

MEMORANDUM

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TO: The Commission

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RE: FEC v. Dear for Congress, et al. and MUR 5180

DATE: May 27, 2004

SENSITIVE

RECOMMENDATIONS: Approve the settlement set forth in the attached Stipulation for Entry of Consent Judgment ("Stipulation") and Consent Judgment in FEC v. Dear for Congress, and take no further action and close the file in MUR 5180.

BACKGROUND:

On June 5, 2003, the Commission filed suit against Abraham Roth and three of Noach Dear's campaign committees, each of whose treasurer is/was Abraham Roth. The Complaint alleges that Dear for Congress and Abraham Roth violated 2 U.S.C. 441f, 441a(f), 441b(a), 434(b)(4)(F), 434(b)(8), 434(a)(6)(A) and 11 C.F.R. 100.9(a), 114.2(d), and 104.5(a) by knowingly accepting contributions in excess of the limits permitted by the Act, knowingly accepting prohibited corporate contributions, failing to file reports accurately and in a timely manner, and knowingly accepting contributions in the name of another. The suit also alleges that Friends of Dear violated 2 U.S.C. 441a(a)(1)(A) and C.F.R. 110.1(b)(1) by making a \$39,000 excessive in-kind contribution in the form of polling results to Dear 2000, and that Dear 2000 and Abraham Roth violated 2 U.S.C. 441a(f), 434(b)(2), 434(b)(4), and 11 C.F.R. 110.9(a) by knowingly accepting an excessive in-kind contribution from Friends of Dear and failing to report that contribution.

In MUR 5180, on February 20, 2002, the Commission found reason to believe that respondents, Dear 2000 and Abraham Roth, as treasurer, violated 2 U.S.C. 434(b)(4)(A) and 434(b)(5)(A), and on March 21, 2003, the Commission found reason to believe that Dear 2000 and Abraham Roth, as treasurer, violated 2 U.S.C. 441b and that Jewish Press violated 2 U.S.C. 441b(a). After an investigation, on November 14, 2003, the General Counsel sent his probable cause brief to the respondents. Respondents have replied to the brief. Attachments 1 & 2.

DISCUSSION:

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B. Take No Further Action in MUR 5180 and Close the File

1. Background

MUR 5180 arose from a complaint filed by Ron Friedman, Chairman of Friends of Weiner, alleging that Dear 2000, Inc. and Abraham Roth, as treasurer ("Committee"), violated 2 U.S.C. § 434(b) by failing to disclose campaign expenditures associated with certain advertisements the Committee placed in the *Jewish Press* newspaper. On February 20, 2002, the Commission found reason to believe that the Committee violated 2 U.S.C. §§ 434(b)(4)(A) and 434(b)(5)(A) by failing to report the expenditures. Thereafter, in the exercise of its supervisory powers, the Commission found reason to believe that Jewish Press, Inc. ("Jewish Press") made, and the Committee accepted, a prohibited in-kind corporate contribution in violation of 2 U.S.C. § 441b(a) in connection with these advertisements in the form of an extension of credit that ripened into a contribution through a lack of commercially reasonable attempts to collect the debt.

The Committee obtained from the Jewish Press advertising services on credit totaling \$52,800 for eight advertisements published between August 18, 2000 and November 3, 2000. It is undisputed that the advertisements ran, cost \$52,800 and that the Committee never paid, or attempted to pay, for these services. The Jewish Press asserted that the candidate, Noach Dear, and the campaign manager, Harris Leitstein, placed the advertisements. In an interview with a Commission investigator, Leitstein admitted placing them. In the Committee's response to the complaint, Abraham Roth, the Committee's treasurer, stated that he did not know about the placement of the advertisements until he received the complaint and that they were "unauthorized." In his subsequent deposition, Mr. Roth testified that he never received the invoices and therefore did not pay them.² However, after learning of the advertisements, Mr. Roth met in February 2002 with Jerry Greenwald, CEO of the Jewish Press. See Roth Dep. at 86-90, 92-93.

² A copy of the Roth deposition is in the MUR 5180 file in the Complaints Examination and Legal Administration docket. This Office has attached to this memorandum all pertinent documents that were received since the General Counsel's Report #2, dated March 14, 2003 ("GCR #2"), was considered by the Commission. Documents mentioned in this Memorandum that were attachments to GCR #2 include the memorandum to the Jewish Press from campaign manager, Harris Leitstein, Jewish Press invoices, and the Report of Investigation prepared by the Commission's investigator

According to the Jewish Press, the Dear campaign ultimately refused to pay for the advertisements. Attachment 6 at 2. The Jewish Press had sent invoices to the address it had for the campaign, and asserted it had undocumented telephone conversations with the candidate and Mr. Leitstein in which they gave assurances of payment. Attachment 7 at 1. In addition, due to nonpayment, the Jewish Press had reissued to the Committee full-price invoices canceling discounts previously granted and declined to run advertisements for Noach Dear's New York Senate race in September 2002 unless the advertisements were prepaid. Attachment 6 at 3; Attachment 7 at 2. Mr. Greenwald asserted during the investigation that due to Noach Dear's popularity among its readership, it would have been counterproductive to its business interests to pursue a lawsuit against the Committee. *Id.* at 2. According to Mr. Greenwald, the newspaper's debt collection practices are "not all that organized"; "[w]e rarely pursue collection through collection agencies or the court. . . . [o]ther advertisers have failed to pay for advertisements. We have not always pursued collection, although sometimes we have." *Id.* at 1-2.

On November 14, 2003, this Office sent General Counsel's Briefs to the Committee and the Jewish Press, respectively, setting forth the factual and legal bases for recommending that the Commission find probable cause to believe they violated the Act. Both the Committee and the Jewish Press replied.

2. Analysis³

The analysis of the reporting violation in MUR 5180 begins with these undisputed facts - - the Committee received the benefit of \$52,000 worth of advertising without paying for it or ever attempting to pay for it; it was aware that at least for some time, Jewish Press sought payment; and it never reported a debt to the Jewish Press. Because the Committee was in debt to the Jewish Press, it was obligated, from the time that debt was incurred, to continually disclose the amount and nature of the outstanding debt. 2 U.S.C. § 434(b)(8); 11 C.F.R. § 104.3(d). The Committee's primary argument is that the advertisements were not authorized. But even if that were true -- and Roth's deposition testimony is arguably to the contrary⁴ -- if the Committee legitimately disputed some or all of the debt, it should have continuously reported it as a disputed debt in accordance with 11 C.F.R. §§ 104.3(d) and 104.11, disclosing the amount it admits it owed and the amount the Jewish Press claims it was owed. *Id.* It has never reported the debt, in violation of 2 U.S.C. § 434(b)(8).

³ All of the facts recounted in this matter occurred prior to the effective date of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub L 107-155, 116 Stat. 81 (2002). Accordingly, unless specifically noted to the contrary, all citations to the Federal Election Campaign Act of 1971, as amended (the "Act"), herein are to the Act as it read prior to the effective date of BCRA and all citations to the Commission's regulations herein are to the 2002 edition of Title 11, Code of Federal Regulations, which was published prior to the Commission's promulgation of any regulations under BCRA.

⁴ Moreover, the involvement of the candidate and the campaign manager in their placement provides a strong argument under an agency theory that the advertisements were authorized

With respect to section 441b, the Committee indisputably received \$52,800 in corporate services without ever paying for them, or attempting to pay for them. However, information submitted by the Jewish Press in response to the brief raises new questions about whether Jewish Press ever made a contribution and thus about whether the Committee ever received a contribution. This Office sent a brief to the Jewish Press because it appeared that the Jewish Press had not vigorously pursued all possible remedies to collect the debt, and that it may have treated the Committee differently than it had treated non-political debtors in terms of collecting debt. See 11 C.F.R. § 116.4(d)(3). Specifically, it had appeared that the Jewish Press might have treated the Committee differently based on Noach Dear's political popularity with its readership.

The Jewish Press's reply to the brief provided additional information. In an affidavit attached to its reply to the brief, Mr. Greenwald averred that it is the Jewish Press' general policy not to sue advertising debtors and the company had filed lawsuits to collect such debts only 3 or 4 times in the last fifteen years. Furthermore, he stated that the Jewish Press was not comfortable in suing advertising debtors because of the impact on the newspaper's closely-knit constituency, which is a religious community in the Brooklyn Borough of New York City. Mr. Greenwald did not provide further information on the circumstances under which the Jewish Press initiated lawsuits against advertising debtors on those 3 or 4 occasions, such as the names of debtors, the amount of the debts and the reasons for pursuing those debtors. In its reply, the Jewish Press also reiterated that it sent invoices, made calls, canceled discounts, and refused to do business with the candidate, Noach Dear, in a state election in 2002 without prepayment. Attachment 2 at 2-3.

In effect, the Jewish Press now argues that its decision not to pursue litigation against the Committee reflected not merely a determination that suing the Committee would be bad for business because of Noach Dear's political popularity, but that suing any advertising debtors is bad for business in the context of the community in which it operates. Moreover, its apparent paucity of collection litigation may support this assertion. Because this rationale could be deemed reasonable, and in light of the other measures the Jewish Press took seeking payment, this Office believes that the case against the Jewish Press for making, and, therefore, the case against the Committee for receiving, a corporate contribution, is not the strongest the Commission could litigate. The additional information provided by the Jewish Press does not fully answer questions about its litigation practices; it merely raises new ones. While we could reopen the investigation to answer them, this Office believes that it would not be the most effective use of Commission resources. Thus, in exercise of prosecutorial discretion, this Office recommends that the Commission take no further action with respect to the Jewish Press.

The reporting violation against the Committee, on the other hand, is solid.

In MUR 5180, Abraham Roth has proceeded as if he is representing the Committee because the Committee has no counsel of record in this matter, and he has consistently and strenuously disputed any liability.

The Consent Judgment also contains injunctive relief pertinent to the same statutory provisions at issue in MUR 5180. These approximate the cease and desist agreement that we would have sought in settlement of the MUR. It enjoins the Committee and its agents, successors and assigns from failing to file timely and accurate financial disclosure reports with the Commission. It also separately enjoins Abraham Roth from failing to file accurate and timely financial disclosure reports for any authorized political committee for which he is or may become treasurer, and from accepting prohibited contributions for any authorized political committee for which he is treasurer.

Accordingly, the Office of General Counsel recommends that the Commission, in the exercise of its prosecutorial discretion, take no further action against Dear 2000, Inc., and Abraham Roth, as treasurer, and close the file.

C. Administrative Termination

defendants indicated that except for Dear for Congress's remaining debts for unrefunded contributions that were in excess of the Act's limits, the Dear campaign committees have had only a few financial transactions, primarily for legal fees associated with this litigation and underlying MURs. The candidate has distanced himself from his committees and from his treasurer, so there is no realistic expectation that the committees would be able to raise funds to make the refunds. Because the committees are filing financial disclosure reports with the Commission to report debts that they cannot repay and because the ongoing MUR and litigation prohibit termination, the committees request that the Commission administratively terminate them so that Abraham Roth, the treasurer for all of the Dear committees, will be able to stop filing reports for these effectively defunct political committees. As of the 2004 April Quarterly Report, Dear for Congress reported cash on hand of \$709.96 and debts of \$148,051.20. Dear 2000 reported cash on hand of \$8,601.32 and no debts.

Pursuant to 11 C.F.R. 102.4, the Commission may administratively terminate a political committee on the basis of the following factors:

- (1) the committee's aggregate reported financial activity in one year is less than \$5,000;
- (2) the committee's reports disclose no receipt of contributions for the previous year;
- (3) the committee's last report disclosed minimal expenditures;
- (4) the committee's primary purpose for filing its reports has been to disclose outstanding debts and obligations;
- (5) the committee has failed to file reports for the previous year;
- (6) the committee's last report disclosed that the committee's outstanding debts and obligations do not appear to represent a possible violation of the prohibitions and limitations of 11 C.F.R. parts 110 and 114;
- (7) the committee's last report disclosed that the committee does not have substantial outstanding accounts receivable; and
- (8) the committee's outstanding debts and obligations exceed the total of the committee's reported cash on hand balance.

All of these factors are satisfied for both committees except that each has continued to file reports in the past year. In addition, Dear for Congress has remaining debts that relate to the violations at issue in the litigation and MUR 5180. Therefore, we recommend that the Commission administratively terminate Dear for Congress and Dear 2000 once the defendants have paid the civil penalties specified in the Consent Judgment.

RECOMMENDATIONS:

1. Approve the attached Stipulation for Entry of Consent Judgment and Consent Judgment.
2. Agree to administratively terminate Dear for Congress and Dear 2000 upon payment of the civil penalties.
3. Close MURs 4935 and 5057 upon the Court's entry of the Consent Judgment and defendants' payment of the civil penalties; and approve the appropriate letters.
4. Take no further action against Dear 2000, Abraham Roth, as treasurer, and Jewish Press in MUR 5180, approve the appropriate letters, and close the file.

Attachments:

1. Dear 2000's Reply to the General Counsel's Brief
2. Jewish Press's Reply to the General Counsel's Brief
3. Stipulation for Entry of Consent Judgment
4. Consent Judgment
5. 2004 April Quarterly reports
6. Affidavit of Jerry Greenwald dated April 30, 2003
7. Affidavit of Jerry Greenwald dated June 4, 2003