BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 5517
James R. Stork	)	
Jim Stork for Congress and William C. Oldaker, in his official capacity as treasurer	)	
Stork Investments, Inc. d/b/a "Stork's Bakery"	)	
Stork's Las Olas, Inc.	)	

GENERAL COUNSEL'S REPORT #2

I. ACTIONS RECOMMENDED

Find probable cause to believe that James R. Stork, Jim Stork for Congress and William C. Oldaker, in his official capacity as treasurer (the "Committee"), Stork Investments, Inc. d/b/a "Stork's Bakery," and Stork's Las Olas, Inc. (the "bakeries") (collectively, the "Respondents") violated 2 U.S.C. § 441b(a) and that the Committee also violated 2 U.S.C. § 434(b).

II. BACKGROUND

James R. Stork was a 2004 candidate for Congress in Florida's 22nd Congressional District. He and his general election opponent were unopposed in their respective primaries, and, therefore, under Florida law, their names did not appear on their parties' ballots in Florida's August 31, 2004 primary election.[1] Stork is the president of Stork Investments, Inc. d/b/a "Stork's Bakery," located in Wilton Manors, Florida, and Stork's Las Olas Inc., located in Fort Lauderdale, Florida ("the bakeries").

The bakeries paid nearly $100,000 to run two cable television advertisements and another $10,734 to disseminate approximately 25,500 pieces of direct mail within Florida's 22nd

[1] Florida law provides that when a candidate is unopposed for his or her party's nomination, the candidate's name shall not be printed on the party's primary or general election ballot. Fl. Stat. §§ 101.151(7) and 101.252(1) (2004).

Congressional District ostensibly advertising the bakeries. The cable television advertisements ran between June 29 and July 18, 2004, and the direct mail campaign ran from June 21 through late July 2004, or between 30 and 71 days before Florida's primary election. Those advertisements featured Stork holding a bakery product and stating, "I'm Jim Stork. Come find out why Stork's Bakery and Café means quality you can trust." In addition, Stork personally made, and received reimbursement for, nearly $18,000 in in-kind contributions in the form of advances to his committee, most of which were not initially reported and none of which were properly reported.

The Commission found reason to believe that Respondents violated 2 U.S.C. §§ 441b(a) and 434(b) when the bakeries made, and the Committee received and failed to disclose, prohibited corporate in-kind contributions, most of which were in the form of coordinated communications as defined by 11 C.F.R. § 109.21. Others appeared to be contributions of food, rent, and office equipment that the bakeries allegedly provided without charge to Stork's campaign; while Respondents provided evidence that these alleged corporate contributions were in fact paid for by the campaign or Stork, many of them, plus others that had never been reported, were candidate advances that were improperly disclosed pursuant to 2 U.S.C. § 434(b). The Commission also authorized pre-probable cause negotiations. After we informed the Commission that these negotiations were unsuccessful, we issued the General Counsel's Brief, which is incorporated herein by reference. Respondents submitted a Response, and subsequently requested a probable cause hearing. The Commission granted this request and held a probable cause hearing on July 17, 2007. Thereafter, with the Commission's permission, Respondents submitted a letter dated August 7, 2007 supplementing the record.[2]

[2] Subsequently, after the three week period the Commission granted to Respondents to supplement the record, Respondents submitted to all Commissioners an unsolicited letter dated August 21, 2007 in order to correct misstatements in the hearing transcript and to clarify some of their responses to Commissioners' questions.

As set forth in the General Counsel's Brief, the bakeries' television and direct mail advertisements satisfy all three prongs of the "coordinated communications" test applicable at the time of the conduct.[3] The bakeries, not candidate Stork, paid for them, thus satisfying the "payment source" prong of the coordination test at 11 C.F.R. § 109.21(a)(1). The "content" standard prong at 11 C.F.R. § 109.21(c)(4) is satisfied because the advertisements were "public communications" distributed by cable television and disseminated by mass mailings, 11 C.F.R. §§ 100.26 and 100.27; Stork's name and image appeared in them, and they were distributed and disseminated in Florida's 22nd Congressional District, within 120 days before Florida's primary election. Finally, Stork was "materially involved" with the advertisements, thus satisfying the "conduct" requirement at 11 C.F.R. § 109.21(d)(2). *See* General Counsel's Brief at 3-4.

In response, Respondents do not dispute that the advertisements met the payment and conduct prongs of the coordination regulations, that they were public communications that referred to Jim Stork, a clearly identified candidate, or that they were disseminated and distributed within the designated time-period prior to the 2004 primary election in Florida. However, they maintain that advertisements run prior to an election in which federal candidates are unopposed and not listed on

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[3] The activity in this case took place in June and July of 2004, and therefore the coordinated content regulations at 11 C.F.R. § 109.21(c) (2004) apply. The Factual and Legal Analysis in this case included a discussion of advertisements that ran within 120 days before both the 2004 general and Florida primary elections. Under then prevailing law, a public communication that referred to a clearly identified Federal candidate that was disseminated within 120 days before an election, and was directed to voters in the jurisdiction of the clearly identified candidate, met the "content" standard for a coordinated communication. After the U.S. District Court for the District of Columbia found in 2005 that 11 C.F.R. § 109.21(c) was defective, the Commission revised its coordination rules, which became effective on July 10, 2006. Pursuant to revised section 109.21(c)(4)(i), for communications referring to House candidates, the period begins 90 days before each of the primary and the general elections. In this matter, all of the advertisements ran within 90 days before the 2004 Florida primary, but none ran within 90 days before the 2004 general election. At the briefing stage, we decided, in view of the revised regulations, to make probable cause recommendations regarding the pre-primary period only. *See* General Counsel's Brief at *n.* 1. The U.S. District Court for the District of Columbia, which once again considered this matter, recently held that the Commission's revised coordinated content regulations at 11 C.F.R. § 109.21(c) violated the Administrative Procedure Act, but did not enjoin the Commission from enforcing them. *See* Shays v. F.E.C.,--- F.Supp.2d ---, 2007 WL 2616689 (D.D.C. Sept. 12, 2007) (NO. CIV.A. 06-1247 (CKK) (granting in part and denying part the respective parties' motions for summary judgment).

their parties' respective primary ballots are not "directed to voters in the jurisdiction of the clearly identified candidate" because there are no voters for that office in that election.

As discussed below, Respondents' position is inconsistent with the definition of "election" in the Federal Election Campaign Act of 1971, as amended (the "Act"), fails to recognize that the clause "directed to voters in the jurisdiction of the clearly identified candidate" is a geographic targeting concept, and ignores the reality that there are voters to appeal to during an unopposed primary. Moreover, while they claim they placed "good faith reliance" on the "directed to voters" language because the primary was uncontested, this claim does not square with the applicable law and facts at the time.

Respondents secondarily argue that the advertisements were exclusively business advertisements aimed at potential bakery customers, not communications to "influence a Federal election," and therefore should be exempted from the coordinated communications regulations. However, as the Commission has recognized, those regulations establish a "bright-line test" and there is no exemption therein for ostensible business advertisements. Moreover, the facts in this matter show the wisdom of adhering to the "bright-line test" for coordinated communications.

Finally, Respondents concede that the Committee's misreporting of advances to Stork violated 2 U.S.C. § 434(b), *see* Section G, *infra*.

Accordingly, for the reasons set forth in the General Counsel's Brief and discussed below, we recommend that the Commission find probable cause to believe that the Respondents violated 2 U.S.C. § 441b(a) and that the Committee also violated 2 U.S.C. § 434(b).

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III. ANALYSIS

A. The Act's Definition of "Election" applies to Uncontested Primaries

Respondents essentially contend that the "directed to voters" language in part (iii) of section 109.21(c)(4) (2004) imposes the additional requirement that the "election" elsewhere referenced in the regulation must be one in which the referenced clearly identified candidate is opposed and one or more candidates' names for the same office must appear on the primary election ballot. There is no support for Respondents' position.

"Election" is defined as the "process by which individuals, **either opposed or unopposed,** seek [] election to Federal office," 11 C.F.R. § 100.2 (emphasis added); section 100.2(c)(5) further states that, for major party candidates whose nominations are unopposed, the primary election is considered to have occurred on the date on which that party's state primary election is held, which, in Stork's case, was August 31, 2004. Respondents concede that an unopposed primary election is "still an 'election' with a separate contribution limit for the unopposed candidate," and "triggers the 90-day window for campaign-related communications." Response at 2-3. In fact, nowhere in the Commission's regulations is the term "election" confined to contested elections. If the Commission had intended the word "election" in section 109.21(c)(4) to have anything but its ordinary meaning, it undoubtedly would have stated that explicitly in the regulation.

B. "Directed to Voters in the Jurisdiction of the Clearly Identified Candidate" is a Geographic Targeting Concept

Respondents misconstrue the clause "directed to voters in the jurisdiction of the clearly identified candidate." That clause did not focus on whether an election was contested, but rather reflected the Commission's incorporation of the electioneering communications' geographic-related "concept of the 'targeting' of the communication as an indication of whether it is election-related." Explanation & Justification, *Coordinated and Independent Expenditures,* 68 Fed. Reg. 421, 431 (Jan.

3, 2003) ("2003 Coordination E&J"). That concept depends only on whether the communication in issue is actually receivable by the population located within the geographic jurisdiction of the clearly identified candidate. To illustrate this concept, the Commission provided an example of a public communication referencing a clearly identified House candidate that was broadcast in Washington, D.C., but not in the candidate's district. This communication, according to the Commission, would not be "directed to voters." *Id.* Similarly, in Advisory Opinion 2005-18 (Reyes), the requester asked whether the appearance of Members of Congress on Representative Reyes' radio show would result in coordinated communications pursuant to section 109.21(c)(4). The Commission advised that the radio show, which was broadcast to listeners within Representative Reyes' congressional district, was "targeted to the relevant [Reyes'] electorate." In contrast, the Commission stated that if other Members of Congress were guests on Reyes' radio show, the show "would not be directed to voters in the jurisdiction of the clearly identified members who are also candidates" because their districts were not "within the listening area of the station broadcasting the program." Thus, the phrase "directed to voters in the jurisdiction of . . ." refers only to the geographical reach of the message. Indeed, in the 2006 revised coordination regulations, the Commission dispensed with the "directed to voters" language entirely in the analogous content standard. *See* 11 C.F.R. § 109.21(c)(4)(i) (2006).

Not only is Respondents' interpretation without legal support, but it would result in a patchwork application of the coordination rules that would differ widely from state to state. For example, in states such as Alabama, Florida, New York and Oklahoma that do not print the names of unopposed candidates on their primary election ballots, Respondents' reasoning would exempt unopposed candidates from the content standard in issue. In contrast, under Respondents' view, in states such as Arkansas and Maryland, where the names of candidates who are unopposed appear on primary ballots, this content standard would apply to those candidates' pre-primary public

communications. Such a system was not intended, and would be inequitable and difficult to interpret and enforce.

C. There were Voters to Whom Stork's Advertisements Could be Directed

Finally, to suggest that there were "no voters" for Stork to appeal to during the 2004 pre-primary period ignores the reality that unopposed primary candidates generally direct their efforts toward influencing general election voters from the outset. As Respondents' counsel stated at the Probable Cause Hearing, Stork "viewed this as a General Election only campaign. There was in his mind no primary. So money he was spending was to influence the general election against Congressman Shaw." Transcript of July 17, 2007 Probable Cause Hearing ("Tr.") at 35. Precisely because there were voters in his jurisdiction during the pre-primary period, Stork's campaign spent over $185,000 on "advertising" and "media buys," plus approximately $19,000 on direct mail and telemarketing, and $7,260 on media consultants, despite Stork being unopposed at that point.[4] *See* the Committee's 2004 April Quarterly, July Quarterly, and Pre-Primary financial disclosure reports. Stork had a powerful incentive to spend large sums of money on these campaign-related activities before the primary election, although he was unopposed, in order to influence potential voters in the general election.

D. Respondents' Good Faith Reliance Argument is Flawed

Respondents claim, as an apparent mitigating factor, that they placed "good faith reliance" on the "directed to voters" language, purportedly believing that it exempted their advertising because there were no candidates on the ballot for the 22nd Congressional District in Florida's 2004 primary election. Response at 5-6. However, at the time the advertisements ran, they were within 120 days of both the

[4] During the same period, the principal authorized committee of incumbent congressman Clay Shaw, who represented Florida's 22nd Congressional District at that time and who was also unopposed for his party's nomination, reported expenditures of approximately $38,531 for "advertising" and $38,080 for "media consultants."

primary and general elections, the latter of which was expected to be a race between Shaw, Stork, and two other candidates. Thus, but for the 2006 revision changing the "coordinated communications" time frame from 120 to 90 days, and our decision not to pursue the advertisements that ran more than 90 days before the general election, *see* General Counsel's Brief at *n.*1, Respondents' purported reliance on the "directed to voters" language would have left them squarely in violation of the extant regulations.

E. Section 109.21(c)(4)'s "Bright-Line Test" Does Not Exempt "Business" Advertisements

Respondents maintain that nearly $100,000 in television advertisements featuring the candidate stating "I'm James Stork. Come find out why Stork's Bakery and Café means quality you can trust," were set to coincide with the opening of the Las Olas bakery, and that the advertisements had no express or implied campaign message. *See* Response Attachment 1 at 3. Even if that were the case, because the advertising satisfied all three prongs of the coordination regulation, this alone "justifies the conclusion that payments for the coordinated communication are made for the purpose of influencing a Federal election, and therefore constitute in-kind contributions." 2003 Coordination E&J at 426. Moreover, as the Commission has recently confirmed, the standard has no "commercial exemption." In MUR 5410 (Oberweis), the Commission conciliated with Respondents on a coordination theory where, in addition to satisfying the payment and conduct prongs, the advertisement met the content standard in 11 C.F.R. § 109.21(c)(4) (2004). The Oberweis advertisement was identical to those in this matter in the sense that it featured the candidate ostensibly promoting his business without any reference to an election, voting, or candidacy.

Indeed, the intent of section 109.21(c)(4) was to establish a "bright-line test" requiring "as little characterization of the meaning or the content of communication, or inquiry into the subjective effect on the reader, viewer or listener as possible," and not requiring "a description of a candidate's views or positions." 2003 Coordination E&J at 430. When the Commission decided to use a bright-line test in the coordination regulations, it recognized that the rule might cover purported

business advertising by candidates since it had specifically rejected such an exemption in establishing the bright-line test for electioneering communications. *See* Explanation and Justification, *Electioneering Communications*, 67 Fed. Reg. 65190, 65202 (Oct. 23, 2002) ("Based on past experience, the Commission believes that it is likely that, if run during the period before an election, such communications could well be considered to promote or support the clearly identified candidate, even if they also serve a business purpose unrelated to the election").

F. There is Wisdom in Adhering to the Bright-Line Test for Coordinated Communications

That a departure from this bright-line test for ostensible business advertisements in the coordinated communications context creates a slippery slope is evident from just a few cursory facts about the advertisements in issue. For example, the advertisements and Stork's campaign used similar logos of a silhouetted stork in a top hat. Some of the direct mail advertisements, which pictured and identified Stork by name, used the same photograph of Stork as used in his campaign literature, superimposed, respectively, on backgrounds picturing a bakery and the U.S. Capitol Dome. Some of those advertisements also stated that the first bakery was "Voted Best Bakery & Best Coffeehouse in East Broward," while campaign advertisements described the candidate as "South Florida's Best." In addition, one individual, Dannielle Sylvester, simultaneously served as the marketing director for the new bakery and as Stork's campaign manager at the time the advertisements were televised and disseminated as mass mailings. Moreover, although Respondents represented that Stork ran cable television advertisements in connection with the opening of his first bakery in 1998, they presented no evidence that Jim Stork appeared live, or even in photographs, in those advertisements or in any other bakery announcements prior to the ones in

issue.[5] Finally, although the candidate paid nearly $100.00 ostensibly to announce a new bakery, the television advertising does not explicitly mention that it had just opened. Tr. at 11-12.

As the regulations set forth a "bright line test," we did not investigate whether facts such as those recited above were evidence that Stork intended the bakeries' advertisements to influence his election. At the probable cause hearing, however, Commissioners noted the similarity in logos and photographs in the advertisements and campaign literature, *see* Tr. at 28, 32-33, and that the use of the words "best" and "trust" in the advertising could indicate a candidate qualification. *See* Tr. at 25, 49. In addition, the General Counsel asked about the dual roles of Ms. Sylvester. Tr. at 55. Counsel received permission to supplement the record regarding these matters, and they did so subsequent to the hearing.

In their supplemental submission, Respondents acknowledge that the photograph of Stork in front of a bakery that was used in one of the direct mailing advertisements was the same photograph, with the U.S. Capitol superimposed behind Stork, used by Stork's campaign on its website and elsewhere. Tr. at 2. Similarly, Respondents acknowledge that both the bakeries and the campaign used the same logo of a silhouette of a stork wearing a top hat. *Id.* Respondents provided no explanation of why the campaign and the bakeries' advertising used the same photograph and logo. In fact, according to Respondents, other photographs and variations on the Stork logo were available. *See* Respondents' August 21, 2007 letter. According to counsels' supplemental submission, Ms. Sylvester, who had been employed by Stork's bakery since 1998 in a variety of roles, was responsible for coordinating construction and working with general contractors on the opening on Stork's new bakery. Respondents assert that she was not responsible for the placement, planning or content of the bakery

[5] At the probable cause hearing in this matter, counsel first said that the bakery's advertisements had not used Stork's photograph prior to the advertisements at issue here. Counsel then qualified his answer by stating that he was not certain whether Stork had used photographs of himself in the earlier set of advertisements. Tr. at 28-29. In their post-hearing supplemental submissions, counsel did not provide any more information on this point.

advertisements, *see id.*; however, according to one invoice provided during the investigation, she was the contact person for the vendors handling the bakeries' media campaign. Thus, while we believe the Commission's "bright-line" test makes facts such as those noted above irrelevant, it is evident that the mere absence of words such as "candidate," "election" and "vote" in ostensible business advertising does not rule out that such advertising may also promote a candidate and influence an election.[6]

G. Respondents Do Not Dispute that the Committee Improperly Reported Candidate Advances

Respondents concede that the Committee's reporting of advances violated 2 U.S.C. § 434(b) because it "was not timely, and in other respects did not fully comply with Commission regulations, in particular, those governing the disclosure of candidate advance payments on Schedule A, and also as debts on Schedule D where the purpose of the advance payments was to cover campaign travel expenses" that were not timely reimbursed. Response at 7. *See* General Counsel's Brief at 7-9.

H. Conclusion

Based on the foregoing, this Office recommends that the Commission find probable cause to believe that James R. Stork, Jim Stork for Congress and William C. Oldaker, in his official capacity as treasurer, Stork Investments, Inc. d/b/a "Stork's Bakery" and Stork's Las Olas, Inc. violated

[6] Although counsel stated at the hearing that Stork had contacted them concerning the advertisements, counsel has not raised an "advice of counsel" defense on behalf of their clients. To the contrary, in their August 21, 2007 letter, they specifically state that they did not, and do not, assert reliance of counsel as a defense for their clients in this matter. It would appear that such a defense is not available because it would require that counsel had full knowledge of the content of the advertisements. *See United States v. Butler*, 211 F.3d 826, 833 (reliance on counsel claim requires showing, *inter alia*, that all pertinent facts were fully disclosed to an expert). At the probable cause hearing, counsel stated that "[w]e did not know anything [about the advertisements] but [Stork's] name would be in the ad." In addition, counsel stated that although they had asked for copies of the advertisements, counsel believed they were not provided. *See* Tr. 37-41.

2 U.S.C. § 441b(a), and that Jim Stork for Congress and William C. Oldaker, in his official capacity as treasurer, also violated 2 U.S.C. § 434(b).

IV.

V. RECOMMENDATIONS

1. Find probable cause to believe that James R. Stork violated 2 U.S.C. § 441b(a).

2. Find probable cause to believe that Stork Investments, Inc. d/b/a "Stork's Bakery" violated 2 U.S.C. § 441b(a).

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3. Find probable cause to believe that Stork's Las Olas, Inc. violated 2 U.S.C. § 441b(a).

4. Find probable cause to believe that Jim Stork for Congress and William C. Oldaker, in his official capacity as treasurer, violated 2 U.S.C. §§ 434(b) and 441b(a).

5.

6. Approve the appropriate letter.

10/17/2007
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