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MICHIGAN DEPT OF STATE

2018 JUN 20 AM 10:16

ELECTIONS/GREAT SEAL

**Campaign Finance Complaint Form
Michigan Department of State**

This complaint form may be used to file a complaint alleging that someone violated the Michigan Campaign Finance Act (the MCFA, 1976 PA 388, as amended; MCL 169.201 *et seq.*).

All information on the form must be provided along with an original signature and evidence.

Please print or type all information

PLEASE PRINT OR TYPE ALL INFORMATION.

I allege that the MCFA was violated as follows:

SECTION 1. COMPLAINANT

Your Name: Colleen Pero

Telephone Number: (517) 487-5413

Mailing Address: 520 Seymour Ave.

City: Lansing

State MI

Zip 48933

SECTION 2. ALLEGED VIOLATOR

Name: Build A Better Michigan

Mailing Address: 700 13th Street NW Suite 600

City: Washington

State: DC

Zip: 20005

SECTION 3. ALLEGED VIOLATIONS

Section(s) of the MCFA violated:

**Section 54; and/or
Section 51.**

Explain how those sections were violated:

INTRODUCTION

Build A Better Michigan (the “*Committee*”) is a corporate entity organized in Michigan with the express purpose of conducting political activity. On March 22, 2018, the Committee incorporated as a non-profit entity pursuant to the provisions of Act 162, Public Acts of 1982. *See* Build A Better Michigan Articles of Incorporation, attached as Exhibit A. By that action, the Committee became a corporate entity under Michigan law. The Committee filed its Articles of Incorporation with the Michigan Department of Licensing and Regulatory Affairs, which list the Committee’s corporate purposes as “[t]o engage in political activities, to influence the selection, nomination, election, appointment or defeat of candidates to federal, state or local public office, and to conduct all lawful activities necessary or desired to operate the corporation in connection therewith.” *Id.* at Article II.

The Committee expressly advocates for a clearly identified candidate for public office. The Michigan Campaign Finance Act, Act 338 of 1976 (the “*Act*”) tells us exactly what it means by express advocacy. In the context of disclosures for communications expenditures, the Act describes “communications containing express words of advocacy of election or defeat, *such as* . . . ‘*Smith for governor*’.” MCL § 169.206(2)(j)(emphasis supplied). The Committee uses such language in its inaugural advertising campaign, featuring multiple videos with the words “GRETCHEN WHITMER CANDIDATE FOR GOVERNOR” next to an image of Ms. Whitmer (the “*Campaign Videos*”). *See* Work Hard Screen Shot, attached as Exhibit B; Fix The Roads Screen Shot, attached as Exhibit C. This is precisely the type of language characterized as express words of advocacy in MCL § 169.206(2)(j). Thus, pursuant to the Act, the Committee is expressly advocating for Gretchen Whitmer, a clearly identified candidate for governor of the State of Michigan.

It is worth noting that the Campaign Videos are part of a reported \$1.8 million advertising push beginning less than sixty days before the gubernatorial primary election. *See* Whitmer Featured in \$1.8M television ad campaign, The Detroit News (June 12, 2018), attached as Exhibit D.

ARGUMENT

Build A Better Michigan’s advertisements featuring express advocacy for a clearly identified candidate for public office constitute either (1) an illegal campaign contribution to the Gretchen Whitmer For Governor campaign committee pursuant to Section 54 of the Act; or (2) a violation of the reporting requirements for independent expenditures pursuant to Section 51 of the Act.

1. The Committee’s Campaign Videos Featuring Words of Express Advocacy Violate the Section 54 Prohibition On Corporate Contributions and Constitute an Illegal Contribution to the Gretchen Whitmer For Governor Campaign Committee.

The Committee’s Campaign Videos constitute an illegal campaign contribution to the Gretchen Whitmer For Governor campaign committee. Contributions and expenditures from corporations are prohibited by the Act. Indeed, Section 54 of the Act provides that “[e]xcept as otherwise provided in this section and section 55, *a corporation... shall not make a contribution*

or expenditure or provide volunteer personal services that are excluded from the definition of a contribution under section 4(3)(a).” MCL § 169.254(1)(emphasis supplied). A knowing violation of this provision is a felony. *Id.* at § 169.254(5). The Committee is subject to Section 54 as a corporation formed under Michigan Law. As the Campaign Videos were made for the purpose of influencing the gubernatorial primary election in Michigan, it runs afoul of Section 54.

The Act defines “contribution” as “a payment, gift, subscription, assessment, expenditure, contract, payment for services, dues, advance, forbearance, loan, or donation of money or anything of ascertainable monetary value, or a transfer of anything of ascertainable monetary value to a person, *made for the purpose of influencing the nomination or election of a candidate*, for the qualification, passage, or defeat of a ballot question, or for the qualification of a new political party.” MCL § 169.204(1)(emphasis supplied). Because the Campaign Videos clearly identify Gretchen Whitmer as a candidate for governor and use express words of advocacy of election or defeat as described in MCL § 169.206(2)(j), they are clearly “made for the purpose of influencing the nomination or election of a candidate” and are thus contributions within the meaning of the Act.

A contribution does not include independent expenditures. MCL § 169.204(3)(e). If the Committee intends to make independent expenditures, it must file and report in the appropriate manner:


2. The Committee Has Violated Section 51 of the Act By Failing To File and Report Independent Expenditures Associated With Its Campaign Videos Featuring Words of Express Advocacy.

The Committee is permitted to make independent expenditures as a corporate entity pursuant to MCL § 169.254(4), but it must follow the rules when so doing. Persons (including corporations) that make independent expenditures of \$100.01 or more advocating “the election or defeat of a candidate for state elective office” shall file a report with the secretary of state within ten (10) days of the independent expenditure. MCL § 169.251(1). In publishing and promoting its Campaign Videos, the Committee has made such expenditures but has not filed the necessary reports.

The Campaign Videos advocate for the election of a clearly identified candidate because they feature words of express advocacy as described in MCL § 169.206(2)(j). Thus, Section 51 of the Act requires the Committee to file an independent expenditure report form as provided by the Secretary of State, together with the name, address, occupation, employer, and principal place of business of each person that contributed \$100.01 or more to the expenditure. Failure to file a report as required by Section 51 is punishable by fines and, in some cases, a misdemeanor. *Id.* at § 169.251(2).

SECTION 4. Certification (Required)

I certify that to the best of my knowledge, information, and belief, formed after a reasonable inquiry under the circumstances, each factual contention of this complaint is supported by evidence.

X 
Signature of Complainant

6/20/19
Date

SECTION 5. Certification (Supplemental to Section 4)

Section 15(6) of the MCFA (MCL 169.215) requires that the signed certification found in section 4 of this form be included in every complaint. However, if, after a reasonable inquiry under the circumstances, you are unable to certify that certain factual contentions are supported by evidence, you may also make the following certification:

I certify that to the best of my knowledge, information, or belief, there are grounds to conclude that the following specifically identified factual contentions are likely to be supported by evidence after a reasonable opportunity for further inquiry. Those specific contentions are:

X _____
Signature of Complainant

Date

Section 15(8) of the MCFA provides that a person who files a complaint with a false certification is responsible for a civil violation of the MCFA. The person may be required to pay a civil fine of up to \$1,000.00 and some or all of the expenses incurred by the Michigan Department of State and the alleged violator as a direct result of filing the complaint.

Mail or deliver the completed complaint form with an **original signature and evidence** to the following address:

Michigan Department of State
Bureau of Elections
Richard H. Austin Building -- 1st Floor
430 W. Allegan Street
Lansing, Michigan 48918

Evidence that supports those allegations (attach copies of pertinent documents and other information)

Exhibit A	Build A Better Michigan Articles of Incorporation
Exhibit B	“Work Hard” Screen Shot
Exhibit C	“Fix the Roads” Screen Shot
Exhibit D	June 12, 2018 Detroit News Article

Exhibit A

03 E.4
413

**MICHIGAN DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
CORPORATIONS, SECURITIES & COMMERCIAL LICENSING BUREAU**

Date Received

MAR 22 2018

This document is effective on the date filed, unless a subsequent effective date within 90 days after received date is stated in the document.

FILED

MAR 23 2018

**ADMINISTRATOR
CORPORATIONS DIVISION**

Name

Graham M. Wilson

Address

700 13th Street NW Suite 600

City

Washington

State

DC

ZIP Code

20005

EFFECTIVE DATE:

Document will be returned to the name and address you enter above.
If left blank, document will be returned to the registered office.

**ARTICLES OF INCORPORATION
For use by Domestic Nonprofit Corporations**
(Please read information and instructions on the last page)

Pursuant to the provisions of Act 162, Public Acts of 1982, the undersigned corporation executes the following Articles:

ARTICLE I

The name of the corporation is:

Build A Better Michigan

ARTICLE II

The purpose or purposes for which the corporation is formed are:

To engage in political activities, to influence the selection, nomination, election, appointment or defeat of candidates to federal, state or local public office, and to conduct all lawful activities necessary or desired to operate the corporation in connection therewith.

ARTICLE III

1. The corporation is formed upon a Nonstock basis.
(Stock or Nonstock)

2. If formed on a stock basis, the total number of shares the corporation has authority to issue is

_____. If the shares are or are to be divided into classes, the designation of each class, the number of shares in each class, and the relative rights, preferences and limitations of the shares of each class to the extent that the designations, numbers, relative rights, preferences, and limitations have been determined are as follows:

\$70.00 CC/dmg 1827003

ARTICLE III (cont.)

3. a. If formed on a nonstock basis, the description and value of its real property assets are: (if none, insert "none")

None

b. The description and value of its personal property assets are: (if none, insert "none")

None

c. The corporation is to be financed under the following general plan:

Contributions from individuals

d. The corporation is formed on a Directorship basis.
(Membership or Directorship)

ARTICLE IV

1. The name of the resident agent at the registered office is:

The Corporation Company

2. The address of its registered office in Michigan is:

40600 Ann Arbor Road East Suite 201 Plymouth Michigan 48170
(Street Address) (City) (ZIP Code)

3. The mailing address of the registered office in Michigan if different than above:

_____, Michigan _____
(Street Address or PO Box) (City) (ZIP Code)

ARTICLE V

The name(s) and address(es) of the incorporator(s) is (are) as follows:

Name

Residence or Business Address

Graham M. Wilson

700 13th Street NW, Suite 600, Washington DC 20005

Use space below for additional Articles or for continuation of previous Articles. Please identify any Article being continued or added. Attach additional pages if needed.

ARTICLE VI
INDEMNIFICATION

The corporation shall indemnify any director or officer of the corporation who was or is a party or is threatened to be made a party to any threatened, pending, or completed action, suit, or proceeding by reason of the fact that he or she is or was a director or officer, or is or was serving at the request of the corporation in another capacity, to the fullest extent permitted by the Michigan Nonprofit Corporation Act. The corporation may indemnify persons who are not directors or officers to the extent authorized by resolution of the Board of Directors or by contractual agreement authorized by the Board of Directors. Subsequent changes in the Michigan Nonprofit Corporation Act, these Articles, or the Bylaws, that reduces the scope of indemnification shall not be interpreted as applying retroactively to actions or omissions that may have occurred prior to such changes.

ARTICLE VII
LIMITATION OF LIABILITY

A volunteer director or volunteer officer shall not be personally liable to the corporation or its members for monetary damages for a breach of the director's or officer's fiduciary duty, except that the liability of a director or officer is not eliminated or limited for:

- (i) The amount of a financial benefit received by a director or volunteer officer to which he or she is not entitled.
- (ii) Intentional infliction of harm on the corporation, its shareholders, or members.
- (iii) A violation of Section 551.
- (iv) An intentional criminal act.
- (v) A liability imposed under Section 497(a).

If, after the adoption of this Article, the Michigan Nonprofit Corporation Act is amended to further eliminate or limit the liability of a volunteer director or officer, then a volunteer director or officer of the corporation (in addition to the circumstances in which a director or officer is not personally liable as set forth in the preceding paragraph) shall, to the fullest extent permitted by the Michigan Nonprofit Corporation Act, not be liable to the corporation or its members, as so amended. No amendment to or alteration, modification or repeal of this Article shall increase the liability or alleged liability of any volunteer director or officer of the corporation for or with respect to any acts or omissions of such director or officer occurring prior to such amendment, alteration, modification or repeal.

I, (We), the incorporator(s) sign my (our) name(s) this 22 day of March, 2018

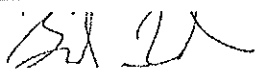
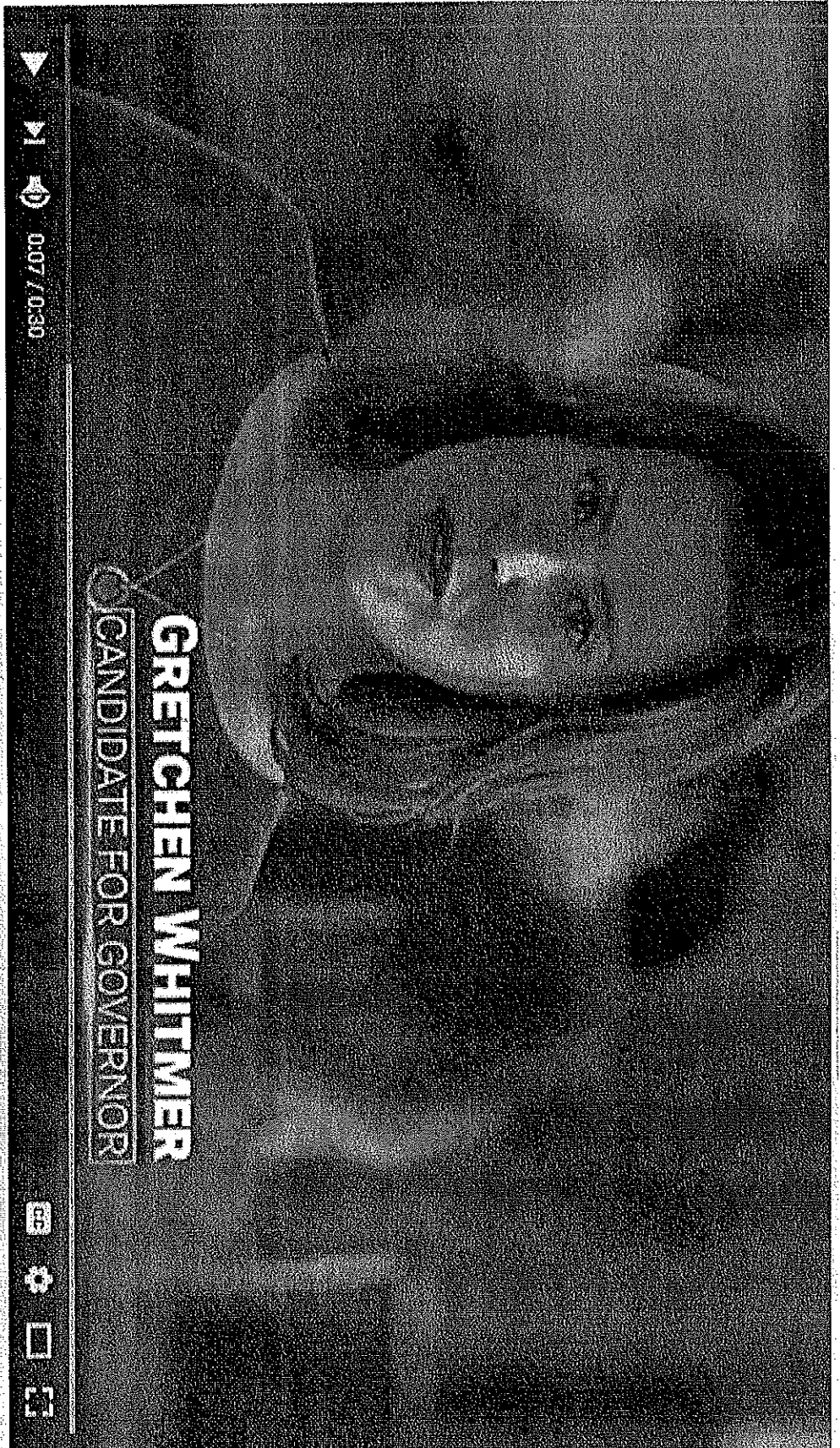
	

Exhibit B



Work Hard



Build a Better Michigan



1,379 views

+ Add to Share ... More



Uploaded on Jun 11, 2018

Report due 6/21/18

The Build a Better Michigan coalition launched a new issue ad campaign featuring Gretchen Whitmer, former Senate Democratic Leader and Ingham County Prosecutor. Whitmer is calling for additional investments in skills training and for a repeal of the Retirement Tax, so hardworking people earn more and keep more of what they earn.

Category People & Blogs
License Standard YouTube License

Exhibit C

No context of picture



Exhibit D

▷ ×

Whitmer featured in \$1.8M television ad campaign

Jonathan Ostling, The Detroit News

Published 8:48 a.m. ET June 12, 2018 | Updated 7:04 p.m. ET June 12, 2018



(Photo: Max Ortiz, The Detroit News)

Lansing — A group aligned with Michigan Democratic gubernatorial hopeful Gretchen Whitmer on Tuesday launched a five-week, \$1.8 million advertising campaign that will put the East Lansing Democrat in television ads for the first time this cycle.

Build a Better Michigan is airing "issue ads" that feature Whitmer but do not directly advocate for her election. In the first of at least two planned commercials, the former Senate minority leader touts her role in raising Michigan's minimum wage and expanding Medicaid health care eligibility.

"But there's still more work to do, like invest in skills training and repeal the retirement tax," Whitmer says, referencing a 2011 tax code overhaul that eliminated an exemption on pension income, "so that people can earn more and keep more of what they earn."

Mark Burton, a longtime Whitmer ally now heading Build a Better Michigan, said the group plans to front-load the ad campaign by spending roughly \$500,000 in each of the next two weeks. They'll spend at least \$1.8 million on broadcast and cable TV ads over five weeks, "but obviously if fundraising continues to go well, that

potentially could be expanded," Burton said.

Work Hard



Whitmer was one of the first candidates to enter the 2018 governor's race, but with the Aug. 7 primary less than 60 days away, she is one of the last major party candidates to be promoted in television ads. Her campaign is also expected to run commercials.

Whitmer has locked up most traditional union support in the Democratic race but has seen her early polling lead evaporate amid a spending blitz by Shri Thanedar. The Ann Arbor businessman had spent an estimated \$1.91 million on broadcast TV ads through June 5, according to the Michigan Campaign Finance Network.

Former Detroit health director Abdul El-Sayed, also competing for the Democratic nomination, had spent roughly \$35,000 in broadcast ads through last week.

Building a Better Michigan is a political group organized under Section 527 of the Internal Revenue Code that can raise unlimited money from unions or corporations but must report donors.

The ad campaign follows a playbook used in 2014 by the Democratic Governors Association, which ran issue ads that featured Michigan gubernatorial nominee Mark Schauer but did not expressly tell viewers to vote for him. Schauer lost to Republican Gov. Rick Snyder by 4 percentage points.

"Whitmer is in the ad talking about things that Build a Better Michigan thinks are important, she thinks are important and obviously a lot of Michigander's think are important as well," Burton said.

On the Republican side, Lt. Gov. Brian Calley's campaign has aired an estimated \$421,000 in broadcast TV ads, while two political action committees that support him had spent more than \$400,000, according to Michigan Campaign Finance Network data.

Attorney General Bill Schuette's campaign had aired \$76,000 in broadcast ads through June 4. A nonprofit that supports him had aired \$408,000 in ads and a super political action committee had spent \$136,000 on broadcast commercials.

Schuette strategist John Sellek called the new Whitmer ad "deceptive." He suggested she would have to raise taxes to pay for several of her proposed policy initiatives, including a new \$100 million plan for two-year college scholarships and skills training programs.

"Whitmer's economic collapse plan would return Michigan to the Lost Decade of Jennifer Granholm with fewer people here to pay higher taxes while struggling to support families on shrinking paychecks," Sellek said in a statement.

El-Sayed also criticized Whitmer from the political left, calling Build a Better Michigan a "corporate dark money PAC" even though the group will be required to disclose donors on future reports, including an inaugural filing due next month.

Internal Revenue Service records show Build a Better Michigan is headed by Burton, former state Sen. Tupac Hunter of Detroit and attorney Suzanna Shkreli, who ran for Congress in 2016 but lost to incumbent U.S. Rep. Mike Bishop, R-Rochester.

joostling@detroitnews.com

(517) 371-3662

Twitter: @Jonathanoostling

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2018 JUL 11 -7 PM 3: 04

CLERK OF GREAT SEAL

August 6, 2018

Adam L.S. Fracassi
Bureau of Elections
Michigan Dept. of State
Richard H. Austin Building, 1st Floor
430 West Allegan Street
Lansing, MI 48919

Re: June 20, 2018 Colleen Pero Campaign Finance Complaint

Dear Mr. Fracassi:

We write to respond to the complaint filed by Colleen Pero, alleging that two communications sponsored by Build a Better Michigan, titled “Work Hard” and “Get It Done,” violated the Michigan Campaign Finance Act (“MCFA” or “Act”). This complaint is without merit. Specifically, Ms. Pero wrongly claims that the advertisements implicate the requirements of the Act because they contain “express advocacy.” The advertisements are both about important legislative policy issues facing Michiganders. While the advertisements feature Gretchen Whitmer addressing these policy issues, and also identify her both as a “Former MI Senator” and as a “Candidate for Governor” so that the viewers of the advertisements are aware of who is speaking to them, at no point do the advertisements urge the viewer to vote for or against any candidate for elective office. Referencing the fact that an individual is a candidate is plainly not the same as telling someone that they should vote for that candidate. That is the essence of “express advocacy” and without such content, the advertisements are not campaign expenditures subject to the regulatory authority of the Michigan Department of State. The Department should immediately dismiss Ms. Pero’s complaint.

1. The MCFA Does Not Apply to Ads Lacking Express Advocacy

The MCFA exempts from state campaign finance regulation any communication that “does not in express terms advocate the election or defeat of a clearly identified candidate.” Mich. Comp. Laws § 169.206(1)(j). It applies only to “communications containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for governor,’ ‘vote against,’ ‘defeat,’ or ‘reject.’” *Id.*¹ The statute conforms Michigan law to the “express advocacy” test established *Buckley v. Valeo*, 424 U.S. 1 (1976), which limits the application of campaign finance law to “communications containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’” *Buckley*, 424 U.S. at 44 n. 52. It is the actual words of an ad that matter, and not a possible inference that viewers may supply on their own.

Michigan has followed *Buckley*’s express advocacy test since 1998, when two federal courts struck down the State’s attempt to regulate issue ads that included the name or likeness of a

¹ As an exception, the MCFA does require sponsorship identification on communications that reference a clearly identified candidate or ballot question via radio, television, mass mailing, or prerecorded telephone message targeted to the relevant electorate within 60 days before a general election and 30 days before a primary election. Mich. Comp. Laws § 169.247(5). There is no allegation that there was any violation of this disclosure requirement.

specific candidate 45 days before an election. See *Planned Parenthood Affiliates of Michigan, Inc. v. Miller*, 21 F. Supp. 2d 740 (E.D. Mich. 1998); *Right to Life of Michigan, Inc. v. Miller*, 23 F. Supp. 2d 766 (W.D. Mich. 1998). The regulation was overbroad partly because it would ban constitutionally protected speech such as “articles that mention the sponsors, authors and supporters of specific pending bills, identification of those who testified at hearings, and **interviews with candidates.**” *Right to Life of Michigan, Inc.*, 23 F. Supp. 2d at 769 (emphasis added).

As a result of those court decisions, in 2002, the Department held that its authority did not extend to issue ads lacking express advocacy, even when the ads were produced after the sponsor held “meetings with the candidate” and “ask[ed] the candidate for photographs and other information.” Mich. Dep’t of State, Interpretive Statement 03-02-CI (Aug. 26, 2002) (Witte). The Department said flatly: “[W]e do not have the authority to regulate ads that do not contain words of express advocacy.” *Id.* at 6. The Department affirmed again in 2004 that it “will continue to apply the express advocacy standard” to the MCFA unless and until the statutory language was amended to reflect any other standard. Mich. Dep’t of State, Interpretive Statement 01-04-CI at 5 (April 20, 2004) (LaBrant).² In 2013, the Legislature amended the MCFA to codify the Department’s long-standing interpretation that the *Buckley* express advocacy test controls. 2013 Mich. Pub. Acts 252. Thus, Michigan law does not reach communications that lack “words of express advocacy—‘vote for,’ ‘vote against,’ ‘elect,’ ‘defeat,’ etc.” *Id.*

2. A Communication Does Not Expressly Advocate for a Candidate Simply Because It Identifies that Person as a Candidate

Neither the Department nor Michigan courts have endorsed the proposition that simply referencing that an individual is a candidate for office amounts to express advocacy. In evaluating the express advocacy standard, the Department has relied on *Clifton v. FEC*, 927 F. Supp. 493 (D. Me. 1996). This case involved voter guides that named candidates and contrasted their positions on issues. See Interpretive Statement 03-02-CI at 5; see also 927 F. Supp. at 495. Importantly, the Department has also relied on the federal court’s opinion in *Federal Election Comm’n v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999), to determine whether a communication was a contribution to a candidate. Mich. Dep’t of State, Interpretive Statement 03-02-CI at 3–4 (Aug. 26, 2002) (Witte). The *Christian Coalition* court explained that applying the *Buckley* “express advocacy” test requires focusing on the verbs used:

First, the communication must in effect contain an explicit directive.
... That effect is determined first and foremost by the words used.
More specifically, the “express advocacy” standard requires focus
on the verbs. ... For a communication to contain, in effect, an explicit

² The Department stated that, even after the Supreme Court’s decision in *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 206 (2003), overruled on other grounds by *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010), Michigan’s broad campaign finance law definition of “expenditure” required it to “apply the express advocacy standard in order to avoid constitutional problems.” Interpretive Statement 01-04-CI at 5. It also made clear that, even if someone could argue that “many if not most of these issue ads are campaign ads without words of express advocacy,” they still “are not considered expenditures.” *Id.*

directive it must use an active verb (or its functional equivalent, e.g., “Smith for Congress” or, perhaps, an unequivocal symbol).

Second, that verb or its immediate equivalent—considered in the context of the entire communication, including its temporal proximity to the election—must unmistakably exhort the reader/viewer/listener to take electoral action to support the election or defeat of a clearly identified candidate.

Id. at 61–62 (citations omitted). Thus, under the *Christian Coalition* analysis, it is the verb that renders a communication express advocacy; it is not sufficient that an advertisement identifies a person as a candidate if the communication otherwise lacks that “explicit directive.” *Id.* “Smith for Congress” is the same as using the active verbs “vote” or “support” Smith, but with “Smith, Candidate for Congress,” there is no active verb. The phrase simply means that Smith is a candidate for congress without the presence of any exhortation.

Tellingly, when faced with these same facts, other courts have held that simply identifying a candidate by name and picture, along with the office for which the candidate is running, does not constitute “express advocacy” under the *Buckley* standard. *See, e.g., Colorado Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 1258–59 (Colo. 2012).

3. Build a Better Michigan’s Ads Lack Express Advocacy and Are Not Subject to the MCFA

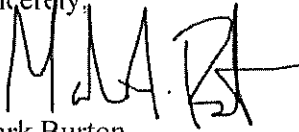
The ads at issue in this complaint contain no words of express advocacy and fall outside the longstanding, clear scope of state campaign finance regulation. The ads ask the audience to contact their legislators and urge them to take a series of actions to promote the public good: invest in skills training, repeal the retirement tax, expand access to affordable health care, and fix the state’s roads. (The scripts for the ads challenged by the Complaint are attached as Exhibit A.) While the ads identified Ms. Whitmer as a former state senator and a current candidate for governor, they do so for identification purposes and without urging any vote for her or against any opposing candidate.

Indeed, the ads contain no “explicit directive” like “vote for,” “elect,” “support,” “cast your ballot for,” “Whitmer for governor,” “vote against,” “defeat,” or “reject,” as the statute requires to fall under the Department’s jurisdiction. Mich. Comp. Law § 169.206(1)(j). Under *Christian Coalition*, the express advocacy test “requires focus on the verbs used.” 52 F. Supp. 2d at 61. Unlike “Smith for governor,” which contains an implied verb, “elect,” the identification used here, “Candidate for Governor,” contains no such implied directive. The advertisements tell the viewers that Gretchen Whitmer is a candidate for Governor, but do not include any words telling viewers who they should vote for in any election. While the complaint would prefer otherwise, there is in fact a real difference between “Gretchen Whitmer/Candidate for Governor” and “Gretchen Whitmer for Governor.” Only the latter tells viewers who to vote for in an election. The only exhortation that appears in these communications is “Tell Your Legislators.” Even under more flexible tests that the Legislature and Department have never adopted, the ads would still be “susceptible of [a] reasonable interpretation other than as an appeal to vote for or against

a specific candidate.” *Fed. Election Comm’n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469-70 (2007).

Because the communications at issue here do not “in express terms advocate the election or defeat of a clearly identified candidate,” Mich. Comp. Laws § 169.206(1)(j), they fall outside the jurisdiction of the MFCA, and Ms. Pero’s complaint should be dismissed.

Sincerely,

A handwritten signature in black ink, appearing to read 'M. A. B.', with a stylized flourish at the end.

Mark Burton
Graham Wilson
Counsel, Build a Better Michigan

Enclosures

Exhibit A

Build a Better Michigan “Work Hard” Script

VISUAL	AUDIO
People working at a lumber yard.	GW VO: Working hard and making things—it’s what we do in Michigan.
Gretchen to camera at lumber yard CG: Gretchen Whitmer Former MI Senator Candidate for Governor	GW SYNC: My first job was in a lumber yard. I’m Gretchen Whitmer. In the state Senate, I fought for working families: GW VO:
Shot of Gretchen, headline	To increase the minimum wage...
Shot of Gretchen, headline	And to expand Medicaid, to over six hundred thousand more Michiganders.
Gretchen to camera CG: Gretchen Whitmer B-roll of skills training CG: Gretchen Whitmer Invest in Skills Training	GW SYNC: But there’s still more work to do. GW VO: Like invest in skills training.... ...and repeal the retirement tax...

B-roll of seniors	
CG: Gretchen Whitmer	
Repeal Retirement Tax	
	...so that hardworking people earn more and keep more of what they earn.
B-roll of Gretchen with people	
	GW SYNC:
Gretchen to camera	Let's get it done.
CG: Gretchen Whitmer:	
Tell Your Legislators -	
Let's Get It Done.	
	(80)



STATE OF MICHIGAN
RUTH JOHNSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

June 22, 2018

Build A Better Michigan
700 13th Street NW Suite 600
Washington, DC 20005

Dear Build A Better Michigan:

The Department of State (Department) received a formal complaint filed by Colleen Pero against you, alleging that you violated the Michigan Campaign Finance Act (MCFA or Act), 1976 PA 388, MCL 169.201 *et seq.* The investigation and resolution of this complaint is governed by section 15 of the Act and the corresponding administrative rules, R 169.51 *et seq.* A copy of the complaint and supporting documentation is enclosed with this letter.

The MCFA prohibits a corporation from making a contribution or expenditure that are excluded from the definition of "contribution." Under the MCFA, a contribution is defined as "a payment, gift, subscription, assessment, expenditure, contract, payment for services, dues, advance, forbearance, loan, or donation of money or anything of ascertainable monetary value, or a transfer of anything of ascertainable monetary value to a person, made for the purpose of influencing the nomination or election of a candidate, for the qualification, passage, or defeat of a ballot question, or for the qualification of a new political party." MCL 169.204(1). A contribution is not an independent expenditure. MCL 169.204(3)(e). A knowing violation of this section is a felony, punishable by a fine of not more than \$10,000 or imprisonment. MCL 169.254(5).

Corporations are permitted to make independent expenditures under the MCFA, but are required to file an independent expenditure report within ten (10) days of independent expenditures totaling \$100.01 or more. MCL 169.251(1). A person who fails to file a report required may be subjected to a late filing fees up to \$5,000 and a civil fine up to \$1,000 and/or imprisonment for no more than 90 days.

Ms. Pero alleges that you improperly contributed to the Gretchen Whitmer For Governor campaign committee by publishing videos which depict Ms. Whitmer in multiple videos next to the phrase "GRETCHEN WHITMER CANDIDATE FOR GOVERNOR." Ms. Pero alleges this is a violation of MCL 169.254. Ms. Pero also alleges that, should these be considered independent expenditures, you failed to timely file an independent expenditure report with the Department of State in violation of MCL 169.251.

The purpose of this letter is to inform you of the Department's examination of these matters and your right to respond to the allegations before the Department proceeds further. It is important to

understand that the Department is neither making this complaint nor accepting the allegations as true.

If you wish to file a written response to this complaint, you are required to do so within 15 business days of the date of this letter. Your response may include any written statement or additional documentary evidence you wish to submit. Should you elect to file a response, **please address the allegations and specifically explain whether the phrase “CANDIDATE FOR GOVERNOR” when placed next to Ms. Whitmer does or does not constitute express advocacy as defined by the MCFA.**

All materials must be sent to the Department of State, Bureau of Elections, Richard H. Austin Building, 1st Floor, 430 West Allegan Street, Lansing, Michigan 48918. If you fail to submit a response, the Department will render a decision based on the evidence furnished by the complainant.

A copy of your answer will be provided to Ms. Pero, who will have an opportunity to submit a rebuttal statement to the Department. After reviewing all of the statements and materials provided by the parties, the Department will determine whether “there may be reason to believe that a violation of [the MCFA] has occurred [.]” MCL 169.215(10). Note that the Department’s enforcement powers include the possibility of entering a conciliation agreement, conducting an administrative hearing, or referring this matter to the Attorney General for enforcement of the criminal penalties provided in section 54 of the Act.

Sincerely,

A handwritten signature in black ink, appearing to read "Adam L.S. Fracassi", written over a horizontal line.

Adam L.S. Fracassi
Bureau of Elections
Michigan Department of State

c: Colleen Pero

Build a Better Michigan “Get It Done” Script

VISUAL	AUDIO
B-roll of family	GW VO: Michigan invented the middle class. Now, we need to protect it.
Gretchen to camera outside CG: Gretchen Whitmer Former MI Senator Candidate for Governor	GW SYNC: I’m Gretchen Whitmer. We need to get some things done right now that’ll make your life better right now.
B-roll of Gretchen with a family CG: Gretchen Whitmer Affordable Healthcare	GW VO: Like making healthcare more affordable and protecting people with pre-existing conditions... ...repealing the retirement tax, so hardworking people can keep more of what they earned.
B-roll of Gretchen with seniors CG: Gretchen Whitmer Repeal Retirement Tax	<i>(sfx car hits pothole)</i> GW SYNC: And since we know how to build things right, right here, it’s about time to fix the damn roads, too.
B-roll of car hitting pothole	

Gretchen to camera	
CG: Gretchen Whitmer	GW VO:
Fix the Roads	Let's get it done.
Portrait of Gretchen	
CG: Gretchen Whitmer:	(77/78)
Tell Your Legislators -	
Let's Get It Done.	



STATE OF MICHIGAN
RUTH JOHNSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

August 7, 2018

Colleen Pero
520 Seymore Avenue
Lansing, Michigan 48933

Via email: cpero@migop.org

Re: *Pero v. Build A Better Michigan*
Campaign Finance Complaint
No. 2018-06-20-54

Dear Ms. Pero:

The Department of State received a response to the complaint you filed against Build A Better Michigan, which concerns an alleged violation of the Michigan Campaign Finance Act (MCFA), 1976 P.A. 388, MCL 169.201 *et seq.* A copy of the response is provided as an enclosure with this letter.

If you elect to file a rebuttal statement, you are required to send it within 10 business days of the date of this letter to the Bureau of Elections, Richard H. Austin Building, 1st Floor, 430 West Allegan Street, Lansing, Michigan 48918. Should you choose to file a rebuttal, **please address the answer to the complaint and specifically explain whether the advertisements in your complaint do or do not constitute express advocacy as defined by the MCFA.**

Sincerely,

Adam Fracassi
Bureau of Elections
Michigan Department of State

c: Mark Burton, via email: Mark@markburton.org
Graham Wilson, via email: GWilson@perkinscoie.com
Emily Hogin, via email: EHogin@perkinscoie.com

Fracassi, Adam (MDOS)

From: Fracassi, Adam (MDOS)
Sent: Tuesday, August 7, 2018 7:47 PM
To: 'Colleen Pero'
Subject: RE: Pero v. Build A Better Michigan - Extension Request
Attachments: Answer Letter as mailed.pdf

Hi Colleen –

Happy election day!

Please find attached a copy of the answer that was filed in this case. I do not intend to send you a hard copy in the mail. If you would like one, please let me know.

Let me know if you have any questions.

Thank you,

Adam

From: Colleen Pero <cpero@migop.org>
Sent: Tuesday, August 7, 2018 10:30 AM
To: Fracassi, Adam (MDOS) <FracassiA@michigan.gov>
Subject: FW: Pero v. Build A Better Michigan - Extension Request

Good morning, Adam – Happy Election Day!!

Any updates you can provide on this?

Thanks much.

Colleen

Colleen Pero
Chief of Staff | Michigan Republican Party
Office: 517-487-5413; Cell: 517-214-5686
cpero@migop.org

From: Colleen Pero <cpero@migop.org>
Date: Monday, August 6, 2018 at 9:42 AM

To: "Fracassi, Adam (MDOS)" <FracassiA@michigan.gov>

Subject: Re: Pero v. Build A Better Michigan - Extension Request

Adam –

I believe that today is the deadline for the Build a Better Michigan response. Could you provide me (via email) a copy of anything they submit?

Thanks.

Colleen

Colleen Pero

Chief of Staff | Michigan Republican Party

Office: 517-487-5413; Cell: 517-214-5686

cpero@migop.org

From: "Fracassi, Adam (MDOS)" <FracassiA@michigan.gov>

Date: Monday, July 23, 2018 at 2:04 PM

To: Colleen Pero <cpero@migop.org>

Subject: Pero v. Build A Better Michigan - Extension Request

Colleen,

Attached is the request for an extension and the approval of the request. If you have any questions, let me know.

Adam Fracassi

Bureau of Elections

Fracassi, Adam (MDOS)

From: Fracassi, Adam (MDOS)
Sent: Tuesday, August 7, 2018 7:48 PM
To: 'Hogin, Emily A. (Perkins Coie)'
Cc: Wilson, Graham M. (Perkins Coie); Mark Burton
Subject: Pero v. Build A Better Michigan
Attachments: Answer Letter as mailed.pdf

Please find attached a copy of correspondence sent in the above-mentioned case. If you would like a hard copy mailed to you, please let me know.

Thank you,

Adam Fracassi
Election Law Specialist
Bureau of Elections
Michigan Department of State
430 West Allegan Street
Lansing, Michigan 48918
(517) 373-2540



MICHIGAN REPUBLICAN PARTY

SECCHIA – WEISER REPUBLICAN CENTER
520 SEYMOUR AVENUE • LANSING, MICHIGAN 48933
(517) 487-5413 • www.migop.org

August 17, 2018

Michigan Department of State, Bureau of Elections
Attention: Adam Fracassi
Richard H. Austin Building, 1st Floor
430 West Allegan Street
Lansing, Michigan 48918

Re: Pero v. Build a Better Michigan
Campaign Finance Complaint No. 2018-06-20-54

RECEIVED/FILED
MICHIGAN DEPARTMENT OF STATE
2018 AUG 17 PM 3:56
ALLEGAN COUNTY CLERK'S OFFICE

Dear Mr. Fracassi:

Please let this correspondence serve as my rebuttal statement to the August 6, 2018 response of Build a Better Michigan (the “*Committee*”) relating to the above-referenced matter.

The subject advertisements undoubtedly constitute express advocacy as defined by the Michigan Campaign Finance Act, Act 338 of 1976 (the “*Act*”). Michigan law is clear and describes express advocacy as “communications containing express words of advocacy of election or defeat, such as . . . ‘*Smith for governor*’.” MCL § 169.206(2)(j)(emphasis supplied). The Committee has run afoul of the letter and the spirit of the Act by producing and distributing multiple videos featuring the magic words “GRETCHEN WHITMER CANDIDATE FOR GOVERNOR” next to an image of Ms. Whitmer.

In its August 6th response, the Committee cites case after case for the proposition that one cannot go beyond the “magic words” under the *Buckley* standard, *Buckley v. Valeo* 424 U.S. 1, 44 n.52 (1976), but the Committee has not refuted that fact that their advertisements include the magic words that constitute express advocacy under Michigan law.

Inclusion of the word “candidate” as part of GRETCHEN WHITMER CANDIDATE FOR GOVERNOR does not render the phrase harmless. Courts have held that so as to avoid absurd results, variations on the “magic words” under the *Buckley* standard may qualify as express advocacy. See, e.g., *Elections Bd. v. Wis. Mfrs. & Commerce*, 227 Wis. 2d 650, 682 (1999)(“express advocacy... may encompass more than the specific list of “magic words” in *Buckley* footnote 52”).

Even what may be their most relevant case (albeit from Colorado on different facts) states that the test for express advocacy, consistent with the language of their own statute, encompasses “those advertisements that use the ‘magic words’ or substantially similar synonyms.” *Colorado Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 1251. (Colo. 2012). Importantly, in that case, “none of the ads included the phrase ‘[candidate] for [office].’” *Id.* Not so here.

Paid for by the Michigan Republican Party with regulated funds.
Not authorized by any candidate or candidate’s committee.
520 Seymour Avenue, Lansing, MI 48933 • www.migop.org

Finally, despite the Committee's attempt to separate the candidate name from the candidate information with a / (slash) on page 3 of its response, no such separation exists in the actual advertisement, which means that the advertisement meets the magic words test, is express advocacy, and violates the Act. Any interpretation to the contrary would invite an onslaught of new advertisements and billboards "identifying" candidates for public office in a similar manner.

Sincerely,

A handwritten signature in black ink, appearing to read "Colleen Pero". The signature is fluid and cursive, with the first name "Colleen" written in a larger, more prominent script than the last name "Pero".

Colleen Pero
Chief of Staff

4840-4655-1152.1

Fracassi, Adam (MDOS)

From: Colleen Pero <cpero@migop.org>
Sent: Friday, August 17, 2018 6:15 PM
To: Fracassi, Adam (MDOS)
Subject: Re: Pero v. Build A Better Michigan

Thanks Adam.

C

Sent from my iPhone

On Aug 17, 2018, at 6:13 PM, Fracassi, Adam (MDOS) <FracassiA@michigan.gov> wrote:

Colleen,

Please find attached a copy of correspondence sent in the above case. If you have any questions, let me know.

Adam Fracassi
Bureau of Elections

<Rebuttal Letter as sent.pdf>



STATE OF MICHIGAN
RUTH JOHNSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

August 17, 2017

Build A Better Michigan
700 13th Street NW Suite 600
Washington, DC 20005

Re: *Pero v. Build A Better Michigan*
Campaign Finance Complaint
No. 2018-06-20-54

Dear Build A Better Michigan:

This letter concerns the complaint that was recently filed against you, which relates to a purported violation of the Michigan Campaign Finance Act (MCFA or Act), 1976 PA 388, MCL 169.201 *et seq.* The Department of State has received a rebuttal statement from the complainant, a copy of which is enclosed with this letter.

Section 15(10) of the MCFA, MCL 169.215(10), requires the Department to determine within 45 business days from the receipt of the rebuttal statement whether there is a reason to believe that a violation of the Act has occurred. Ms. Pero's complaint remains under investigation at this time. At the conclusion of the review, all parties will receive written notice of the outcome of the complaint.

Sincerely,

A handwritten signature in black ink, appearing to read "Adam Fracassi".

Adam Fracassi
Bureau of Elections
Michigan Department of State

c: Colleen Pero, via email



STATE OF MICHIGAN
RUTH JOHNSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

October 22, 2018

Colleen Pero
520 Seymour Ave
Lansing, Michigan 48933

Via email only: cpero@migop.org

Re: *Pero v. Build A Better Michigan*
Campaign Finance Complaint
No. 2018-06-020-54

Dear Ms. Pero:

The Department of State has received an additional complaint filed against Build a Better Michigan, Gretchen Whitmer, and Gretchen Whitmer for Governor which included the same alleged violations of the Michigan Campaign Finance Act, 1976 P.A. 388, MCL 169.201 *et seq* together with the same evidence. Because of the additional complaint and the commonality of the allegations, your complaint will be taken under advisement pending the results of the investigation into the new complaint. A global resolution will be sought for the outcomes of all complaints.

Should you have any questions, please do not hesitate to contact this office.

Sincerely,

A handwritten signature in black ink, appearing to read "Adam Fracassi".

Adam Fracassi
Bureau of Elections
Michigan Secretary of State

c: Build A Better Michigan (via email)
Eric Doster (via email)
Joe Popek (via email)

Fracassi, Adam (MDOS)

From: Malerman, Melissa (MDOS)
Sent: Thursday, February 7, 2019 5:51 PM
To: Hogin, Emily A. (Perkins Coie); Wilson, Graham M. (Perkins Coie)
Cc: Fracassi, Adam (MDOS)
Subject: RE: conciliation agreement
Attachments: Daunt v BBM Signed Conciliation Agreement 020719.pdf

Importance: High

Signed conciliation agreement attached. Please forward Exhibit A as soon as you are able. Additionally, we would appreciate it if you could please send us the signed original; we will have Sally sign the original and return a copy to you.

Please note, I will be out of the office through President's Day; Adam Fracassi – copied here – is our point of contact going forward.

Thank you,

Melissa Malerman

From: Hogin, Emily A. (Perkins Coie) <EHogin@perkinscoie.com>
Sent: Thursday, February 7, 2019 5:37 PM
To: Malerman, Melissa (MDOS) <malermanm@michigan.gov>; Wilson, Graham M. (Perkins Coie) <GWilson@perkinscoie.com>
Subject: RE: conciliation agreement

Hi Melissa,

This language is good for us. Attached is the executed CA.

Thank you,
Emily

Emily Hogin | Perkins Coie LLP
ASSOCIATE
D. +1.202.654.6225
F. +1.202.654.6211
E. EHogin@perkinscoie.com

From: Malerman, Melissa (MDOS) <malermanm@michigan.gov>
Sent: Thursday, February 07, 2019 5:22 PM
To: Wilson, Graham M. (WDC) <GWilson@perkinscoie.com>; Hogin, Emily A. (WDC) <EHogin@perkinscoie.com>
Subject: conciliation agreement
Importance: High

NOTICE: This communication may contain privileged or other confidential information. If you have received it in error, please advise the sender by reply email and immediately delete the message and any attachments without copying or disclosing the contents. Thank you.

Fracassi, Adam (MDOS)

From: Fracassi, Adam (MDOS)
Sent: Friday, February 8, 2019 2:21 PM
To: Colleen Pero
Subject: Pero v. Build A Better Michigan
Attachments: Final Determination Letter.pdf; BBM Signed Conciliation Agreement 020719.pdf

Colleen,

Please find attached correspondence from the Department in regards to the Campaign Finance Complaint you filed against Build A Better Michigan. The Department now considers this action closed and resolved. If you have any questions, please do not hesitate to contact me.

Adam Fracassi
Bureau of Elections



STATE OF MICHIGAN
RUTH JOHNSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

February 8, 2019

Colleen Pero
520 Seymour Avenue
Lansing, Michigan 48933

Via email

Dear Ms. Pero:

The Department of State has concluded its investigation of the complaint that you filed against Build a Better Michigan, which concerned an alleged violation of the Michigan Campaign Finance Act (MCFA), 1976 P.A. 388, MCL 169.201 *et seq.* A copy of the final resolution is provided as an enclosure with this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Adam Fracassi".

Adam Fracassi
Bureau of Elections
Michigan Department of State



STATE OF MICHIGAN
JOCELYN BENSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

In the Matter of:

**Build a Better Michigan
Gretchen Whitmer for Governor**

CONCILIATION AGREEMENT

Pursuant to MCL §169.215(10) of the Michigan Campaign Finance Act (the Act), MCL §169.201 *et seq.*, the Secretary of State and Build a Better Michigan, a domestic nonprofit corporation, Gretchen Whitmer, and Gretchen Whitmer for Governor, the candidate committee for the Democratic Party nominee for Governor at the November 6, 2018 general election (collectively, Respondents), hereby enter into a conciliation agreement with respect to certain acts, omissions, methods, or practices prohibited by the Act.

The Secretary of State alleges that Respondents cooperated, consulted or acted in concert with one another in the creation and dissemination of two television ads containing words of express advocacy: "Gretchen Whitmer | Candidate for Governor."

Based on the conclusion that the advertisements contained express advocacy, the Secretary of State further alleges that there may be reason to believe that Respondents violated the Act by failing to fully comply with the registration and disclosure requirements of the Act.

While Respondents disagree with the Secretary of State's allegations and legal conclusions, and without admitting any issue of law or fact, Respondents hereby voluntarily

enter into this conciliation agreement and assure the Secretary of State that they will comply with the Act and the Rules promulgated to implement the Act.

By executing this conciliation agreement, Respondents certify that Build a Better Michigan will pay a civil fine in the amount of \$37,500.00 to the State of Michigan within 60 days of execution of this conciliation agreement.

The Secretary of State and Respondents agree that the failure to remit payment in accordance with the terms of this agreement shall constitute a violation of this agreement.

While the contributions and disbursements at issue were already in the public record and available through Build a Better Michigan's filings with the Internal Revenue Service, Build a Better Michigan is including its reports showing the transactions at issue as Exhibit A.

Respondent Build a Better Michigan further certifies that it will not produce or disseminate ads containing words of express advocacy in the future, including any future ads that include the phrase, "[Name], candidate for [Office]," and will dissolve itself within 60 days of execution of this conciliation agreement.

The Secretary of State and Respondents agree that this agreement is in effect and enforceable for four years from the date it is signed by the Secretary of State or her duly authorized representative.

The Secretary of State and Respondents further agree that this agreement, unless violated, shall constitute a complete bar to any further action by the Secretary of State with respect to the underlying facts and alleged violations that resulted in the execution of this agreement, including any action against any individual or entity, based on the allegation that Build a Better Michigan's communications contained express advocacy, and as stated in the complaints and investigation that resulted in this agreement.

The Secretary of State and Respondents further agree that the complaints and investigation that resulted in this agreement are disposed of and will not be the basis for further proceedings, except pursuant to this agreement.

The Secretary of State and Respondents further agree that this agreement will not prevent the Secretary of State from taking action for violations of this agreement.

The Secretary of State and Respondents further agree that their performance under this agreement shall be given due consideration in any subsequent proceedings.

The Secretary of State and Respondents further agree that this agreement, when signed, shall become a part of the permanent public records of the Department of State.


The Secretary of State and Respondents agree that the signatories below are authorized to enter into and bind the parties to this agreement, and have done so by signing this agreement on the date below.

JOCELYN BENSON
SECRETARY OF STATE



Sally Williams, Director of Elections

RESPONDENTS



Graham M. Wilson, Counsel
Joseph T. Popek, Counsel

Date: Feb 7, 2019

Date: February 7, 2019