

## FEDERAL ELECTION COMMISSION Washington, DC 20463

February 4, 2022

## **BY EMAIL ONLY**

jessica@hvjt.law eellington@hvjt.law Jessica Johnson Elizabeth Ellington Holtzman Vogel Josefiak Torchinsky PLLC 15405 John Marshall Highway Haymarket, VA 20169

RE: MUR 7806

Cory Gardner for Senate and Lisa Lisker, as Treasurer

Cory Gardner

Dear Ms. Johnson and Ms. Ellington:

On October 2, 2020, the Federal Election Commission ("Commission") notified your clients, Cory Gardner for Senate and Lisa Lisker in her official capacity as treasurer and Cory Gardner, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On February 2, 2022, based on the information provided in the complaint, and information provided by you, the Commission decided to exercise its prosecutorial discretion to dismiss the allegations as to Cory Gardner for Senate and Lisa Lisker in her official capacity as treasurer and Cory Gardner. The Commission then closed its file in this matter. A copy of the General Counsel's Report, which more fully explains the basis for the Commission's decision, is enclosed.

Documents related to the case will be placed on the public record within 30 days. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009). If you have any questions, please contact Don Campbell, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Lisa J. Stevenson Acting General Counsel

Roy Q. Luckett

BY: Roy Q. Luckett

Acting Assistant General Counsel

Enclosure:

General Counsel's Report

2	BEFORE THE FEDERAL ELECTION COMMISSION	
1 2 3 4 5	ENFORCEMENT PRIORITY SYSTEM DISMISSAL REPORT	
6 7 8 9	MUR 7806 Respondents:	Cory Gardner for Senate and Lisa Lisker in her official capacity as treasurer Cory Gardner
10 11 12 13 14	Complaint Receipt Date: Sept. 28, 2020 Response Date: Oct. 20, 2020	
15 16 17 18	Alleged Statutory Regulatory Violations:	52 U.S.C. § 30120(d)(1)(B)(i); 11 C.F.R. § 110.11(c)(3)(ii)(B)
19	The Complaint alleges that Cory Gardner for Senate aired two television advertisements in	
20	which the images of U.S. Senate candidate Cory Gardner that accompany his statement of approva	
21	do not comply with the disclaimer requirements of the Federal Election Campaign Act of 1971, as	
22	amended (the "Act"), and Commission regulations. 1 Specifically, the Complaint alleges that	
23	"Major Victories," which began airing June 2, 2020, and "Both Parties," which began airing	
24	August 13, 2020, include verbal statements by Gardner approving the communication, but the	
25	image of Gardner that accompanies the statements occupied less than 80 percent of the screen	
26	height, and thus was not a "clearly identifiable image" of the candidate as required by Commission	
27	regulations. <sup>2</sup> The Response asserts that both advertisements fully complied with the requirements	
28	of the Act and Commission regulations, noting that Gardner is plainly and obviously "clearly	
29	identifiable in each photographic image in the ads," and that the Complaint mistakes the 80% safe	
30	harbor for a requirement. <sup>3</sup>	

<sup>&</sup>lt;sup>1</sup> Compl. at 1, 4 (Sept. 28, 2020).

<sup>&</sup>lt;sup>2</sup> Id. at 2-4 (citing 11 C.F.R. § 110.11(c)(3)(ii)(B)).

Resp. at 1-2 (Oct. 20, 2020). The Response further states that the Explanation and Justification accompanying the Commission's final rule expressly refers to the 80% standard as a "safe harbor provision." *Id.* at 3 (citing Final Rule

MUR 7806 (Cory Gardner for Senate, *et al.*) EPS Dismissal Report Page 2 of 2

1 Based on its experience and expertise, the Commission has established an Enforcement 2 Priority System using formal, pre-determined scoring criteria to allocate agency resources and 3 assess whether particular matters warrant further administrative enforcement proceedings. These 4 criteria include (1) the gravity of the alleged violation, taking into account both the type of activity 5 and the amount in violation; (2) the apparent impact the alleged violation may have had on the 6 electoral process; (3) the complexity of the legal issues raised in the matter; and (4) recent trends in potential violations and other developments in the law. This matter is rated as low priority for 7 8 Commission action after application of these pre-established criteria. Given that low rating, the 9 technical nature of the violation, and the unlikeliness the general public would have been confused 10 as to whether the television ad was authorized by Gardner, we recommend that the Commission 11 dismiss the Complaint consistent with the Commission's prosecutorial discretion to determine the proper ordering of its priorities and use of agency resources.<sup>4</sup> We also recommend that the 12 13 Commission close the file and send the appropriate letters. 14 Lisa J. Stevenson 15 **Acting General Counsel** 16 17 Charles Kitcher 18 Associate General Counsel 19 20 21 1/21/2022 BY: 22 Date Claudio J. Pavia 23 Acting Deputy Associate General Counsel

on Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, 67 Fed. Reg. 76,962, 76,966 (Dec. 13, 2002)).

for Enforcement

Donald E. Campbell

Roy Q. Luckett

Attorney

Roy Q. Luckett

Acting Assistant General Counsel

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<sup>&</sup>lt;sup>4</sup> Heckler v. Chaney, 470 U.S. 821, 831-32 (1985).