FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Oberweis Dairy, Inc.	)	
Robert Renaut	)	
James D. Oberweis	)	MUR 5410
Oberweis for U.S. Senate 2004, Inc. and	)	
Joseph M. Wiegand, in his official	)	
capacity as Treasurer	)	

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STATEMENT OF REASONS OF
COMMISSIONER HANS A. von SPAKOVSKY

(Commercial Advertisements as Coordinated Communications)

This matter involves a milk commercial titled "Sunny Side Up" that was broadcast by Oberweis Dairy, Inc., between December 2003 and January 2004, which was within 120 days of the March 16, 2004, Illinois primary election for U.S. Senate.[1] "Sunny Side Up" featured the Chairman of Oberweis Dairy, James D. Oberweis, who was also a candidate for the U.S. Senate in the March primary.[2] In November 2004, the Commission unfortunately concluded that this commercial advertisement was a "coordinated communication," and found reason to believe that Oberweis Dairy violated 2 U.S C. § 441b by making a prohibited in-kind contribution to Oberweis for U.S. Senate 2004; that James D. Oberweis and Robert Renaut, President and CEO of Oberweis Dairy, violated § 441b by consenting to the making of a prohibited in-kind contribution; that Oberweis for U.S. Senate 2004, its treasurer, and James D. Oberweis, in his capacity as a federal candidate, violated § 441b by knowingly accepting a prohibited in-kind contribution; and that Oberweis for U.S Senate 2004 and its treasurer violated § 434(b) by failing to report this in-kind contribution. *See* First General Counsel's Report[3]; General Counsel's Report #2.

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[1] Under current Commission regulations, the relevant coordination window for a Congressional race is 90 days, rather than 120 days Under either standard, though, "Sunny Side Up" was aired within the window Of course, the law as it existed at the time of the activity in question controls

[2] Mr Oberweis appeared in three other commercial advertisements for Oberweis Dairy that were not broadcast within 120 days of the Illinois primary *See* First General Counsel's Report at 3-4

[3] I was not a member of the Commission in November 2004 when the First General Counsel's Report in this matter was approved

The Commission authorized pre-probable cause conciliation with the respondents, and an opening settlement offer of $44,000 was made. Respondents submitted a counteroffer which was the subject of General Counsel's Report #2. While the respondents contend that "their actions did not cause a violation of the law," they are willing to pay a civil penalty of $10,000 to settle this matter. *See* Conciliation Agreement Counteroffer of Respondents, included in General Counsel's Report #2. In General Counsel's Report #2, the Office of General Counsel ("OGC") recommended that the Commission reject respondents' counteroffer, but make a final attempt to conciliate this matter before proceeding to the probable cause stage. OGC proposed to reduce the civil penalty amount to $41,000. By a 5-1 vote, the Commission agreed with OGC's recommendation to continue conciliation efforts, but further reduced the civil penalty amount to $21,000.

I dissented from pursuing this matter further, and disagree with the basis of this enforcement action – that a purely commercial advertisement designed to sell milk that made no mention whatsoever of a Federal election, a Federal campaign, or any issues of any kind relevant to any Federal campaign, candidate or election, was a violation of the Federal Election Campaign Act ("FECA").

I. Background

The facts of this case are fairly simple and straightforward. Oberweis Dairy is a 75-year old, family-owned business that processes and delivers milk products directly to homes in Illinois, Indiana, and Missouri, and maintains 32 ice cream and dairy stores in the Chicago and St. Louis metropolitan areas. "For more than 20 years, James Oberweis has made personal appearances in advertisements for businesses with which he is involved," starting with Oberweis Securities in the early 1980's. *Respondent Oberweis for U S. Senate 2004 Response to Commission's Reason To Believe Findings* at 2. He first appeared in television advertisements on cable channels in 1986 for one of his businesses. In 1998, he recommended that Oberweis Dairy begin airing commercial advertisements and the Dairy soon began a cable television advertising campaign to supplement its print and radio advertising. *Id* at 2-3. Thus, contrary to the Office of General Counsel's ("OGC") assertion, "Sunny Side Up" was neither the Dairy's first televised advertisement nor the first instance in which Mr. Oberweis appeared in television advertisements for the Dairy.

Oberweis Dairy's venture from cable to broadcast television advertising was the result of *bona fide* business needs brought on largely by federal telemarketing legislation:

> In 1998, when Oberweis began to encourage going on TV, the Dairy's market was smaller; its stores were in a more concentrated areas, and it was unable to make home deliveries to significant parts of the Chicago metropolitan area. In addition, broadcast advertising rates were significantly more expensive than cable rates. There, because broadcasting would have cost too much and reached too wide a region, the Dairy initially refrained from investing in broadcast advertisements. By 2003, times had changed The Oberweis Dairy had more than

double its number of stores and expanded its distribution network to make home delivery available to virtually all of the Chicago area. However, the federal "Do Not Call" list that was to become effective in fall 2003 threatened to curtail further growth, as the Dairy had acquired over 90% of its home delivery customers in response to telemarketing efforts. The Dairy therefore had to look to other sources of new customers, and so the time was finally ripe to launch a series of broadcast television commercials for the Dairy.

Id. at 4-5.

Oberweis Dairy's broadcast advertising campaign ran from the summer of 2003 through January 2004, and the choice of which markets to air advertisements in was based on the Dairy's customer profiles, with all timing decisions made solely by the production firm. Only one ad, "Sunny Side Up," is the subject of this enforcement action, but there were a total of four commercials, including "Grandpa," "Love at First Sight," and "It's Your Morning," all of which featured Oberweis Dairy Chairman James Oberweis as the spokesman for the company. *See supra* footnote 2.

Oberweis Dairy had entirely reasonable and justified business reasons for running these commercial advertisements, and Mr. Oberweis had a 20-year history of appearing in ads for his companies. These are milk commercials that do not mention or refer to his federal candidacy, make no mention whatsoever of any elections, do not discuss any issues of any kind that could be considered relevant to any election, and are clearly designed to do one thing – convince the public to buy milk from Oberweis Dairy. Yet Oberweis Dairy is now being punished by a federal agency for running milk commercials, an action that does not even remotely "prevent corruption or the appearance of corruption" in the election process.

II. Discussion

A. A *Bona Fide* Commercial Advertisement Is Not A Coordinated Communication

The Commission's legal case is based on the entirely mistaken idea that the funds spent by Oberweis Diary for its commercials were in-kind contributions to James Oberweis's campaign, because the advertisements were public communications coordinated with the Oberweis for U.S. Senate campaign.

Our coordination regulations derive from 2 U.S.C. § 441a(a)(7), which provides that certain *expenditures* (or disbursements for electioneering communications) shall be treated as *contributions* to a candidate. Both expenditures and contributions are made *for the purpose of influencing an election for Federal office. See* 2 U.S.C. §§ 431(8)(A), (9)(A). One of the Commission's regulations implementing this statutory provision is 11 C.F R. §109.21, which provides that a communication is "coordinated" if it is: (1) paid for by a person other than the candidate or candidate's committee; (2) satisfies one or more of the four content standards set forth in the regulation, and (3) satisfies one or

more of the six conduct standards in the regulation. I disagree that either a content or conduct standard was met in this case.

1. The Content Standard

In this matter, the Commission concluded that the content standard was met because the advertisement referred to a clearly identified candidate for federal office and was targeted to the relevant jurisdiction within 120 days of an election. But Oberweis was never clearly identified *as a candidate for federal office*, and there was absolutely nothing in the commercial that would give any listener a clue that he was anything other than the spokesman for a dairy company trying to convince the listener to buy the dairy's products.

Interpreting our regulation to apply to purely (and factually undisputed) commercial ads that happen to feature a business owner is an extreme interpretation not required by the statute or its legislative history, and such an interpretation increases the chances that a federal court will eventually find 11 CFR § 109.21(c)(4) unconstitutional in an "as applied" challenge. Such an interpretation also puts individuals who work for a living, and are not members of the "idle" rich, but want to run for federal office in the strange position of having to refrain from certain activity related to running and promoting their business, to avoid running afoul of regulations so broad that they encompass normal and accepted business activity that has no relation to any election.

I do not view the Commission's regulations as precluding individuals from continuing to act in different capacities just because they are candidates. Where a person running for office appears in a *bona fide* commercial advertisement in his capacity as the owner of a business, rather than as a federal candidate, FECA should not be stretched implausibly to prohibit his activities. This matter demonstrates the broad sweep of 11 CFR § 109.21(c)(4), and the unfortunate results that can arise from this Commission's decision to utilize a simple, bright-line test that does not ask even the most rudimentary questions about whether a communication is being made for the purpose of influencing an election.[4] In fact, this lack of any inquiry into the meaning or content of the communication is the test's supposed virtue. *See Final Rules on Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 430 (Jan. 3, 2003) ("The intent is to require as little characterization of the meaning or the content of communication, or inquiry into the subjective effect of the communication on the reader, viewer, or listener as possible.").

The Commission should take one of two approaches to *bona fide* commercial advertisements. It could adopt a specific exemption for such advertisements – an

[4] Although I was not a member of the Commission when the original 11 CFR 109.21(c)(4) was published on January 3, 2003, I did vote the current 11 CFR 109 21(c)(4), which maintains the same bright-line characteristics as its predecessor However, before casting this vote, I motioned to incorporate a "promote, attack, support, or oppose" requirement into the test, which would have limited the reach of section 109 21(c)(4) to communications genuinely made for the purpose of influencing an election for Federal office. This motion failed 3-3 *See* Minutes of an Open Meeting of the Federal Election Commission, April 7, 2006, at 3-4, *available at* http //www fec gov/agenda/2006/approve06-27 pdf

approach entirely consistent with FECA, which conceives of coordinated communications as communications made for the purpose of influencing a Federal election. Alternatively, the Commission could apply 11 CFR 109.21(c)(4) as I have suggested here, and not punish businessmen by forcing them to choose between their livelihood and their decision to run for office. This application would be consistent with how the Commission has treated commercial advertisements in the electioneering communications context.

11 CFR 109.21(c)(4) is modeled on BCRA's bright-line test for electioneering communications, *see* 2 U.S C. § 434(f)(3), so it is logical that both provisions should be applied in a consistent manner. After the Commission erred when it refused to adopt a blanket exemption for commercial advertisements from the electioneering communications regulations, see *Explanation and Justification, Final Rules on Electioneering Communications*, 67 Fed. Reg. 65190, 65202 (Oct. 23, 2002), it was forced to apply those regulations as I argue 11 CFR 109.21(c)(4) should be applied here to avoid an obviously overbroad result.

In Advisory Opinion 2004-31, Russ Darrow, Jr. was a candidate for U.S. Senate in the Wisconsin Republican primary. Mr. Darrow was the founder, CEO, and Chairman of the Board of Russ Darrow Group, Inc., which owned and operated a number of car dealerships in Wisconsin. Mr. Darrow's son, Russ Darrow III, served as President and COO of Russ Darrow Group, Inc., and handled day-to-day operations, including advertising. Russ Darrow III appeared in advertisements for several dealerships that included "Russ Darrow" as part of the dealership's name (*e g.*, Russ Darrow West Bend and Russ Darrow Appleton Chrysler). The Commission concluded that "Russ Darrow" as used in the advertisements at issue was not a reference to the candidate Russ Darrow, but a reference to either the car dealership or the son, Russ Darrow III Thus, the "clearly identified candidate" requirement of the definition of "electioneering communication" was not met. As the Commission stated in Advisory Opinion 2004-31, the decision not to adopt a blanket commercial advertising exemption in the electioneering communication context "does not preclude the Commission from making a determination that the specific facts and circumstance of a particular case indicate that certain advertisements do not refer to a clearly identified Federal candidate and, hence, do not constitute electioneering communications."

The same approach should be taken with respect to 11 CFR 109.21(c)(4). In my opinion, "Sunny Side Up" should not be the basis of an enforcement action by the Commission pursuant to 11 CFR 109.21(c)(4) any more than the Russ Darrow car dealership advertisements of Advisory Opinion 2004-31 should have been subject to the electioneering communication provisions.

2. The Conduct Standard

I disagree also with the Commission's conclusion that any of the conduct standards set forth at 11 CFR 109.21(d) were satisfied. The Commission's conclusion is based on a misreading of precedent. In the First General Counsel's Report, OGC states:

> In a recent Advisory Opinion, the Commission stated that a candidate's appearance in a communication would be sufficient to conclude that the candidate was materially involved in decisions regarding that communication. In Advisory Opinion 2003-25, the Commission determined that the appearance of a U.S. Senator in an advertisement endorsing a mayoral candidate showed sufficient involvement by the Senator to satisfy the "materially involved" conduct standard. See also Advisory Opinion 2004-1 and 2004-29 (citing with approval Advisory Opinion 2003-25). Mr. Oberweis' appearance in "Sunny Side Up," is therefore sufficient to meet the conduct standard.

First General Counsel's Report at 7.

To the contrary, none of these three cited advisory opinions held that a candidate's appearance, by itself, was sufficient to establish "material involvement." An examination of each of those decisions shows very clearly that they establish an "appearance *plus* content control" standard.

> In Advisory Opinion 2003-25, the Commission wrote:
>
> The Commission further concludes that, despite your assertion to the contrary, "Committed" would satisfy the conduct standard in 11 CFR 109.21(d) in light of Senator Bayh's appearance in the "Committed" advertisement. The conduct standard is satisfied if, among other things, the Federal candidate, the candidate's authorized committee, or one of their agents is "materially involved" in a decision regarding one or more listed aspects of the creation, production, or distribution of a communication. 11 CFR 109.21(d)(2) Given the importance of and potential campaign implications for each public appearance by a Federal candidate, it is highly implausible that a Federal candidate would appear in a communication without being materially involved in one or more of the listed decisions regarding the communication. See 11 CFR 109.21(d)(2). [Footnote 5: It is also likely that the candidate or his or her agent would engage in one or more substantial discussions with the person paying for that communication. 11 CFR 109.21(d)(3).] In fact, your request explicitly assumes that Senator Bayh or his representative will review the final script in advance "for appropriateness." To suggest that a candidate may personally approve the content of an advertisement without satisfying the conduct standard in 109.21(d)(2) would be to obviate that section of the regulations.

The retention of content approval by Senator Bayh is a more significant factor than his appearance in the advertisement Similarly, in Advisory Opinion 2004-1, the "material involvement" conclusion was driven by the endorsing candidate's script approval:

> You stated in your request that "[a]gents of the President will review the final script in advance of the President's appearance in the advertisements for legal compliance, factual accuracy, quality, consistency with the President's position and any content that distracts from or distorts the 'endorsement' message that the

President wishes to convey." This involvement by the President's agents, whenever it occurs, would constitute material involvement for purposes of the conduct standard.

Finally, in Advisory Opinion 2004-29, control over an advertisement's content once again provided the justification for finding "material involvement" in communications in which the candidate would appear:

> You state that Representative Akin wishes to appear in advertisements that will be paid for by a ballot initiative committee, and that he will "retain control over his appearance in any radio or television advertisement" and would either submit to the ballot committee any statement to be attributed to him, or would review any statement attributed to him. . . Representative Akin will likewise be materially involved in decisions regarding the proposed communication because he retains control over his appearance in the advertisements and will either submit to the ballot committee any statement to be attributed to him, or will review any statement to be attributed to him. Thus, the conduct standard is met.

This MUR does not simply follow precedent, as the First General Counsel's Report suggest; it re-reads precedent to establish a new, lower bar to finding "material involvement."

In this case, no decisions regarding the content, intended audience, means or mode, media outlet, timing, frequency, or duration of the television advertisements were made by James Oberweis. Rather, those decisions were made by Oberweis Dairy's management committee. Other than suggesting that the Dairy consider a particular producer for the advertisements, Mr. Oberweis did not guide, direct, oversee, or manage the process of finding a producer, and he had no involvement in the conceptualization, selection, or content development of any of the ads. He did not see the scripts until he arrived on the sets for filming and made no changes other than suggesting immaterial, minor word corrections. He played himself in the advertisements as the Chairman of the Dairy. *Id.* at 5-6. These circumstances do not satisfy the Commission's previously stated "material involvement" standard. Thus, contrary to my colleagues' conclusion, Mr. Oberweis was not "materially involved" in the production of these commercials.

B. Other Considerations

I must also point out that in this particular matter, Oberweis Dairy exercised proper and commendable due diligence by consulting an attorney at a well-known law firm in Illinois, over the applicability of campaign finance law to these milk advertisements. This attorney is now an adjunct professor at a very well-regarded law school and holds herself out as an expert on "BCRA compliance, state campaign finance disclosure, petition drafting, and petition challenges."[5] Oberweis Dairy's lawyer specifically advised the Dairy that it could run its planned commercial advertisements "as long as they are not within thirty (30) days of a Primary Election or sixty (60) days before

[5] See http //www law uiuc edu/faculty/DirectoryResult asp?Name=Mool,+Deanna

a General Election." *See* Letter of July 7, 2003 to Robert Renault, President, Oberweis Dairy, Inc. Oberweis Dairy followed the advice of counsel to the letter, and ended the broadcast of the advertisement that is the subject of this enforcement action well in advance of 30 days before the Illinois primary.

III. Conclusion

The Commission should have voted to find no reason to believe that a violation of the law occurred when this matter first came before it, in November 2004. Two years later, the Commission should have taken the opportunity to reconsider the underlying case, and dismiss the matter.

December 8, 2006

Commissioner Hans A. von Spakovsky