

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Campaign Legal Center, Common Cause, and)
Sunlight Foundation)
)
Against)
)
Eighteen Broadcast Licensees)
)
For Violations of 47 USC §317 and 47 CFR)
§73.1212)

**CONSOLIDATED REPLY OF CAMPAIGN LEGAL
CENTER, COMMON CAUSE, AND SUNLIGHT FOUNDATION**

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February 12, 2016

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Summary

Campaign Legal Center, Common Cause, and the Sunlight Foundation (Complainants) filed complaints against the licensees of eighteen television stations alleging that they violated Section 317 of the Communications Act and 47 CFR §73.1212 with their on air identification of Independence USA PAC (Independence) as the sponsor of certain advertisements.

In their responses, the stations deny that they knew or should have known that Michael Bloomberg provided all of the funding to and otherwise controlled Independence. They argue that they need not have given any scrutiny to the identity of the sponsor notwithstanding the requirement of Section 317 that they use “reasonable diligence” to obtain sponsorship information from “persons with whom [they] deal[] directly.” However, the complaints showed that even a minimal inquiry of Independence’s advertising agency, material provided for inclusion in the public file or a Google search would have revealed enough information to trigger concern that additional investigation was needed.

Whether or not the stations properly exercised their initial duty to inquire as to the sponsorship of the Independence ads when they were first presented, Complainants argue that the stations unquestionably had to take further action once Complainants provided the stations with extrinsic evidence that Mr. Bloomberg provided 100% of the funds for Independence and that Independence’s website and other information show that Independence is an extension of Mr. Bloomberg’s personal political activities.

The stations rely on *Loveday v. FCC* to claim that they had no duty to investigate the sponsorship of the ads. However, here, unlike *Loveday*, the evidence of Mr. Bloomberg’s control is undisputed, and the stations were provided not just with evidence that Mr. Bloomberg

provided all the funds for Independence, but also that he exercised control over its activities. Moreover, much of the *Loveday* language which the stations invoke is dictum and ignores changes in technology that reduce the fact finding burden on stations.

While *Loveday* is inapposite, this case is controlled by *Trumper Communications*. Indeed, this case is stronger than *Trumper*, where the Bureau ruled that evidence of the source of funds for ads and the fact that two lobbyists for R.J. Reynolds were the only individuals associated with the purported sponsor was sufficient circumstantial evidence to determine that The Tobacco Institute, of which R.J. Reynolds was a member, was the true sponsor. Here, the stations were provided with even more direct evidence of Mr. Bloomberg's control of Independence and, unlike *Trumper*, the evidence was undisputed. Thus, even if the stations were unaware of Mr. Bloomberg's involvement before the ads were aired, they were under a duty to review the sponsorship of the ads once Complainants contacted them.

Efforts to invoke *VOTER*, an unpublished staff decision issued in 1979, are unavailing. Claims that *VOTER* relieves licensees of any duty to look into the identity of the sponsor in the absence of direct evidence about its bona fides are belied by the fact that *Trumper*, issued subsequently, made plain that Section 317 obligations can be triggered by relevant circumstantial evidence.

Some of the stations assert that the fact that Independence is a validly registered PAC and that information about its officers was placed in the stations' public file relieves them of any duty to identify Mr. Bloomberg on air as the sponsor. However, these separate legal schemes do not alter the requirements of Section 317 for correct on air identification.

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Campaign Legal Center, Common Cause, and the Sunlight Foundation (Complainants) respectfully submit this consolidated reply to responses to their complaints against the licensees of 18 broadcast television stations alleging violations of the political advertising on air disclosure requirements in Section 317 of the Communications Act and Section 73.1212 of the Federal Communications Commission’s (FCC) regulations.¹

¹ The stations and licensees are Scripps Media, Inc. Stations WXYZ-TV, Detroit, MI and KSHB-TV, Kansas City, MO; Scripps Broadcasting Holdings LLC Station WTMJ-TV, Milwaukee, WI; Graham Media Group Stations WDIV-TV, Detroit, MI and WKMG-TV, Orlando, FL; Television Wisconsin, Inc. Station WISC-TV, Madison, WI; Weigel Broadcasting Co. Station WDJT-TV, Milwaukee, WI; Fox Television Stations LLC Station WOFL(TV), Orlando, FL; New World Communications of Detroit, Inc. Station WJBK(TV), Detroit, MI; Meredith Corporation Stations KMOV(TV), St. Louis, MO and KCTV(TV), Kansas City, MO; Gray

In this case, the stations failed to comply with their duty to ensure that advertisements they carried contained adequate on air sponsorship disclosures. Their non-compliance persisted even after they were provided with evidence that their on air disclosures were inadequate. The stations' responses demonstrate these failures. This consolidated reply addresses the inadequacies of the stations' arguments, along with a few additional points raised by various stations.

I. BACKGROUND

The stations indicated in their responses that, in late 2015, they received individual requests on behalf of Independence USA PAC (Independence) for airtime during November 2015. Depending on the location, each advertisement portrayed the particular state attorney general of Michigan, Missouri, Wisconsin, or Florida as "siding with polluters" because he or she opposed the Obama Administration's Clean Power Plan, the subject of multi-state litigation with the Environmental Protection Agency. The commercial provided to the stations listed Independence USA PAC as the sponsor of the content. The stations each agreed to air the material and accepted payment in exchange

After the advertisements began to air, the Complainants sent letters to each station containing publically available information regarding Michael Bloomberg's connection to Independence. The letters provided the stations with excerpts from Independence's Federal Election Commission (FEC) filings that show Michael Bloomberg to be the sole source of its

Television Licensee, LLC Station WMTV(TV), Madison, WI; WKOW License, LLC Station WKOW(TV), Madison, WI; Hearst Properties, Inc. Stations WESH(TV), Daytona Beach, FL; KMBC Hearst Television, Inc. Station KMBC-TV, Kansas City, MO; WISN Hearst Television, Inc. Station WISN-TV, Milwaukee, WI; NBC Telemundo License LLC Station WTVJ, Miami, FL; and Sunbeam Television Corporation Station WSVN(TV), Miami, FL.

funds, statements from the PAC's website which describe the purpose of the entity as a "continuation" of Michael Bloomberg's political efforts, and citations to news stories detailing Mr. Bloomberg's high degree of involvement with the PAC. The letters also reminded stations of their obligations under the Communications Act and the FCC's regulations to use reasonable diligence to identify the "true sponsor" of the material.

After receiving the letters but before complaints were filed against them, some stations reviewed Independence's website and FEC online filings.² Others wrote to Complainants, indicating that they felt that the disclosures that they made were correct and no action was necessary.³ Some forwarded the letter to Independence or its ad agency and requested their position on the matter, then forwarded that response on to Complainants.⁴ One station took no additional action, explaining that the advertisement had stopped airing.⁵

Because no station changed, or indicated that it would in the future change, its sponsor identification on Independence ads to include Michael Bloomberg, on December 10, 2015, Complainants filed complaints against the each of the stations. By letter dated December 17, 2015, the Assistant Chief, Policy Division of the Media Bureau directed the stations to respond to the complaints.⁶ The stations all responded, taking the position that their on air identification was sufficient and that they complied with the diligence requirements of the disclosure laws.

² Response of WXYZ-TV, KSHB-TV, and WTMJ-TV at 2.

³ Response of WKOW-TV at 3 and Response of WESH(TV), KMBC-TV, WISN-TV at 4.

⁴ Response of WDIV-TV and WKMG-TV at 2, Response of WDJT-TV at 4, Response of KCTV(TV) and KMOV(TV) at 1, Response of WTVJ at 4, and Response of WMTV at 1-2.

⁵ Response of WISC-TV at 3.

⁶ The time for filing responses was extended until January 29, 2016 and Complainants were afforded until February 12, 2016 to file their reply.

II. THE STATIONS FAILED TO USE REASONABLE DILIGENCE REQUIRED BY 47 USC §317 IN DETERMINING AND DISCLOSING THE TRUE SPONSOR OF THE ADVERTISEMENTS.

Before and even after Complainants presented evidence of Michael Bloomberg’s funding and control of Independence, the stations did not fulfill their duties to identify Michael Bloomberg on air as the sponsor.

A. The Stations Failed to Use Reasonable Diligence to Ensure That the Advertisement Contained an Adequate Disclosure Before it Aired

Large portions of the stations’ responses are devoted to discussion of the public file requirements of Section 315, FCC rules promulgated thereunder, and on the requirements of the Federal Election Commission Act. Despite these efforts to deflect attention, the complaints were clearly limited to violations of the separate on air disclosure requirements of Section 317 of the Communications Act and FCC rules implementing Section 317. This provision requires that any advertisement that a broadcast station is paid to air shall announce at the time of broadcast that the advertisement is “paid for or furnished, as the case may be, by such person.”⁷ Section 317 further requires that a broadcast licensee use “reasonable diligence” to “obtain from its employees, and from other persons with whom it deals directly in connection with [the advertisement], information to enable” the broadcaster to accurately identify the advertisement’s sponsor.⁸ These requirements are to ensure that the public “know[s] by whom they are being persuaded.”⁹

⁷ 47 USC §317(a)(1).

⁸ 47 USC §317(c) (emphasis added).

⁹ *Applicability of Sponsorship Identification Rules*, 40 FCC 141 (1963).

Section 73.1212 of the Commission's regulations mirrors the statutory language and states that the on air sponsorship identification shall "fully and fairly disclose the true identity" of the person or entity paying for the advertisement.¹⁰ In addition, Section 73.1212(e) requires that:

Where an agent or other person or entity contracts or otherwise makes arrangements with a station on behalf of another, and such fact is known *or by the exercise of reasonable diligence, as specified in paragraph (b) of this section*, could be known to the station, the announcement shall disclose the identity of the person or persons or entity on whose behalf such agent is acting instead of the name of such agent.¹¹

Therefore, both the Communications Act and Commission's regulations mandate that broadcasters assure themselves of the identity of sponsors before airing advertisements and exercise reasonable diligence to ensure that the named sponsors are the actual sponsor of the content.

The complaints showed that even a minimal inquiry of Independence's advertising agency, a review of the material provided for inclusion in the station's public files or a simple Google search to determine the bona fides of Independence should have produced enough information to trigger the need for further inquiry to insure that the commercials were properly labeled so that viewers would be fully and fairly apprised of the identity of the true sponsor of the ads.

Several stations argue that by simply obtaining information needed for the separate public file requirements imposed under FCC rules, they fulfilled their obligations under Section 317.¹²

¹⁰ 47 CFR §73.1212(e).

¹¹ *Id.* (emphasis added).

¹² See e.g. Response of WESH(TV), KMBC-TV, and WISN-TV at 4-5; Response of WKOW(TV) at 4-5 (citing *Loveday v. FCC*, 707 F.2d 1443, 1451, 1456-57 (D.C. Cir. 1983)).

However, such credulity is far from what the law requires. Despite the express requirement that they make inquiry of “persons with whom it deals directly in connection with any program or program matter for broadcast,” the stations do not claim, much less prove, that they asked any questions whatsoever of Independence’s advertising agency, that they examined FEC files or even Googled the organization. Indeed, several of the station managers conceded, via declarations, submitted with their responses, that they were “unaware of any facts relating to the funding of IUSA PAC” before receiving notice from Complainants.¹³

Even if it were appropriate to use public files as a substitute for on air identification—and it is not—many of the stations’ public file entries were incomplete and failed to comply with the requirements of Sections 315 and 317. For example, many of the stations identified the ads as not addressing an issue of national importance.¹⁴ This further establishes the lack of diligence on the part of the stations. At a bare minimum, if stations are to rely on these forms, they must require, review, and confirm their accuracy. Because the stations failed to obtain adequate assurances from Independence, they did not exercise adequate diligence before airing the advertisements.

¹³ Response of WKOW(TV), Declaration of Thomas Allen; Response of WESH(TV), KMBC-TV, and WISN-TV, Declarations of James J. Carter, Sarah Smith, and Jan Wade.

¹⁴ The stations that fail to identify this as a national issue in their political files are WSVN, WISN-TV, WKOW(TV), WXYZ-TV, KSHB-TV, WTMJ-TV, WDJT-TV, WJBK(TV), WOFL(TV), WISC-TV, and WTVJ. The commercials address multi-state litigation related to the Environmental Protection Administration’s implementation of the Clean Air Act, which is inherently federal in nature. Indeed, long before the EPA was created, air pollution has been recognized as an issue affecting interstate commerce, which does not respect state borders. *Georgia v. Tennessee Copper Company*, 206 U.S. 230 (1907) (Holmes, J.).

B. Even After Being Provided with Information That Their Disclosures Were Inadequate, the Stations Continued to Fail to Meet Their Disclosure Obligations

Whether or not the stations properly exercised their initial duty to inquire as to the true sponsor of the Independence USA ads when they were first presented, the stations unquestionably had to take further action once Complainants gave them extrinsic evidence of Michael Bloomberg's control over Independence's funding and activities. The stations' responses indicate that they fell well short of this obligation. It is especially significant that, to the extent that some of them ultimately forwarded Complainants' letters to Independence, the facts of Mr. Bloomberg's funding and control of Independence went rebutted.

The stations' responses rely extensively on *Loveday v. FCC* to show that they did not have to take further action after Complainants made them aware of Mr. Bloomberg's funding and control of Independence. For instance, WDIV-TV and WKMG-TV claim that they are entitled to rely on whatever assurances an advertiser's legal counsel provides no matter how unpersuasive or irrelevant it may be.¹⁵

WISC-TV wrongly claims that *Loveday* rejected any duty of broadcasters to investigate conflicting representations about a named sponsor because it would result in an "unconstitutional burden on political speech."¹⁶ In fact, *Loveday* confirmed that broadcasters must act when adequate evidence is presented.¹⁷

The facts in *Loveday* were substantially different than this case. In *Loveday*, the complainants submitted information *to the stations* about the funding source of the named

¹⁵ Response of WDIV-TV and WKMG-TV at 3-4.

¹⁶ Response of WISC-TV at 6.

¹⁷ See n. 19, *infra*.

sponsor of certain ads, but did not provide them with any other documented information establishing that the named sponsor did not control the advertising.¹⁸ While the Complainants later provided additional information *to the Commission* in its complaint, that information had not been given to the stations. Thus, in finding that the stations were not unreasonable, the Commission was assessing their action based largely on information limited to describing the group's funding. The Commission might well have reached a different result if more information had been provided to the stations before the complaint was filed, as was the case here.

Although in *Loveday* the D.C. Circuit found that the responding stations did not have enough evidence on hand that someone other than the named sponsor was the "true sponsor," the Court recognized that there may be situations where evidence was undisputed or highly credible and thus might trigger further obligations.¹⁹ Moreover, unlike the present case, the named sponsor in *Loveday* forcefully disputed the complainants' assertions in its response to the stations. Here, the Complainants gave the *stations* (not the Commission) powerful evidence of Mr. Bloomberg's control and all of the evidence remains undisputed. Thus, *Loveday* is inapplicable and *Trumper*, discussed *infra*, controls.

Moreover, and in any event, much of the *Loveday* language cited by the stations in their responses is mere dictum. *Loveday* was decided in 1983, one year before the Supreme Court's 1984 decision in *Chevron* determined that the proper role of a court reviewing agency action is to

¹⁸ See *Paul Loveday*, 87 FCC 2d 492, 499 n. 6, *aff'd sub nom. Loveday v. FCC*, *supra*.

¹⁹ See *Loveday*, 707 F.2d at 1459 (1983) ("There may be cases where a challenger makes so strong a circumstantial case that someone other than the named sponsor is the real sponsor that licensees, in the exercise of reasonable diligence, would have to inform the named sponsor that they could not broadcast the message without naming another party.").

decide whether the agency interpreted the relevant statute in a reasonable way.²⁰ In *Loveday*, rather than considering the interpretation and reasoning of the Commission's decision, the Court conducted an essentially *de novo* review and engaged in a lengthy discussion of the legislative history of Section 317 that was entirely unrelated to anything the Commission said in the decision under review. Therefore, any language in *Loveday* that goes beyond accepting as legitimate the Commission's interpretation of its own statutory authority and regulations is dictum.

Loveday should be further discounted because of the significant changes in technology since 1983, undermining the stations' assertions regarding the burdensome nature of investigating named sponsors. In the decades following *Loveday*, new information communication technologies and disclosure requirements have given broadcasters new tools that enable them to fulfill their obligation to investigate without having to resort to onerous investigations and research. Today, broadcasters can fulfill their duty to investigate a nominal sponsor without making public records requests, visiting government offices, observing suspected persons, or establishing research departments staffed by detectives. The information required to disclose the true identity of a political advertisement's sponsor is freely and publicly available via the Internet, in Federal Elections Commission disclosure reports, online databases, and news outlets.

Loveday's discussion of the First Amendment similarly offers no reason for the Bureau to dismiss these complaints. This discussion is not only dictum, but purely speculative. The *Loveday* court claims that reasonable diligence obligations may deter broadcasters from running

²⁰ *Chevron v. NRDC*, 467 U.S. 837 (1984).

political ads, which could choke-off political speech. The Court offered no supporting evidence for this claim, and neither do the stations' responses. Given the large amount of money that stations receive for airing political ads, they are unlikely to be chilled from airing ads simply by an obligation to conduct reasonable diligence. Moreover, a string of cases in recent years reaffirms that disclosure requests have no chilling effect and do not violate the First Amendment. PACs are unlikely to be chilled by disclosure requirements.²¹ Without evidence of a chilling effect, it would be imprudent to choke-off disclosure requirements, which have been upheld time and again against First Amendment challenge at the Supreme Court post-*Loveday* by *McConnell v. FEC*,²² *Citizens United v. FEC*,²³ and *McCutcheon v. FEC*.²⁴

While *Loveday* is inapposite, this case is controlled by *Trumper Communications of Portland, Ltd.*, 11 FCCRcd 20415 (1996), which provides useful and authoritative guidance. In that case, the Bureau found that "Fairness Matters for Oregonians Committee" ("FMOC"), the organization initially identified on air as the sponsor of a series of advertisements, was not the true sponsor, and that the Tobacco Institute should have been identified as the sponsor. This was based on two undisputed facts presented to each of the stations. First, all but \$20 of FMOC's

²¹ See *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 41 (1st Cir. 2011) (finding disclosure provisions at issue "neither erect a barrier to political speech nor limit its quantity. Rather, they promote the dissemination of information about those who deliver and finance political speech, thereby encouraging efficient operation of the marketplace of ideas.").

²² *McConnell v. FEC*, 540 U.S. 93, 210 201 (2003) (finding disclosure requirements that "do not prevent anyone from speaking" and "perform an important function in informing the public" to be constitutional) (internal citations and quotation marks omitted).

²³ *Citizens United v. FEC*, 558 U.S. 310, 371 (2010) ("The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.").

²⁴ *McCutcheon v. FEC*, 134 S. Ct. 1434, 1460 (2014) ("With modern technology, disclosure now offers a particularly effective means of arming the voting public with information.").

\$2,664,600 budget came from the Tobacco Institute. Second, the only two individuals associated with FMOC were lobbyists for R.J. Reynolds, one of the largest members of the Tobacco Institute. The Bureau ruled that this evidence was sufficient to have required the stations to infer that the Tobacco Institute, and not FMOC, controlled the content of the advertisements.

This case is far stronger than *Trumper*. In addition to proof that Michael Bloomberg has provided all of the funding for Independence,²⁵ the undisputed evidence shows that Mr. Bloomberg explicitly and unapologetically claims that he created Independence for the purpose of advancing his political beliefs, and that news coverage refers to it as “Michael Bloomberg’s PAC.”²⁶

Even if the stations were unaware of Mr. Bloomberg’s involvement and control before the advertisements were aired, once they received the letters from Complainants, they were put on notice. The letters provided ample evidence of both funding and editorial control. At this point, they were required to conduct some sort of investigation to assess whether Mr. Bloomberg

²⁵ WMTV(TV) argued that it was possible that someone other than Mr. Bloomberg could have given a donation so small that it went undocumented with the FEC. *See* Response of WMTV(TV) at 2 n.7. However, this issue is addressed in *Trumper*, as there was \$20.00 there that was not traceable to the Tobacco Institute, which did not prevent the group from still being considered the funder.

²⁶ *See* Maggie Haberman, Bloomberg Targets Attorneys General With Ads on Carbon Emissions, *New York Times* (Nov. 6, 2015), http://www.nytimes.com/2015/11/07/us/politics/michaelbloomberg-state-attorneys-general-carbon-emissions.html?smid=fb-nytimes&smtyp=cur&_r=1 (“Former Mayor Michael R. Bloomberg of New York City said this week that he would run millions of dollars in political television ads against four state attorneys general” “Mr. Bloomberg will pay for television ads through his Independence USA PAC.”); Jennifer M. Granholm, AG Schuette Joins Fight Against Renewable Energy, Michigan Jobs, *Huffington Post* (Nov. 11, 2015), http://www.huffingtonpost.com/jennifer-mgranholm/ag-schuette-joins-fight-a_b_8538714.html (describing ads as being purchased by “Independence USA--Michael Bloomberg’s PAC”); Catalina Camina, Michael Bloomberg Puts Money in Key Races for Governor, Congress, USA Today (Oct. 7, 2014), <http://onpolitics.usatoday.com/2014/10/07/bloomberg-bakermassachusetts-governor/>.

should have been included in the on air disclosure. However, this did not occur. No stations provided responses to the Bureau that contained any evidence or even made any claims to counter Mr. Bloomberg's involvement with Independence.

Some of the stations, after being provided with evidence of Mr. Bloomberg's involvement, took no steps to ensure that their disclosures were correct. They did not contact Independence, conduct any outside research, nor did they conduct any sort of inquiry of Independence as to the nature of Mr. Bloomberg's sponsorship and control over the organization. They failed to provide any evidence to the Bureau to counter that provided them by Complainants. Other stations responded to Complainants with mere legal conclusions, asserting that they did not need to amend the disclosures in any way. Again, these stations did not seek any evidence or assurances from the advertiser or any outside sources to confirm or deny the allegations made by Complainants.

Even the stations that did contact Independence after being put on notice by the Complainants failed to exercise proper diligence. They requested general responses rather demanding evidence associated with Mr. Bloomberg's funding and editorial control over the advertisements. The responses that were given to the stations from Independence merely stated that Independence was a legally existing PAC and made no mention of Mr. Bloomberg. Independence made no assertions regarding editorial control or funding.²⁷ Because the stations did not make appropriate inquiries of Independence, the responses that they provided to the Bureau were inadequate and left Complainants' charges credible and undisputed.

²⁷ See, e.g., Response of WDJT-TV, Attachment A.

Under *Trumper*, unless the stations obtained credible evidence disputing Complainants' charges, they would have to conclude that Mr. Bloomberg did not exercise editorial control over the ads. Notably, in *Trumper*, one of the responding stations reached out to FMOC regarding editorial control and received a response that one of FMOC's directors, and not the Tobacco Institute, exercised editorial control over the advertisement in question.²⁸ The Bureau found that this bare assertion, unaccompanied by any other evidence, was insufficient to overcome the circumstantial evidence to the contrary. Here, no stations received any evidence from Independence even purporting to claim that Mr. Bloomberg does not control Independence. The only evidence that the Bureau has to consider is the evidence of Mr. Bloomberg's control provided by Complainants, which is much stronger than what was present in *Trumper*.

Several of the stations attempt to rely on *VOTER*,²⁹ a very old, unpublished staff decision that appears to emphasize the need to have direct evidence to demonstrate that a party has editorial control over advertisements for it to be identified as the sponsor. Complainants have argued that to the extent that this is what *VOTER* says, it was wrongly decided and should be disavowed.³⁰ However, *Trumper*, a published decision issued long after *VOTER*, relied on indirect and purely circumstantial evidence to justify a finding that the Tobacco Institute had control, including editorial control over FOMC and its commercials. *Trumper* thus clarified the holding in *VOTER*, and is the proper authority governing this case, especially since the evidence here is much stronger than the evidence in either *Trumper* or *VOTER*.

²⁸ *Trumper*, 11 FCCRcd at 20415.

²⁹ *VOTER*, 46 Rad. Reg. 2d (P&F) 350 (1979).

³⁰ See CLC *et al.* Joint Reply to Oppositions to Application for Review of DA 14-267, October 20, 2014, at 3.

In their responses, some stations attempted, but failed, to distinguish the present case from *Trumper*. WESH(TV), KMBC-TV, WISN-TV, and WKOW(TV) claim that *Trumper* does not apply to the case at hand because Complainants presented no evidence that Mr. Bloomberg exercised editorial control over the ads.³¹ In fact, under *Trumper*, only circumstantial evidence is necessary.³² Complainants' evidence more than passed this bar.³³

WXYZ-TV, KSHB-TV, and WTMJ-TV characterize *Trumper* as “extreme” and inapplicable because here Independence is a validly organized legal entity, there was further information about it available online, and there was no attempt to deceive the public.³⁴ However, in *Trumper*, there was no dispute as to whether FMOC was a legal entity, only whether it was the appropriate organization to identify on air. The fact that information is now available online in stations' political files does not relieve a station of their on air sponsor identification obligations.³⁵ Further, intent to deceive is not a requirement under *Trumper*.

WDIV-TV, WKMG-TV, and WDJT-TV claim that *Trumper* is distinguishable because it involved a nominal sponsor that had no genuine independent existence, and operated solely as a front.³⁶ The fact that Super PACs now have “genuine independent” purposes beyond operating

³¹ Response of WESH(TV), KMBC-TV, and WISN-TV at 7; Response of WKOW(TV) at 6.

³² *Trumper*, 11 FCCRcd at 20417-18 (“We believe the evidence provided by MAP presents a compelling circumstantial case that the Tobacco Institute is the sponsor of the ads.”)

³³ These stations further contend that Complainants “appear to ignore *Trumper*” because they “believe a talismanic and conclusory incantation of the phrase ‘alter ego’ is sufficient to constitute dispositive proof for such a legal conclusion.” Response of WESH(TV), KMBC-TV, and WISN-TV at 8; Response of WKOW(TV) at 6-7. This, again, misinterprets *Trumper*, under which only circumstantial evidence, and not “dispositive proof,” is needed to require further review.

³⁴ Response of WXYZ-TV, KSHB-TV, and WTMJ-TV at 6.

³⁵ See Section IV, *infra*.

³⁶ Response of WDIV-TV and WKMG-TV at 4; Response of WDJT-TV at 3. See also Response

solely as fronts does not all of a sudden make them *per se* acceptable entities to disclose on air in the face of uncontested evidence that another entity is the funder and exercises editorial control.

WJBK(TV) and WOFL(TV) argue in a footnote that *Trumper* is somehow distinguishable because there is no allegation here that Independence is acting as an “agent for some third party,” presumably along the lines of the lobbyists who served as the nominal officers of FOMC.³⁷ Somewhat similarly, WTVJ emphasizes that “FOMC was a front for the Tobacco Institute, which in turn was controlled in its funding and editorial voice *by a third party*, R.J Reynolds, a fact that was not apparent to the public.”³⁸ These are red herrings; what matters is who provides the funds and controls the activity of the advertisement, not whether the sponsor does so directly or through an agent of some kind. Thus, whether Independence may or not be an “agent” for Mr. Bloomberg is irrelevant because Complainants made persuasive showings that Mr. Bloomberg funds and controls it. As to WTVJ’s point, the relevant fact in *Trumper* was that FOMC was not paying the bills or controlling its own operations, as is the case here with Independence.

Finally, WTVJ claims that the present case is distinguishable because there was no effort to conceal the committee’s funding and editorial voice.³⁹ Importantly, the issue here is on air disclosure, and while Mr. Bloomberg has not hid the fact that Independence is “his” PAC, and despite WTVJ’s disclosure of Mr. Bloomberg’s officer status in its political file, these available facts are not a substitute for the mandatory on air disclosure. Actually, Mr. Bloomberg’s role is

of WTVJ at 7.

³⁷ Response of WJBK(TV); Response of WOFL(TV) at 3 n.10.

³⁸ Response of WTVJ at 7.

³⁹ *Id.*

the very reason he should be listed as the sponsor, not a reason to obscure his role. Indeed, WTVJ's argument proves too much, since it demonstrates that WTVJ knew or should have known that it had to investigate further and demonstrates that Mr. Bloomberg was the true sponsor.

III. SUPER PAC COMPLIANCE WITH FEC REGULATIONS HAS NO BEARING ON BROADCASTERS' DISCLOSURE OBLIGATIONS.

In their responses, several stations indicated that they would not change the sponsorship identification on the advertisement because Independence is a "valid, legally existing committee" and that Complainants have failed to present any evidence to the contrary.⁴⁰ Further, they contend that because Independence is a legally existing entity, that it must be the true sponsor of the advertisement. This is a misinterpretation of the complaints, as well as the statutes, regulations, and case law giving rise to this cause of action.

The complaints were filed against *broadcaster licensees*, not Independence. The fact that Independence is a registered PAC under FEC requirements does not excuse the stations from disclosing that Mr. Bloomberg is the true sponsor of the advertisements pursuant to Section 317. Complainants do not assert that Independence has failed to comply with FEC regulations. Nor do they question its status as an entity with the FEC. Rather, they assert that the stations failed to use reasonable diligence in discovering whether the name "Independence USA PAC" was sufficient to identify the true sponsor for purposes of the disclosure obligations in Section 317 and the Commission's rules.

⁴⁰ Response of WXYZ-TV, KSHB-TV, and WTMJ-TV at 2; Response of WDJT-TV at 4-5; Response of WOFL(TV) at 2-3, Response of WJBK(TV) at 2-3, Response of WKOW(TV) at 7; Response of WESH(TV), KMBC-TV, and WISN-TV at 8.

Here, too, *Trumper* controls. In that case, the stations argued that FMOC should be identified as the sponsor because it was a “bona fide political committee as evidenced by its registration with the State of Oregon.”⁴¹ The Bureau was not convinced by this argument then, and it should not be convinced by it now. In *Trumper*, it found that despite FMOC’s existence as a valid and legal committee, it was still acting as the alter ego of the Tobacco Institute. Because the Tobacco Institute was the true sponsor standing behind the advertisement, it was required to be named during the sponsorship identification. Regardless of whether Independence is a validly existing political action committee, it still acts as the alter ego of Michael Bloomberg for purposes of his political speech. Thus, Mr. Bloomberg must be named in the sponsorship identification.

The stations also assert that if they were to adhere to the disclosure rules and include Mr. Bloomberg’s name as part of the sponsorship identification that they would fall out of compliance with FEC regulations.⁴² This is not the case. Disclosure is not an either/or matter; identifying Michael Bloomberg as the true sponsor of the advertisements would not impede the stations from also making any announcement required by FEC rules.

Further, some stations indicated in their responses that the FCC would be exceeding the scope of its authority in ruling on this issue because, as one station said, “the relationship between political committees and donors is fundamentally a question of campaign finance

⁴¹ *Trumper*, 11 FCCRcd at 20416.

⁴² Specifically, they assert that they must disclose that advertisements are affiliated with PACs in accordance with 11 CFR §110.11(b)(3) and 110.11(c)(4)(i). Response of WXYZ-TV, KSHB-TV, and WTMJ-TV at 4; Response of WDIV-TV and WKMG-TV at 5; Response of WDJT-TV at 4.

law.”⁴³ The FEC certainly has the authority to promulgate and enforce regulations related to campaigns. However, the FCC has long had the authority to promulgate and enforce regulations related to broadcasters. Indeed, when Congress enacted disclosure and public file requirements in the Bipartisan Campaign Reform Act, it did so by amending Section 315 of the Communications Act and did not place the provision elsewhere in the U.S. Code. Resolution of this case has nothing to do with the relationship between committees and donors. It pertains to broadcasters’ on air disclosure obligations. As such, the FCC is the only administrative body with the authority to decide this issue.

IV. PUBLIC FILE REQUIREMENTS SET FORTH IN SECTION 315 OF THE COMMUNICATIONS ACT DO NOT ACT TO REMEDY A LACK OF ON AIR SPONSORSHIP IDENTIFICATION AS REQUIRED BY SECTION 317.

Complainants alleged that the stations failed to comply with the on air disclosure requirements of Section 317. Several stations responded that because they placed information in their public files as required by Sections 315 and 317, there was no need to amend the on air sponsorship disclosure.⁴⁴ One asserted that “information about Mr. Bloomberg’s connection to Independence is readily and publicly available, not only on the PAC’s website and in the online records of the Federal Election Commission but also in the Stations’ own online public inspection files — a fact the Complaints curiously and conspicuously omit.”⁴⁵

Even if all of the stations’ public files were accurate and complete, the contents and completeness of their political files is irrelevant here. Information in public files is not a

⁴³ Response of WKOW(TV) at 12; Response of WESH(TV), KMBC-TV, and WISN-TV at 12.

⁴⁴ See Response of WXYZ-TV, KSHB-TV, and WTMJ-TV at 5-6; Response of WDJT-TV at 5; Response of WDIV-TV and WKMG-TV at 6; Response of WDJT-TV at 5.

⁴⁵ Response of WDIV and WKMG at 6.

substitute or alternative to the on air identification required by Section 317 and does not remediate failures to comply with those requirements. Public file requirements differ from sponsorship disclosure requirements. They fulfill different purposes and are separate legal requirements. The on air sponsorship identification requirements inform the public who is trying to persuade them at the time the material is broadcast. It is important that this information is broadcast simultaneously so that the public is aware of the source. It is the duty of the broadcaster to ensure that the proper sponsorship identification is presented. The public files allow motivated individuals and journalists to do additional research about sponsors, but they do not serve the same function as on air disclosure presented to the entire audience. Listing Mr. Bloomberg as the “chair” of Independence in the stations’ political file does not inform the public that he actually was the true sponsor of the advertisement. As such, it is insufficient that Mr. Bloomberg’s name is listed as the chair of Independence in the political files.

WTVJ argues that whoever are listed in the public file as the “chief executive officers or members of the executive committee” of an organization, by definition, “are the people who control the editorial content of an issue ad.”⁴⁶ Sometimes it may be the case that those persons have editorial control, but that is not necessarily so. In many cases, the CEO or board of directors will not be at all involved in an organization’s advertising activities. Indeed, it was the R.J. Reynolds lobbyists and not the CEO or board of directors of the Tobacco Institute who were identified in Trumper’s public file.

⁴⁶ Response of WTVJ at 6.

V. THE ISSUE IS NOT MOOT, PARTICULARLY BECAUSE IT INVOLVES POLITICAL MATERIAL.

Several of the licensees suggest that no further Commission action is appropriate because the particular flight of Independence ads has completed. However, that does not mean that the Commission lacks the authority to declare that the stations' handling of these particular advertisements was in violation of the Communications Act and the Commission's regulations. Nor is the case moot, as it clearly falls within the familiar framework of the mootness exception first delineated in *Southern Pacific Terminal Co. v. ICC*, 219 US 498 (1911). "The exception provides that the appeal of an issue will not be rendered moot by a change of circumstances occurring during the pendency of the litigation if it appears that every time the particular issue is appealed, the same or similar change in circumstances would render the issue moot before the appeal is decided."⁴⁷ This provision is especially relevant for disputes arising in political contexts. In a more recent implementation of this doctrine, the Supreme Court described the exception as applicable where "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again."⁴⁸ Here, because of the relatively short nature of the airing of advertisements, it is impossible for the issue to be fully litigated before the advertisements cease. Complainants have filed other, similar complaints and they and others will do so in the future. In addition, the stations have made it clear that they are unwilling to comply with the requirements of the disclosure laws. As such, it is reasonable to expect that

⁴⁷ *Federal administrative orders as subject to judicial review where such orders are "capable of repetition, yet evading review,"* 66 A.L.R. Fed. 285 (collecting cases). See also, *CBS, Inc. v. FCC*, 629 F.2d 1, 27-28 (D.C. Cir. 1980), *aff'd.*, 453 U.S. 367 (1981).

⁴⁸ *Fed. Election Com'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 450 (2007).

the issue is likely to recur and that it will evade review if a strict mootness standard were imposed.

Conclusion

The broadcasters' responses confirm that they are unwilling to comply with the Communications Act and the Commission's regulations. Complainants therefore renew their request that the FCC take prompt action to ensure that the proper sponsorship identification information is displayed on political advertisements that will be aired in the future. They further request that the FCC take other measures, such as assessing forfeitures and issuing a Public Notice reminding broadcast stations of their obligations, to ensure that all broadcast stations fully comply with the requirements for complete public disclosure as required by law and that it grant all such other relief as may be just and proper.

Respectfully submitted,

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February 12, 2016

CERTIFICATE OF SERVICE

I, Drew Simshaw, hereby certify that copies of the Consolidated Reply of Campaign Legal Center, Common Cause, and Sunlight Foundation, through its attorneys, the Institute for Public Representation, have been served by e-mail, this 12th of February 2016, on the following persons at the addresses shown below.

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