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2004 APR -6 P 1:51

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April 6, 2004

Lawrence H. Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 5415 (Club for Growth)

Dear Mr. Norton:

This office represents the Club for Growth ("Club"), which has received a complaint ("Complaint") designated Matter Under Review ("MUR") 5415 by the Federal Election Commission ("FEC" or "Commission").

The Complaint is deficient on its face. It obviously fails to provide "a clear and concise recitation of the facts which describe a violation." 11 C.F.R. § 111.4(d)(3). Thus, the Commission should have summarily dismissed it under 11 C.F.R. § 111.5.

Unless the Commission takes its pleading standards seriously, Commission procedures increasingly will be abused as a governmentally sanctioned political bludgeon against core First Amendment activity. Accordingly, the Club asks that the Commission dismiss the Complaint under §§ 111.4(d)(3) and 111.5, giving clear notice that coordination complaints must provide specific facts that, if true, actually would permit a reasonable person to infer coordination.

The Club also demonstrates through the attached April 6, 2004 Affidavit of David Keating that the charges are baseless and subject to dismissal under 2 U.S.C. § 437g(a)(1) and 11 C.F.R. §111.6. But the Club should not have been put to the burden of making such a demonstration and the Commission need not and should not rely on it to dispose of the Complaint. If the Commission does determine to examine the merits of the Complaint, then it should find that there is no reason to believe that the Club violated the Federal Election Campaign Act, as amended ("FECA" or "Act").

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THE COMPLAINT

This Complaint challenges the Club's issue advocacy relating to the views and policies of Senator Specter.[1] Such speech is fully protected by the Constitution and by FECA so long as the Club does not coordinate with a candidate, campaign, or political party. 11 C.F.R. §109.21. Thus, the heart of the present Complaint, and any future complaint concerning similar speech, is the facts alleged to justify an inference of coordination.

The Complaint offers only two supposed "facts" to support its speculation that the Club coordinated its ad with Senator Specter's opposition, the Toomey campaign. First, the Complaint observes that the Club's ads ran during a time when the Toomey campaign was not running ads. Second, the Complaint says that the Club and the Toomey Campaign have consulted common media consultants for various unspecified purposes. But no facts are offered to show any actual communication as to the timing of the ads or to show that the common vendors played any role in the challenged ad.

In short, if every fact alleged in the Complaint were assumed to be true, no reasonable person could have concluded that the Club's ads were coordinated. Yet, rather than summarily dismissing the Complaint under § 111.5, the Commission has put the Club to the burden of responding and has allowed complainants the political advantage of being able to assert that their FEC Complaint remains pending.

THE LAW

The issue in this case revolves around the question of whether the Club's ads were "coordinated communications." "A payment for a coordinated communication is made for the purpose of influencing a Federal election, and is an in-kind contribution under 11 CFR 100.52(d) to the candidate . . .." 11 C.F.R. § 109.21(b)(1). Pursuant to section 109.20, "*[c]oordinated* means made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents." Further,

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[1] The full text and a description of the ad is Exhibit 1 to the attached Keating Affidavit. Contrary to the Complaint, the ad does not expressly advocate the election or defeat of Senator Specter, or any candidate.

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> A communication is coordinated with a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing when the communication
>
> (1) Is paid for by a person other than that candidate, authorized committee, political party, or agent of any of the foregoing;
>
> (2) Satisfies at least one of the content standards in paragraph (c) of this section; and
>
> (3) Satisfies at least one of the conduct standards in paragraph (d) of this section.

Id. § 109.21(a). The relevant portions of the regulations relating to the content standard and the conduct standard are attached at Tab 1.

DISCUSSION

A. The Complainant Made No Factual Allegations of a Violation.

This Complaint should be dismissed on its face. The FEC regulations state that a complaint "should contain a clear and concise recitation of the facts which describe a violation of a statute or regulations over which the Commission has jurisdiction; and . . . [i]t should be accompanied by any documentation supporting the facts alleged if such documentation is known of, or available to the complainant." 11 C.F.R. § 111.4(d)(3) & (4). This Complaint does not meet that standard and forces the Club into responding to pure conjecture. The enforcement system will be abused unless the Commission requires concrete and specific factual information that the conduct standard has been met.

The Complaint in this matter revolves around the issue of coordination. Saying that an advertisement ran at a certain time and that it must be coordinated because the Club and Toomey have had common vendors in the last year is not sufficient to make out a violation of law. Rather, the FEC has issued regulations identifying five categories of conduct that will satisfy the conduct element of a coordinated communication. These conduct standards can be summarized as follows: the communication is created, produced, or distributed at the request or

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suggestion of the candidate, his committee, or his agents; the candidate, his committee, or his agents are materially involved in a panoply of decisions regarding the communication; there has been substantial discussion with the candidate, his committee, or his agents about the communication; there is a common vendor who has played some role in creation of the communication; the person paying for the communication employs a former employee or independent contractor of the candidate and that person has some role in the creation of the communication.

The Complainant makes an inference that because of the timing of the ads "coupled with the fact that the Club for Growth and Toomey have engaged many of the same media consultants" that either Toomey or his committee or his agents were materially involved in decisions regarding the advertisement. Inferences are not facts and do not rise to the level of a valid complaint.

Further, the regulations are quite specific that all of the components of being a common vendor must be met in order for that element of the conduct standard to be triggered. First and foremost, the common vendor must have been used for the communication at issue. The Complaint does not so allege, and as will be seen below, a common vendors was not used. See Affidavit of David Keating, dated April 6, 2004, before the Federal Election Commission (hereinafter "Keating Aff.") at ¶ 9 (Tab 2).

B. The Advertisements Were Not Coordinated.

This Complaint is baseless. Since there is no dispute that the content standard of the FEC coordinated communication regulations found in 11 C.F.R. § 109.21(c)(4) have been met by this advertisement, the easiest way to dispense of this Complaint is by addressing each of the conduct standards identified in the Commission's coordinated communication regulation.[2] The Complaint identifies no facts indicating that the conduct standard was met, and there are no such facts. Rather, the Club was careful to make sure that it did not coordinate these or any other ads with the Toomey campaign in any way. This is substantiated by the affidavit of the Club's Executive Director, David Keating, who was involved in the decision to run the "Guess Who" advertisement.

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[2] The advertisement did reference a clearly identified candidate, it was aired less than 120 days before an election, and it was aired in Pennsylvania.

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1. There Was No Request or Suggestion by the Toomey Camp.[3]

The Complaint does not suggest that there was any request or suggestion by the Toomey camp that the Club create, produce, or distribute these advertisements. In fact, the "advertisements were not created, produced, or distributed at the request or suggestion of a Mr. Toomey or his committee or an agent of any of the foregoing," nor did the Club "obtain the assent of Mr. Toomey, his campaign, or any agents of the foregoing with respect to these advertisements." Keating Aff. ¶ 5. Thus, the first element of the conduct standard has not been met.

2. There Was No Material Involvement by the Toomey Camp.

The Complaint suggest that because of the alleged "parallelism of the Club's media buy coupled with the fact that the Club for Growth and Toomey have engaged many of the same media consultants over the course of the last year, supports the conclusion that Toomey, his committee and/or his agent were materially involved in decisions regarding specific media outlets used for the Club for Growth ads, the timing of these ads, and the duration of the communications through these outlets." Thus, the Complaint is apparently suggesting that the Toomey camp had some material involvement in both "the specific media outlet used for the communication" as well as "the timing or frequency of the communication." 11 C.F.R §109.21(d)(2)(iv) & (v).[4]

However, this was not the case. Mr. Keating states that the Toomey camp was not involved "never mind materially involved" in any decisions regarding the advertisement, its placement or its timing. Keating Aff. ¶ 6. As he explains, "[t]he timing and scope of the Club's media buys were driven by budgetary constraints, as well as the fact that the law restricted our placement of the advertisements on broadcast stations that could reach three states surrounding Pennsylvania during a pre-presidential primary period in those states, and also restricted the placement of

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[3] The "Toomey Camp" refers to Mr. Toomey, his campaign, or his agents.

[4] The Common Vendor standard is also implicated by this statement and will be refuted below.

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these advertisements in Pennsylvania in the thirty days preceding the Pennsylvania primary." Keating Aff. ¶4. Further, Mr. Keating specifically refutes the inference in the Complaint that the Club's media buying was based on non-public information regarding the Toomey Campaign's media buy.[5] There was no overt or surreptitious information provided by the Toomey camp to the Club in connection with these ads. Instead, he states that "the Club had no information, outside of publicly disseminated information, regarding Mr. Toomey's intended media buys or media schedule." Id. ¶ 6. Moreover, the Club's media buyer has done no work for the Toomey campaign. See, id. ¶ 12. In sum, the Toomey camp was not materially involved in the advertisements at question. Thus, the second element of the conduct standard has not been met.

3. There Was No Substantial Discussion with the Toomey Camp.

The third potential element triggering the conduct standard is "one or more substantial discussions about the communication ." As the Commission was well aware when it implemented this regulation, this standard requires discussion.[6] However, as Mr. Keating states, "[t]here were no discussions between the Club and Mr. Toomey, his campaign, or any agents of the foregoing regarding these advertisements." Id. ¶7. Thus, the third element of the conduct standard has not been met.

4. There Were No Common Vendors.

As indicated in the Explanation and Justification to the coordination regulations, "[t]he common vendor rule is carefully tailored to ensure that all four of the following conditions must be met. First, under 11 CFR 109.21(d)(4)(i), the person paying for the communication . . . must contract with, or employ, a 'commercial vendor' to create, produce, or distribute the communication." 68 Fed. Reg. at 436 (Jan. 3, 2003). It is with this first requirement that this present inquiry stops. The fact that the Club and Toomey may have "engaged many of the same

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[5] The Commission's Explanation and Justification for these regulations repeats frequently that information obtained from a speech to the public does not trigger the conduct standards of the regulations. See e.g. 68 Fed. Reg. 432, 434 (January 3, 2003).

[6] "'Discuss' has its plain and ordinary meaning, which the Commission understands to mean an interactive exchange of views." 68 Fed. Reg. at 435.

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media consultants over the course if the last year" is irrelevant to this inquiry. The only relevant inquiry for the common vendor conduct standard is whether the Club employed Toomey's media consultant for this communication. It did not. Keating Aff. ¶9. Further, the consultants that the Club did use for this advertisement have done no work for the Toomey campaign. Id. ¶¶11-12. Thus, the fourth element of the conduct standard has not been met.[7]

5. The Club Does Not Employ Any Former Toomey Employees or Independent Contractors.

The last element of conduct that can trigger a coordinated communication starts with the requirement that the Club employ "an employee or independent contractor of the candidate." The Club does not employ any such individual. Keating Aff. ¶ 10. Thus, the fifth element of the conduct standard has not been met.[8]

---

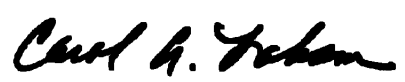
[7] Moreover, the one vendor that Toomey and the Club have in common did not work on this advertisement, was not aware of this advertisement, provided no information relevant to this advertisement, and has been instructed by the Club not to discuss the Senate 2004 U.S. Senate primary in Pennsylvania with the Club. Keating Aff. ¶¶8-9.

[8] While section 109.21(d) does have a part six, it applies to the dissemination, distribution, or republication of campaign materials and is meant "to clarify that the candidate's actions in preparing the original campaign materials are not to be construed as triggering *per se* one or more of the conduct standards in paragraph (d)." In that the advertisement was not (and has not been alleged to be) a dissemination, distribution, or republication of campaign materials, it is not relevant to this discussion.

CONCLUSION

There are no facts that suggest that the "Guess Who" advertisement at issue in this Complaint was a coordinated communication. The Club engaged in no conduct that triggers a coordinated communication. Thus, no in-kind contribution was made, and no law violated. Any suggestion by the complainant to the contrary is based upon a lack of facts and faulty suppositions. Thus, the Commission should find that there is no reason to believe a violation occurred and should dismiss this matter.

Sincerely,



Carol A. Laham

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Tab 1

Excerpts from 11 C.F.R. § 109.21

The Content Standard

The content standard applies to, among other things, public communications about which each of the following statements are true:

> (i) The communication refers to a political party or to a clearly identified candidate for Federal office:
>
> (ii) The public communication is publicly distributed or otherwise publicly disseminated . . . 120 days or fewer before a primary election . . .; and
>
> (iii) The public communication is directed to voters in the jurisdiction of the clearly identified candidate.

11 C.F.R. §109.21(c)(4).

The Conduct Standard

The conduct standard requires that any one of the following types of conduct be met:

> (1) *Request or suggestion.*
>
> (i) The communication is created, produced, or distributed at the request or suggestion of a candidate or an authorized committee, political party committee, or agent of any of the foregoing; or
>
> (ii) The communication is created, produced, or distributed at the suggestion of a person paying for the communication and the candidate, authorized committee, political party committee, or agent of any of the foregoing, assents to the suggestion.
>
> (2) *Material involvement.* A candidate, an authorized committee, a political party committee, or an agent of any of the foregoing, is materially involved in decisions regarding:
>
> (i) The content of the communication;
> (ii) The intended audience for the communication;
> (iii) The means or mode of the communication;
> (iv) The specific media outlet used for the communication;
> (v) The timing or frequency of the communication; or
> (vi) The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite.

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(3) *Substantial discussion.* The communication is created, produced, or distributed after one or more substantial discussions about the communication between the person paying for the communication, or the employees or agents of the person paying for the communication, and the candidate who is clearly identified in the communication, or his or her authorized committee, or his or her opponent or the opponent's authorized committee, or a political party committee, or an agent of any of the foregoing. A discussion is substantial within the meaning of this paragraph if information about the candidate's or political party committee's campaign plans, projects, activities, or needs is conveyed to a person paying for the communication, and that information is material to the creation, production, or distribution of the communication.

(4) *Common vendor.* All of the following statements in paragraphs (d)(4)(i) through (d)(4)(iii) of this section are true:

(i) The person paying for the communication, or an agent of such person, contracts with or employs a commercial vendor, as defined in 11 CFR 116.1(c), to create, produce, or distribute the communication;

(ii) That commercial vendor, including any owner, officer, or employee of the commercial vendor, has provided any of the following services to the candidate who is clearly identified in the communication, or his or her authorized committee, or his or her opponent or the opponent's authorized committee, or a political party committee, or an agent of any of the foregoing, in the current election cycle:

(A) Development of media strategy, including the selection or purchasing of advertising slots;
(B) Selection of audiences;
(C) Polling;
(D) Fundraising;
(E) Developing the content of a public communication;
(F) Producing a public communication;
(G) Identifying voters or developing voter lists, mailing lists, or donor lists;
(H) Selecting personnel, contractors, or subcontractors; or
(I) Consulting or otherwise providing political or media advice; and

(iii) That commercial vendor uses or conveys to the person paying for the communication:

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(A) Information about the clearly identified candidate's campaign plans, projects, activities, or needs, or his or her opponent's campaign plans, projects, activities, or needs, or a political party committee's campaign plans, projects, activities, or needs and that information is material to the creation, production, or distribution of the communication; or

(B) Information used previously by the commercial vendor in providing services to the candidate who is clearly identified in the communication, or his or her authorized committee, or his or her opponent or the opponent's authorized committee, or a political party

committee, or an agent of any of the foregoing, and that information is material to the creation, production, or distribution of the communication.

(5) *Former employee or independent contractor*. Both of the following statements in paragraph (d)(5)(i) and (d)(5)(ii) of this section are true:

(i) The communication is paid for by a person, or by the employer of a person, who was an employee or independent contractor of the candidate who is clearly identified in the communication, or his or her authorized committee, or his or her opponent or the opponent's authorized committee, or a political party committee, or an agent of any of the foregoing, during the current election cycle; and

(ii) That former employee or independent contractor uses or conveys to the person paying for the communication:

(A) Information about the clearly identified candidate's campaign plans, projects, activities, or needs, or his or her opponent's campaign plans, projects, activities, or needs, or a political party committee's campaign plans, projects, activities, or needs, and that information is material to the creation, production, or distribution of the communication; or

(B) Information used by the former employee or independent contractor in providing services to the candidate who is clearly identified in the communication, or his or her authorized committee, or his or her opponent or the opponent's authorized committee, or a political party committee, or an agent of any of the foregoing, and that information is material to the creation, production, or distribution of the communication.

Id. § 109.21(d)

28044221978

BEFORE THE FEDERAL ELECTION COMMISSION

Washington	)	
	)	Matter Under Review 5415
District of Columbia	)	

AFFIDAVIT OF DAVID KEATING

28044221979

DAVID KEATING, first being duly sworn, deposes and says:

1. I am David Keating. I am the Executive Director of the Club for Growth ("Club").

2. I have read the complaint in Matter Under Review Filed by Christopher Nicholas on behalf of the Citizens for Arlen Specter.

3. I am familiar with the activities of the Club as they relate to an advertisement entitled "Guess Who" that is the subject of that complaint. The text of that advertisement can be found at Exhibit 1. Further, I have surveyed each individual associated with the Club involved in discussions regarding the development and airing of this advertisement and been informed that none of the individuals had any communications with Mr. Toomey, the Toomey for Senate Committee, or any agents of either regarding the advertisement at issue in this matter. Any such communication would have been contrary to our practice and I would have been promptly informed had any communication occurred. Thus, based on my personal knowledge, as well as the information conveyed to me, the following statements are true.

4. The "Guess Who" advertisements ran from February 12–19 on various Pennsylvania cable television stations and a smaller number of broadcast stations in the middle of Pennsylvania. These ads did not reach beyond the state's boundary. The ads ran again from March 1-5 on cable stations that reached an audience only in Pennsylvania, and from March 3–27 on broadcast stations. The timing and scope of the Club's media buys were driven by budgetary constraints, as well as the fact that the law restricted our placement of the advertisements on broadcast stations that could reach three states surrounding Pennsylvania during a pre-presidential primary period in those states, and also restricted the placement of these advertisements in Pennsylvania in the thirty days preceding the Pennsylvania primary.

5. These advertisements were not created, produced, or distributed at the request or suggestion of a Mr. Toomey or his committee or an agent of any of the foregoing. Further, the Club did not suggest to Mr. Toomey, his campaign or his agents that it would run these ads on behalf of the Toomey campaign. Thus, the Club did not obtain the assent of Mr. Toomey, his campaign, or any agents of the foregoing with respect to these advertisements.

6. Neither Mr. Toomey, his campaign, nor any agent of the foregoing were involved, never mind materially involved, in decisions regarding "(i) The content of the communication; (ii) The intended audience for the communication; (iii) The means or mode of the

communication; (iv) The specific media outlet used for the communication; (v) The timing or frequency of the communication; or (vi) The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite." As an example, neither Mr. Toomey, his campaign, nor his agents shared any information with the Club. Further, they did not convey their approval or disapproval of Club plans, and were not given the opportunity to do so, and they in no way assisted the Club in connection with these advertisements. Further, the Club had no information, outside of publicly disseminated information, regarding Mr. Toomey's intended media buys or media schedule.

7. There were no discussions between the Club and Mr. Toomey, his campaign, or any agents of the foregoing regarding these advertisements.

8. The Club has had a relationship with Red Seas LLC since 2000. In December 2003, the Club instructed Red Sea not to engage in any discussions with Club personnel or agents regarding the Pennsylvania Primary Election for United States Senate, and they have not. A letter reflecting this understanding is attached at Exhibit 2.

9. Red Seas, LLC had no role in the creation or distribution of the advertisement referenced in this complaint. Specifically, Red Seas, LLC did not create, produce, or distribute the advertisement. Further, Red Seas, LLC did not provide any information to the Club with respect to Mr. Toomey's campaign plans, projects, activities, or needs, nor did Red Seas, LLC provide the Club with any information previously obtained from the Toomey Campaign.

10. The Club for Growth does not employ any former employee or independent contractor to the Toomey campaign or Mr. Toomey.

11. The Club for Growth used Warfield and Company for creative and consulting work related to these communications. We have confirmed that Warfield and Company has done no work for the Toomey for Senate Committee.

12. The Club for Growth used Thompson Communications for ad placement related to these communications. We have confirmed that Thomson Communications has done no work for the Toomey for Senate Committee.

13. In sum, this communication was made totally independently of Mr. Toomey, his campaign, and his agents.

14. Complaints such as the one leading to this affidavit are disruptive, burdensome, and expensive, and they chill and inhibit our expressive speech. The FEC must develop clear and demanding standards that will foreclose such complaints in the absence of specific and concrete factual grounds.

The above information is true and correct to the best of my knowledge.

David Keating

28044221980

Washington, D.C.

Subscribed to and sworn before me this 6th day of April, 2004

Larry E. Jefferson
Notary Public, District of Columbia
My Commission Expires 1-14-2007

Notary Public

My Commission Expires: _____

28044221981

"Guess Who"

Audio	Visual
	[Very minimalist feel, white background, sans-serif fonts] Still of John Kerry begins series of similar shots, tightly framed;
He fought to slash the Bush job-creating tax cut.	Graphic: He fought to slash the Bush tax cut; source
	New Kerry still; Graphic: Voted for 8 huge tax hikes, source
He voted for 8 huge tax hikes.	New Kerry still; Graphic: Supports trial lawyers instead of doctors, source
He supports greedy trial lawyers instead of Pennsylvania doctors on legal reform.	New Kerry still; Graphic: Blocked school choice, source.
He's blocked school choice education programs.	New Kerry; Graphic: One of Senate's most wasteful spenders, source
And he's rated one of the Senate's most wasteful spenders.	Kerry still; Graphic: John Kerry?
John Kerry? [V/O surprise, then disappointment] No. Arlen Specter.	Fast fade out Kerry, fade up Arlen Specter; Graphic: Arlen Specter
Fact is, nearly 70% of the time Specter and Kerry voted the same way.	Specter and Kerry stills with Graphic: Nearly 70% of the time Specter & Kerry voted the same; source
And that makes Arlen Specter 100% too liberal.	Specter still; Graphic: Arlen Specter 100% too liberal; disclaimer.
	www.clubforgrowth.org *"PAID FOR BY THE CLUB FOR GROWTH.*

Exhibit 1

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Red Sea, LLC
1111 19th Street, NW, Suite 211
Washington, DC 20036
202 822 1900 Phone
202 822 3750 Fax
www.redsealic.com

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December 26, 2003

Mr. David Keating
Executive Director
Club for Growth

Dear David:

This letter will serve to confirm our understanding that henceforth no person employed by or affiliated with Red Sea, LLC or its subsidiary companies will have any discussions or other communications with any person employed by or affiliated with the Club for Growth pertaining to the Republican U.S. Senate primary in Pennsylvania that is scheduled to take place on April 27, 2004.

Notwithstanding this understanding, Red Sea, LLC will continue to perform its consulting functions for the Club for Growth on matters unrelated to the previously identified Pennsylvania primary.

Sincerely,

Jon Lerner