UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Gen# 5385

81 SEP 2 AM : 53

Jon Epstein,
Plaintiff

v.

Civil Action No. 81-336

Federal Election Commission,
Defendant

SEP 2 P2:51

REPLY MEMORANDUM OF PLAINTIFF IN
SUPPORT OF PLAINTIFF'S OPPOSITION
TO THE FEC MOTION FOR SUMMARY JUDGMENT

In its response to plaintiff's opposition to the Federal Election Commission's motion for summary judgment, the Commission contends:

> The Commission has consistently used the "purpose" test with regard to all matters involving a media corporation.

The Federal Election Commission also suggested in its response that a distinction must be made between the political advertisements of media corporations and the political advertisements of non-media corporations.

In this reply memorandum, the plaintiff will demonstrate that: the Federal Election Commission does not always employ a purpose-to-influence-an-election test with respect to media corporations and does sometimes employ such a test with respect to non-media corporations; the Matters Under Review(#296, 1051, and 1235) and advisory opinions(AO's 1978-15, 1978-4, 1977-54, and 1977-42) cited as precedents in the second General Counsel's Report dealing with plaintiff's administrative complaint are factually dissimilar to the Reader's Digest advertisement; and no distinction should be established between the political advertisements of media corporations and the political advertisements of non-media corporations.

A. The Federal Election Commission does not always employ a "purpose" test with respect to media corporations and does sometimes employ such a test with respect to non-media corporations.

The Federal Election Commission contends it has consistently applied a "purpose" standard to the activities of media corporations. The plaintiff points out that no such test was used

in the Commission's handling of one of the most important issues faced by the FEC--the February 1980 Republican Presidential Primary Debate. In MURs 1167, 1168, and 1170 (portions of which represent Exhibit #1 to the instant Reply Memorandum), the Federal Election Commission judged the validity of a debate to be held between George Bush and Ronald Reagan and to be financed and sponsored by the Nashua Telegraph of Nashua, New Hampshire.

Acting upon a General Counsel's Report, the Commission found that there was reason to believe a prohibited corporate expenditure by the publisher of the Nashua Telegraph was about to be made; as a result of this Commission action, President Reagan ended up financing the cost of the debate.

The General Counsel's Report which dealt with MURs 1167, 1168, and 1170 did not discuss the purpose of the Nashua Telegraph in staging the debate; rather, the General Counsel's Report largely concentrated on the proposition that any corporate expenditures associated with the debate would not fall within a legislative or regulatory exemption to the definition of "expenditure in connection with" an election. The General Counsel's Report stated at 4-5:

> The news story exemption..., itself very narrowly drawn, refers only to news stories, commentaries and editorials. It provides that funds incidental to the publishing of news stories, commentaries or editorials are not "expenditures" within the meaning of the Act.

The General Counel's Report at 5 contended that advertisements of editorial positions did not fall within the news story exemption:

> Nor may a newspaper rent a billboard to display its editorial endorsement or charter an airplane to fly over the city displaying a message notifying the city of its endorsement.

This General Counsel's Report did not suggest an inquiry into the purposes of chartering an airplane to notify the public of its

editorial position or into the purposes of staging a debate; the General Counsel's Report simply suggested that expenditures for these activities represented prohibited corporate expenditures.

Another situation in which a purpose test was not applied to the activities of a media corporation is found in the FEC Advisory Opinion 1978-60(Exhibit #2 to the instant Reply Memorandum). The facts underlying this advisory opinion involved NBC giving a videotape of a Congressional candidate making a speech to that Congressional candidate. In AO 1978-60 in footnote #1, the Federal Election Commission rejects adoption of the "purpose" standard with respect to NBC; instead, the question of whether a prohibited contribution had been made largely depended on whether the candidate would use the free videotape in connection with his election efforts.

Reviewing the situation, one finds that the Commission does not consistently employ a "purpose" standard for media corporations. Plaintiff further notes that the FEC sometimes applies a "purpose" standard to the advertisements of non-media corporations, calling into question the contention of the FEC in the instant case that it has established distinctions in its treatment of non-media corporations and media corporations.

Thus, in MUR #1235(FEC Exhibit #8 to its motion for summary judgment, incorporated herein by reference), with respect to an advertisement placed by "The Yes on Proposition 9 Committee," the General Counsel's Report used a "major purpose" standard. Plaintiff points out that "The Yes on Proposition 9 Committee" was not a media corporation, based on the description of the committee in the General Counsel's Report.

Basically, in its handling of administrative complaints and advisory opinions, the Federal Election Commission has not distinguished between the activities of media corporations and non-media corporations. Sometimes, a "purpose" standard is applied to the activities of media corporations, and sometimes a more stringent standard is applied. Likewise,

sometimes a "purpose" standard is applied to the activities of non-media corporations and sometimes a more stringent standard is applied. The plaintiff remains convinced that the Federal Election Commission has been quite inconsistent in determining the existence of 2 U.S.C. Sec. 441b(a) violations.

B. The Matters Under Review (#296, 1051, and 1235) and advisory opinions (AO's 1978-15, 1978-4, 1977-54, and 1977-42) cited as precedents in the second General Counsel's Report dealing with plaintiff's administrative complaint are factually dissimilar to the Reader's Digest advertisement.

None of the MURs or advisory opinions cited by the Federal Election Commission involved communications of express advocacy; in contrast, the Reader's Digest advertisement was telling the reader of the Washington Post "Why You Should Vote Republican" and "Why You Should Vote Democratic."

Each of the advisory opinions cited by the Federal Election Commission (FEC Exhibit #9 to its motion for summary judgment, incorporated herein by reference) states that the opinion is premised on the assumption that that activity discussed will not include communications of express advocacy. Thus, AO 1977-42 applied a "purpose" standard, but this application is "...conditioned on (i) the absence of any communication expressly advocating the nomination or election of the candidate involved or the defeat of any other candidate....". The General Counsel Reports in MURs 1051 and 1235 recognized this express advocacy limitation on the use of the major purpose standard.

Basically, the advisory opinions cited by the Federal Election Commission tend to support, rather than weaken, the plaintiff's contention that the Reader's Digest ad represented a prohibited corporate expenditure.

C. No distinction should be established between the political advertisements of media corporations and the political advertisements of non-media corporations.

Plaintiff contends that even if the Federal Election Commission had consistently used the "purpose to influence" test with respect to

the advertisements of media corporations and a more stringent test for non-media corporations, such a distinction in the treatment of media corporations and non-media corporations would have little basis in the law and thus should be accorded minimal deference.

A plain reading of the news media exemption, 2 U.S.C. Sec. 431(9)(B)(i), indicates that the exemption refers to the contents of a periodical rather than advertisements in other periodicals. As earlier mentioned, in the General Counsel's Report dealing with the Reagan-Bush debate, the General Counsel's Office of the Federal Election Commission contended that the media exemption should be narrowly construed and that the exemption did not apply to advertising which states the editorial endorsements of a periodical.

A broad interpretation of the media exemption was, however, set out in Federal Election Commission v. Phillips Publishing Co., CCH, Fed. Elec. Camp. Fin. Guide, Para. 9156 at 51,223(D.D.C. 1981). In this case, a newspaper had sent out solicitation letters which included statements indicating strong disapproval of Senator Kennedy's 1980 presidential candidacy. At 51,226, the Court held:

> Because the purpose of the solicitation letter was to publicize The Pink Sheet and obtain new subscribers, both of which are normal, legitimate press functions, the press exemption applies.

Plaintiff contends that the Court's construction of the news story exemption in Phillips Publishing Company severely weakens the Congressional prohibition on corporate and union political expenditures.

Because it is difficult to distinguish between a purpose to sell more newspapers and a purpose to influence an election, media corporations would be able to flood the nation with substantial independent political expenditures. In the case of the Reader's Digest advertisement, the publisher seems to have two purposes. An immediate objective of the advertisement was to encourage the readers of the ad to think about the strengths and weaknesses of the Congressional candidates of the two major political parties. But, since the ultimate objective of the advertisement is likely to be the increased sales of magazines, the Reader's Digest advertisement would meet the standard set forth in Phillips Publishing Company. Because an ultimate objective

to sell more periodicals would probably be present to some degree in all independent political expenditures by media corporations, the Court's holding in Phillips Publishing Company would permit political advertising by media corporations.

Plaintiff adds that it may be difficult to define what is a media corporation. This problem has already surfaced in the FEC Advisory Opinion 1978-90. In this advisory opinion, the Atlantic Richfield Company contended that its news service fell under the news story exemption. In AO 1978-90(Plaintiff Exhibit #3 to the instant memorandum), the FEC concluded that the ARCO news service did not qualify for the media exemption. An article published in the Wall Street Journal, describing the ARCO news service, and submitted to the FEC by ARCO, contains facts which seem to indicate that the ARCO news service does, in many respects, resemble the operations of a media entity(Plaintiff Exhibit #4 to the instant memorandum).

D. Conclusion

The Federal Election Commission has not applied any distinctions between media corporatiors and non-media corporations in determining the existence of prohibited corporate political expenditures. In fact, all of the advisory opinions cited by the FEC support the contention of the plaintiff that the advertisement in question does represent a prohibited expenditure since express advocacies are contained in the ad. The only standard which need be applied to the advertisement is the standard announced in F.E.C. v. Central Long Island Tax Reform Immediately Committee, 616 F.2d 45(Second Circuit 1980); that is, does the expenditure expressly advocate the election or defeat of clearly identified candidates?

If the excerpts in the advertisement were approved beforehand by Representatives Wright and Kemp, plaintiff contends that the ad was a contribution to the campaigns of the two Congressmen. The advertisement would not be an independent political expenditure because the ad would have been placed with the cooperation of the

two Congressmen. 11 CFR 109.1(a). The advertisement would probably represent a prohibited republication of campaign material. 11 CFR 109.1(d)(1). Plaintiff notes that the question of whether the ad was approved beforehand by the two Congressmen was not dealt with by the Federal Election Commission either in the administrative record or in the FEC motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jon Epstein, certify under penalty of perjury that the above Reply Memorandum and supporting exhibits were mailed first class, postage prepaid, to the following individual on [illegible]:

Mr. R. Scott Rinn
Federal Election Commission
1325 K Street, N.W.
Washington, D.C. 20463

Respectfully submitted,

Jon Epstein