



FEDERAL ELECTION COMMISSION
Washington, DC 20463

May 26, 2011

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2011-07

Randall B. Hebert
Treasurer
Chuck Fleischmann for Congress, Inc.
Henderson, Hutcherson, McCullough, PLLC
1200 Market Street
Chattanooga, TN 37402

Dear Mr. Hebert:

We are responding to your advisory opinion request on behalf of Chuck Fleischmann for Congress, Inc. (the “Committee”), concerning the application of the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to the use of campaign funds to pay legal fees and expenses of a former campaign consultant.

The Commission concludes that the Committee may use campaign funds to pay the legal fees and expenses described in this request because such payment would not constitute personal use under the Act and Commission regulations.

Background

The facts presented in this advisory opinion are based on your letter received on April 21, 2011, and public disclosure reports filed with the Commission.

Chuck Fleischmann is the U.S. Representative from the Third District of Tennessee. The Committee is Representative Fleischmann’s principal campaign committee. In the 2010 primary election, Representative Fleischmann won the Republican Party nomination for the Third District of Tennessee over his opponent, Ms. Robin T. Smith.

During the 2010 campaign, Mr. John Bruce Saltsman, Jr. was a consultant employed by S&S Strategies LLC. *See* Request at 1; Committee’s July 2010 Quarterly

Report, FEC Form 3, Schedule A. Through S&S Strategies LLC, Mr. Saltsman provided campaign advice to then-candidate Fleischmann. *See* Request at 1. Mr. Saltsman is currently Chief of Staff for Representative Fleischmann's Congressional office.

Mr. Saltsman has been sued by Mr. Mark A. Winslow for tortious interference with a contractual relationship and defamation. Mr. Winslow was a campaign staffer for then-candidate Robin T. Smith during the 2010 Republican Party primary election. *See* Complaint at 1, *Winslow v. Saltsman*, No. 11-C229 (Davidson County, Tenn. Cir. Ct. filed Jan. 18, 2011).

Mr. Winslow's complaint alleges that "in his compensated role with Mr. Fleischmann's congressional campaign, Mr. Saltsman acted as a message and media consultant and assisted with shaping and creating campaign advertisements, or attack ads, directed at Ms. Smith" and "improperly obtained" and disseminated to the press a confidential employment agreement between Mr. Winslow and his former employer, the Tennessee Republican Party. *See* Complaint at 5. Further, the complaint alleges that then-candidate Fleischmann used the employment agreement that Mr. Saltsman obtained during the campaign to attack his opponent, Ms. Smith, including in a television advertisement and during a radio interview. *Id.* at 5 and 6. Moreover, during the same radio program, Mr. Saltsman allegedly made defamatory statements about Mr. Winslow regarding the same issue. *Id.* at 6. Lastly, the complaint alleges Ms. Smith was defeated "in large part due to" Mr. Saltsman's actions. *Id.*

Question Presented

May the Committee use campaign funds to pay legal fees and expenses of a campaign consultant arising from a civil suit against the campaign consultant brought by an employee of the candidate's opponent during the 2010 election?

Legal Analysis and Conclusions

Yes, the Committee may use campaign funds to pay these legal fees and expenses because such payment is for a lawful purpose that would not constitute personal use under the Act and Commission regulations.

The Act identifies six categories of permissible uses of contributions accepted by a Federal candidate. They include: (1) otherwise authorized expenditures in connection with the candidate's campaign for Federal office; (2) ordinary and necessary expenses incurred in connection with the duties of the individual as a holder of Federal office; and (3) any other lawful purpose not prohibited by 2 U.S.C. 439a(b). 2 U.S.C. 439a(a); 11 CFR 113.2(a)-(e).

Under the Act and Commission regulations, contributions accepted by a candidate may not be converted to "personal use" by any person. 2 U.S.C. 439a(b)(1); 11 CFR 113.2(e). The Act specifies that conversion to personal use occurs when a contribution or amount is used "to fulfill any commitment, obligation, or expense of a

person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office." 2 U.S.C. 439a(b)(2); *see also* 11 CFR 113.1(g).

The Act and Commission regulations provide a non-exhaustive list of items that would constitute personal use *per se*, none of which applies here. For items not on this list, the Commission determines on a case-by-case basis whether an expense would fall within the definition of "personal use." 11 CFR 113.1(g)(1)(ii). Commission regulations specifically provide that "legal expenses" are subject to a case-by-case determination. 11 CFR 113.1(g)(1)(ii)(A).

The Commission has long recognized that if a candidate "can reasonably show that the expenses at issue resulted from campaign or officeholder activities, the Commission will not consider the use to be personal use." Explanation and Justification for Final Rules on Expenditures; Reports by Political Committees; Personal Use of Campaign Funds, 60 FR 7862, 7867 (Feb. 9, 1995). Legal fees and expenses, however, "will not be treated as though they are campaign or officeholder related merely because the underlying proceedings have some impact on the campaign or the officeholder's status." *Id.* at 7868. Thus, the Commission has concluded that the use of campaign funds for legal fees and expenses does not constitute personal use when the legal proceedings involve allegations directly relating to the candidate's campaign or duties as a Federal officeholder. *See, e.g.*, Advisory Opinions 2009-20 (Visclosky), 2009-10 (Visclosky), 2008-07 (Vitter), 2006-35 (Kolbe), 2005-11 (Cunningham), and 2003-17 (Treffinger). On the other hand, "legal expenses associated with a divorce or charges of driving under the influence of alcohol will be treated as personal, rather than campaign or officeholder related." Explanation and Justification for Final Rules on Expenditures; Reports by Political Committees; Personal Use of Campaign Funds, 60 FR 7862, 7867 (Feb. 9, 1995).

Here, the Committee seeks to use campaign funds to pay the legal expenses of a person who was working as a campaign consultant for the candidate, namely Mr. Saltzman. In Advisory Opinion 2009-20 (Visclosky), the Commission approved the use of campaign funds for the legal fees of persons other than the candidate. In that instance, Representative Visclosky's current and former congressional staff members had received, or expected to receive, grand jury subpoenas to produce documents related to a Federal investigation of Representative Visclosky for alleged improper receipt of campaign contributions and obtaining earmarked appropriations for clients of a lobby group. The Commission concluded the staffers' expenses "would not exist irrespective of Representative Visclosky's campaign or duties as a Federal officeholder."¹

¹ In one other instance, the Commission has approved use of campaign funds for legal expenses related to media inquiries and allegations concerning both a candidate and the candidate's spouse. Advisory Opinion 1996-24 (Cooley). Although the campaign funds paid for conferences between the candidate, his spouse, and the candidate's legal counsel, the campaign funds were primarily used to pay legal fees of the candidate. On the other hand, in Advisory Opinion 1998-01 (Hilliard), the Commission concluded that campaign funds may not be used to pay legal expenses that are primarily for the purposes of representing persons other than the candidate. In that case, the Commission reached that conclusion specifically with respect to allegations that did not relate directly to the campaign or Representative Hilliard's duties as a Federal officeholder. *See* Advisory Opinion 1998-01 (Hilliard) at 6 & n.4.

The facts presented in the request differ in one important element from those presented in Advisory Opinion 2009-20 (Visclosky). Although the Commission approved the use of campaign funds for the legal fees of persons other than Representative Visclosky, it was Representative Visclosky's activity that was the subject of the investigation. Here, the basis of the lawsuit is the alleged activity of Mr. Saltsman, not Representative Fleischmann. Nonetheless, it appears that the legal fees and expenses involve allegations directly relating to campaign activities engaged in by Mr. Saltsman.

The civil lawsuit arises from the alleged conduct of Mr. Saltsman in his role as a campaign consultant for Representative Fleischmann's campaign. The complaint alleges that Mr. Saltsman acted as the campaign's message and media consultant and participated in the creation of campaign ads directed at Ms. Smith. In that capacity, Mr. Saltsman allegedly acquired and publicized plaintiff's employment agreement, including in the form of a campaign ad, which provides the basis of the lawsuit. Moreover, according to the complaint, Mr. Fleischmann allegedly used the materials Mr. Saltsman obtained as the basis for many of the attacks that Mr. Fleischmann made himself as a candidate against Ms. Smith. In fact, the complaint attributes Mr. Fleischmann's primary victory over Ms. Smith "in large part" to Mr. Saltsman's actions. As a result, the lawsuit against Mr. Saltsman would not exist irrespective of Representative Fleischmann's campaign.

Accordingly, the Commission concludes that, to the extent that the legal proceedings derive from allegations directly relating to campaign activity, the Committee may use campaign funds to pay legal fees described in this request.

The Commission expresses no opinion regarding the application of the rules of the United States House of Representatives or any tax law ramifications of the matters presented in your request, because those are not within the Commission's jurisdiction.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law.

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On behalf of the Commission,

(signed)
Cynthia L. Bauerly
Chair