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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 7760

Dear Mr. Jordan:

We write as counsel to SMP and Rebecca Lambe, in her official capacity as Treasurer (collectively, “**Respondents**”), in response to the complaint in MUR 7760 (the “**Complaint**”) filed by the Foundation for Accountability and Civic Trust (“**FACT**”) on July 9, 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 John Hickenlooper, and his principal campaign committee, Hickenlooper for Colorado, in connection with a television advertisement produced by Respondents. The Complaint also alleges that Respondents’ advertisement constitutes an impermissible contribution through the republication of campaign materials. The Complaint’s only factual basis for these allegations is that Respondents’ advertisement included short clips of b-roll video footage which were used in a John Hickenlooper campaign advertisement, and that Respondents’ advertisement contained widely-known facts which happen to share some thematic similarities to a public website created by John Hickenlooper’s campaign. As FACT is well aware, the Commission has repeatedly made clear that such activity does not constitute “coordination” or “republication” for purposes of the Act. As the Complaint does not allege any additional facts to demonstrate that Respondents violated the Act or Commission regulations, the Commission should find no reason to believe that Respondents violated the Act or FEC regulations and should dismiss the Complaint.

FACTUAL BACKGROUND

John Hickenlooper is a candidate for U.S. Senate in Colorado in 2020.¹ Hickenlooper for Colorado is his principal campaign committee.² Cory Gardner is the current U.S. Senator in Colorado and is John Hickenlooper's opponent for the U.S. Senate race in Colorado in 2020.³

SMP is a federally registered super PAC.⁴ As a super PAC, SMP operates completely separate from any federal candidates and their committees, including John Hickenlooper and his campaign.

John Hickenlooper's campaign maintains a publicly available website located at www.getthefacts.co. This website contains information about Cory Gardner's policy positions as well as additional context concerning Republican attacks on John Hickenlooper.⁵

In June 2020, Respondents ran a 30-second advertisement entitled "Honest Mistake" (the "*Advertisement*").⁶ The Advertisement featured information about both Cory Gardner and John Hickenlooper and provided information about an ethics complaint filed against John Hickenlooper by a dark money group with Republican ties. The Advertisement also contains four short b-roll video clips featuring John Hickenlooper which appear on screen for a total of six seconds.

LEGAL ANALYSIS

A. The Complaint Alleges No Facts That Establish That the Advertisement at Issue Is a Coordinated Communication because the Complaint Alleges No Facts That Establish That the Conduct Prong Is Met

The Complaint alleges that Respondents coordinated with John Hickenlooper and his campaign on the Advertisement. However, no coordination occurred, and 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 conduct prong was satisfied in connection with the Advertisement. As such, the Complaint fails to allege facts which, even if

¹ John Hickenlooper, FEC Form 2, Statement of Candidacy (amended June 18, 2020), <https://docquery.fec.gov/pdf/803/202006189239944803/202006189239944803.pdf>.

² Hickenlooper for Colorado, FEC Form 1, Statement of Organization (amended June 18, 2020), <https://docquery.fec.gov/pdf/689/202006189239944689/202006189239944689.pdf>.

³ Cory Gardner, FEC Form 2, Statement of Candidacy (Jan. 23, 2015), <https://docquery.fec.gov/pdf/070/15020035070/15020035070.pdf>.

⁴ SMP, FEC Form 1, Statement of Organization (amended Oct. 1, 2019), <https://docquery.fec.gov/pdf/667/201910019163579667/201910019163579667.pdf>.

⁵ Hickenlooper for Colorado, Get the Facts, <https://www.getthefacts.co/> (last visited Aug. 29, 2020).

⁶ See Compl. p.3; SMP, "Honest Mistake," ADMO Creative, <https://host2.advertisinganalyticsllc.com/admo/viewer/2339525> (last visited Aug. 29, 2020).

taken as true, would constitute a violation of the Act or FEC regulations, and thus the Complaint must be dismissed.⁷

1. The Complaint's Claim That a Statement to the General Public on a Public Website Is a "Request or Suggestion" Is Incorrect as a Matter of Law

The Complaint claims that the Advertisement meets the conduct prong under 11 C.F.R. § 109.21(d)(1) because John Hickenlooper's campaign committee requested the Advertisement by posting information on a public website accompanied by the phrase: "Coloradans Need to Know."⁸

First, this statement is not a request or suggestion. As is self-evident, nothing about the above phrase requests or suggests that a third party create an advertisement.

Second, even if the above phrase could be interpreted as a request or suggestion to engage in a particular communication, because the statement was posted on a public website and was not sent to a select audience, the posting would not constitute a "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 As this language demonstrates, a request or suggestion made on a publicly available website does not, as a matter of law, satisfy the conduct prong.

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

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. p. 2, 12.

⁹ 11 C.F.R. § 109.21(d)(1).

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

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.”¹¹ 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 standard.¹²

The material facts at issue are identical to those the Commission considered in MUR 6821 and MUR 7124. Here, the Complaint claims that John Hickenlooper’s campaign requested or suggested the Advertisement by posting the phrase “Coloradans Need to Know” on a public website.¹³ Since the content appeared on a public website and was not sent to a select audience, it cannot constitute a “request or suggestion” under 11 C.F.R. § 109.21(d)(1), and as a matter of settled law is insufficient to establish coordination.

2. The Complaint’s Additional Allegations Are Speculative and Do Not Establish That Coordination Occurred

Perhaps because FACT 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 there was [sic] other communications instructing [Hickenlooper] to use this language.”¹⁴ Yet, the Complaint provides absolutely no evidence or support for the assertion that any non-public communication occurred. In fact, Respondents maintain 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 of candidates, a candidate’s authorized committee, a political party committee, or agents of the foregoing.

Furthermore, the Complaint alleges that the fact that the Advertisement aired twelve days after John Hickenlooper’s campaign posted information on its public website demonstrates coordination.¹⁵ The Commission previously dealt with similar baseless allegations from FACT 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

¹¹ See FEC MUR 6821 (Shaheen for Senate), Factual and Legal Analysis at 8 (Dec. 2, 2015).

¹² FEC MUR 7124 (Katie McGinty for Senate), Factual and Legal Analysis at 8-9 (May 4, 2017).

¹³ Compl. at 2, 12.

¹⁴ *Id.* at 14.

¹⁵ *Id.* at 12.

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

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 Advertisement Constitutes a Contribution by Disseminating, Distributing, or Republishing Campaign Material

Additionally, the Complaint fails to provide sufficient evidence to demonstrate that the Advertisement constitutes a contribution by Respondents to John Hickenlooper’s campaign by disseminating, distributing, or republishing campaign material.¹⁷

The Complaint alleges that the Advertisement constitutes republication of campaign materials as it contains themes similar to those present on John Hickenlooper’s campaign’s website, as well as short clips of b-roll video footage featuring John Hickenlooper which were used in a John Hickenlooper campaign advertisement and which appear on screen in the Advertisement for a total of six seconds.¹⁸ However, the Commission has consistently failed to find reason to believe that similar themes or the brief incorporation of a candidate’s campaign materials in a third party’s advertisement amount to republication under the Act or Commission regulations.

1. The Alleged Thematic Similarities between the Advertisement and Campaign Website Do Not Amount to Republication

Commission regulations explain that no contribution occurs when “[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.”¹⁹ 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.”²⁰ 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.”²¹

Although the campaign’s website and the Advertisement share similar themes, this is simply due to the fact that the statements at issue are general, widely-known facts about John

¹⁷ 52 U.S.C. § 30116(a)(7)(B)(iii); 11 C.F.R. § 109.23(a).

¹⁸ Compl. at 4-5, 7.

¹⁹ 11 C.F.R. § 109.23(b)(4).

²⁰ MUR 7124 (Katie McGinty for Senate), Factual and Legal Analysis at 11 (May 4, 2017).

²¹ *Id.* (citing to MUR 6502 (Nebraska Democratic State Central Committee), Factual & Legal Analysis at 9 (citing 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.”)).

Hickenlooper and Cory Gardner. Respondents' Advertisement contains its own message and delivers this message with its own words.

The Complaint falsely asserts that "60% of the messaging narration" in Respondents' Advertisement was taken "directly from" the campaign's website and the Complaint includes the below chart in an attempt to support this assertion.²² What the below chart actually demonstrates is that the Advertisement expresses its own views and does not constitute "republication" under the Act or Commission regulations.

Ad Time (30 seconds)	Senate Majority PAC's AD Narration	Hickenlooper's "Coloradans Need to Know" Website
0:00 - 0:03 (3 seconds)	"Cory Gardner votes 98% of the time with Donald Trump."	"Senator Cory Gardner stands with Trump 100% of the time – not Colorado."
0:07 - 0:15 (8 seconds)	"So it's no surprise they're attacking John Hickenlooper. That's why a Republican dark money group filed the ethics complaints to begin with."	"Republicans have attacked Hickenlooper for his trips to bring business to Colorado."
0:15-0:18 (3 seconds)	"But 95 of the 97 Republican charges were dismissed."	"Republicans made 97 allegations, 95 of them were dismissed."
0:18-0:22 (4 seconds)	"And the Denver Post said Hickenlooper made 'an honest mistake.'"	"In a recent editorial, the Denver Post called Hickenlooper 'an ethical public servant' who made 'an honest mistake.'"

The chart illustrates that other than the factual statement concerning the number of complaints filed and dismissed against John Hickenlooper and the quote from the Denver Post (both of which are factual statements, meaning that by their nature they cannot differ), each of Respondents' sentences in the chart above differ substantively from the sentences used on the campaign's website. For instance, Respondents' Advertisement states that "Cory Gardner votes 98% of the time with Donald Trump," while the campaign's website states that Cory Gardner "stands with Trump 100% of the time - not Colorado." These two messages are different in both phrasing and in meaning; the first is a factual representation of Cory Gardner's voting record whereas the second is simply a statement about Cory Gardner's general support of Donald Trump and is compared to Cory Gardner's support of Colorado.

²² Compl. at 4.

Similarly, FACT attempts to assert that the message in Respondents' Advertisement that "it's no surprise they're attacking John Hickenlooper. That's why a Republican dark money group filed the ethics complaints to begin with" is the same as the following statement posted by John Hickenlooper's campaign on a public website: "Republicans have attacked Hickenlooper for his trips to bring business to Colorado." Although both statements reference the fact that Republicans are attacking John Hickenlooper, that is where the similarity ends. Respondents' message provides more context on these attacks, explaining that they were made by a "dark money group," a fact which is not mentioned on John Hickenlooper's campaign website.²³ Additionally, the Complaint omits the fact that Respondents' statement is prefaced with the statement "Cory Gardner's critical to Mitch McConnell staying in power" which Respondents claim explains why "it's no surprise they're attacking John Hickenlooper." Respondents' message that a dark money group is attacking John Hickenlooper so that Mitch McConnell can stay in power is Respondents' own message, and it is markedly different from the statement on the campaign's website.

Accordingly, it is clear that Respondents' Advertisement contains Respondents' own words and Respondents' own message, and thus any similarities in the above statements do not rise to a level sufficient to constitute republication under the Act or Commission regulations.

2. The Brief Use of B-Roll Candidate Footage in the Advertisement Does Not Amount to Republication

Further, the Commission has consistently failed to find reason to believe that an advertisement which contains short snippets of b-roll video footage from a campaign violates the Act or FEC regulations by disseminating, distributing, or republishing campaign material.²⁴

In MUR 6902, the Commission failed to find reason to believe a violation of the Act or FEC regulations occurred when an advertisement produced by an independent expenditure-only PAC contained video footage from a campaign committee's advertisement. In the Statement of Reasons for voting against such a finding, three Commissioners wrote that "republication requires more than respondents creating and paying for advertisements that incorporate as background footage brief segments of video footage posted on publicly accessible websites by authorized committees of federal candidates. Here, snippets of b-roll footage of federal candidates were 'incorporated into [] communication[s] in which [respondents] add[ed their] own text, graphics, audio, and narration to create [their] own message.'"²⁵ Similarly, in MUR

²³ Hickenlooper for Colorado, Get the Facts, <https://www.getthefacts.co/> (last visited Aug. 29, 2020).

²⁴ See, e.g., MUR 7432 (John James for Senate, et al.), Statement of Reasons, Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 2 (Aug. 30, 2019) (In MUR 7432, the Commission failed to find reason to believe a violation occurred when a 30-second advertisement produced by a PAC contained 6 seconds of video from a campaign's advertisement. In the Statement of Reasons, two Commissioners wrote that "[o]ur position on the Act's republication provision has been consistent: '[I]t is designed to capture situations where third parties [] subsidize a candidate's campaign by expanding the distribution of communications whose content, format, and overall message are devised by the candidate.'").

²⁵ MURs 6603, 6777, 6801, 6870, 6902 (Al Franken for Senate 2014, et al.), Statement of Reasons, Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman at 2 (Dec. 17, 2015).

6357, the Commission failed to find reason to believe a violation occurred when American Crossroads, an independent expenditure-only PAC, used several clips of video footage posted online by the candidate or the candidate's committee amounting to 10-15 seconds in a 30-second advertisement.²⁶ Three Commissioners stated that the use of campaign footage did not constitute republication because "the few fleeting images from [the campaign's] footage are incorporated into a communication in which American Crossroads adds its own text, graphics, audio, and narration to create its own message. [The advertisement was] neither in whole nor in substantial part [] anything close to a carbon copy of the [campaign's] footage."²⁷

Here, just as in the matters referenced above, Respondents' Advertisement only contains short snippets of candidate b-roll footage which contain no audio and convey no messages from John Hickenlooper's campaign, and which were shown on screen for a total of 6 seconds out of the 30 second Advertisement. Additionally, Respondents added their own text, graphics, audio, and narration to create their own message.

Pursuant to established Commission precedent, the brief incorporation of materials from a campaign's public website in an advertisement which contains its own words and reflects its own message does not amount to republication under 11 C.F.R. § 109.23(a). Accordingly, this Complaint does not allege any facts establishing that the Advertisement constitutes a contribution by Respondents to John Hickenlooper's 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.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 they provide no independent basis for investigation.³⁰

²⁶ MUR 6357 (American Crossroads), Factual and Legal Analysis at 1-2, 6-7 (Jan. 27, 2012).

²⁷ MUR 6357 (American Crossroads), Statement of Reasons, Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen at 4 (Feb. 22, 2012).


²⁸ 52 U.S.C. § 30109(a)(2).

²⁹ 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).

³⁰ 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 2 (Dec. 21, 2000).

The Complaint has not alleged any 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
Ezra W. Reese
Rebecca K. Mears
Counsel to Respondents