



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Caroline Goodson, Esq.
Perkins Coie
607 Fourteenth Street, NW
Washington, DC 20005

JUN 28 2007

Re: MUR 5834
Darcy Burner
Darcy Burner for Congress

Dear Ms. Goodson:

On October 11, 2006, the Federal Election Commission notified your clients, Darcy Burner for Congress and Philip Lloyd, in his official capacity as treasurer ("Burner Committee"), and Darcy Burner of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On June 20, 2007, the Commission found, on the basis of the information in the complaint and information provided by your clients, that there is no reason to believe that the Burner Committee violated 2 U.S.C. §§ 441b(a). Additionally, the Commission dismissed the allegation that the Burner Committee and Darcy Burner violated 2 U.S.C. § 441d(d)(1)(B)(ii). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Kate Belinski, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

Thomasenia P. Duncan
General Counsel

A handwritten signature in black ink, appearing to read "Kate Guith".

BY: Kathleen M. Guith
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Darcy Burner for Congress MUR: 5834
 and Philip Lloyd, in his
 official capacity as treasurer
 Darcy Burner

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission by Diane E. Tebelius, Chairman of the Washington State Republican Party. *See* 2 U.S.C. § 437g(a)(1). The complaint alleges that Darcy Burner for Congress and Philip Lloyd, in his official capacity as treasurer ("Burner Committee"), violated the Federal Election Campaign Act of 1971, as amended ("the Act"), by failing to comply with the Commission's "stand by your ad" disclaimer requirements in connection with a television advertisement that the Committee aired during the 2006 election cycle. The complaint further alleges that the Burner Committee may have received an impermissible corporate in-kind contribution from one or more of the television stations that aired the advertisement.

II. FACTUAL SUMMARY

Darcy Burner was a candidate in Washington's Eighth Congressional District in the 2006 election and Darcy Burner for Congress was her principal campaign committee. On August 10, 2006, the Burner Committee began airing a television advertisement entitled "Burner Bio" on six Seattle-area stations. The advertisement, which makes no mention of any other candidate, features photographs of Burner with a voice-over narrative describing Burner's childhood, education and career. At the end of the advertisement, Burner appears in front of a group of people, addresses the camera and states "I'm Darcy Burner and I approve of this message." In

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addition to Burner's verbal disclaimer, a printed disclaimer appears at the end of the advertisement, which states that it was "Paid for by Darcy Burner for Congress." Although expressed verbally, the printed disclaimer does not specify that Burner authorized the advertisement. The Burner Committee aired a substantially similar advertisement entitled "Darcy" from August 22-24, 2006, on the same six television stations.¹ The printed disclaimer at the end of "Darcy" also does not specify that Burner authorized the advertisement.

On August 24, 2006, Burner's campaign manager, Zach Silk, apparently discovered that the advertisements "did not contain a required written statement" expressing Burner's approval of the advertisements. Silk purportedly contacted the vendor that same day and "ordered that the advertisements be corrected." According to Silk, the vendor modified the advertisements immediately to include a written "stand by your ad" disclaimer at the end of the communication, and contacted the television stations airing the advertisements to inform them that corrected versions of the advertisements would be provided later that day. The vendor then transmitted the new versions of the advertisements to the television stations, and confirmed that the stations took the original versions out of rotation and replaced them with the corrected versions.

The complaint alleges that the Burner Committee failed to comply with the Commission's "stand by your ad" disclaimer requirements in connection with the "Burner Bio" advertisement. The complaint further asserts that, because the Burner Committee failed to include the required disclaimer, the advertisement does not qualify for the discounted "lowest unit charge" rate available for certain political advertisements pursuant to 47 U.S.C. § 315(b)(2),

¹ There was one slight difference between the two ads; specifically, in "Burner Bio," Darcy Burner was standing in front of a group of supporters when she stated "I'm Darcy Burner and I approve of this message," whereas in "Darcy," Burner was standing by herself when she made the same statement.

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and therefore, "in the event she does receive such a discount, she would have accepted a corporate in-kind contribution" from any television station that gave the Committee the discount.

In their response to the complaint, Respondents admit that the initial version of both the "Burner Bio" and "Darcy" advertisements contained oral, but not written, disclaimers that Burner approved of the advertisement. Silk stated in a sworn declaration that he reviewed both advertisements prior to airing, and did not notice the absence of the written statement expressing Burner's approval. Respondents contend that immediately upon discovering the inadvertent omission of the written "stand by your ad" disclaimers, they contacted the vendor to correct the problem.

With respect to the "lowest unit charge" allegation, Respondents contend that because "Burner Bio" and "Darcy" do not make any references to another candidate for the same office, the Federal Communication Commission's "stand by your ad" requirement set forth in 47 U.S.C. § 315(b)(2) does not apply. Therefore, Respondents aver, if a television station had provided the lowest unit charge rate, the Committee would be entitled to it and no corporate contribution would result.

III. LEGAL ANALYSIS

A. "Stand by your Ad" Disclaimer

The complaint alleges that the "Burner Bio" television advertisement failed to include the requisite written "stand by your ad" disclaimer. The Act requires that whenever a candidate or an authorized political committee of a candidate makes a disbursement for the purpose of financing any communication through any broadcasting station, or any other type of general public political advertising, such communication shall clearly state that the authorized political committee paid for the communication. *See* 2 U.S.C. § 441d(a)(1); 11 C.F.R. § 110.11(b)(1). Furthermore,

under the Act's "stand by your ad" provisions, a television communication paid for or authorized by a candidate's principal campaign committee must include a statement by the candidate that identifies the candidate and states that the candidate approved the communication. 2 U.S.C. § 441d(d)(1)(B); 11 C.F.R. § 110.11(c)(3)(ii). A "similar" statement must also appear in writing at the end of the communication in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, for a period of at least four seconds. 2 U.S.C. § 441d(d)(1)(B)(ii); 11 C.F.R. § 110.11(c)(3)(iii).

In this matter, the Burner Committee has admitted that the original versions of the "Burner Bio" and "Darcy" advertisements in question did not contain the requisite written statement regarding the candidate's authorization. However, the Burner Committee's advertisements included the appropriate verbal statements identifying the candidate and expressing approval, and also included the required printed statement that they were "Paid for by Darcy Burner for Congress."

Therefore, the Commission dismisses the allegation that Darcy Burner and Darcy Burner for Congress and Philip Lloyd, in his official capacity as treasurer, violated 2 U.S.C. § 441d(d)(1)(B)(ii).

B. Corporate Contribution

The complaint also alleges that, in the event the Burner Committee received the lowest unit charge rate from any television station airing the "Burner Bio" and "Darcy" advertisements, the Committee would have received an impermissible corporate in-kind contribution from the television station(s) because it was not entitled to a reduced rate. Under the Communications Act of 1934, broadcasters are required to provide the lowest unit charge rate for candidates' political advertisements in the 45 days prior to the primary election and 60 days prior to the general

election for the same classification of advertising. *See* 47 U.S.C. § 315(b)(1)(A). However, Federal candidates “shall not be entitled to receive” the lowest unit charge if the candidate’s television advertisement makes a “direct reference” to the candidate’s opponent and fails to contain a “clearly readable printed statement” identifying the candidate and stating that the candidate’s authorized committee paid for the broadcast. *See* 47 U.S.C. § 315(b)(2)(C).

The Federal Election Campaign Act prohibits corporations from making any contributions or expenditures in connection with a Federal election. *See* 2 U.S.C. § 441b(a). Under the Commission’s regulations, a corporation makes a prohibited in-kind contribution to a political committee when it offers that committee a discount outside of its ordinary course of business. *See* 11 C.F.R. § 100.52(d)(1).

In this matter, the complaint does not allege that the Burner Committee *actually received* the lowest unit charge rate from any of the six television stations that aired the “Burner Bio” advertisement, and the Committee’s response does not specifically address whether it received the lowest unit charge rate. Instead, the complaint framed the allegation as a hypothetical devoid of factual support. Thus, based on the information contained in the complaint, the complainant’s allegation is speculative and appears insufficient to support a reason to believe finding regarding whether the Committee received an impermissible corporate in-kind contribution. *See* MUR 4960 (Clinton for Senate) Statement of Reasons of Commissioners Mason, Sandstrom, Smith, and Thomas (Dec. 21, 2000) (“[u]nwarranted legal conclusions from asserted facts ... or mere speculation will not be accepted as true”).

Furthermore, the Commission has no jurisdiction to make a formal determination as to whether the Committee was entitled to the lowest unit charge for the advertisements pursuant to the Communications Act, and/or whether the Committee violated the disclaimer requirements

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contained in the Communications Act. *See* Statement of Chairman Toner and Commissioners von Spakovsky and Mason in AOR 2006-31 at 1 and Statement of Vice Chairman Lenhard and Commissioners Walther and Weintraub in AOR 2006-31 at 2. Rather, such determinations are within the jurisdiction of the Federal Communications Commission. However, the advertisements ran within the 45-day period prior to the September 19, 2006, primary election; and, as Respondents point out, it is apparent on the face of the advertisements that they do not make any reference to another candidate for the same office, *i.e.* the advertisements do not appear to be excluded from the entitlement to the lowest unit charge that is set forth in 47 U.S.C. § 315(b)(1)(A).

Therefore, there is no reason to believe that Darcy Burner for Congress and Philip Lloyd, in his official capacity as treasurer, violated 2 U.S.C. § 441b(a).



FEDERAL ELECTION COMMISSION
Washington DC 20463

THIS IS THE END OF MUR # 5834

DATE SCANNED 8/9/07

SCANNER NO. 2

SCAN OPERATOR EA

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