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December 15, 1997

HAND DELIVERED

Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 4689

Dear Commissioners:

Salem Radio Network ("SRN") files this response to the complaint filed by the California Democratic Party ("CDP") under date of October 17, 1997, charging violations of the Federal Election Campaign Act of 1971, as amended ("FECA"), 2 U.S.C. §§ 431 et seq., and related regulations of the Federal Election Commission ("FEC"), 11 C.F.R. §§ 101.1 et seq., by the Alan Keyes show, the Oliver North show, various other radio programs, Robert K. Dornan, and "various radio broadcast stations around the country." Complaint at 1. By letter dated November 12, 1997, the FEC gave SRN "the opportunity to demonstrate in writing that no action should be taken against" it, the Alan Keyes show and the Oliver North Show. This response constitutes that demonstration.

The CDP alleges that FECA was violated by the "making and accepting illegal corporate contributions in violation of 2 U.S.C. § 441b." Id. The CDP complaint suggests that these violations occurred when SRN allowed Robert K. Dornan to use "his position as a guest host on several national radio talk shows to raise funds and to attack Congresswoman Loretta Sanchez." Id. These charges against SRN and the Keyes and North shows are without merit.

Section 441b(a) states in part that it is unlawful "for any corporation whatever . . . to make a contribution or expenditure in connection with any election at which . . . a . . . Representative in . . . Congress [is] to be voted for . . ." 2 U.S.C. § 441b.(a). Salem is not in violation of this statute for two reasons. First, it has not made a "contribution" or "expenditure" as defined by Section 441b(b)(2) of FECA. Second, even if it has made such an expenditure, it has not violated section 441b since Mr. Dornan has not expressly advocated his own election or Congresswoman Sanchez's defeat.

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The terms "contribution" and "expenditure" only include contributions and expenditures made "in connection with any election." 2 U.S.C. § 441b(b)(2). SRN has not made a "contribution" or "expenditure" in connection with Dornan's campaign for federal office. SRN is a commercial entity that hires its radio talk show hosts based on their entertainment value. Dornan has worked for numerous other non-SRN radio and television talk shows around the country. SRN, and perhaps many other broadcast entities, would employ Dornan regardless of whether he was a candidate for political office or not. See Declaration, signed by Greg Anderson, President of SRN. SRN's employment of Dornan has everything to do with good business practices and has nothing to do with his personal involvement in politics.

Even if SRN is considered to have made contributions or expenditures for the purposes of section 441b, such expenditures were not made in violation of FECA since Dornan has not expressly advocated his own election or Congresswoman Sanchez's defeat. The Supreme Court in Buckley v. Valeo, 424 U.S. 1 (1976), recognized that on its face, section 441b is very broad. Specifically, the words "in connection with" appear to capture virtually all corporate expenditures that are even remotely related to an election. Furthermore, the Court in Buckley recognized that a broad reading of section 441b(a) would most likely be unconstitutional since it would limit constitutionally protected speech such as issue advocacy. Id. at 42-43. As a result, it stated that the statute should be "limited to communications that include explicit words of advocacy of election or defeat of a candidate . . ." Id. at 43 (emphasis added). The Court defines express advocacy as language which "in express terms advocate[s] the election or defeat of a clearly identified candidate." Id. at 44. Examples of express advocacy include such language as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject." Id. The Supreme Court embraced this test again in Massachusetts Citizens for Life, 479 U.S. 238, 249 (1986). It stated, "[w]e therefore hold that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." Id. at 249 (emphasis added). All nine Justices assented to that portion of the opinion which contained this statement. Furthermore, the Buckley Court intended for the express advocacy test to be applied strictly. If it is not applied strictly, it will be ineffective at protecting issue advocacy. Faucher v. Federal Election Com'n, 928 F.2d 468, 471 (1st Cir. 1991) ("In limiting section 441b(a) to express advocacy, the Court in Buckley clearly had the protection of issue advocacy in mind.")

Mr. Dornan has never, on SRN, expressly advocated his own election, or Congresswoman Sanchez's defeat, in any electoral contest. Specifically, he has never used such phrases as "vote for me," "elect me," "support me," "cast your ballot for me," "vote against Sanchez," "do not elect Sanchez," or any equivalent. See Declarations of Joe Giganti and Griff Jenkins, producers of the Alan Keyes and Oliver North shows respectively. Furthermore, the complaint filed by the CDP does not allege that Mr. Dornan ever used such language. Although the CDP would argue to the contrary, it is perfectly legal for Mr. Dornan to criticize

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Congresswoman Sanchez, to discuss the controversy surrounding the 1996 electoral contest between Mr. Dornan and Congresswoman Sanchez, and to discuss the possibility of a special election should the 1996 results be invalidated. The Supreme Court has stated that "[d]iscussion of public issues and debate on the *qualifications* of candidates are integral to the operation of the system of government established by our constitution." Buckley 424 U.S. at 14-15 (emphasis added). Furthermore, it would be perfectly lawful under FECA for SRN to permit Mr. Dornan to discuss the possibility of his making another bid for his election to Congress so long as SRN does not permit him to expressly advocate on SRN programs his election or the defeat of another identified candidate.

The CDP would like Mr. Dornan off the air because "[t]he value of such time is enormous." Complaint at 3. In other words, the CDP does not want Mr. Dornan to have the edge over Congresswoman Sanchez, through public exposure in radio broadcasts, which it perceives he may have. SRN is not, however, prohibited by FECA from exercising its business judgment and employing an entertaining guest host, namely Mr. Dornan, and allowing Mr. Dornan to discuss policy issues even if one result of Mr. Dornan's employment may be advantageous publicity for Mr. Dornan. FECA, as construed by the Supreme Court, only prohibits express advocacy and Mr. Dornan has not expressly advocated his election or Congresswoman Sanchez's defeat on SRN and the CDP does not even allege that he has done so. As a result, the complaint filed by the CDP is deficient as a matter of law and should be dismissed.

Yours very truly,


James P. Riley
Counsel for Salem Radio Network

JPR:deb

Enclosures (3)

cc: F. Andrew Turley, Esquire (By Hand w/Enclosures)

DECLARATION

Greg R. Anderson, under penalty of perjury, hereby declares the following to be true and correct.

1. I am the President of Salem Radio Network.

2. The Salem Radio Network has employed Robert K. Dornan as an occasional guest talk show host because of the informational and entertainment value he brings to the programs. At such times the Salem Radio Network has paid Dornan a talent fee for services rendered. In addition to his occasional work for the Salem Radio Network, Dornan has substituted other non-Salem radio and television talk shows around the country. It is also my understanding that Dornan has acted as a talk show host prior to his involvement in federal politics.

Executed this 12th day of December, 1997


Greg R. Anderson

Date: 12/12/97

11-00-463-40-66

DECLARATION

Joe Giganti, under penalty of perjury, hereby declares the following to be true and correct:

1. I am the producer of the Alan Keyes radio show. In my capacity as producer, I have listened to every production of the Alan Keyes radio show in which Robert K. Dornan has been the guest host. To the best of my knowledge, as a guest host on the Alan Keyes radio show:

(a) Dornan never expressly advocated his own election in any electoral contest. Specifically, he has never used express words of advocacy such as "vote for me," "elect me," "support me," "cast your ballot for me," "send me to Congress," or any equivalent.

(b) Dornan never expressly urged the public to vote against incumbent Congresswoman Loretta Sanchez. Specifically, he never used express words of advocacy such as "defeat Sanchez," "reject Sanchez," "give your vote to anyone but Sanchez," or any equivalent. In addition, Dornan's on air discussions regarding Loretta Sanchez pertained to the Congressional election of 1996 and its aftermath, including investigations related thereto, her voting record and her stance on policy issues - not the forthcoming elections of 1998.

(c) Dornan never made a plea for campaign contributions of any kind.

Executed this 12 day of December, 1997.


Joe Giganti

5400-163-10-66

DECLARATION

Griff Jenkins, under penalty of perjury, hereby declares the following to be true and correct:

1. I am the producer of the Oliver North radio show. In my capacity as producer, I have listened to every production of the Oliver North radio show in which Robert K. Dornan has been the guest host. To the best of my knowledge, as a guest host on the Oliver North radio show:

(a) Dornan never expressly advocated his own election in any electoral contest. Specifically, he has never used express words of advocacy such as "vote for me," "elect me," "support me," "cast your ballot for me," "send me to Congress," or any equivalent.

(b) Dornan never expressly urged the public to vote against incumbent Congresswoman Loretta Sanchez. Specifically, he never used express words of advocacy such as "defeat Sanchez," "reject Sanchez," "give your vote to anyone but Sanchez," or any equivalent. In addition, Dornan's on air discussions regarding Loretta Sanchez pertained to the Congressional election of 1996 and its aftermath, including investigations related thereto - not the forthcoming elections of 1998.

(c) Dornan never made a plea for campaign contributions of any kind.

Executed this 12 day of December, 1997.


Griff Jenkins

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