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VIA E-MAIL
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Jeff S. Jordan, Esq.
Assistant General Counsel
Complaints Examination & Legal Administration
Federal Election Commission
1050 First Street, NE
Washington, D.C. 20463

Re: MUR 7717

Dear Mr. Jordan:

We write as counsel to Theresa Greenfield, Theresa Greenfield for Iowa (the “*Campaign*”), and Theresa Kehoe, in her official capacity as Campaign Treasurer (collectively, the “*Respondents*”) in response to a Complaint filed by the Foundation for Accountability and Civic Trust (“*FACT*”) on March 11, 2020 (the “*Complaint*”), alleging a violation of the Federal Election Campaign Act of 1971, as amended (the “*Act*”), and Federal Election Commission (“*FEC*” or the “*Commission*”) regulations.

The Complaint falsely alleges that Respondents engaged in prohibited coordination with SMP, commonly referred to as Senate Majority PAC, in connection with an advertisement featuring U.S. Senate candidate Theresa Greenfield. The only factual basis for this allegation is that the advertisement includes short b-roll video clips and photographs of Theresa Greenfield and references publicly-available facts about her background. As FACT is aware, the Commission has repeatedly made clear that such activity does not constitute “coordination” for purposes of the Act. Because the Complaint does not allege any additional facts to demonstrate that the Campaign engaged in illegal coordination with SMP, the Commission should find no reason to believe that Respondents violated the Act and should dismiss the Complaint immediately.

FACTUAL BACKGROUND

Theresa Greenfield is a candidate for U.S. Senate in Iowa in 2020,¹ and Theresa Greenfield for Iowa is her principal campaign committee.² The Campaign maintains a publicly available website located at www.greenfieldforiowa.com. The Campaign uses this website to communicate with the general public about Theresa's background, her candidacy, her policy positions and more. The Campaign also maintains a YouTube page with over 43,000 views, which it similarly uses to communicate with the public.³ The Campaign makes additional videos and content available to the public through its Facebook page, which has almost 9,000 followers, and through its Instagram account.⁴

SMP is a federal Super PAC registered with the FEC.⁵ As a super PAC, SMP was formed and operates completely separately from Respondents. On February 23, 2020, SMP ran a television advertisement featuring Theresa Greenfield ("*SMP Ad*" herein).⁶ According to the Complaint, SMP's television ad included content from the Campaign's website, YouTube page and Instagram account.

LEGAL ANALYSIS

The Complaint alleges that Respondents coordinated with SMP in the production of the SMP Ad, yet fails to provide any facts establishing that the SMP Ad was a coordinated communication under the law.

A. The Complaint Alleges No Facts that Establish that the Conduct Prong is Met

A communication is a "coordinated communication," and thus an in-kind contribution to the benefitting candidate under 11 C.F.R. § 109.21, only if it satisfies all three prongs of the coordinated communication regulation: (1) the payment prong, (2) the content prong, and (3) the conduct prong.⁷ Because the SMP Ad fails to satisfy the conduct prong and the Complaint fails to allege facts which, if true, would constitute a violation of the Act or FEC

¹ Theresa Greenfield, FEC Form 2 - Statement of Candidacy (Apr. 10, 2020), <https://docquery.fec.gov/pdf/314/202004109216632314/202004109216632314.pdf>.

² *Id.*; Theresa Greenfield for Iowa, FEC Form 1 - Statement of Organization (Apr. 10, 2020), <https://docquery.fec.gov/pdf/282/202004109216632282/202004109216632282.pdf>.

³ Theresa Greenfield for Iowa, YouTube, *available at* https://www.youtube.com/channel/UC8Vxm_O_tRZcBTFLehegQZuQ/about.

⁴ Theresa Greenfield for Iowa, Facebook, *available at* https://www.facebook.com/pg/GreenfieldForIowa/videos/?ref=page_internal; Theresa Greenfield for Iowa, Instagram, *available at* <https://www.instagram.com/theresagreenfield/?hl=en>.

⁵ SMP, FEC Form 1 - Statement of Organization (Oct. 1, 2019), <https://docquery.fec.gov/pdf/667/201910019163579667/201910019163579667.pdf>.

⁶ Tough, YouTube (Feb. 23, 2020), <https://youtu.be/kSIz2gLoRtY>.

⁷ 11 C.F.R. § 109.21.

regulations, there is simply no basis for the Commission to find reason to believe that Respondents have violated the Act in this instance.

1. Posting Campaign Information on a Public Website does not meet the Conduct Standard

The Complaint's basis for coordination between the Campaign and SMP relies on two facts: (i) that the Campaign, like most political campaigns, uploaded campaign photographs and video onto publicly available websites; and (ii) SMP made an expenditure in support of Theresa Greenfield "within a short amount of time" thereafter.⁸ However, the Commission has consistently made clear that communications appearing on a campaign's publicly available website are *never* sufficient to find that the conduct prong has been satisfied, nor is proximity between an updated public website and the airing of an advertisement.

As part of the revision of its coordination regulations in 2003, the Commission established that the conduct prong would be satisfied if a campaign made a "request or suggestion" that a third party disseminate a communication on its behalf.⁹ The Commission further clarified that "[t]he 'request or suggestion' conduct standard in paragraph (d)(1) is intended to cover requests or suggestions made to a select audience, but not those offered to the public generally. For example, a request that is posted on a web page that is available to the general public is a request to the general public and does not trigger the conduct standard in paragraph (d)(1), but a request posted through an intranet service or sent via electronic mail directly to a discrete group of recipients constitutes a request to a select audience and thereby satisfies the conduct standard in paragraph (d)(1)."¹⁰ As this language makes clear, any request or suggestion made on a publicly available website simply does not satisfy the conduct prong.

The Commission subsequently confirmed that the use of publicly available information by a third party does not satisfy the conduct prong, noting that "[u]nder the new safe harbor, a communication created with information found, for instance, on a candidate's or political party's Web site, or learned from a public campaign speech, is not a coordinated communication if that information is subsequently used in connection with a communication."¹¹

Indeed, the Commission has re-affirmed this basic principle time and again through its enforcement process, consistently dismissing complaints with similarly speculative coordination allegations.¹² For example, in MUR 6821, the FEC dismissed a complaint that alleged that a

⁸ Compl. at 1, 3, 9.

⁹ 11 C.F.R. § 109.21(d)(1).

¹⁰ Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003).

¹¹ Coordinated Communications, 71 Fed. Reg. 33,190, 33,205 (Jun. 8, 2006).

¹² See, e.g., FEC Matter Under Review 6821 (Shaheen for Senate), Factual and Legal Analysis at 8 (Dec. 2, 2015). ("a communication resulting from a general request to the public or use of publicly available information, including information contained on a candidate's campaign website, does not satisfy the conduct standards"); FEC Matter Under Review 7124 (Katie McGinty for Senate), Factual and Legal Analysis at 8-9 (May 4, 2017); FEC Matter Under Review 6902 (Al Franken for Senate 2014), General Counsel's Report at 12; FEC Matter Under Review 6902

coordinated communication occurred when SMP began to air an advertisement with similar themes to those contained in a message posted on the publicly available website of Shaheen for Senate, the principal campaign committee of Senator Jeanne Shaheen.¹³ In finding that there was no reason to believe that any violation of the Act occurred, and dismissing the complaint, the Commission emphasized that “a communication resulting from a general request to the public or use of publicly available information, including information contained on a candidate’s campaign website, does not satisfy the conduct standards.”¹⁴

Here, the Complaint relies on information posted via prominent links on the Campaign’s website, YouTube page and Instagram account – all of which are commonly visited by members of the public, as evidenced by thousands of views and followers for each. None of the Campaign content identified in the Complaint could possibly qualify as a “request or suggestion” that SMP make an expenditure to support the Campaign. Moreover, even if the posting of these photographs and video could be interpreted as a request or suggestion to engage in a particular communication, because they were posted on a public website and were not sent to a select audience, their posting would not constitute “request or suggestion” and would not be evidence of coordination under 11 C.F.R. § 109.21(d)(1).

The Complaint also alleges that coordination must have occurred between the parties because of the “close proximity in time between the campaign providing the instruction and materials and...[SMP] running the advertisement.”¹⁵ However, the fact that the Campaign’s website was updated in early February and SMP began running the advertisement at issue during the final days of February is not proof of any coordination. In MUR 6902, the Commission faced equally speculative claims that coordination occurred based on similarity in the use of campaign materials between a campaign and an outside group.¹⁶ There, the complainant alleged that an outside group used materials posted by Al Franken’s campaign to produce a communication, and that the timing of the materials being posted, and the similarities in the content of the ads, indicated that coordination had occurred.¹⁷ The Commission found no reason to believe any violation occurred in this instance, and clarified that the allegations of coordination that are “wholly speculative based primarily on the proximity of time between placement of the footage online and airing of the ads, as well as thematic similarities of the communications” cannot sustain an allegation of coordination.¹⁸ The same conclusion applies here.

(Al Franken for Senate 2014), Statement of Reasons of Vice Chairman Matthew S. Peterson and Commissioners Caroline C. Hunter and Lee E. Goodman at 2 (Dec. 17, 2015).

¹³ FEC Matter Under Review 6821 (Shaheen for Senate), Factual and Legal Analysis at 8 (Dec. 2, 2015).

¹⁴ *See id.*

¹⁵ Compl. at 9.

¹⁶ *See* FEC Matter Under Review 6902 (Al Franken for Senate 2014), General Counsel’s Report at 12.

¹⁷ *Id.*

¹⁸ *See* FEC Matter Under Review 6902 (Al Franken for Senate 2014), Statement of Reasons of Vice Chairman Matthew S. Peterson and Commissioners Caroline C. Hunter and Lee E. Goodman at 2 (Dec. 17, 2015).

2. The Remaining Facts Alleged do not Support a Finding that the Conduct Standard was Met

Finally, and perhaps because FACT knows that a message on a public website is insufficient to establish coordination, the Complaint alleges that private communications must have occurred between the parties, claiming that “because Greenfield knew to use this format, it also indicates other communications occurred.”¹⁹ Yet, the Complaint provides no evidence or support for the assertion that any non-public communications occurred between Respondents and SMP. The Commission has previously dealt with similar baseless allegations also made by FACT regarding private communications in MUR 7124 and held that “similarities between [the campaign website] and the commercials and the timing and geographical placement of the commercials, are insufficient to show that any additional private communications occurred.”²⁰

Accordingly, the Complaint fails to allege any facts that if true demonstrate that the conduct prong of the Commission’s coordinated communication test is met, and thus the Complaint fails to allege that SMP’s advertisement constitutes a coordinated communication and impermissible contribution to Respondents.

B. The Complaint Alleges No Facts that Establish that SMP Republished Campaign Materials

In direct contravention of FEC precedent, the Complaint also alleges that “[a]ny republication of photographs or video prepared by a campaign is a contribution even if the campaign materials are only a small part of a larger advertisement.”²¹ Like the Complaint’s position on coordination, this is simply incorrect as a matter of law. The regulations actually include an exception to the republication rule in instances where “the campaign material used consists of a brief quote of materials...”²² And the Commissioners have repeatedly stated that “[t]he Act’s republication provision is designed to capture situations where third parties, in essence, subsidize a candidate’s campaign by expanding the distribution of communications whose content, format, and overall message are devised by the candidate.” It is not intended to address situations where Respondents “did not repeat verbatim the [candidate’s] message” but instead create their own message, using publicly available materials.²³

When considering whether republication has occurred, the Commission has consistently found that “mere thematic similarities between a candidate’s campaign materials and a third-party communication are insufficient to establish republication,”²⁴ and “similar

¹⁹ Compl. at 12.

²⁰ FEC Matter Under Review 7124 (Katie McGinty for Senate), Factual and Legal Analysis at 10 (May 4, 2017).

²¹ Compl. at 6.

²² 11 C.F.R. § 109.23(b)(4).

²³ FEC Matter Under Review 6603, Statement of Reasons of Vice Chairman Matthew S. Peterson and Commissioners Caroline C. Hunter and Lee E. Goodman (Dec. 17, 2015) *citing* FEC Matter Under Review 6357.

²⁴ FEC Matter Under Review 7124 (Katie McGinty for Senate), Factual and Legal Analysis at 11 (May 4, 2017).

sentences...do not rise to the level sufficient to indicate republication of campaign materials because of differences in wording or phrasing.”²⁵ Similarly, the Commission has consistently failed to find reason to believe that an advertisement that contains short snippets of b-roll video footage from a campaign has violated the Act or FEC regulations by disseminating, distributing or republishing campaign material.²⁶ Here, SMP’s advertisement only uses brief snippets of b-roll footage and photographs from the Campaign’s publicly available website, YouTube page and Instagram account. While the Campaign’s website and the SMP Ad share similar themes, it is clear that SMP’s advertisement contains its own words and reflects its own message.

Even if SMP had republished Campaign materials within the scope of the regulations, the Campaign would not have received or accepted an in-kind contribution. As explained by 11 C.F.R. § 109.23(a), “the candidate who prepared the campaign material does not receive or accept an in-kind contribution, and is not required to report an expenditure, unless the dissemination, distribution, or republication of campaign materials is a coordinated communication” under FEC regulations.²⁷

For the reasons described above, the Complaint does not allege any facts that, even if taken as true, would establish that Respondents coordinated with SMP on the SMP Ad. Therefore, the Complaint does not state facts which support a finding that the Campaign received an in-kind contribution in the form of the dissemination, distribution or republication of campaign materials.

CONCLUSION

The Act requires that the Commission find “reason to believe that a person has committed, or is about to commit, a violation” of the Act as a precondition to opening an investigation into the alleged violation.²⁸ In turn, the Commission may find “reason to believe” only if a complaint sets forth specific facts, which, if proven true, would constitute a violation of the Act.²⁹ Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true and provide no independent basis for investigation.³⁰

²⁵ *Id.* at 10 (citing to FEC Matter Under Review 6502 (Nebraska Democratic State Central Committee Campaign), Factual & Legal Analysis at 9 (citing FEC Matter Under Review 2766 (Auto Dealers and Drivers for Free Trade PAC) for the proposition that “similar sentences . . . do not rise to the level sufficient to indicate republication of campaign materials because of differences in wording or phrasing.”)).

²⁶ *See, e.g.*, FEC Matter Under Review 7432 (John James for Senate, et al.), Statement of Reasons, Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter (Aug. 30, 2019).

²⁷ 11 C.F.R. § 109.23(a).

²⁸ 52 U.S.C. § 30109(a)(2).

²⁹ *See* 11 C.F.R. § 111.4(a), (d); FEC Matter Under Review 4960 (Clinton for U.S. Senate), Statement of Reasons of Commissioners Mason, Sandstrom, Smith and Thomas at 1 (Dec. 21, 2000).

³⁰ FEC Matter Under Review 4960 (Clinton for U.S. Senate), Statement of Reasons of Commissioners Mason, Sandstrom, Smith and Thomas at 1 (Dec. 21, 2000).

The Complaint has not alleged facts that provide a sufficient basis for the Commission to find “reason to believe” that the Act or Commission regulations have been violated. Accordingly, the Commission must reject the Complaint’s request for an investigation. It should instead immediately dismiss the Complaint and close the file.

Very truly yours,

A handwritten signature in blue ink, appearing to be 'Marc E. Elias', written over a light blue horizontal line.

Marc E. Elias
Aria C. Branch
Courtney T. Weisman
Counsel to Respondents