

COVINGTONBEIJING BRUSSELS DUBAI FRANKFURT JOHANNESBURG
LONDON LOS ANGELES NEW YORK PALO ALTO
SAN FRANCISCO SEOUL SHANGHAI WASHINGTONCovington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
T +1 202 662 6000**Via Electronic Mail**

December 21, 2020

Mr. Jeff S. Jordan
Federal Election Commission
Office of Complaints Examination
and Legal Administration
1050 1st Street NE
Washington, DC 20463**Re: Response of Biden for President - MUR 7841**

Dear Mr. Jordan:

We write on behalf of our client, Biden for President (“the Committee”), in response to your letter dated November 4, 2020 and the accompanying complaint. The Commission should find no reason to believe that Biden for President violated the Act, and dismiss the complaint because it fails to allege any facts, much less facts based on personal knowledge, that would constitute a violation of the Federal Election Campaign Act of 1971, as amended (“the Act”).

I. Factual Background

On October 26, 2020, Eugene Delgaudio, on behalf of himself and Public Advocate of the United States, filed a complaint against Twitter and “the Biden-Harris campaign.” At its core, the complaint alleges that while Mr. Delgaudio does not know why Twitter suspended his account, he suspects that it was because he wrote favorably of President Trump, that Twitter was biased in favor of Vice President Biden, and the company acted on that bias. By choosing not to do business with him, Mr. Delgaudio believes Twitter made an in-kind contribution, for his writings, if they continued to be published on Twitter, would have aided President Trump’s re-election. As to coordination, again, Mr. Delgaudio acknowledges that he has no evidence of any coordination between the parties, nor even of any communications of any sort between Twitter and Biden for President. Undaunted, he argues that an investigation into whether such evidence exists should begin, principally because he has identified people who, at one time or another, worked for Twitter and the Biden-Harris transition, the FBI during the Obama administration or Senator Harris’s office.

II. Analysis

The complaint lacks any factual predicate for an investigation, or a sound legal theory that a violation of FECA occurred, and should be dismissed as a result. If Black’s Law Dictionary were to define “fishing expedition,” it might point to Mr. Delgaudio’s complaint as an example.

COVINGTON

Mr. Jeff S. Jordan
December 21, 2020
Page 2

The complaint cites no authority for the proposition, nor are we aware of any, that would make a corporation's decision not to do business with someone an in-kind contribution to a candidate the erstwhile customer opposed. Nor is Mr. Delgaudio aware of any facts that would support his claim under such a theory. In fact, Mr. Delgaudio acknowledges he does not know why Twitter suspended his account.

His second claim—that there was some communication between Twitter and Biden for President that would constitute “coordination” of the “expenditure” he believe occurred—similarly has no facts to support it. Mr. Delgaudio is unaware of any communications between Twitter and Biden for President, much less communications about him, his posts, or Twitter's decision to terminate his use of Twitter's programs.

Nor does he recite or analyze the factors established by the Commission in 11 C.F.R. § 109.21 for determining whether a communication is coordinated. Were he to do so, he would find the communications at issue fail the content standards for coordination for they are neither (1) an electioneering communication, nor (2) a “public communication” that meets the criteria set forth in FEC regulations.¹ *Id.* § 109.21(c). Similarly, Mr. Delgaudio concedes that he “know[s] of no direct evidence . . . that Respondents have coordinated their activities with federal political candidates.” Compl. at 7. The complaint contains no facts, much less sworn facts, that Biden for President or Twitter engaged in any *conduct* that would meet the FEC's test in assessing if coordination occurred. *Id.* § 109.2(d). The best Mr. Delgaudio's complaint can do is to infer that the Biden *Transition's* hiring of a former Twitter public policy director demonstrates that the Biden *Campaign* violated the Act.² The FEC has long treated such speculation as an insufficient basis to find “reason to believe” a violation has occurred. *See, e.g.*, FEC MUR 4960, Statement of Reasons of Commissioner David Mason, Karl Sandstrom, Bradley Smith and Scott Thomas, at 3.

III. Conclusion

The complaint in this matter lacks any sworn allegations that, even if true, would suggest that the Committee has coordinated any expenditures with Twitter, or committed any other violation of the Act. The Commission should find no reason to believe that Biden for President has violated the Act and dismiss the complaint.

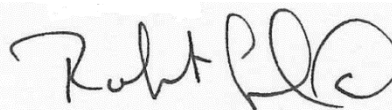
¹ While not entirely clear from the complaint, the “communications” alleged to be “coordinated” in this matter involve a notation on a restricted or suspended account page indicating that the account has been restricted or suspended. These notations are not paid advertisements and the notations are visible only to viewers of the account over the Internet. This online activity qualifies for exemptions from both the definition of “electioneering communication” and “public communication.” *See* 11 C.F.R. § 100.29(c)(1) and § 100.26.

² *See* S. Overly, “Twitter Public Policy Director Decamps for Biden Transition Team,” *Politico*, Sept. 17, 2020, <https://www.politico.com/news/2020/09/17/twitter-public-policy-director-decamps-for-biden-transition-team-417293> (stating that “Twitter's public policy director, Carlos Manje, has left the social media company's Washington office to join the transition team for Democratic presidential nominee Joe Biden.”).

COVINGTON

Mr. Jeff S. Jordan
December 21, 2020
Page 3

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert D. Lenhard", is written over a light gray rectangular background.

Robert D. Lenhard
Derek Lawlor
Matthew S. Shapanka
COVINGTON & BURLING LLP
850 Tenth Street NW
Washington, DC 20001
(202) 662-5940

Counsel for Biden for President