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May 15, 2023

Ms. Wanda Brown
Federal Election Commission
Office of Complaints Examination
& Legal Administration
1050 First Street, NE
Washington, DC 20463**Re: MUR 8123 (Biden for President, *et al.*)**

Dear Ms. Brown:

We write on behalf of Respondent Biden for President (“BFP” or “the campaign”) and Keana Spencer in her official capacity as Treasurer of BFP in response to the Complaint filed by former President Donald J. Trump and designated as MUR 8123.

The Complaint should be dismissed with no further action because it fails to allege any facts that amount to a violation of the Federal Election Campaign Act of 1971, as amended (“the Act”). The Complaint claims, without factual or legal support, that a public letter signed by fifty-one former U.S. intelligence officials (“Individual Respondents”) and originally published online by *Politico*¹ was coordinated with BFP and, as a result, constituted in-kind contributions by the Individual Respondents to BFP. The Complaint further alleges, also without factual or legal support, that those purported contributions were prohibited by the ban on federal contractor contributions.

These claims are fundamentally without merit under the Act. The Complaint asks the Commission to restrict or punish voluntary speech by individuals during an election season.²

¹ The letter addressed reporting by the *New York Post* regarding a laptop that allegedly belonged to Hunter Biden.

² As the United States Supreme Court has noted: “The Act’s contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order ‘to assure [the] unfettered interchange of ideas for the bringing about of political and

COVINGTON

Ms. Wanda Brown
 May 15, 2023
 Page 2

This is inconsistent with the Federal Election Commission's ("FEC" or "Commission") purpose and is unsustainable under the First Amendment.³ The publication of an opinion letter by individuals on a topic of public interest simply does not amount to "contribution" or an "expenditure" under any FEC regulation or precedent, as shown in more detail below.

In addition to being wrong as a matter of law, the Complaint relies entirely on speculation and unsupported assertions in its winding search for a claim under the Act. Under FEC precedents, such speculation and assertions cannot support a Complaint. Therefore, the Commission should find no reason to believe a violation occurred and close the matter.

I. The Complaint Does Not Support Finding that the Letter is a Contribution or Expenditure Under the Act.

The Complaint fails as a matter of law. The Complaint alleges that the letter by the Individual Respondents is an in-kind contribution to BFP because it is a coordinated expenditure,⁴ but does not present a legal argument sufficient to show that the activity constituted either a "contribution" or an "expenditure" under the Act or FEC regulations. In addition, FEC regulations provide specific rules defining when a communication is a coordinated,⁵ which would apply to an analysis of the published letter at issue in this matter, but the Complaint neither recites nor analyzes these rules. Finally, because the Complaint fails to show that BFP received an in-kind contribution from the Individual Respondents through a coordinated expenditure or communication, it also fails on its claim that BFP did not report an alleged contribution.

A. The letter is not a "contribution" or an "expenditure."

The Complaint fails to show that the letter by the Individual Respondents is a "contribution" or an "expenditure" under the Act or FEC regulations.

A "contribution" and an "expenditure" are defined as a payment or anything of value made "for the purpose of influencing any election for Federal office."⁶ FEC regulations,

social changes desired by the people." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (quoting *Roth v. United States*, 354 U. S. 476, 484 (1957)) (alteration in *Buckley*).

³ See MUR 7821, 7827 & 7868 (Twitter, Inc., *et al.*), Statement of Reasons of Vice Chair Dickerson and Comm'r Trainor at 4 (Sept. 13, 2021) ("[T]here is a tendency to recast political disputes as campaign finance violations and enlist the Commission as a party to larger conflicts. . . . But one need not shrink from the difficult policy questions involved with [such disputes] to realize that they are not, at their core, campaign finance issues.")

⁴ Compl. ¶ 49, 50.

⁵ 11 C.F.R. § 109.21

⁶ 11 C.F.R. §§ 100.52(a), 100.111(a).

COVINGTON

Ms. Wanda Brown
May 15, 2023
Page 3

however, specifically exempt the uncompensated activity by volunteers at issue in this matter from the definition of a “contribution” or an “expenditure.”⁷ The Commission has previously examined situations similar to the one alleged in the Complaint and found the individuals involved were engaged in volunteer activity that did not constitute a contribution or an expenditure.⁸ More specifically, the Commission determined that when an individual writes an op-ed in support of a candidate and there is no allegation in the Complaint that the activity was paid, the individual is a volunteer and their activity is not a contribution or an expenditure.⁹ In addition, because this letter was published online, separate FEC regulations regarding uncompensated internet activity exempt the letter from the definition of a contribution or expenditure.¹⁰ Moreover, while the Complaint *states* that the letter was for “the purpose of influencing the 2020 presidential election,” it does not provide any factual or legal support for that conclusion.

B. The letter is not a coordinated communication.

This matter relates to a *communication* in the form of a published letter, which the Complaint alleges is coordinated and thus a contribution. The FEC has specific rules for determining whether a *communication* is coordinated, but the Complaint fails to address those specific rules, and does not prove that *any* of the specific elements of these rules are met. To prove that a person has made a “coordinated communication” that constitutes an in-kind contribution to a candidate, a complaint must show that a communication (1) is paid for by a person other than a candidate or political committee, (2) meets at least one of the “content standards” set forth in the coordinated communications regulations, and (3) meets at least one of the “conduct standards” set forth in those regulations.¹¹ The Complaint fails on each element.

First, there is no allegation that there was *any* spending by any person on the letter. Absent some payment, there can be no “coordinated communication” under the FEC’s regulations.

Second, the Complaint does not allege that the letter meets any of the “content standards” of the coordinated communication rules. The content standards require that the

⁷ *Id.* §§ 100.74, 100.111(e)(1).

⁸ See MUR 5853 (Michael Grace), Factual and Legal Analysis at 4-5 (Sept. 4, 2007) (blog author who wrote satirical and critical blog posts about a candidate without compensation did not make an expenditure); AO 1978-77 (Aspin) (an individual does not make a contribution simply by appearing in a campaign advertisement for a candidate, even if identified as a corporate officer in the ad).

⁹ See MUR 7863 (Astrid Silva, *et al.*), Factual and Legal Analysis at 11 (Sept. 15, 2021); see also *id.*, First General Counsel’s Report at 12, 12 n.48 (July 6, 2021) (explaining there is no information provided that the author was paid for the op-ed).

¹⁰ 11 C.F.R. §§ 100.94, 100.155.

¹¹ *Id.* § 109.21(a).

COVINGTON

Ms. Wanda Brown
May 15, 2023
Page 4

communication be either an “electioneering communication” or a “public communication,”¹² but the letter is neither. The letter is not an “electioneering communication” because it is not a broadcast, cable, or satellite communication.¹³ A “public communication,” at the time of the alleged violation, included broadcast, cable, satellite, periodicals, mass mailings, outdoor advertising, phone banks, and other general public political advertising, but expressly did not include a communication over the internet other than a communication placed for a fee on another person’s website.¹⁴ The Complaint does not allege that the letter was published in any location other than online, for free, so it is not a public communication.

Third, the Complaint does not support a finding that the letter met the “conduct standards” of the coordinated communication rules. As described in more detail in Part III, the Complaint only offers speculation about or bald assertions of joint or aligned activity between the Individual Respondents and the campaign, none of which is sufficient to support a finding that one of the detailed conduct elements was met.

Failing to show any one of these elements — payment, content, or conduct — is enough to conclude that the letter was not a coordinated communication and thus not an in-kind contribution. As shown in this section, the Complaint cannot prove *any* of these elements.

II. The Complaint Does Not Support Finding BFP Received a Prohibited Federal Contractor Contribution.

The Complaint alleges that the Individual Respondents made impermissible contributions because they were federal contractors.¹⁵ This claim fails because the Complaint does not show that the letter amounted to a contribution from the Individual Respondents to BFP, as shown in Part I, but also because the Complaint does not provide a legal basis for finding that the Individual Respondents were federal contractors.

The Act and FEC regulations prohibit federal contractors from making contributions and any person from soliciting a contribution from a federal contractor.¹⁶ A “federal contractor” is defined as a person who has an agreement with the United States for “rendition of personal services,” “furnishing any material, supplies, or equipment,” or “selling land or buildings,” *if* the

¹² See *id.* § 109.21(c).

¹³ *Id.* § 100.29(a).

¹⁴ *Id.* § 100.26. Even under the new “public communication” definition adopted December 1, 2022 and effective March 1, 2023, the letter would not be a public communication because internet communications not placed for a fee on another person’s website, digital device, application, or advertising platform are still exempt. See 87 Fed. Reg. 77478 (Dec. 19, 2022).

¹⁵ See Compl. ¶¶ 45-50.

¹⁶ 52 U.S.C. § 30119(a), 11 C.F.R. § 115.2. However, the law is clear that federal contractors may engage in volunteer activity for a campaign. See AO 2012-16 (King; Pierce Atwood LLP).

COVINGTON

Ms. Wanda Brown
May 15, 2023
Page 5

payment for the agreement is made at least in part from funds appropriated by Congress.¹⁷ The Complaint itself acknowledges that payment is a necessary requirement for the federal contractor ban to have effect.¹⁸

The Complaint does not, however, allege any facts sufficient to show that any of the Individual Respondents had any covered agreement with the United States. The Complaint stretches to argue that the Individual Respondents' allegedly ongoing obligations to not disclose classified information as former intelligence officials somehow constitutes a "personal service" to the United States, or otherwise falls within the scope of this law. Nor is there any evidence these individuals are compensated for this "service." The Complaint provides no legal support or precedent for its allegation, does not offer proof that the Individual Respondents were under such obligations, and does not allege any payment with appropriated funds.¹⁹ Therefore, these allegations are untethered from any relevant law or facts.

III. The Complaint's Speculation and Unsupported Assertions Do Not Support a Reason to Believe Finding.

In addition to the core legal deficiency of the Complaint, the allegations in the Complaint are based entirely on speculation, and are unsupported by facts.²⁰ When faced with such a complaint, the Commission must find that there is no reason to believe a violation occurred.

The Commission has long held that a complaint must present facts sufficient to show a violation has occurred.²¹ Mere conclusory allegations without supporting evidence do not shift

¹⁷ 11 C.F.R. § 115.1(a).

¹⁸ See Compl. ¶ 44.

¹⁹ The Complaint's theory, if true, would empower the FEC to muzzle the speech of countless former civilian and military personnel who remain bound by agreements to retain the confidentiality of information they have learned while serving our country. There is nothing in the history of FECA or the judicial decisions interpreting it that would indicate the FEC should hold such power, and countless citations, beginning with *Buckley*, that reflect that the opposite is true.

²⁰ A significant portion of the Complaint is spent alleging facts related to social media companies that the Complaint ultimately states are not named as Respondents. Compl. ¶¶ 8-23. The Complaint does not allege that either company played a role in the purported contribution by the Individual Respondents to BFP, and are therefore irrelevant to this matter. In addition, the Commission has already dismissed matters related to those alleged facts. See MURs 7821, 7827 & 7868 (Twitter, Inc., *et al.*), Factual and Legal Analysis at 13-16 (Aug. 16, 2021); MURs 7812, 7825, 7869 (Facebook, *et al.*), Factual and Legal Analysis at 14-17 (Aug. 18, 2021).

²¹ See MUR 7868 (Twitter, Inc., *et al.*), Statement of Reasons of Vice Chair Dickerson and Comm'r Trainor at 4 ("At the reason-to-believe stage, we cannot proceed to authorize an investigation based upon '[u]nwarranted legal conclusions from asserted facts or mere speculation.'") (quoting MUR 4960 (Clinton), Statement of Reasons of Comm'rs Mason, Sandstrom, Smith, and Thomas at 2 (Dec. 21,

COVINGTON

Ms. Wanda Brown
May 15, 2023
Page 6

the burden of proof to the respondents.²² For example, a claim that something “must have” happened cannot support a reason to believe finding.²³

The Complaint relies on such speculation and conclusory language when describing allegations of coordination. The Complaint states that BFP “*had to have* been aware” that more was needed to discredit the *New York Post* reporting;²⁴ that “[t]he speed with which this letter was written and the number of Individual Respondents involved *points directly to*” BFP’s involvement;²⁵ the speed with which the letter was written, signed, and published “*would have been impossible without* assistance and/or solicitation from” BFP;²⁶ “*Based on* the speed with which” the letter was written and the similarity between the letter and BFP’s position on the *Post* reporting, there is reason to believe there was coordination.²⁷ At another point, the Complaint simply makes assertions without *any* support.²⁸

This speculation is not, on its own, sufficient to find reason to believe a violation has occurred. The Commission must make its reason to believe decision only on the basis of the allegations in the Complaint and may not look to extrinsic evidence to reach its conclusion.²⁹ Where, as here, there is no factual support for the allegations in the Complaint, there can be no reason to believe a violation occurred.

2000)); *see also* MUR 7340 (Great America Committee), Response of Donald J. Trump for President, Inc. and Bradley T. Crate, as Treasurer (Apr. 30, 2018) (arguing same).

²² *See, e.g.*, FEC MUR 4850 (Deloitte & Touche, LLP), Statement of Reasons of Chairman Wold and Comm’rs Mason and Thomas at 2 (“The burden of proof does not shift to a respondent merely because a complaint is filed.”).

²³ *See* MUR 4960 (Clinton), Statement of Reasons of Comm’rs Mason, Sandstrom, Smith, and Thomas at 3 (Dec. 21, 2000).

²⁴ Compl. ¶ 23 (emphasis added).

²⁵ *Id.* ¶ 24 (emphasis added).

²⁶ *Id.* ¶ 33 (emphasis added).

²⁷ *Id.* ¶¶ 49, 55.

²⁸ *See id.* ¶ 37 (“The Campaign . . . solicited the assistance of the Individual Respondents . . .”).

²⁹ *See, e.g.*, MUR 7889 (SIG SAUER, Inc.), Statement of Reasons of Vice Chairman Cooksey and Comm’rs Dickerson and Trainor at 5-7 (Jan. 20, 2023); FEC, Guidebook for Complainants and Respondents on the FEC Enforcement Process at 12 (May 2012) (explaining that a reason to believe finding is “a precondition to opening an investigation into the alleged allegation”) (citing former 2 U.S.C. § 437g(a)(2) (current 52 U.S.C. § 30109(a)(2))).

COVINGTON

Ms. Wanda Brown
May 15, 2023
Page 7

IV. Conclusion

The Complaint in this matter is totally devoid of any allegations that would suggest that BFP has committed a violation of the Act. Therefore, the Commission should find no reason to believe that BFP has violated the Act and dismiss the complaint.

Respectfully submitted,

Two handwritten signatures in black ink. The first signature is on the left and the second is on the right.

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