



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C.

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

Fox Corporation, *et al.*

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MURs 8117 & 8118

**STATEMENT OF REASONS OF
CHAIRMAN SEAN J. COOKSEY**

In this matter, the Commission declined to find reason to believe that Fox Corporation made—and Make America Great Again PAC (formerly known as Donald J. Trump for President, Inc.) (“MAGA PAC”) knowingly accepted—a prohibited corporate contribution in the form of information shared by Fox’s Chair Rupert Murdoch with Jared Kushner, the son-in-law of 2020 presidential candidate Donald Trump.¹ This statement explains why I did not adopt Office of the General Counsel’s (“OGC”) recommendation to find the Respondents had violated the Federal Election Campaign Act of 1971, as amended (the “Act”), and voted instead to close the case file.

I. Factual Background

The two Complaints in this matter allege that Rupert Murdoch, the Chair of Fox Corporation, sent a series of emails to Jared Kushner in September 2020 that conveyed “material, non-public information” about the 2020 Biden campaign’s “advertising and messaging strategy,” including “the actual advertisements that Mr. Biden placed with Fox News *before they aired publicly.*”² In his initial email to Kushner, on September 24th, 2020, Murdoch wrote, “Know you are spending less on tv than Biden. However my people tell me his advs are a lot better creatively than yours. Just passing by it on [sic].”³ After Kushner replied the next day that the Trump campaign would also “have some new creative out this week,” Murdoch responded that a new Trump ad for “this Sunday” was “an improvement,” then forwarded Kushner an email from a Fox

¹ Certification (Oct. 8, 2024), MURs 8117 & 8118 (Fox Corporation, *et al.*).

² Complaint at 4 (Mar. 3, 2023), MUR 8117 (Fox Corporation, *et al.*) (emphasis in original). Although the Complaints refer to Murdoch sharing multiple advertisements with Kushner, the available evidence shows that Murdoch sent only one advertisement to Kushner.

³ See Fox Corporation Response, Exs. B, C (Mar. 9, 2023), MURs 8117 & 8118 (Fox Corporation, *et al.*).

employee with a link to the Biden campaign ad scheduled to air on September 27th, 2020, during the broadcast of an NFL game on Fox.⁴

According to the Complaints, the advertising and information that Murdoch provided to Kushner were “material to the [Biden] campaign’s strategy and of value under the Act and the Commission’s regulations.”⁵ Therefore, the Complaints alleged, “Respondents appear to have violated the Act and Commission regulations by making and accepting a prohibited in-kind contribution.”⁶

In their Responses, Murdoch and Fox do not deny that Murdoch shared the relevant ad and information with Kushner, but they argue that the advertisement at issue was not “material non-public information,” because the Biden campaign had previously made that ad publicly available via YouTube on September 24th, and the same ad had already broadcast on a local Fox TV station in Marquette, Michigan on the morning of September 25th, hours before Murdoch forwarded it to Kushner.⁷ Moreover, the Respondents point out that this advertisement was essentially “a variation on a previously aired ad,” which the Biden campaign had “publicly posted on YouTube almost two weeks earlier on September 8, 2020.”⁸ While the Respondents acknowledge that the advertisement shared with Kushner “contained cosmetic differences” from the earlier ad, they state it was “substantially similar” and “[t]he message and strategy of that advertisement was already well-known and had already been deployed publicly.”⁹

In the First General Counsel’s Report, OGC recommended that the Commission find reason to believe both that Murdoch and Fox Corporation had violated the Act’s prohibition on corporate contributions, and that MAGA PAC—through the actions of its “agent” Jared Kushner—had knowingly accepted and failed to report an illegal corporate contribution from Fox.¹⁰ Although OGC recognizes that Kushner had no “titled position” with Trump’s 2020 campaign, it nonetheless concluded that Kushner was “an agent of the Trump campaign when he accepted the information from Fox”—making MAGA PAC liable for his alleged violations of the Act.¹¹

II. Legal Analysis

The Act broadly prohibits any corporation from making a contribution to a candidate or candidate’s authorized committee; likewise, no candidate or authorized committee may knowingly

⁴ *Id.*

⁵ Complaint at 5 (Mar. 3, 2023), MUR 8117 (Fox Corporation, *et al.*).

⁶ *Id.* at 8.

⁷ Fox Corporation Response at 4 (Mar. 9, 2023), MURs 8117 & 8118 (Fox Corporation, *et al.*).

⁸ *Id.*

⁹ *Id.*

¹⁰ See First General Counsel’s Report at 25–26 (June 10, 2024), MURs 8117 & 8118 (Fox Corporation, *et al.*).

¹¹ *Id.* at 19.

accept a corporate contribution.¹² As defined in the Act, a “contribution” is “anything of value made by any person for the purpose of influencing any election for Federal office.”¹³ The Commission’s regulations stipulate that “anything of value” encompasses any “in-kind contribution,” including “the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services.”¹⁴ The Commission’s enforcement precedent and regulations have made clear that certain kinds of information, such as opposition research and polling results, may constitute “a thing of value,” and therefore qualify as an in-kind contribution if given to a campaign without charge or at a reduced cost.¹⁵

Turning to the allegations in this matter, I am unpersuaded that the Biden campaign advertisement and accompanying information Murdoch sent to Kushner are “something of value” within the scope of the term “contribution.” First, the available evidence indicates that the advertisement at issue was already in the public domain at the time Murdoch sent it to Kushner. The Respondents have pointed out that the Biden advertisement was both posted to YouTube and broadcast on a Michigan-based Fox station prior to Murdoch ever sharing it with Kushner.¹⁶ Biden’s campaign also had disseminated a “substantially similar” ad on September 8th, 2020, several weeks before Murdoch emailed Kushner.¹⁷ The Commission has repeatedly concluded that, as a general matter, “the use of publicly available information generally defeats” allegations of prohibited in-kind support.¹⁸ When Murdoch shared Biden’s ad with Kushner, it was no longer “material non-public information” concerning the Biden campaign’s strategy, messaging, or advertising, and therefore it could not be considered “a thing of value” at that time.

Murdoch’s other statements in his emails to Kushner, including his disclosure that the Biden campaign ad would air on Fox during an upcoming NFL game, also do not amount to “a thing of value” for purposes of the Act’s contribution regime.¹⁹ Determining whether the limited, non-proprietary information that Murdoch conveyed to Kushner “has ‘value,’ and what that value

¹² 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(a)-(b).

¹³ 52 U.S.C. § 30101(8)(A)(i); 11 C.F.R. § 100.52(a).

¹⁴ C.F.R. § 100.52(d)(1).

¹⁵ See, e.g., Factual & Legal Analysis at 13–20 (July 17, 2012), MUR 6414 (Carnahan in Congress Committee, *et al.*) (provision of opposition research services to a committee may result in an in-kind contribution if the committee does not pay the “usual and normal charge” for such services); 11 C.F.R. § 106.4(b) (“The purchase of opinion poll results by a political committee or other person not authorized by a candidate to make expenditures and the subsequent acceptance of the poll results by a candidate or a candidate’s authorized political committee . . . is a contribution in-kind by the purchaser to the candidate or other political committee”).

¹⁶ Fox Corporation Response at 4 (Mar. 9, 2023), MURs 8117 & 8118 (Fox Corporation, *et al.*).

¹⁷ *Id.*

¹⁸ Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 4 (May 2, 2019), MUR 6908 (NRCC, *et al.*). See also Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003) (“[A] request that is posted on a web page that is available to the general public” is not a basis for finding coordination).

¹⁹ Fox Corporation Response, Ex. A ((Murdoch Dep. at 210:06-09)) (Mar. 9, 2023), MURs 8117 & 8118 (Fox Corporation, *et al.*).

might be, is an inherently subjective exercise” for which the Commission is ill-suited.²⁰ As even OGC recognizes, “[i]nformation about the planned airing of a specific campaign advertisement does not appear to have a commercial market,”²¹ and, unlike commercially available goods or services, its fair market value is “too nebulous to quantify.”²² Moreover, to adopt OGC’s view that any stray information that a campaign might consider useful is a “thing of value” would open the floodgates to regulating every bit of back-and-forth information on a campaign as a contribution. Such a rule would be absurd and unadministrable.²³ Even if the Commission could somehow objectively determine the value of the information conveyed in Murdoch’s emails, that monetary valuation would almost certainly be *de minimis* within the context of a presidential race that involved hundreds of millions of dollars in advertising.

And while the Trump campaign may not have otherwise known which advertisement the Biden campaign planned to air on Fox, I am not convinced that Murdoch’s brief comments and opinions about upcoming advertising from both the Biden and Trump campaigns, just days before those ads were scheduled to air, would have “allowed the Trump campaign the opportunity to proactively alter the timing and/or substance of its own messaging, conceivably by altering the advertisement that it was airing in the same football game, or in other upcoming advertisements.”²⁴ Murdoch’s personal observations about the ads—such as his remarks that Biden’s ads “were a lot better creatively” than Trump’s and that one of Trump’s new ads was “an improvement” — were more akin to “advice, in ‘broad generalities,’ about the effectiveness of a particular television ad,” which the Commission has previously declined to find amounts to an in-kind contribution.²⁵

In addition, I disagree with OGC’s determination that MAGA PAC knowingly accepted and failed to report a prohibited corporate contribution, based on Kushner’s actions as its supposed agent.²⁶ The Act and Commission regulations provide only limited guidance on how the law of

²⁰ Statement of Reasons of Vice Chair Allen Dickerson and Commissioners Sean J. Cooksey and James E. “Trey” Trainor, III at 11 (June 10, 2021), MUR 7271 (DNC, *et al.*). As the Supreme Court explained in *Buckley v. Valeo*, the phrase “thing of value,” as used within the Act’s definition of “contribution,” poses both vagueness and overbreadth concerns unless it is subjected to the “limiting connotation created by the general understanding of what constitutes a political contribution”—*i.e.*, “funds provided to a candidate or political party or campaign committee either directly or indirectly through an intermediary.” 424 U.S. 1, 23 n.24 (1976) (*per curiam*).

²¹ First General Counsel’s Report at 20 (June 10, 2024), MURs 8117 & 8118 (Fox Corporation, *et al.*).

²² Statement of Reasons of Vice Chair Caroline C. Hunter and Commissioner Lee E. Goodman and Matthew S. Petersen at 7 (Feb. 28, 2017), MUR 6958 (Senator Claire McCaskill, *et al.*). *See also* Statement of Reasons of Vice Chair Allen Dickerson and Commissioners Sean J. Cooksey and James E. “Trey” Trainor, III at 10–11 (June 10, 2021), MUR 7271 (DNC, *et al.*) (“Information, however, does not always fit neatly into the ‘goods’ or ‘services’ category—especially if it does not take a form that can be commercially distributed or made available for purchase or sale, and especially not when the ‘information’ concerned is purely speech.”).

²³ Statement of Reasons of Vice Chair Allen Dickerson and Commissioners Sean J. Cooksey and James E. “Trey” Trainor, III at 10–11 (June 10, 2021), MUR 7271 (DNC, *et al.*).

²⁴ First General Counsel’s Report at 10 (June 10, 2024), MURs 8117 & 8118 (Fox Corporation, *et al.*).

²⁵ Statement of Reasons of Vice Chair Caroline C. Hunter and Commissioners Lee E. Goodman and Matthew S. Petersen at 1 (Feb. 28, 2017), MUR 6958 (Senator Claire McCaskill, *et al.*); *see also* Certification (Sept. 13, 2016), MUR 6958 (Senator Claire McCaskill, *et al.*).

²⁶ *See* First General Counsel’s Report at 22–23 (June 10, 2024), MURs 8117 & 8118 (Fox Corporation, *et al.*).

agency applies to political committees. The Act requires a political committee to have a treasurer to oversee all its receipts and disbursements, and it stipulates candidates are also considered agents of their authorized committees for purposes of receiving contributions and making disbursements.²⁷ Separately, the Commission has issued regulations concerning the meaning of an “agent” in relation to restrictions on coordinated communications and non-federal funds.²⁸ Outside these provisions, however, the Commission has generally considered background principles of the law of agency in determining an entity’s liability for the conduct of its officers or agents.²⁹

In recommending that the Commission find reason to believe against MAGA PAC, OGC accepts the Complaints’ claim that, despite Kushner having no official title or position with the committee, he “was a senior leader to the Trump campaign” in 2020, and that “[t]his type of authority [] indicates that Kushner was in a position to accept the information from Murdoch about the Biden campaign’s advertisements, as Kushner would have the authority to use that information to affect the Trump campaign’s communications.”³⁰ But these allegations depend significantly on third-party news reports, which in turn rely on unnamed sources, in an effort to characterize Kushner as the “person officially overseeing [Trump’s] entire campaign.”³¹ I remain skeptical that these news accounts are a sufficiently reliable source on which to conclude that Kushner had actual or apparent authority to accept advertising information from Murdoch on behalf of MAGA PAC.³² Similarly, while Kushner wrote in one of his emails to Murdoch that he “will now be reviewing [advertisements] every week until the end as the real money is starting to be spent on TV and Digital,” that remark alone does not establish Kushner had any real decision-making authority with respect to the Trump campaign’s development of messaging or strategy.³³

Moreover, even assuming *arguendo* that Kushner was acting as MAGA PAC’s agent in his email exchange with Murdoch, the Complaints and the overall record here fail to demonstrate that the committee ever received or “knowingly accepted” Murdoch’s emails and the information in them from Kushner, let alone that MAGA PAC then adjusted its own political messaging or

²⁷ 52 U.S.C. § 30102(a), (e)(2).

²⁸ See 11 C.F.R. §§ 109.3, 300.2 (defining “agent” for purposes of coordination rules and restrictions on non-federal funds, respectively).

²⁹ See Factual & Legal Analysis for the Arizona Sports Foundations, dba The Fiesta Bowl at 8 (Jan. 12, 2012), MUR 6465 (Fiesta Bowl, *et al.*) (citing Restatement (Third) of Agency (2006)); Factual & Legal Analysis for Precision Pipeline, LLC at 6 & nn.30–31 (Dec. 20, 2017), MUR 7137 (Precision Pipeline, LLC, *et al.*) (same).

³⁰ First General Counsel’s Report at 20, 21 (June 10, 2024), MURs 8117 & 8118 (Fox Corporation, *et al.*).

³¹ Complaint at 3 (Mar. 3, 2023), MUR 8117 (Fox Corporation, *et al.*) (quoting Annie Karni & Maggie Haberman, *Kushner’s Global Role Shrinks as He Tackles Another: The 2020 Election*, N.Y. TIMES (Jan. 9, 2020), <https://www.nytimes.com/2020/01/09/us/politics/jared-kushner-trump-campaign.html>).

³² See Statement of Reasons of Chairman Allen J. Dickerson and Commissioners Sean J. Cooksey and James E. “Trey” Trainor, III at 8–9 (June 9, 2022), MUR 7784 (MAGA PAC, *et al.*) (“Unsourced reports are not a proper basis for Commission enforcement action (particularly where, as here, they are heavily characterized, conclusory, and laden with innuendo).”).

³³ Fox Corporation Response, Ex. B (Mar. 9, 2023), MURs 8117 & 8118 (Fox Corporation, *et al.*).

strategy in response to that information.³⁴ That evidentiary gap is fatal to the allegations that the committee accepted and failed to report a contribution from Fox Corporation.

Finally, although the Commission’s decision not to proceed with enforcement in this matter does not turn on the Act’s media exemption, I am mindful that Fox Corporation is, first and foremost, a media organization whose press activities and editorial decision-making are broadly protected from regulation by both the statutory media exemption and the First Amendment’s Press Clause. The Commission does not have to decide here whether Murdoch’s communications with Kushner may have qualified as a “legitimate press function,” but in future cases I will continue to read the scope of exempted press activities broadly, in recognition that Congress did not intend the Act to “limit or burden in any way the First Amendment freedoms of the press and of association.”³⁵

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For the foregoing reasons, I did not support OGC’s recommendations to find reason to believe the Respondents violated the Act by making and knowingly accepting prohibited corporate contributions.



Sean J. Cooksey
Chairman

November 8, 2024

Date

³⁴ See First General Counsel’s Report at 21–22 (June 10, 2024), MURs 8117 & 8118 (Fox Corporation, *et al.*).

³⁵ H.R. Rep. No. 93-1239 at 4 (1974). See Statement of Reasons of Commissioner Sean J. Cooksey at 5 (Apr. 22, 2022), MUR 7789 (Courier Newsroom, *et al.*) (“The scope of legitimate press activity should include all costs associated with writing, producing, publishing, or distributing news content, commentary, editorials, and other constitutionally protected speech. Whether done by individuals or corporations, regularly or sporadically, all of it is protected by the First Amendment.”).