



FEDERAL ELECTION COMMISSION
Washington, DC 20463

May 31, 2022

VIA ELECTRONIC MAIL ONLY

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Mark Prak, Esq.
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Brooks Pierce
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Suite 1700
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RE: MUR 7835
WMTW-TV

Dear Messrs. Prak and Schauer:

On October 28, 2020, the Federal Election Commission notified your client, WMTW-TV, of a complaint alleging violations of the Federal Election Campaign Act of 1971, as amended. A copy of the complaint was forwarded to your client at that time. Upon further review of the allegations contained in the complaint and information supplied by your client, the Commission, on May 24, 2022, found no reason to believe that WMTW-TV violated 52 U.S.C. § 30118(a) in connection with its staging of the candidate debate. The Factual and Legal Analysis, which more fully explains the Commission's decision, is enclosed for your information.

Documents related to the case will be placed on the public record within 30 days. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016).

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Letter to Mark Prak, Esq., & Craig Schauer, Esq.

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If you have any questions, please contact Thaddeus H. Ewald, the attorney assigned to this matter, at (202) 694-1650 or tewald@fec.gov.

Sincerely,

Mark Allen

Mark Allen
Assistant General Counsel

Enclosure:

Factual and Legal Analysis

FEDERAL ELECTION COMMISSION**FACTUAL AND LEGAL ANALYSIS****RESPONDENT:** WMTW-TV

MUR 7835

I. INTRODUCTION

The Complaint alleges that WMTW-TV (“WMTW”), a Maine television station, failed to use pre-established objective criteria in selecting participants for an October 28, 2020, candidate debate, as required by Commission regulations, resulting in the exclusion of two U.S. Senate candidates from the debate and prohibited corporate contributions from WMTW to the participating candidates. WMTW responded by providing contemporaneous documentation of the criteria used in advance of the debate and sworn declarations from station officials describing the development and application of the criteria used for selecting debate participants. For the reasons set forth below, the Commission finds no reason to believe that WMTW violated 52 U.S.C. § 30118(a) by failing to comply with the requirements for staging debates.

II. FACTUAL BACKGROUND

WMTW is a television station in Maine owned by Hearst Television, Inc.¹ The station has hosted debates between political candidates, including one it staged on October 28, 2020 for Maine’s U.S. Senate race.² Four candidates appeared on the ballot for that election: U.S. Senator Susan Collins (Republican); Speaker of the Maine House of Representatives Sara Gideon (Democrat); Max Linn (independent); and Lisa Savage (independent Green).³

¹ Compl. at 1 (Oct. 23, 2020); Resp. at 5 (Dec. 8, 2020).

² Compl. at 2, 4; Resp. at 1; Resp., Decl. of David Abel ¶ 3 (“Abel Decl.”); Resp., Decl. of Amy Beveridge ¶ 4 (“Beveridge Decl.”).

³ Compl. at 1; Resp. at 2.

1 According to their October Quarterly reports, as of September 30, 2020, the total election
2 cycle spending reported by each candidate was: Gideon at \$35,701,610; Collins at \$19,193,484;
3 Linn at \$439,898; and Savage at \$42,035.⁴ At the same time, the cash-on-hand reported by each
4 of the candidates was: Gideon with \$22,732,633; Collins with \$6,568,317; Linn with \$10,280;
5 and Savage with \$115,067.⁵ Polling at the time reflected similar standing among the candidates.
6 Collins was polling between 38% and 45% and Gideon between 44% and 49%.⁶ The Complaint
7 asserts that, in the polling closest to the debate, Savage and Linn had a combined polling of 13%,
8 but does not cite to specific polls in support of the statement.⁷ Polling results included in the
9 Response reflect Savage and Linn at a combined range of 3% to 6.9% in October polls.⁸

10 On or about October 21, 2020, Linn and Savage became aware from third-party sources
11 that WMTW had scheduled the 2020 debate.⁹ On October 22, when Savage's campaign
12 inquired as to the criteria the station used to determine participants, WMTW's legal counsel,
13 Mark Prak, responded, in part:

14 WMTW made it's [sic] news judgment about whom to include in
15 its debate based on predetermined objective criteria. Those
16 criteria included the following: (1) fundraising support,
17 (2) primary voting numbers, (3) past electoral performance,
18 (4) previous offices held, (5) party voting registration numbers,
19 and (6) assessment of the campaign's viability (including

⁴ Sara Gideon for Maine, 2020 October Quarterly Report at 2 (Oct. 15, 2020); Collins for Senator, 2020 October Quarterly Report at 2 (Oct. 15, 2020); Max Linn for Senate 2020, 2020 October Quarterly Report at 2 (Oct. 15, 2020); Lisa for Maine, Amended 2020 October Quarterly Report at 2 (Oct. 9, 2020).

⁵ Sara Gideon for Maine, 2020 October Quarterly Report at 2 (Oct. 15, 2020); Collins for Senator, 2020 October Quarterly Report at 2 (Oct. 15, 2020); Max Linn for Senate 2020, 2020 October Quarterly Report at 2 (Oct. 15, 2020); Lisa for Maine, Amended 2020 October Quarterly Report at 2 (Oct. 9, 2020).

⁶ Resp. at 3.

⁷ Compl. at 5.

⁸ See Beveridge Decl., Ex. A (showing results of BDN Critical Insights's Sept. 25 - Oct. 4 poll having Linn at 1% and Savage at 2% and results of Pan Atlantic's Oct. 2-6 poll having Linn at 2% and Savage at 4.9%).

⁹ Compl. at 2.

1 campaign organization and outreach, coverage by major media,
2 and support in public opinion polls).¹⁰

3 This was the first time Linn or Savage had been informed of the debate criteria, and the
4 Complaint alleges that these six criteria were inconsistent with the station's selection criteria for
5 its 2018 U.S. Senate debate.¹¹

6 In its Response to the Complaint, WMTW asserts that debate planning began in
7 August 2020 and that four persons participated in the station's development of the selection
8 criteria: David Abel, WMTW's President and General Manager; Amy Beveridge, WMTW's
9 News Director; Andrew Vrees, Vice President of News for Hearst Television; and Prak.¹²
10 According to the declarations and a contemporaneous email attached to the Response, the final
11 criteria settled on for selecting debate participants were:

- 12 (1) Whether the candidate was currently holding elected office;
13 (2) Whether the candidate had previously held elected office;
14 (3) Whether the candidate had previously run for elected office;
15 (4) The amount of political contributions the candidate received in his or her last
16 race for elected office;
17 (5) The percentage of vote the candidate received in his or her last race for an
18 elected office;
19 (6) The candidate's fundraising for the current Senatorial race; and
20 (7) The candidate's performance in independent polls in the current Senatorial
21 race.¹³

¹⁰ *Id.*; Compl., Ex. A (Oct. 22, 2020 email from Prak to Sam Pfeifle of Lisa for Maine).

¹¹ Compl. at 2, 4. In 2018, WMTW also staged a debate for senatorial candidates, and the Complaint alleges that one of those participants reported less in fundraising than either Linn or Savage and had never previously held elected office. *Id.* at 4.

¹² Resp. at 1; Abel Decl. ¶ 4; Beveridge Decl. ¶ 5.

¹³ Resp. at 2; Abel Decl. ¶ 6; Beveridge Decl. ¶ 8; Beveridge Decl., Ex. A (Oct. 19, 2020 email from Beveridge to Prak copying Abel attaching analysis of debate criteria).

1 Linn and Savage were trailing Collins and Gideon in polling and fundraising when
2 WMTW established its criteria,¹⁴ and, according to the station, Savage’s campaign manager had
3 reached out to Beveridge in August “making a case for her to be invited to” WMTW’s debate.¹⁵
4 WMTW states that it decided to wait until mid-October to complete its research into participants
5 to see if Linn and Savage “would perform better under the pre-established criteria.”¹⁶ WMTW
6 states that it completed its analysis on October 19, 2020, and, relying on the seven criteria and its
7 “journalist experiences,” the station determined that the “lone newsworthy candidates” were
8 Collins and Gideon.¹⁷ WMTW then invited only Collins and Gideon to participate in a debate
9 scheduled for, and held on, October 28.¹⁸

10 As to the six criteria provided to Savage by Prak, WMTW responds that they were
11 “intended to be examples of permissible criteria,” and the station asserts that the seven criteria
12 used were pre-established and objective.¹⁹ In its response, the station provided two declarations
13 – one from Abel and one from Beveridge – providing the history of the development of the seven

¹⁴ Collins for Senator, Amended 2020 July Quarterly Report at 2 (Nov. 17, 2020) (reflecting \$5,582,159.93 cash on hand as of June 30, 2020); Sara Gideon for Maine, 2020 July Quarterly Report at 2 (July 15, 2020) (reflecting \$5,404,313.56 cash on hand as of June 30, 2020); Max Linn for Senate 2020, Amended 2020 July Quarterly Report at 2 (Aug. 7, 2020) (reflecting \$0 cash on hand as of June 30, 2020); Lisa for Maine, 2020 July Quarterly Report at 2 (July 10, 2020) (reflecting \$25,509.07 cash on hand as of June 30, 2020); Beveridge Decl., Ex. A (reflecting polling results into August with Linn at 1% and Savage at 5% and 3%); *see also* Beveridge Decl. ¶ 9 (“Mr. Linn and Ms. Savage were not listed in the vast majority of available polls; and their campaign-finance reports at the time showed that neither had raised more than \$70,000 (whereas Sen. Collins and Ms. Gideon had both eclipsed \$15,000,000 already).”).

¹⁵ Beveridge Decl., Ex. A. All four candidates participated in four debates that were “televised on networks other than WMTW.” Compl. at 2.

¹⁶ Resp. at 2 (citing Beveridge Decl. ¶ 9).

¹⁷ Resp. at 3; Abel Decl. ¶¶ 9-12; Beveridge Decl. ¶¶ 11-12.

¹⁸ Resp. at 3; Abel Decl. ¶¶ 13-15.

¹⁹ *See* Resp. at 3, 9.

1 debate criteria, as well as an October 19, 2020 email from Beveridge to Prak, copying Abel,
2 showing all four candidates being evaluated against the seven criteria.²⁰

3 **III. LEGAL ANALYSIS**

4 **A. Background Law**

5 The Federal Election Campaign Act of 1971, as amended (the “Act”), prohibits any
6 corporation from making contributions to a federal candidate.²¹ Funds used or provided “to
7 defray costs incurred in staging candidate debates” are not contributions, provided that the
8 debates are conducted “in accordance with the provisions of 11 C.F.R. [§§] 110.13 and
9 114.4(f).”²² “Broadcasters (including a cable television operator, programmer or producer) *bona*
10 *fide* newspapers, magazines and other periodical publications” are specifically permitted to stage
11 candidate debates.²³

12 The debate regulations leave the structure of the debate to the discretion of the staging
13 organization. The only requirements are that: (1) the debate includes at least two candidates;
14 (2) the organization does not structure the debates to promote or advance one candidate over
15 another; and (3) the staging organization uses “pre-established objective criteria to determine
16 which candidates may participate in the debate.”²⁴ The Complaint alleges that WMTW’s
17 selection criteria were neither “pre-established” nor “objective.”

²⁰ Abel Decl.; Beveridge Decl.; Beveridge Decl., Ex. A. The Response does not address why parts of the email attached to Beveridge’s declaration as Exhibit A are redacted.

²¹ 52 U.S.C. § 30118(a).

²² See 11 C.F.R. § 100.92.

²³ *Id.* § 110.13(a)(2).

²⁴ *Id.* § 110.13(b)-(c); see generally *Readers Digest Ass’n, Inc. v. FEC*, 509 F. Supp. 1210, 1214 (S.D.N.Y. 1981).

1 Although the regulation does not define “objective criteria,” it does not “mandat[e] a
2 single set of objective criteria all staging organizations must follow, but rather [gives] the
3 individual organizations leeway to decide what specific criteria to use.”²⁵ Objective selection
4 criteria are “not require[d] [to contain] rigid definitions or required percentages.”²⁶ To qualify as
5 “objective,” the criteria need not “be stripped of all subjectivity or be judged only in terms of
6 tangible, arithmetical cut-offs. Rather, it appears that they must be free of ‘content bias,’ and not
7 geared to the ‘selection of certain pre-chosen participants.’”²⁷ Major party status can be a factor
8 considered by a staging organization so long as it is not the only factor.²⁸ Both polling data and
9 financial disclosures have been considered objective criteria.²⁹

10 The Commission has explained that section 110.13 does not require that candidate
11 selection be reduced to writing or made available to all candidates, but that staging organizations
12 “must be able to show that their objective criteria were used to pick the participants, and that the
13 criteria were not designed to result in the selection of pre-chosen participants.”³⁰ Further, “the
14 rule at section 110.13(c) . . . is not intended to maximize the number of debate participants; it is

²⁵ *Buchanan v. FEC*, 112 F. Supp. 2d 58, 73 (D.D.C. 2000) (quoting *Perot v. FEC*, 97 F.3d 553, 560 (D.C. Cir. 1996) (internal citations omitted)); see Factual & Legal Analysis (“F&LA”) at 22, MURs 6869R & 6942R (Commission on Presidential Debates).

²⁶ F&LA at 7, MUR 6383R (Ohio News Organization, *et al.*) (quoting First Gen. Counsel’s Rpt. (“First GCR”) at 19, MURs 4956, 4962 & 4963 (Union Leader Corp, *et al.*)).

²⁷ F&LA at 7, MUR 6383R (quoting First GCR at 23, MUR 4956, 4962, 4963); *cf. Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 682 (1998) (observing in a case involving a First Amendment challenge to a state-owned television network’s decision on a candidate’s exclusion from a televised debate that “objectivity” is based on a “reasonable, viewpoint neutral exercise of journalistic discretion”).

²⁸ 11 C.F.R. § 110.13(c); Explanation & Justification, Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates, 60 Fed. Reg. 64,260, 64,262 (Dec. 14, 1995) (“E&J”); F&LA at 7, MUR 6383R.

²⁹ *La Botz v. FEC*, 889 F. Supp. 2d 51, 63-64 (D.D.C. 2012); *Buchanan*, 112 F. Supp. 2d at 74 (concluding that polling data is objective); *Ark. Educ. Television Comm’n*, 523 U.S. at 682 (citing lack of financial support as an objective indicator).

³⁰ E&J, 60 Fed. Reg. at 64,262; F&LA at 8-9, MUR 7541 (Columbus Metropolitan Club, *et al.*).

1 intended to ensure that staging organizations do not select participants in such a way that the
2 costs of a debate constitute corporate contributions to the candidates taking part.”³¹

3 **B. The Commission Finds No Reason to Believe that WMTW Made a**
4 **Prohibited Corporate Contribution**

5 *1. Pre-established Selection Criteria*

6 The available information shows that WMTW used pre-established criteria in selecting
7 debate participants. WMTW attached to its Response an email dated October 19, 2020, showing
8 all four candidates evaluated against its seven criteria to determine participation in the
9 October 28 debate, as well as two declarations attesting to the criteria’s development two months
10 prior, in August 2020.³²

11 The Complaint bases its allegation that the criteria were not pre-established on the fact
12 that they were not shared with Linn or Savage in advance of WMTW’s selection of debate
13 participants.³³ The Commission has encouraged debate staging organizations to share criteria in
14 advance of the debates;³⁴ nevertheless, sharing the selection criteria is not required.³⁵ Thus, even
15 if the criteria WMTW used had been the six factors shared with Savage after the participants had
16 been selected, they could have still been considered pre-established under the Act and
17 Commission regulations.³⁶

³¹ E&J, 60 Fed. Reg. at 64,262; *see* F&LA at 32, MUR 6869R & 6942R.

³² *See* Beveridge Decl., Ex. A.

³³ Compl. at 3.

³⁴ *See* E&J, 60 Fed. Reg. at 64,262; F&LA at 10, MURs 7484 & 7514 (Nexstar Broadcasting, Inc., *et al.*).

³⁵ *See* E&J, 60 Fed. Reg. at 64,262.

³⁶ *See* F&LA at 8-9, MUR 7541.

1 2. *Objective Selection Criteria*

2 The seven criteria employed by WMTW are of the type the Commission has previously
3 found to be objective. For example, in MUR 5395 (Dow Jones, *et al.*), the Commission found no
4 reason to believe where one debate sponsor employed a criterion of the candidate's prior service
5 in statewide office that served to demonstrate some level of recognition as a "serious
6 candidate,"³⁷ and another debate sponsor used a criterion of "whether the candidates had
7 demonstrated the potential to fundraise successfully" that was directed towards examining public
8 interest and the level of competitiveness of the candidate's campaign.³⁸ In MUR 6111
9 (Columbus Metropolitan Club), the Commission found "receiv[ing] five percent or more of
10 support in a professionally conducted independent poll or survey" to be an objective criterion.³⁹

11 The available information does not suggest that WMTW's criteria were content driven or
12 geared to selecting pre-chosen participants.⁴⁰ WMTW states that it was looking to stage a debate

³⁷ First GCR at 14, MUR 5395 (Dow Jones, *et al.*); Certification ¶ 1 (Jan. 21, 2005), MUR 5395 (approving First GCR's recommendations). We note that the relevant debate sponsor in MUR 5395 was staging a presidential primary debate for the 2004 Democratic nomination. The full criteria for participation in that debate was the filing of a formal declaration of candidacy with the Commission and *either* prior service in statewide office *or* support of at least one percent (1%) of the Democratic electorate. First GCR at 13-14, MUR 5395.

³⁸ First GCR at 9, MUR 5395; Certification ¶ 1 (Jan. 21, 2005), MUR 5395 (approving First GCR's recommendations); *see also* F&LA at 9, MURs 7484 & 7514 (finding \$50,000 fundraising threshold in Nevada senate race an objective debate criterion).

³⁹ F&LA at 5, MUR 6111 (Columbus Metropolitan Club); *cf.* F&LA at 7-8, MUR 6383R (Ohio News Organization, *et al.*) (citing *La Botz*, 889 F. Supp. 2d at 63-64) (noting on remand that the district court had found debate sponsor using polling, input from political reporters, and financial disclosures to pare debate down to the two frontrunners to be "acceptably 'objective'"). The Commission has also previously found the use of polling without thresholds to be an objective criterion. *See* First GCR at 31-32 & Certification ¶ 2 (Nov. 29, 2000), MURs 4956, 4962 & 4963 (Gore 2000, Inc., *et al.*) (approving First GCR's recommendations) (finding "[t]he candidate's ability to fundraise" and his "level of financial support" to be "sufficiently 'objective' for purposes of the statute and regulations"); First GCR at 7, 8, 9 & Certification ¶ 1 (Jan. 21, 2005), MUR 5395 (approving First GCR's recommendations) (finding "standing in the public opinion polls" among criteria "geared towards examining the levels of public interest and organization of the candidate's campaign," not "geared towards selecting pre-chosen participants," and not "appear[ing] to exclude candidates based on content bias").

⁴⁰ *See* First GCR at 32 & Certification ¶ 2 (Nov. 29, 2000), MURs 4956, 4962 & 4963 (approving First GCR's recommendations).

1 featuring viable candidates.⁴¹ “Courts have approved debate criteria not only when debate
2 sponsors wish to narrow large fields of candidates but also to ensure that voters hear only from
3 viable candidates.”⁴²

4 WMTW states that, based on the available information at the time, its journalistic
5 determination was that Collins and Gideon were the only two viable candidates in the race.⁴³ As
6 reflected in the candidates’ latest FEC filings available to WMTW prior to selecting debate
7 participants, Linn had \$10,280 cash on hand and had spent \$439,898 in the total election-cycle-
8 to-date, and Savage reported \$115,067 cash on hand and \$42,035 in total spending,⁴⁴ whereas
9 Collins and Gideon had spent \$20 million and \$35.7 million, respectively, with millions more in
10 cash on hand.⁴⁵ For the two polls that reflected opinions of Maine voters in October 2020,
11 Collins polled at 39.8% and 43%, and Gideon polled at 46.9% and 44%.⁴⁶ The same polls
12 showed Linn at 2% and 1% and Savage at 4.9% and 2%.⁴⁷

13 The Complaint’s arguments with regard to objectivity center on the lack of thresholds for
14 otherwise objective criteria and the way in which the criteria function to the “exclu[sion] of
15 newcomers.”⁴⁸ First, although fundraising, polling, and primary voting numbers are otherwise

⁴¹ Resp. at 8; Abel Decl. ¶ 12; Beveridge Decl. ¶¶ 6, 12.

⁴² F&LA at 10, MUR 7484 & 7514; *see La Botz*, 889 F. Supp. 2d at 63 (polling data and fundraising reports may be used as “an objective measure of a candidate’s viability”); *cf. Buchanan*, 112 F. Supp. 2d at 75 (“It is difficult to understand why it would be unreasonable or subjective to consider the extent of a candidate’s electoral support prior to the debate to determine whether the candidate is viable enough to be included.”).

⁴³ Resp. at 8; Abel Decl. ¶ 12; Beveridge Decl. ¶¶ 6, 12.

⁴⁴ *See Beveridge Decl.*, Ex. A; *supra* notes 4-5 and accompanying text.

⁴⁵ *See supra* notes 4-5 and accompanying text.

⁴⁶ *See Beveridge Decl.*, Ex. A.

⁴⁷ *Id.*

⁴⁸ Compl. at 4-6. Because the six criteria shared with Linn and Savage are not the same as the seven criteria that WMTW used, the Complaint’s arguments do not completely align; however, there is sufficient overlap with the seven criteria used to consider the arguments.

1 “quantifi[able] and objective,” without thresholds, the Complaint argues that they cannot be
2 objectively implemented.⁴⁹ Second, the criteria of past electoral performance and previous
3 offices held “function[] to completely bar newcomers.”⁵⁰ To argue that WMTW applied the
4 criteria in a subjective manner, the Complaint relies heavily on WMTW’s selection of a
5 Democratic candidate to participate in the 2018 debate who is alleged to have fundraising and
6 polling numbers similar to Linn and Savage and who had also never held previous office.⁵¹

7 The argument offered in the Complaint is not persuasive. *First*, the Act and Commission
8 regulations do not require specific benchmarks in order to satisfy objectivity.⁵² The relevant
9 inquiry is whether the criterion is objective.⁵³ *Second*, the Act and Commission regulations do
10 not require consistency over election cycles in order to satisfy the objectivity requirement.⁵⁴
11 WMTW acknowledges that it used different debate selection criteria than it did in 2018 but also
12 notes that, because there was only one viable candidate in the 2018 race, the station invited non-
13 viable candidates in order to be able to stage a debate at all.⁵⁵ In short, the available information
14 does not suggest that WMTW chose criteria designed to result in the selection of Collins and

⁴⁹ *Id.* at 4-5.

⁵⁰ *Id.* at 4.

⁵¹ *Id.* at 4-5; *see also* Ringelstein for Maine, 2018 October Quarterly Report at 2 (Oct. 15, 2018) (reflecting \$9,299 cash on hand as of Sept. 30, 2018 and total election-cycle-to-date spending of \$314,677).

⁵² *See supra* note 39.

⁵³ E&J, 60 Fed. Reg. at 64,262; *see* F&LA at 32, MURs 6869R & 6942R (Commission on Presidential Debates).

⁵⁴ *Cf.* E&J, 60 Fed. Reg. at 64,262 (“[N]othing in the Commission’s regulations or guidance require a debate staging organization to provide the criteria to candidates in advance of the debate.”).

⁵⁵ Resp. at 10-11; Abel Decl. ¶¶ 15, 16. The Response also notes that the 2018 debate was aired outside of primetime in contrast with the primetime 2020 debate. Abel Decl. ¶¶ 15, 16.

1 Gideon “in such a way that the costs of [the] debate constitute corporate contributions to the
2 candidates.”⁵⁶

3 Accordingly, the Commission finds no reason to believe that WMTW made prohibited
4 corporate contributions in violation of 52 U.S.C. § 30118(a).

⁵⁶ E&J, 60 Fed. Reg. at 64,262; *see* F&LA at 32, MUR 6869R & 6942R; F&LA at 8-9, MUR 7541 (Columbus Metropolitan Club, *et al.*).