



Wiley Rein & Fielding LLP

RECEIVED  
FEC MAIL  
OPERATIONS CENTER

2004 DEC 27 P 4: 17

1776 K STREET NW  
WASHINGTON, DC 20006  
PHONE 202 719.7000  
FAX 202 719 7049

Virginia Office  
7925 JONES BRANCH DRIVE  
SUITE 6200  
McLEAN, VA 22102  
PHONE 703 905 2800  
FAX 703 905 2820

www.wrf.com

December 27, 2004

Carol A. Laham  
202.719.7301  
claham@wrf.com

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

Re: MUR 5609 (Club for Growth)

Dear Mr. Norton:

This office represents the Club for Growth, Inc. ("Club"), which has received a complaint ("Complaint") designated Matter Under Review ("MUR") 5609 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 sections 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 December 27, 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 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 of 1971, as amended ("FECA" or "Act").

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
OFFICE OF GENERAL  
COUNSEL  
2004 DEC 27 P 5: 04

25044121329

Lawrence H. Norton, Esq.  
December 27, 2004  
Page 2

### THE COMPLAINT

This Complaint is mostly concerned with Arizona state law and Arizona state elections, which are outside the FEC's jurisdiction. The Complaint contains little about federal elections. The portion of the Complaint related to federal elections is described below.

Simply put, the Complaint alleges coordination between the Club and Congressman Trent Franks, although it is impossible to glean from the Complaint what type of coordination is alleged. The complainant bases her allegations on the fact that her research shows that the Club paid Christopher Baker or Bluepoint Consulting \$74,510 from January to August 2004 and that, again according to her research, Congressman Trent Franks' campaign, in addition to several state legislative campaigns, also paid Christopher Baker or Bluepoint Consulting. As a summation, the complainant states as follows: "We believe there exists a high likelihood that due to the fees paid to both the Club for Growth and the candidates that coordination did occur in violation of the federal law . . . ."

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

According to the FEC's regulations, a "coordinated communication" is a communication by a third party that meets both the content and conduct standards contained in the regulations. 11 C.F.R. § 109.21(a). Three of the four content standards require that federal candidate be clearly identified in the communication at issue. *Id.* § 109.21(c)(1), (3), (4).<sup>1</sup> The other content standard applies to "a public communication that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate, the candidate's authorized committee, or an agent of any of the foregoing, unless the dissemination, distribution, or republication is excepted [under other FEC regulations]." *Id.* § 109.21(c)(2).

---

<sup>1</sup> For the electioneering communication and 120-day public communication prongs, there is a requirement that any communication be directed toward the jurisdiction in question.

25044121330

Lawrence H. Norton, Esq.  
December 27, 2004  
Page 3

In addition, the regulations count as an in-kind contribution any non-political party expenditure that is "coordinated within the meaning of" section 109.20(a) but does not qualify as a "coordinated communication" as described above. Id. § 109.20(b).

## 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, but what type of coordination allegedly took place is not provided in the Complaint. Saying that the Club and a Congressman's campaign have had a common vendor in the last year is not sufficient to make out a violation of law. Rather, the FEC has issued regulations identifying four categories of content and five categories of conduct that will satisfy the conduct element of a coordinated communication. The allegations in the Complaint only mention one part of one conduct factor (i.e., that the Club and the campaign had a vendor in common) and do not speak to the content standards at all.

The Complainant makes an inference that because both the Club and the Congressman's campaign appear to have paid the same consultant, some coordination was involved. The Complaint does not even mention that any covered communication was made by the Club or that the Club subsidized the vendor's work for the Congressman's campaign. No facts are mentioned because, per the attached affidavit of David Keating, Executive Director of the Club (discussed below), there are no such facts. Inferences are not facts and do not rise to the level of a valid complaint.

25044121331

Lawrence H. Norton, Esq.

December 27, 2004

Page 4

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, certain types of information about the campaign from a common vendor must have been used for a third party's covered communication. See id. § 109.21(d)(4). The Complaint does not so allege, and as will be seen below, that the Club made no communication mentioning or featuring a Congressional candidate from Arizona and did not disseminate or otherwise redistribute any of the Congressman's campaign materials. See Affidavit of David Keating, dated December \_\_, 2004, before the Federal Election Commission (hereinafter "Keating Aff.") at ¶¶ 4-5 (Tab 1).

**B. There Were No Covered Communications.**

According to the Affidavit of David Keating, the Club did not "pay for or otherwise air or disseminate any communication in Arizona or elsewhere in 2003 or 2004 that mentioned, referenced, or featured the likeness of Congressman Trent Franks or his opponent." Keating Aff. ¶ 4. In addition, the Club did not "disseminate, distribute, or republish, in whole or in part, the campaign materials of Congressman Trent Franks, his campaign, or his opponent." Keating Aff. ¶ 5.

As a result of these facts, the Club could not have made any coordinated communication with Congressman Franks' campaign because the Club made no communications in Arizona or elsewhere that "clearly identified" Congressman Franks or his opponent and because the Club did not redistribute any of the Congressman's campaign materials. Without one of these types of covered communications, the coordinated communication regulations do not apply. See 11 C.F.R. § 109.21(a).

**C. There Were No Coordinated Expenditures.**

Not only did the Club not make any "coordinated communication" with Congressman Franks' campaign, the Club also did not make any other type of expenditure coordinated with the Congressman's campaign. As the Club's Executive Director has sworn under oath, "[t]he Club did not pay Christopher Baker or Bluepoint Consulting in 2003 or 2004 to do any work for, to provide any services to, or to provide any Club-strategic information to Congressman Trent Franks, his campaign, or his opponent." Keating Aff. ¶ 6. As a result of this fact, it is clear that there is no merit to the unsubstantiated allegation in the Complaint that the Club

25044121332


Lawrence H. Norton, Esq.  
December 27, 2004  
Page 5

coordinated with the Congressman's campaign through the vendor in Arizona that they had in common.

**CONCLUSION**

There are no facts that suggest that the Club coordinated communications or other types or expenditures with Congressman Franks' campaign through Christopher Baker or Bluepoint Consulting. The Club did not disseminate any communication in Arizona or elsewhere that clearly identified the Congressman or his opponent. The Club also did not pay Christopher Baker or Bluepoint Consulting to assist the Congressman's campaign. 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

25044121333

**BEFORE THE FEDERAL ELECTION COMMISSION**

Washington )

District of Columbia )

Matter Under Review 5609

**AFFIDAVIT OF DAVID KEATING**

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

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

2. I have read the complaint in Matter Under Review 5609 filed by Barbara Lubin on behalf of the Clean Elections Institute, Inc. I understand that this complaint relates to the 2003-2004 election cycle and thus this affidavit relates to that election cycle. Further, the only Federal candidate identified in the complaint was Congressman Trent Franks. Thus, my response is limited to Club activities allegedly undertaken on behalf of this Federal candidate since it is my understanding that Federal law does not regulate any activity the Club may have undertaken on behalf of state candidates.

3. I am familiar with the activities of the Club as they relate to communications aired, disseminated, or otherwise paid for by the Club and as they relate to political consultants retained by the Club.

4. The Club did not pay for or otherwise air or disseminate any communication in Arizona or elsewhere in 2003 or 2004 that mentioned, referenced, or featured the likeness of Congressman Trent Franks or his opponent.

5. The Club did not disseminate, distribute, or republish, in whole or in part, the campaign materials of Congressman Trent Franks, his campaign, or his opponent.

25044121334

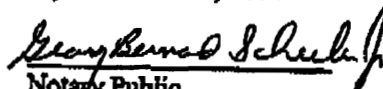
6. The Club did not pay Christopher Baker or Bluepoint Consulting in 2003 or 2004 to do any work for, to provide any services to, or to provide any Club-strategic information to Congressman Trent Franks, his campaign, or his opponent. Further, Christopher Baker did no work for the Club in 2003 or 2004 related to Congressman Trent Franks.

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

  
David Keating

Aberdeen, Maryland

Subscribed to and sworn before me this 27<sup>th</sup> day of December, 2004

  
Notary Public

My Commission Expires: 9/29/08



25044121335