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VIA HAND DELIVERYJeff S. Jordan, Esq.
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Federal Election Commission
1050 First Street, NE
Washington, D.C. 20463Marc Erik Elias
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Dear Mr. Jordan:

We write as counsel to Majority Forward (“Respondent”) in response to the complaint in MUR 7727 (the “Complaint”) filed by the Foundation for Accountability and Civic Trust (“FACT”) on April 16, 2020, 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 Respondent engaged in prohibited coordination with Sara Gideon and her principal campaign committee, Sara Gideon for Maine, in connection with an advertisement Respondent ran concerning Senator Susan Collins’s votes impacting prescription drug costs, receipt of contributions from the drug and insurance industries, and failure to hold town hall meetings.¹ The only factual basis for this allegation is that Respondent’s advertisement references widely-known facts concerning Senator Collins’s political record, which also happened to be listed on Sara Gideon’s publicly available website. As FACT is well aware, the Commission has repeatedly made clear that such activity does not constitute “coordination” for purposes of the Act. As the Complaint does not allege any additional facts to demonstrate that coordination took place, and because no coordination took place, the Commission should find no reason to believe that Respondent violated the Act or FEC regulations and should dismiss the Complaint.

FACTUAL BACKGROUND

Sara Gideon is a candidate for U.S. Senate in Maine in 2020, running to challenge the sitting U.S. Senator, Susan Collins.² Sara Gideon for Maine is Sara Gideon’s principal campaign committee.³ The campaign maintains a publicly available website located at www.saragideon.com to communicate with the general public about Sara Gideon’s candidacy. According to the Complaint,

¹ Majority Forward, “Twenty Years,” YOUTUBE (uploaded Feb. 18, 2020) <https://www.youtube.com/watch?v=bA2Ao9zzAK8&feature=youtu.be>.

² Sara Gideon, FEC Form 2 - Statement of Candidacy (Apr. 15, 2020).

³ Sara Gideon for Maine, FEC Form 1 - Statement of Organization (Apr. 15, 2020).

the website previously featured a box entitled “Important Update, What Mainers Need to Know” that linked to information on Senator Collins’s record on healthcare. The link provided detailed information on Senator Collins’s record with respect to pharmaceutical companies, including her votes to delay access to generic drugs and the fact that, according to the Center for Responsive Politics, Senator Collins has taken \$1.4 million dollars in contributions from sources associated with the drug and insurance industries.⁴

Majority Forward is a non-profit organization organized under Section 501(c)(4) of the Internal Revenue Code. Majority Forward was formed and operates completely separately from Sara Gideon and her campaign.

In February 2020 and early March 2020, Respondent ran a 30-second advertisement entitled “Twenty Years” (the “Advertisement”).⁵ The Advertisement features video footage of several individuals asking questions in a town hall format to an empty lectern. The Advertisement does not mention Sara Gideon, nor does it contain any footage or photos taken from her campaign’s website. Instead, the Advertisement’s message is entirely focused on Senator Collins and her record. The Advertisement: (i) asks “Senator Collins, why did you vote against lowering prescription drug costs”; (ii) claims that Collins was taking “so much money from the drug companies”; and (iii) claims that Collins has not held a town hall in twenty years.⁶ The sole similarity between the Advertisement and Sara Gideon’s campaign website is that the Advertisement touches on two topics that were also generally reflected in the publicly available facts posted on the website—that Senator Collins has voted against lowering drug costs and that she has taken money from the pharmaceutical and insurance industries.

LEGAL ANALYSIS

The Complaint alleges that Respondent coordinated with Sara Gideon and her campaign on the Advertisement. However, the facts in the Complaint do not establish that coordination occurred under the Act and Commission regulations. A communication is a “coordinated communication” under 11 C.F.R. § 109.21 only if it satisfies all three prongs of the regulation: the payment prong, the content prong, and the conduct prong. The Complaint fails to allege any facts that demonstrate that the content prong or the conduct prong were satisfied in connection with the Advertisement. As such, the Complaint fails to allege facts which, even if taken as true, would constitute a violation of the Act or FEC regulations, and thus, the Complaint must be dismissed.⁷

⁴ Compl. at p. 6-7.

⁵ Majority Forward, “Twenty Years,” YOUTUBE (uploaded Feb. 18, 2020) <https://www.youtube.com/watch?v=bA2Ao9zzAK8&feature=youtu.be>.

⁶ *Id.*

⁷ See 11 C.F.R. § 111.4(a), (d); MUR 4960 (Clinton for U.S. Senate), Statement of Reasons, Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas at 1 (Dec. 21, 2000).

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

The Complaint claims that the Advertisement meets the conduct prong under 11 C.F.R. § 109.21(d)(1) because Sara Gideon’s campaign committee requested the Advertisement through public postings on its website that stated: “Important Update: What Mainers Need to Know.”⁸

First, this public positing is not a request or suggestion. Nothing about the above phrase requests third parties to run an advertisement.

Second, this assertion is simply incorrect as a matter of law. Even if the posting of information on the campaign’s website containing two of the same general themes that are reflected in the Advertisement could be interpreted as a request or suggestion to engage in a particular communication, because the information was posted on a public website and was not sent to a select audience, their posting would not constitute “request or suggestion,” and would not be evidence of coordination under 11 CFR § 109.21(d)(1). The Commission’s regulations, and the Commission’s interpretation of those regulations on numerous occasions, make clear that communications appearing on a campaign’s publicly available website are never sufficient to find that the conduct prong has been satisfied.

As part of the revision of the 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 In the accompanying Explanation and Justification, the Commission 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 A 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

The Commission has re-affirmed this basic principle through the enforcement process. In MUR 6821, the FEC dismissed a complaint that alleged that a coordinated communication occurred when Senate Majority PAC 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

⁸ Compl. at p. 4-5.

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 (June 8, 2006).

campaign committee of Senator Jeanne Shaheen. 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 the use of publicly available information, including information contained on a candidate’s campaign website, does not satisfy the conduct standards.”¹² Further, in MUR 7124, the Commission dismissed a complaint filed by FACT against Katie McGinty, a candidate for U.S. Senate. The complaint alleged that coordinated communications occurred when Women Vote! and Majority Forward paid to air three separate television advertisements supporting McGinty that contained themes similar to those posted on McGinty’s publicly available campaign site. The Commission voted 5-0 to dismiss the complaint and made clear once again that “the ‘request or suggestion’ ‘conduct’ standard refers to requests or suggestions ‘made to a select audience, but not those offered to the public generally,’” and therefore, a request that is posted on a web page that is available to the general public does not trigger the request or suggestion content standard.¹³

The material facts at issue are identical to those the Commission considered in MUR 6821 and MUR 7124. Here, as in those prior MURs, the only connection between Sara Gideon’s campaign website and the Advertisement is that the Advertisement touches on two *general themes* that were also reflected on the campaign’s publicly available website - Senator Collins’ votes against lowering drug costs and her receipt of contributions from the pharmaceutical and insurance industries.

Although the campaign’s website and the Advertisement share similar themes, it is clear that Respondent’s Advertisement contains its own words and reflects its own message focused on Senator Collins’s failure to hold a town hall and hear her constituents. While the Advertisement does reference Senator Collins voting against lowering prescription drug costs and taking “so much” money from the pharmaceutical industry, these two points are widely cited, publicly available facts about Senator Collins’s long record in the U.S. Senate. The Complaint’s only evidence of coordination is that the information on Senator Collins’s voting history on prescription drug costs and receipt of money from the pharmaceutical and insurance industries were also featured on the campaign’s publicly available website. As a matter of settled law, this is insufficient to establish coordination.

Perhaps because the complainant knows that a message on a public website is insufficient to establish coordination, the Complaint alleges that private communications occurred between the parties, claiming that the format of information posted on the campaign’s website indicates that “other communications occurred.”¹⁴ Yet, the Complaint provides absolutely no evidence or support for the assertion that any non-public communication occurred. The Advertisement features video footage that was filmed without any input from Sara Gideon or her campaign. In fact, Respondent maintains a firewall policy specifically designed to abide by Commission regulations and prevent any cooperation, consultation, or acting in concert with, or at the request or suggestion

¹² See FEC MUR 6821 (Shaheen for Senate), Factual and Legal Analysis at 8 (Dec. 2, 2015).

¹³ FEC MUR 7124 (Katie McGinty for Senate), Factual and Legal Analysis at 8-9 (May 4, 2017).

¹⁴ Compl. at p. 14.

of candidates, a candidate’s authorized committee, a political party committee, or agents of the foregoing. Furthermore, the Complaint alleges that the “close proximity in time between the campaign [posting information] . . . and the outside group running the advertisement also demonstrates this was a ‘request or suggestion.’”¹⁵ The Commission previously dealt with similar baseless allegations from 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.”¹⁶ 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.

B. The Complaint Alleges No Facts that Establish that the Content Prong is Met

The Advertisement at issue also fails to meet the content prong under 11 C.F.R. § 109.21(c). A communication meets the content prong under 11 C.F.R. § 109.21(c) only if the communication, in relevant part: (i) is an “electioneering communication”; (ii) disseminates, distributes, or republishes campaign materials prepared by a candidate or the candidate’s authorized committee and is not subject to an applicable exception; (iii) expressly advocates the election or defeat of a clearly identified candidate or contains “the functional equivalent of express advocacy”; or (iv) refers to a clearly identified Senate candidate and is publicly distributed in the clearly identified candidate’s jurisdiction within 90 days of the candidate’s primary or general election.¹⁷

The Advertisement at issue does not satisfy any of those standards. The Advertisement aired in February 2020 and early March 2020.¹⁸ The Advertisement did not air 90 days or fewer before the primary or general election for U.S. Senate in 2020 in Maine.¹⁹ Additionally, the Advertisement is not an “electioneering communication” as it was not publicly distributed within 60 days before the general election for U.S. Senate or within 30 days before a primary involving Susan Collins.²⁰

Furthermore, the Advertisement does not contain any express advocacy against Susan Collins, nor is it the functional equivalent of express advocacy. A public communication is the functional equivalent of express advocacy only if “it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.”²¹ In a previous matter, MUR 6311, the Commission considered whether advertisements created by Americans for

¹⁵ *Id.* at p. 11.

¹⁶ FEC MUR 7124 (Katie McGinty for Senate), Factual and Legal Analysis at 10 (May 4, 2017).

¹⁷ 11 C.F.R. § 109.21(c).

¹⁸ See FCC Public File, Majority Forward 8040 Twenty Years (Feb. 19, 2020).

¹⁹ See Maine Dep’t. of the Sec’y. of State, *Upcoming Elections: 2020 Schedule of Federal/State Elections*, <https://www.maine.gov/sos/cec/elec/upcoming/index.html> (last accessed June 1, 2020) (Noting that the Maine 2020 primary election for U.S. Senate is on July 14, 2020, and the general election is on November 3, 2020.).

²⁰ *Id.*; 11 C.F.R. § 100.29.

²¹ 11 C.F.R. § 109.21(c)(5).

Prosperity constituted express advocacy or the functional equivalent of express advocacy.²² The advertisements in MUR 6311 included the lines “[House member] cast [his] vote. Tell [him we] won’t forget” and a link to the website www.novemberiscoming.com, which included the language “we will remember in November.”²³ The Commission voted 6-0 to find no reason that Americans for Prosperity violated the Act.²⁴ Additionally, the Commission approved its General Counsel’s factual and legal analysis, which concluded that the advertisements did not constitute express advocacy, nor did they contain language “which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s).”²⁵ The analysis further explained that “[t]he ‘tell him’ language could be interpreted as a request to call and express disapproval of the vote. The exhortation, therefore, does not direct viewers to vote against the incumbent and may reasonably be understood to be requesting a different position on future legislative votes relating to the issue of healthcare. Indeed, the ads discuss the economic consequences of the members’ support for healthcare reform legislation by discussing the total cost of the legislation”²⁶

Similarly, here, there is a reasonable interpretation of the Advertisement other than as an appeal to vote against Susan Collins. The Advertisement at issue centers on the question of why Susan Collins has not held a town hall in 20 years, as demonstrated by the fact that the individuals in the video are asking questions in a town hall format to an empty lectern.²⁷ The Advertisement ends with a call to action that states, “If she won’t hear us at a town hall, she’ll hear us in November.”²⁸ The Advertisement is a clear call for Susan Collins to abide by the democratic principles of our country and host a town hall to listen to her constituents’ concerns. The Advertisement does not include any words of express advocacy against Senator Collins, nor does it mention an opponent of hers. Rather, the Advertisement urges Susan Collins to listen to constituent concerns about the consequences of her votes on bills, particularly on the impact her votes have on the cost of prescription drugs. Accordingly, this Advertisement is not the functional equivalent of express advocacy.

The Advertisement also does not disseminate, distribute, or republish campaign material within the scope of 11 C.F.R. § 109.21(c)(2). The Complaint appears to misunderstand—or willfully ignore—the FEC’s precedent regarding the republication of candidate campaign materials. FACT’s claim that “republishing campaign materials is a contribution to the candidate, even if the republication is only a small portion of a larger advertisement,” is simply incorrect as a matter of law.²⁹ The regulation itself includes an exception to the republication rule in

²² FEC MUR 6311 (Americans for Prosperity), Factual and Legal Analysis (Apr. 8, 2011).

²³ *Id.* at p. 2-3.

²⁴ FEC MUR 6311 (Americans for Prosperity), Certification (Apr. 7, 2011).

²⁵ FEC MUR 6311 (Americans for Prosperity), Factual and Legal Analysis at 5 (Apr. 8, 2011).

²⁶ *Id.* at p. 6.

²⁷ Majority Forward, “Twenty Years,” YOUTUBE (uploaded Feb. 18, 2020)

<https://www.youtube.com/watch?v=bA2Ao9zzAK8&feature=youtu.be>.

²⁸ *Id.*

²⁹ Compl. at p. 15.

instances where “the campaign material used consists of a brief quote of materials”³⁰ 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.”³¹ 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.³²

The Advertisement does not feature any video footage, images, or any other materials produced by Sara Gideon or her campaign committee. The Advertisement contains new footage filmed for the Advertisement. This footage was in no way prepared by Sara Gideon or her campaign. The Advertisement also features one image of Senator Collins and a stock image of prescription drugs. These images were likewise not prepared by Sara Gideon or her campaign. Finally, Respondent used publicly available information to create its own advertisements, with its own message.

In determining whether an entity has republished a candidate’s campaign materials under this regulatory standard, the Commission examines the degree of overlap between the two communications. The Commission has concluded that “mere thematic similarities between a candidate’s campaign materials and a third-party communication are insufficient to establish republication.”³³ According to the Commission, “similar sentences . . . do not rise to the level sufficient to indicate republication of campaign materials because of differences in wording or phrasing.”³⁴

Although the campaign’s website and the Advertisement share similar themes, it is clear that Respondent’s Advertisement contains its own words and reflects its own message. The Advertisement centers on the need for Susan Collins to listen to her constituents’ concerns by showing a town hall format, noting that Susan Collins has not hosted a town hall in 20 years, and ending with an ask for Susan Collins to abide by the democratic process and hear her constituents’ concerns.

The sole similarity between the Advertisement and the campaign’s website is that both presented widely-known, and publicly accessible information on Susan Collins’s political record—her history of voting against lowering drug prices and accepting contributions from the pharmaceutical and insurance industries. Senator Collins’s voting history and contribution history are publicly available facts—they are not “campaign materials.” Under clear Commission precedent, a mere

³⁰ 11 C.F.R. § 109.23(b)(4).

³¹ FEC MUR 6603, Statement of Reasons, Vice Chairman Matthew S. Peterson and Commissioners Caroline C. Hunter and Lee E. Goodman at 1 (citing FEC MUR 6357 (American Crossroads), Statement of Reasons at 4) (Dec. 17, 2015).

³² *Id.*

³³ FEC MUR 7124 (Katie McGinty for Senate), Factual and Legal Analysis at 11 (May 4, 2017).

³⁴ *Id.* at 10 (citing to FEC MUR 6502 (Nebraska Democratic State Central Committee), Factual & Legal Analysis at 9 (citing FEC MUR 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.”)).

similarity in themes, all that is present here, is insufficient to establish republication. Therefore, the facts presented in the Complaint do not demonstrate that the Advertisement resulted in republication under 11 C.F.R. § 109.21(c)(2), and the Complaint fails to allege any facts that, if true, demonstrate that the content prong of the Commission's coordinated communication test is met.

B. The Complaint Alleges No Facts that Establish the Advertisement Impermissibly Republished Campaign Materials

As discussed above, Respondent did not republish campaign materials prepared by Sara Gideon or her campaign committee in its Advertisement. Accordingly, this Complaint does not allege facts establishing that the advertisement at issue constitutes a contribution by Respondent to Sara Gideon or her campaign under 11 C.F.R. § 109.23(a), and thus, the Commission should dismiss the Complaint.

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.³⁵ In turn, the Commission may find “reason to believe” only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the Act.³⁶ Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true, and provide no independent basis for investigation.³⁷

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,



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³⁵ 52 U.S.C. § 30109(a)(2).

³⁶ See 11 C.F.R. § 111.4(a), (d); FEC MUR 4960 (Clinton for U.S. Senate), Statement of Reasons, Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas at 1. (Dec. 21, 2000).

³⁷ *Id.*