BEFORE THE FEDERAL ELECTION COMMISSION

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In the Matter of	)	
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Douglas Schoen	)	**MURs 4544; 4407**
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MOTION TO QUASH

NOW COMES Douglas Schoen, pursuant to 11 C.F.R. section 111.15, and moves to quash the subpoena issued by the Federal Election Commission (the "Commission" or "FEC") to him in connection with Matters Under Review ("MURs") 4407 and 4544. For the reasons stated below, the Commission should quash this subpoena in its entirety.

Introduction

The Commission has issued this subpoena in connection with its investigation of the Democratic National Committee ("DNC") legislative media advertisements run during 1995 and 1996. (See Document Request Numbers 1 through 4, wherein such advertisements are specifically mentioned.) The Commission should quash this subpoena for the following reasons: 1) the document requests and interrogatories are fatally overbroad; and 2) the subpoena relates to matters outside the scope of the Commission's jurisdiction and therefore is contrary to law. The advertisements in question did not expressly advocate the election or defeat of a clearly identified candidate, nor did they mention an election or even urge anyone to vote. These communications were thus constitutionally protected. It is not disputed that the Commission, upon a procedurally proper finding, has jurisdiction to examine the question of whether the ads contained an electioneering message, provided that the Commission limits its examination to advertisements which contain words of express advocacy.

A. The subpoena is fatally overbroad.

Both the document requests and interrogatories in the subpoena are fatally overbroad. Unless substantially narrowed, the subpoena is unenforceable.

1) Document Request #1 seeks "any information regarding television, radio or print advertisements developed and created by SKO which were paid for in whole or in part by the DNC." The only limitation on this request appears to be the date, as the Commission is requesting documents after January 1, 1995. This request quite literally

encompasses any advertisement by the DNC, including those relating strictly to state or local elections, which are obviously beyond the scope of the Commission's jurisdiction under the Federal Election Campaign Act. The same request appears in Document Request #2, except that it relates to advertisements developed or created by the November 5 Group.

2) Document Requests #3 and #4 are even broader in that they relate to advertisements by any State Democratic Party. State Democratic Parties clearly play a role in non-federal elections over which the Commission lacks jurisdiction.

3) Interrogatories #1-4 are similarly overbroad in that they deal with all advertisements paid for by the DNC or a State Democratic Party, thereby encompassing activity over which the Commission lacks jurisdiction.

4) Interrogatory # 5 is perhaps the most outrageous in that it requests information about each meeting and conversation during which there was discussion "...concerning the planning, organization, development and/or creation of television, radio or print advertisements"*(emphasis added).* This question is ridiculously broad in that it does not specify the type of advertisements sought or who paid for them.

Further, the Commission appears to be requesting the same information (i.e., identical documents, such as invoices) from numerous individuals and entities. This duplication will only serve to burden respondents and create a paper logjam at the Commission, and for the sake of order and efficiency, the Commission should consider limiting its document requests to eliminate the redundancy.

B. The Commission's inquiry is outside the scope of its jurisdiction and therefore contrary to law.

The Commission subpoena specifically refers to several advertisements aired by the DNC during 1995 and early 1996. These advertisements are clearly outside the scope of the Commission's jurisdiction.

The Commission has dealt with legislative issue advocacy ads in its advisory opinions and enforcement proceedings. In determining the treatment of such ads under the Federal Election Campaign Act, the Commission has in the past always applied a two prong test to the content of a communication in order to determine whether it is issue advocacy or candidate related. The Commission has thus reviewed the content (i.e., text and images) of an ad and found them to be candidate related only if "the communication both (l) depicted a clearly identified candidate and (2) conveyed an electioneering message...." FEC Advisory Opinion 1985-14, Fed. Election Camp. Fin. Guide (CCH) §5766 (1985). This test has been repeatedly relied upon in Commission Advisory Opinions and enforcement proceedings. (See FEC Advisory Opinion 1995-25, Fed. Election Camp. Fin. Guide (CCH) par. 6162 (1995), MUR 2216 (August 1, 1989), MUR

2370 (June 5, 1986), MUR 4246 (May 6, 1997) and the MUR which eventually led to Colorado Republican Campaign Committee v. FEC ("Colorado Republican"), 116 S. Ct. 2309 (1996).

In Advisory Opinion 1995-25, the Commission sanctioned as issue advocacy a series of RNC media ads which specifically criticized President Clinton on certain legislative issues. The Commission acknowledged in its opinion that such ads were intended to gain popular support for the Republican legislative agenda and to influence the public's positive view of Republicans. The Commission in its Opinion specifically concluded that the "stated purpose" of the ads "encompasses the related goal of electing Republican candidates to Federal office." FEC Advisory Opinion 1995-25, Fed. Election Camp. Fin. Guide (CCH), 6162 . The DNC issue ads were specifically designed to and did comply with the Commission's holding in Advisory Opinion 1995-25.

The Commission's efforts to limit expenditures for communications which do not contain express advocacy have been repeatedly rebuffed by the courts, many of which have held that the Federal Election Campaign Act does not cover communications which lack express advocacy. Most recently the Court of Appeals for the Fourth Circuit, citing to the Commission's "string of losses" on this issue, summed up all existing case law on the topic by concluding that those cases "unequivocally require 'express' or 'explicit'' words of advocacy of election or defeat of a candidate.' MRLC, 914 F.Supp. at 10-12." FEC v. Christian Action Network, 894 F.Supp. 946 (W.D. Va. 1995) aff'd No. 95-2600 (4th Cir. April 7, 1997) Fed. Election Camp. Fin. Guide (CCH) par. 9409.

Conclusion

The Commission should quash the subpoena issued to Douglas Schoen, because it is overbroad and contrary to law as it is outside the scope of the Commission's jurisdiction.

Sincerely,

Lyn Utrecht
General Counsel

Eric Kleinfeld
Chief Counsel