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VIA HAND DELIVERY

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Re: MUR 7727

Dear Mr. Jordan:

We write as counsel to Sara Gideon, Sara Gideon for Maine, and Lisa Lunn, in her official capacity as Treasurer (collectively, “Respondents”) 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 Respondents engaged in prohibited coordination with Majority Forward in connection with an advertisement highlighting 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 the Majority Forward advertisement references widely-known facts concerning Senator Collins’s political record that were listed on Respondents’ 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 Respondents 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 (the “Committee”), is Sara Gideon’s principal campaign committee.³ The Committee maintains a publicly available website located at

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).

www.saragideon.com. The Committee uses this website to communicate with the general public about Sara Gideon's background, her candidacy, her policy positions and more. One of Sara Gideon's top policy priorities is affordable health care, as demonstrated by her website, which includes a page entitled "Sara's Priorities: Healthcare" that lays out her position.⁴ In addition to including this information about Sara's position on healthcare, the website also previously featured a prominent box entitled "Important Update, What Mainers Need to Know" that linked to information on Sara's opponent'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.

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 the Committee.

In February 2020 and early March 2020, Majority Forward ran a 30-second advertisement entitled "Twenty Years" (the "Advertisement").⁵ 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 Advertisement does not mention Sara Gideon, nor does it contain any footage or photos taken from the Committee's website. Instead, the Advertisement's message is entirely focused on Senator Collins and her record. The sole similarity between the Advertisement and the Committee's website is that the Advertisement touches on two topics that are also generally reflected in the publicly available facts posted on the Committee's website - that Senator Collins has voted against lowering drug costs and that she has taken money from the pharmaceutical industry.

LEGAL ANALYSIS

The Complaint alleges that Respondents coordinated with Majority Forward 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,

⁴ Sara Gideon for Maine, "Sara's Priorities: Healthcare," available at <https://saragideon.com/issue/health-care/>.

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

⁶ *Id.*

would constitute a violation of the Act or FEC regulations and the Complaint must be dismissed.⁷

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 the Committee requested the Advertisement through public postings on its website that stated: “Important Update: What Mainers Need to Know.”⁸ This assertion is simply incorrect as a matter of law. 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 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

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).

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).

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 the Committee and the Advertisement is that the Advertisement touches on two *general themes* that were also reflected on the Committee's publicly available website - Senator Collins' votes against lowering drug costs and her receipt of contributions from the pharmaceutical and insurance industries.

Although the Committee's website and the Advertisement share similar themes, it is clear that Majority Forward'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. 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 Committee also included information on Senator Collins's voting history on prescription drug costs and receipt of money from the pharmaceutical and insurance industries on its publicly available website. As a matter of settled law, this is insufficient to establish coordination.

Even if the posting of information on the Committee'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).

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 Committee'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. 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

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.

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 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

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 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).

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

www.novemberiscoming.com which included the language “we will remember in November.”²³ The Commission 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 candidates.”²⁴ The Commission explained that “The ‘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”²⁵

Similarly, here, there is a reasonable interpretation of the Advertisement other than as an appeal to vote against Susan Collins. The Advertisement at issue is a town hall format with individuals asking questions about Susan Collins’s positions, and centers on the question of why Susan Collins has not held a town hall in 20 years.²⁶ 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.”²⁷ 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 constituent’s 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). FEC regulations provide that the content prong is met if a communication “disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate or the candidate's authorized committee, unless the dissemination, distribution, or republication is excepted under 11 CFR 109.23(b).”²⁸ Under 11 C.F.R. § 109.23(b) the content prong is not met where: “[t]he campaign material used consists of a brief quote of materials that demonstrate a candidate’s position as part of a person's expression of its own views.”²⁹

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

²³ *Id.* at p. 2-3.

²⁴ *Id.* at p. 5.

²⁵ *Id.* at p. 6.

²⁶ Majority Forward, “Twenty Years,” YOUTUBE (uploaded Feb. 18, 2020) <https://www.youtube.com/watch?v=bA2Ao9zzAK8&feature=youtu.be>.

²⁷ *Id.*

²⁸ *Id.* § 109.21(c)(2).

²⁹ *Id.* § 109.23(b)(4).

republication.”³⁰ 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.”³¹

Although the Committee’s website and the Advertisement share similar themes, it is clear that Majority Forward’s Advertisement contains its own words and reflects its own message. Indeed, 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 Advertisement does not feature any video footage, images, or any other materials produced by the Committee. The sole similarity between the Advertisement and the Committee’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 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).

C. The Complaint Alleges No Facts That Establish the Advertisement Impermissibly Republished Campaign Materials and Resulted in an In-Kind Contribution to Respondents

As discussed above, Majority Forward did not republish campaign materials prepared by Respondents in its Advertisement. Even if Majority Forward had republished campaign materials within the scope of the republication regulation at 11 CFR § 109.23, 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 11 CFR 109.21”³² As explained at length above, the Complaint fails to allege any facts that, even if taken as true, establish that Respondents coordinated with Majority Forward on the Advertisement at issue. Therefore, the Complaint does not state facts which support a finding that Respondents received an in-kind contribution in the form of the dissemination, distribution, or republication of candidate campaign materials.

³⁰ FEC MUR 7124 (Katie McGinty for Senate), Factual and Legal Analysis at 11 (May 4, 2017).

³¹ *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.”)).

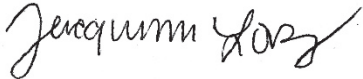
³² 11 C.F.R. § 109.23(a).

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.³³ 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.³⁴ Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true, and provide no independent basis for investigation.³⁵

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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Counsel to Respondents

³³ 52 U.S.C. § 30109(a)(2).

³⁴ 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).

³⁵ *Id.*