further, the record does not indicate that James or the Committee were materially involved in or had a substantial discussion with BFM to create, produce, or distribute the ads, or that BFM republished the Committee’s campaign material.

⁵⁰ MUR 7716 Compl. at 1.

⁵¹ *See id.* at 4.

⁵² 52 U.S.C. § 30125(e)(1)(A).

⁵³ 11 C.F.R. § 300.2(b)(3).

Here, the record does not contain sufficient information to support a reasonable inference that Sachs continued to serve as James's agent after she terminated her independent contractor relationship with him in May 2019. According to the Committee's 2019 July Quarterly Report, Sachs received her last payment from the Committee on May 3, 2019, and Respondents contend that she stopped providing services to James and the Committee at or before that time.⁵⁴ Although the Complaints suggest that Sachs continued her work for the Committee throughout May, Respondents directly rebut the suggestion, and there is no available information corroborating it. The Complaint relies on the timing of Sachs's transition from the Committee to BFM and BFM's advertising attacking James's opponent, but the available information is insufficient to create a reasonable inference that James gave Sachs actual authority, express or implied, to solicit, receive, direct, transfer, or spend funds to support his election.⁵⁵

Accordingly, we recommend that the Commission dismiss the allegations that Respondents violated 52 U.S.C. § 30125(e)(1) by soliciting, receiving, directing, transferring, or spending funds prohibited under the Act in connection with an election for federal office.

IV. RECOMMENDATIONS

1. Dismiss the allegation that Better Future Michigan made a prohibited in-kind contribution in violation of 52 U.S.C. § 30118(a);
2. Dismiss the allegation that John James, John James for Senate, and Timothy Caughlin in his official capacity as treasurer accepted or received a prohibited in-kind

⁵⁴ John James for Senate, Inc., Amended 2019 July Quarterly Report at 347 (Aug. 21, 2019); MUR 7686 James Resp. at 3; *see also* MUR 7714 James Resp. at 2; MUR 7716 James Resp. at 1-2; MUR 7686 BFM Resp. at 2; MUR 7714 BFM Resp. at 2; MUR 7716 BFM Resp. at 2.

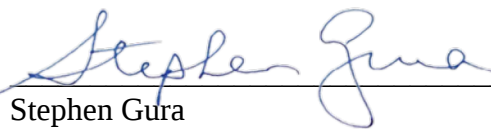
⁵⁵ *See* F&LA at 6, MUR 7288 (DNC) (requiring specific information that individual was acting on behalf of principal); *Definitions of "Agent" for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures*, 71 Fed. Reg. 4,975, 4,978 n.6 (Jan. 31, 2006) (quoting *Final Rules and Explanation and Justification for Prohibited Excessive Contributions: Non-Federal Funds or Soft Money*, 67 Fed. Reg. 49,064, 49,083 (July 29, 2002)) ("Specifically, it is not enough that there is some relationship or contact between the principal and agent; rather, the agent must be acting on behalf of the principal to create potential liability for the principal.").

- 1 contribution in violation of 52 U.S.C. § 30118(a);
2
3 3. Dismiss the allegation that Better Future Michigan and Victoria Sachs violated
4 52 U.S.C. § 30125(e)(1) by soliciting, receiving, directing, transferring, or spending
5 funds prohibited under the Act in connection with an election for federal office;
6
7 4. Dismiss the allegation that John James, John James for Senate, and Timothy Caughlin
8 in his official capacity as treasurer violated 52 U.S.C. § 30125(e)(1) by soliciting,
9 receiving, directing, transferring, or spending funds prohibited under the Act in
10 connection with an election for federal office;
11
12 5. Approve the attached Factual and Legal Analysis;
13
14 6. Approve the appropriate letters; and
15
16 7. Close the file.
17

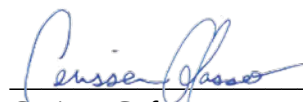
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19 Lisa J. Stevenson
20 Acting General Counsel
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22 Charles Kitcher
23 Acting Associate General Counsel for Enforcement
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27 Date

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29 Stephen Gura
30 Deputy Associate General Counsel for Enforcement
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32 
33 Jin Lee
34 Acting Assistant General Counsel
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36 
37 Cerissa Cafasso
38 Attorney
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40 Attachments:

- 41 1. Factual and Legal Analysis for John James for Senate and Timothy Caughlin in his
42 official capacity as treasurer, John James, Better Future Michigan, and Victoria Sachs

FEDERAL ELECTION COMMISSION**FACTUAL AND LEGAL ANALYSIS**

RESPONDENTS: John James for Senate, Inc. and Timothy Caughlin in his official capacity
as treasurer
John James
Better Future Michigan
Victoria Sachs

I. INTRODUCTION

The Complaints in these matters allege that Better Future Michigan, Inc. (“BFM”), a non-profit corporation, made prohibited in-kind contributions to John James and John James for Senate, Inc. and Timothy Caughlin in his official capacity as Treasurer (the “Committee”), in violation of the Federal Election Campaign Act of 1971 as amended (“the Act”). The Complaints allege that within a month of leaving her employment with the Committee in May 2019, Victoria Sachs became Executive Director of BFM, which ran negative advertisements featuring Gary Peters, James’s opponent in the 2020 race for U.S. Senate in Michigan, in coordination with James and the Committee. The Complaint in MUR 7716 also alleges that James, through Sachs as his agent, directly or indirectly established, financed, maintained or controlled (“EFMC’d”) BFM.¹

The Respondents deny that the advertisements satisfy the Commission’s standards for coordinated communications because they do not satisfy the conduct prong. Further, Respondents deny that the Committee had any involvement, directly or indirectly through Sachs, in the establishment of BFM.

As discussed below, there is insufficient information to support the allegations that BFM made communications in coordination with James and the Committee or that Sachs acted as

¹ MUR 7716 Compl. at 3-5.

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James's agent when she became BFM's Executive Director. Thus, the Commission:

(1) dismisses the allegation that BFM made, and James and the Committee accepted, a prohibited in-kind contribution in violation of 52 U.S.C. § 30118(a); and (2) dismisses the allegation that James, the Committee, BFM, and Sachs violated 52 U.S.C. § 30125(e)(1) by soliciting, receiving, directing, transferring, or spending funds prohibited under the Act in connection with an election for federal office.

II. FACTUAL BACKGROUND

On June 6, 2019, James declared his 2020 candidacy for U.S. Senate in Michigan; his opponent is Senator Gary Peters.² John James for Senate, Inc., is James's principal campaign committee.³

In 2018, James also ran for U.S. Senate in Michigan against Senator Debbie Stabenow and designated the Committee as his principal campaign committee.⁴ Sachs was James's campaign manager for his 2018 candidacy. After James lost the election, Sachs began serving James as an independent contractor in January 2019 to "assist with 2018 vendor issues, 2018 donor maintenance, and Mr. James [sic] 2020 testing-the-waters process to decide whether to run for office again, and if so, for what office."⁵ Sachs received her last payment from the

² MUR 7714 James Resp. at 2; MUR 7716 John James and John James for Senate, Inc. Resp. at 2 (Apr. 1, 2020) ("MUR 7716 James Resp."); John James, Amended Statement of Candidacy, FEC Form 2 (Sept. 11, 2020).

³ John James for Senate, Inc., Statement of Organization, FEC Form 1 (May 4, 2020).

⁴ See John James for Senate Inc., Amended Statement of Organization, FEC Form 1 (Oct. 4, 2018); John James, Amended Statement of Candidacy, FEC Form 2 (June 6, 2018).

⁵ MUR 7686 John James and John James for Senate, Inc. Resp. at 3 (Feb. 19, 2020) ("MUR 7686 James Resp."); see also MUR 7714 James Resp. at 2; MUR 7716 James Resp. at 1-2; MUR 7686 Victoria Sachs and Better Future Michigan Resp. at 2 (Apr. 2, 2020) ("MUR 7686 BFM Resp."); MUR 7714 Victoria Sachs and Better Future Michigan Resp. at 2 (Apr. 2, 2020) ("MUR 7714 BFM Resp."); MUR 7716 Victoria Sachs and Better Future Michigan Resp. at 2 (Apr. 2, 2020) ("MUR 7716 BFM Resp.).

Committee on May 3, 2019.⁶ While the Complaints allege that Sachs served the Committee for the entire month of May, Respondents contend that Sachs's independent contractor relationship with the Committee concluded the same day she received final payment.⁷

The next month, Sachs became the first Executive Director of BFM, which was incorporated on June 12, 2019, as a section 501(c)(4) organization established under the Internal Revenue Code.⁸ According to its Articles of Incorporation, BFM's purpose is "to educate and engage the public on the need for leadership committed to taking action to secure a better future through strong national security, and increased economic and educational opportunities with the objective of ensuring everyone the opportunity to achieve the American Dream."⁹

The Complaints and Responses identify three advertisements paid for by BFM. The Complaints focus on "Eliminate,"¹⁰ which ran on Facebook from August 7-12, 2019 (within 120 days of Sachs's departure from the Committee).¹¹ The Responses cite two additional

⁶ MUR 7686 James Resp. at 3; *see also* MUR 7714 James Resp. at 2; MUR 7716 James Resp. at 1-2; MUR 7686 BFM Resp. at 2; MUR 7714 BFM Resp. at 2; MUR 7716 BFM Resp. at 2; John James for Senate, Inc., Amended 2019 July Quarterly Report at 347 (Aug. 21, 2019).

⁷ MUR 7686 Compl. at 6; MUR 7716 Compl. at 3; MUR 7686 James Resp. at 3; *see also* MUR 7714 James Resp. at 2; MUR 7716 James Resp. at 1-2; MUR 7686 BFM Resp. at 2; MUR 7714 BFM Resp. at 2; MUR 7716 BFM Resp. at 2.

⁸ MUR 7686 BFM Resp. at 2; *see also* MUR 7714 BFM Resp. at 2; MUR 7716 BFM Resp. at 2.

⁹ Better Future Michigan, Articles of Incorporation (June 12, 2019), *available at* https://cofs.lara.state.mi.us/CorpWeb/CorpSearch/CorpSearchFormList.aspx?SEARCH_TYPE=3. We also note the existence of Better Future MI Fund, a similarly named independent expenditure-only political committee ("IEOPC"). *See* Statement of Organization, FEC Form 1 (Oct. 31, 2019). We analyze the issues under the assumption that the relevant organization is the 501(c)(4), as the Complaint alleges and the records support. *See infra* nn. 11-14.

¹⁰ Better Future Michigan, *Eliminate*, FACEBOOK AD LIBRARY (Aug. 7-12, 2019), <https://www.facebook.com/ads/library/?id=2470707176327256>.

¹¹ MUR 7686 Compl. at 5-6; *see also* MUR 7716 Compl. at 4.; *see also* Ads from Better Future Michigan, FACEBOOK, <https://bit.ly/2yQqiAi> (last accessed Sept. 22, 2020) ("Facebook Ad Library").

advertisements – “Falling in Line”¹² and “Radical Washington Liberals”¹³ – that BFM states it publicly distributed in December 2019 (more than 120 days after Sachs’s departure).¹⁴

Relying on a *Daily Beast* article, the Complaint in MUR 7714 alleges that the Committee and BFM used some of the same vendors – IMGE and Smart Media Group.¹⁵ First, the article notes that James’s largest vendor during the 2020 cycle is IMGE, a digital consulting firm. The article states that BFM used IMGE to create its website and “[h]ours after [*The Daily Beast* journalist] asked the James campaign about that particular case of apparent vendor overlap, BFM’s website registration data was scrubbed of fingerprints tying it to IMGE.”¹⁶ Second, the Complaint alleges an overlap because the Committee used Smart Media Group to place its ads in 2018, and BFM used Del Cielo Media, a subsidiary of Smart Media group, to place its ads.¹⁷

In response, BFM and the Committee both admit that they have each used IMGE. BFM hired IMGE to create its website, which the non-profit described as “an online platform dedicated to educating Michiganders on important policy issues.”¹⁸ The Committee hired IMGE

¹² Better Future Michigan, *Falling in Line*, YOUTUBE (Dec. 10, 2019), <https://www.youtube.com/watch?v=pfAv5r4trHE&feature=youtu.be>.

¹³ Better Future Michigan, *Radical Washington Liberals*, FACEBOOK AD LIBRARY (Dec. 17-23, 2019), <https://www.facebook.com/ads/library/?id=1009141209419973>.

¹⁴ MUR 7686 BFM Resp. at 2; MUR 7714 BFM Resp. at 2; MUR 7716 BFM Resp. at 2; *see also* Facebook Ad Library. BFM stated that it “disseminated” “Falling in Line,” which was posted to BFM’s YouTube page on December 10, 2019. *See* MUR 7686 BFM Resp. at 2; MUR 7714 BFM Resp. at 2; MUR 7716 BFM Resp. at 2. Although “Falling in Line” does not appear in either BFM’s Facebook Ad Library or in the Google Transparency Report, as of August 4, 2020, the “pinned” tweet on BFM’s account was to an article dedicated to BFM’s release of the ad, including its “spending \$300,000 to run the ad across the state on television and digital platforms,” and that quoted Sachs’s statement about the ad. *See* BetterFutureMichigan (@BetterFutureMI), TWITTER (Dec. 11, 2019), <https://twitter.com/BetterFutureMI/status/1204846944851578881?s=20> (linking to William Davis, *2020 Anxiety: Outside Groups Pour First Million into Michigan*, *Daily Caller* (Dec. 11, 2019), <https://dailycaller.com/2019/12/11/2020-liberal-groups-better-future-michigan/>).

¹⁵ *See* MUR 7714 Compl. at 1-2.

¹⁶ *Id.* (quoting from *The Daily Beast* Article).

¹⁷ MUR 7714 Compl. at 1.

¹⁸ MUR 7714 BFM Resp. at 7. A case study on IMGE’s website profiles work done for “a c4 that cares about economic freedom [and] wanted to build a strong, state-wide network of activists who were passionate about free-market health care.” *See Build a Statewide Network of Issue Advocates*, IMGE, <https://imge.com/case-study/build->

for “media buying services” shortly before James announced his candidacy; since then, the Committee has disbursed \$728,566.39 to the firm though July 15, 2020.¹⁹ Both respondents contend that IMGE used a firewall policy to prevent its work from being shared with other clients and provided excerpts of the firewall policy from their respective contracts.²⁰

As to Smart Media Group and its subsidiary Del Cielo Media (“Del Cielo”), the Committee acknowledges that it used Smart Media Group for ad placements, but states that its contract ended after the 2018 election, more than 120 days before BFM incorporated.²¹ BFM acknowledges that it currently uses Del Cielo for ad placement.²²

III. LEGAL ANALYSIS

A. The Available Information Is Insufficient to Support Finding Reason to Believe That Respondents Made Coordinated Communications

Corporations are prohibited from making contributions to candidates and their authorized committees,²³ and federal candidates and their authorized committees may not knowingly accept such contributions.²⁴ When a person makes an expenditure in cooperation, consultation, or in

[a-statewide-network-of-issue-advocates/](#) (last visited Aug. 4, 2020). The page, which features multiple images reading “Medicare for All,” states that the services provided included IMGE “us[ing] an interstitial ad network to catch locals online and drive them directly to an action center where they could contact their senator.” *Id.* IMGE reports that it “drove over 11,000 contacts to a U.S. Senator’s office from their constituents on health care policy, despite there being no urgent legislation on the topic.” *Id.*

¹⁹ MUR 7714 James Resp. at 2; John James for Senate, Inc., Amended 2019 July Quarterly Report at 335 (Aug. 21, 2019) (showing disbursements to IMGE LLC beginning June 5, 2019); John James for Senate, Inc., 2020 Pre-Primary Report at 603 (July 23, 2020) (showing disbursements to IMGE as late as July 15, 2020); John James for Senate, Inc., 2019-2020 Disbursements to IMGE, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00651208&recipient_name=IMGE&two_year_transaction_period=2020.

²⁰ MUR 7714 James Resp. at 2, 5-6; MUR 7714 BFM Resp. at 7-8.

²¹ MUR 7714 James Resp. at 2; *see also* John James for Senate, Inc., 2018 Post-General Report at 856 (Jan. 24, 2019).

²² MUR 7714 BFM Resp. at 2, 6.

²³ 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b).

²⁴ 52 U.S.C. § 30118(a).

concert with, or at the request or suggestion of, a candidate or the authorized committee or their agents, it is treated as an in-kind contribution.²⁵

Under the Commission's regulations, a communication is "coordinated" with a candidate, an authorized committee, a political party committee, or agent thereof, and is treated as an in-kind contribution, if the communication satisfies a three-prong test: (1) it is paid for, partly or entirely, by a person other than the candidate, authorized committee, political party committee, or agent thereof; (2) it satisfies at least one of the "content standards" at 11 C.F.R. § 109.21(c); and (3) it satisfies at least one of the "conduct standards" at 11 C.F.R. § 109.21(d).²⁶ All three prongs must be satisfied for a communication to be considered coordinated.²⁷

The three advertisements in question satisfy the first prong because BFM, not James or the Committee, paid for the ads. However, they do not appear to constitute coordinated communications because they do not meet any of the conduct standards set forth at section 109.21(d).²⁸ The "conduct" prong will be satisfied if: (1) the communication was created, produced, or distributed at the request or suggestion of a candidate or his campaign; (2) the candidate or his campaign was materially involved in decisions regarding the communication; (3) the communication was created, produced, or distributed after substantial discussions with the campaign or its agents; (4) the parties contracted with or employed a common vendor that used or conveyed material information about the campaign's plans, projects, activities or needs,

²⁵ *Id.* § 30116(a)(7)(B); 11 C.F.R. § 109.20; *see also Buckley v. Valeo*, 424 U.S. 1, 46-47 (1976).

²⁶ 11 C.F.R. § 109.21(a); *see also id.* § 109.21(b) (describing in-kind treatment and reporting of coordinated communications).

²⁷ *Id.* § 109.21(a); *see also* Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 453 (Jan. 3, 2003) (Explanation and Justification) ("E&J").

²⁸ We do not analyze whether the advertisements meet the content standards because they do not appear to satisfy any of the conduct standards, as explained below.

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1 or used material information gained from past work with the candidate to create, produce, or
 2 distribute the communication; (5) the payor employed a former employee or independent
 3 contractor of the candidate who used or conveyed material information about the campaign's
 4 plans, projects, activities or needs, or used material information gained from past work with the
 5 candidate to create, produce, or distribute the communication; or (6) the payor republished
 6 campaign material.²⁹

7 The Complaints allege that the ads satisfy the conduct prong because: (1) Sachs joined
 8 BFM approximately a month after she had served as an advisor to James; and (2) BFM shared
 9 common vendors with the Committee.³⁰

10 1. Former Employee or Independent Contractor

11 Under the "former employee or independent contractor standard," the conduct prong may
 12 be satisfied if: (1) the payor employed a person who had been an employee or independent
 13 contractor of the candidate's authorized committee during the previous 120 days; and (2) that
 14 former employee or independent contractor conveyed to the payor material information about the
 15 campaign's plans, projects, activities or needs, or used information gained from past work with
 16 the candidate that was material to creating, producing, or distributing the communication.³¹ The
 17 first part of the former employee standard is satisfied here because the Committee had an
 18 independent contractor arrangement with Sachs within 120 days of BFM creating "Eliminate,"

²⁹ See 11 C.F.R. § 109.21(d); *see also* Factual & Legal Analysis at 6, MUR 6660 (Angus King for U.S. Senate Campaign *et al.*) ("F&LA"); F&LA at 5, MUR 6337 (Jay Riemersma for Congress Campaign Committee); F&LA at 5, MUR 5999 (Freedom's Watch, Inc.).

³⁰ MUR 7686 Compl. at 6-7; MUR 7714 Compl. at 1-2; *see also* MUR 7716 Compl. at 4.

³¹ 11 C.F.R. § 109.21(d)(5).

1 which was the only ad of the three in question disseminated in the 120 days after Sachs left the
2 Committee.³²

3 Regarding the second part of the standard, the Commission has explained that “campaign
4 information must be both current and proprietary (that is, non-public) to be subject to the
5 coordinated communications regulation.”³³ Similarly, when creating the standard, the
6 Commission noted “much of the information gained working for candidates during primary races
7 becomes largely irrelevant for general elections.”³⁴

8 Here, the Complaint does not allege, nor are we aware of, any specific facts indicating
9 that Sachs used non-public material information in creating, producing, or distributing
10 “Eliminate.” The campaign that Sachs managed for James in 2018 was against a different
11 opponent – Debbie Stabenow, not Gary Peters – suggesting that whatever Sachs may have
12 learned from her work in the 2018 race would have less value for the 2020 race. Although Sachs
13 also advised James while he was testing the waters for his 2020 campaign, there is insufficient
14 information to support finding reason to believe that any non-public information she may have
15 had about the Committee’s plans was actually material to the creation, development, or
16 distribution of “Eliminate.”

17 Instead, the Complaint posits that “[i]f Ms. Sachs used or conveyed any material, non-
18 public information regarding the James campaign’s projects, plans, activities or needs, the
19 conduct prong is clearly met.”³⁵ The Commission has previously declined to investigate matters

³² Respondents assert that Sachs’s last day with the Committee was May 3, 2019. *See* MUR 7686 James Resp. at 3. According to the Facebook Ad Library, BFM distributed “Eliminate” on August 7, 2019.

³³ Coordinated Communications Explanation & Justification, 75 Fed. Reg. 55,947, 55,959 (Sept. 15, 2010).

³⁴ Coordinated Communications Explanation & Justification, 71 Fed. Reg. 33,190, 33,205 (June 8, 2006).

³⁵ MUR 7686 Compl. at 6 (emphasis added).

where the allegations of coordinated conduct are similarly speculative and lacked support.³⁶ A review of the available information does not support a finding that Sachs used non-public information in providing services to James and that that same information was material to the creation, production, or distribution of “Eliminate.”

2. Common Vendor

The “common vendor” conduct standard is satisfied if all of the following are true:

(1) the person paying for the communication employs a commercial vendor³⁷ to “create, produce, or distribute” the communication; (2) the vendor has provided certain delineated services to the recipient of the contribution during the 120 days preceding the communication; and (3) the vendor conveys non-public information about the campaign’s “plans, projects, activities, or needs,” or services previously provided to the campaign by the vendor, and that information is material to the creation, production, or distribution of the communication.³⁸

Under a “safe harbor” provision, the common vendor conduct standard is not satisfied if a commercial vendor has established and implemented a written firewall policy that meets certain requirements, so long as material information is not shared.³⁹

³⁶ Cf. F&LA at 8-9, MUR 6358 (Jaime for Congress) (finding no reason to believe where available information did not indicate that campaign or its agents requested or suggested that third party organization “create the ad, participated in any discussion about the ad on behalf of the Committee, were materially involved in its creation or dissemination as Committee agents, or otherwise informed [organization] about the campaign’s plans, projects, activities or needs.”), F&LA at 5-6, MUR 5999 (NRCC, *et al.*) (finding no reason to believe where respondents rebutted allegations that former employees of party committee shared material information to create communication). We note that in prior matters, such as MURs 6368 and 5999, the Commission relied, in part, on respondents’ sworn affidavits or declarations and respondents in the instant matters did not provide such statements. However, because the Complaints rely on speculation to satisfy the former employee standard, and we are not aware of information supporting the allegation, the lack of sworn statements is of less import.

³⁷ “Commercial vendor” means any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease or provision of those goods or services. 11 C.F.R. § 116.1(c).

³⁸ *Id.* § 109.21(d)(4)(i)-(iii).

³⁹ *Id.* § 109.21(h). A firewall policy satisfies this safe harbor if it (1) is designed and implemented to prohibit the flow of information between employees or consultants providing services for the person paying for the

1 The information does not support a finding that the Committee and BFM coordinated
2 communications through Smart Media Group and Del Cielo. Even assuming that the parent firm
3 and its subsidiary are a “common vendor,” their work does not satisfy the second part of the
4 standard: providing certain delineated services to the Committee during the 120 days preceding
5 BFM’s advertisements.⁴⁰ Smart Media Group stopped providing services to the Committee
6 more than 120 days before BFM began using Del Cielo.⁴¹

7 IMGE, on the other hand, did provide qualifying services to the Committee within 120
8 days of all three of BFM’s advertisements. The Committee has used IMGE for media
9 placements since James announced his candidacy in June 2019,⁴² and during that time, BFM
10 hired IMGE to build its website.⁴³ There is no information in the record, however, that the first
11 part of the common vendor standard is satisfied: there is no allegation that IMGE “create[d],
12 produce[d], or distribute[d]” any of BFM’s three advertisements, and we are not aware of any
13 such information.⁴⁴

communication and those employees or consultants currently or previously providing services to the candidate who is clearly identified in the communication, or that candidate’s authorized committee, the candidate’s opponent, the opponent’s authorized committee or a political party committee; and (2) is described in a written policy distributed to all relevant employees, consultants and clients. *Id.* § 109.21(h)(1)-(2). This safe harbor does not apply if specific information indicates that, despite the firewall policy, material information about the candidate’s campaign plans, projects, activities, or needs was used or conveyed to the person paying for the communication. *Id.* § 109.21(h).

⁴⁰ See *Id.* § 109.21(d)(4)(ii).

⁴¹ MUR 7714 James Resp. at 2; MUR 7714 BFM Resp. at 2, 6; see also John James for Senate, Inc., 2018 Post-General Report at 856 (Jan. 24, 2019).

⁴² MUR 7714 James Resp. at 2; John James for Senate, Inc., Amended 2019 July Quarterly Report at 335 (Aug. 21, 2019) (showing disbursements to IMGE LLC beginning June 5, 2019); John James for Senate, Inc., 2020 Pre-Primary Report at 603 (July 23, 2020) (showing disbursements to IMGE as late as July 15, 2020); see 11 C.F.R. § 109.21(d)(4)(ii)(A) (“Development of media strategy, including the selection or purchasing of advertising slots”).

⁴³ MUR 7714 BFM Resp. at 7. Respondents also rebut the allegation by invoking the safe-harbor provision and pointing to IMGE’s internal firewall policy found in the entities’ contracts with the consulting firm. MUR 7714 James Resp. at 5; MUR 7714 BFM Resp. at 2-3, 7-8. We note that Respondents did not provide copies of the actual signed contracts or of IMGE’s firewall policy.

⁴⁴ See 11 C.F.R. § 109.21(d)(4)(i); MUR 7714 Compl. at 1-2.

1 In addition, the Complaint does not allege that IMGE conveyed material non-public
2 information about the Committee's plans, projects, activities, or needs to create, produce, or
3 distribute the communications paid for by BFM.⁴⁵ And we are not aware of any. Rather, the
4 Complaint relies on the fact the Committee and BFM used IMGE within the same 120 days, but
5 such facts are insufficient to satisfy this element of the conduct prong.⁴⁶ The Commission has
6 explained that "the mere presence of a common vendor" does not result in a presumption of
7 coordination.⁴⁷ Thus, the available information indicates that the common vendor conduct
8 standard has not been satisfied.

9 Because the record does not support a finding that the conduct standard is satisfied for
10 any of the advertisements in question, the Commission dismisses the allegation that Respondents
11 made or accepted a prohibited in-kind contribution in violation of 52 U.S.C. § 30118(a).⁴⁸

12 **B. There Is Insufficient Information to Support a Reason to Believe Finding**
13 **That Respondents Violated the Act's Soft-Money Provisions**

14 The Complaint in MUR 7716 alleges that James, through his agent, Sachs, established
15 BFM to raise and spend non-federal funds to support his election.⁴⁹ The Complaint asserts that
16 "[i]t is nearly impossible" to believe Sachs acted of her own accord, and not as an agent of
17 James, in helping to establish BFM because: (1) she went from the Committee directly to BFM

⁴⁵ See 11 C.F.R. § 109.21(d)(4)(iii).

⁴⁶ See F&LA at 9, MUR 6477 (Huey, *et al.*) (finding no reason to believe that common vendor standard was satisfied where there was no information indicating that common vendor "used or conveyed information material to the creation, production, or distribution of the communication").

⁴⁷ Coordinated & Independent Expenditures, 68 Fed. Reg. 421, 437 (Jan. 3, 2003).

⁴⁸ In addition, none of the remaining conduct standards appear to be satisfied. The available information does not indicate that BFM created, produced, or distributed the relevant ads at the request or suggestion of James or the Committee. Further, the record does not indicate that James or the Committee were materially involved in or had a substantial discussion with BFM to create, produce, or distribute the ads, or that BFM republished the Committee's campaign material.

⁴⁹ MUR 7716 Compl. at 1.

just a few weeks later; and (2) BFM promptly ran negative advertisements featuring Gary Peters, the incumbent senator and James's opponent.⁵⁰

The Act prohibits a candidate, an agent thereof, or an entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of a candidate from soliciting, receiving, directing, transferring, or spending funds in connection with a federal election that do not comply with the limits, prohibitions, and reporting requirements of the Act.⁵¹ Commission regulations provide that an agent is "any person who has actual authority, either express or implied," to solicit, receive, direct, transfer, or spend funds in connection with any election.⁵²

Here, the record does not contain sufficient information to support a reasonable inference that Sachs continued to serve as James's agent after she terminated her independent contractor relationship with him in May 2019. According to the Committee's 2019 July Quarterly Report, Sachs received her last payment from the Committee on May 3, 2019, and Respondents contend that she stopped providing services to James and the Committee at or before that time.⁵³ Although the Complaints suggest that Sachs continued her work for the Committee throughout May, Respondents directly rebut the suggestion, and there is no available information corroborating it. The Complaint relies on the timing of Sachs's transition from the Committee to BFM and BFM's advertising attacking James's opponent, but the available information is

⁵⁰ See *id.* at 4.

⁵¹ 52 U.S.C. § 30125(e)(1)(A).

⁵² 11 C.F.R. § 300.2(b)(3).

⁵³ John James for Senate, Inc., Amended 2019 July Quarterly Report at 347 (Aug. 21, 2019); MUR 7686 James Resp. at 3; *see also* MUR 7714 James Resp. at 2; MUR 7716 James Resp. at 1-2; MUR 7686 BFM Resp. at 2; MUR 7714 BFM Resp. at 2; MUR 7716 BFM Resp. at 2.

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1 insufficient to create a reasonable inference that James gave Sachs actual authority, express or
2 implied, to solicit, receive, direct, transfer, or spend funds to support his election.⁵⁴

3 Accordingly, the Commission dismisses the allegations that Respondents violated 52
4 U.S.C. § 30125(e)(1) by soliciting, receiving, directing, transferring, or spending funds
5 prohibited under the Act in connection with an election for federal office.

⁵⁴ See F&LA at 6, MUR 7288 (DNC) (requiring specific information that individual was acting on behalf of principal); *Definitions of “Agent” for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures*, 71 Fed. Reg. 4,975, 4,978 n.6 (Jan. 31, 2006) (quoting *Final Rules and Explanation and Justification for Prohibited Excessive Contributions: Non-Federal Funds or Soft Money*, 67 Fed. Reg. 49,064, 49,083 (July 29, 2002)) (“Specifically, it is not enough that there is some relationship or contact between the principal and agent; rather, the agent must be acting on behalf of the principal to create potential liability for the principal.”).