



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

MAY 18 2005

CERTIFIED MAIL
RETURNED RECEIPT REQUESTED

Benjamin L. Ginsberg, Esq.
Patton Boggs LLP
2550 M Street, Northwest
Washington, DC 20037

RE: MUR 5502
Martinez for Senate and Charles W. Puckett,
in his official capacity as treasurer

Dear Mr. Ginsberg:

On August 9, 2004, the Federal Election Commission notified your client, Martinez for Senate and Charles W. Puckett, in his official capacity as treasurer, ("Martinez Committee"), of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your client at that time.

Upon further review of the allegations contained in the complaint and information provided by your client, the Commission, on April 19, 2005, found that there is reason to believe that the Martinez Committee violated 2 U.S.C. § 441a(a)(1)(A). The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Statements should be submitted under oath.

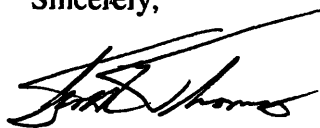
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Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

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

Sincerely,



Scott E. Thomas
Chairman

Enclosures

Factual and Legal Analyses

cc: Senator Mel Martinez

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FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Martinez for Senate and
 Charles W. Puckett, in his
 official capacity as treasurer

MUR 5502

I. GENERATION OF MATTER

This matter was generated by a complaint filed with the Federal Election Commission (“Commission”) by Frederick H. Armstrong (“Complaint”). *See* 2 U.S.C. § 437g(a)(1).

II. FACTS

Mel Martinez (“Martinez”) ran for a Florida Senate seat in 2004. His authorized committee for that race was Martinez for Senate (“Martinez Committee”). The Florida Republican primary was held on August 31, 2004. Martinez won the Republican nomination and was elected to the Senate on November 2, 2004.

The Complaint in this matter alleges that the Martinez Committee “has repeatedly utilized the images of President George W. Bush on its website, in its mailings, and other campaign materials promoting his [Martinez’s] candidacy.” The Complaint primarily focuses on a television advertisement, titled “Strong Conservative” (“Advertisement”), that began airing on or about July 27, 2004, just prior to the primary election in Florida, and within 120 days of the general election.¹ According to the Complaint, the Advertisement was coordinated between the

¹ While the Complaint did not identify the title of the Advertisement, it stated that it appeared on the Martinez Committee’s website. The Advertisement was on the website, news articles quoted from the Advertisement, and the Response from the Martinez Committee attached invoices for the Advertisement. Although citing to the Martinez Committee’s website, the Complaint does not specify in what other ways the Martinez Committee used images of President Bush. When the Martinez Committee’s website was reviewed, it featured, in addition to the Advertisement, a photograph of President Bush and Martinez talking in the Oval Office. Moreover, (footnote continued on next page)

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Martinez Committee and Bush-Cheney '04, Inc. ("Bush Committee") through a common media vendor, The Stevens and Schriefer Group ("Stevens-Schriefer"), which allegedly produced the Advertisement for the Martinez Committee and served as a media vendor to the Bush Committee. See 11 C.F.R. § 109.21(d)(4).

The content of the thirty-second Advertisement is as follows:²

| Audio | Visual Images |
|---|---|
| <u>President Bush</u> : "I'm honored to be with a great American . . . | President Bush speaking at podium in front of crowd; "Miami, 5/20/02" appears superimposed in lower right |
| . . . Mel Martinez, who makes a big difference in our Cabinet." | waving American flag appears over screen; then images of President Bush and Martinez shaking hands at two events |
| <u>Announcer</u> : "Mel Martinez escaped communism as a young boy, alone . . . | "Mel Martinez" superimposed over pictures of Martinez as a child; other photos in background |
| . . . and fell in love with America and freedom. | "Mel Martinez, an American Story" superimposed on screen with photo of Martinez as a youth in a baseball uniform to the right and an American flag waving to the left of the screen; then flag stripes appear over screen |
| Chosen by President Bush for his Cabinet, . . . | President Bush and Martinez at podium with Presidential seal appear to left of screen, with image of newspaper clipping with words "Orlando Sentinel" and "Bush picks Martinez" |
| . . . Mel Martinez is a natural leader, . . . | Martinez speaking at event with American flag as backdrop |

according to news reports, a radio advertisement aired containing audio clips of President Bush speaking about Martinez. Neither the Complaint nor any publicly available information provided any details regarding any mass mailings.

² The ellipses simply indicate a continuation of the audio with corresponding changes in the video images, not missing or deleted audio.

| | |
|--|--|
| <p>... conservative, pro-life, fierce defender of our American values.”</p> <p>President Bush: “The American dream is alive ...”</p> <p>“... and well ...”</p> <p>“... and Mel Martinez ...”</p> <p>“... represents it all.”</p> <p>Martinez: “I’m Mel Martinez, and I approved this message.”</p> | <p>Scenes of Martinez talking and shaking hands with people, “Conservative,” “Pro-life,” and “American Values” superimposed on screen</p> <p>President Bush speaking (apparently at same event as in opening scene); waving American flag then appears over screen</p> <p>Martinez walking with his arm around a boy in a baseball uniform</p> <p>Close-up of Martinez’s face</p> <p>President Bush and Martinez together at a podium, “Mel Martinez for U. S. Senate” superimposed on screen, disclaimer “PAID FOR BY MARTINEZ FOR SENATE” appears and remains on bottom of screen until end of Advertisement</p> <p>Martinez talking to boys in baseball uniforms</p> <p>Martinez walking and talking with woman with whom he is holding hands</p> |
|--|--|

The Martinez Committee Response (“Response”) contends that the Advertisement is not a coordinated public communication because there was not a common vendor.³ Although the Complaint alleges that Stevens-Schriefer produced the Advertisement, the Response states that the Advertisement “was not ‘produced by one of the media vendors providing media services to Bush-Cheney ’04, Inc.’” Rather, according to the Response, “the [Martinez] campaign erected a wall around the vendor in question (Stevens-Schriefer) and retained a separate media vendor, Red October Productions, to handle any communications mentioning or showing the President.” However, it appears that Stevens-Schriefer and Red October Productions, Inc. (“Red October”)

³ The Bush Committee’s Response stated that the communication at issue was not sufficiently identified in order to frame a response to “the vague allegations in the complaint.”

each provided services to both the Martinez and Bush campaigns during the 2004 election cycle. Moreover, it appears that Stevens-Schriefer and Red October are closely related.

First, not only did Stevens-Schriefer provide advertising services for both the Bush-Cheney and Martinez campaigns, but the Martinez Committee's implication that Stevens-Schriefer did not "handle any [Martinez] communications mentioning or showing the President" appears simply to be incorrect. The home page of the Stevens-Schriefer website, www.stevens-schriefer.com, claims the company is "part of the Bush/Cheney Media Team" and provides a link to more information about re-electing President Bush. Upon entering the Stevens-Schriefer website, users are directed to a page titled "Congratulations to our 2004 winners including:" and lists both "Bush-Cheney 2004" and "Senator-Elect Mel Martinez," evidencing that both campaigns have used Stevens-Schriefer in the current election cycle. The website allows visitors to "click here to view our 2004 spots." Visitors then enter a page that allows one to view three advertisements under "Bush-Cheney '04" and three under "Mel Martinez for U. S. Senate (Florida)." Two of the latter, "Hard Work" and "Greatest Generation," utilize images of President Bush and Martinez shaking hands and mention that Martinez was a member of the "President's Cabinet." Additionally, Stuart Stevens, listed on the Stevens-Schriefer website as one of its "principles [sic]," was quoted in a media report as being "the man who crafted Mel Martinez' television campaign ads," Brian E. Crowley, *Hispanic vote probably propelled Martinez into Senate*, Palm Beach Post, Nov. 7, 2004, at 1.

Second, Red October, which the Martinez Committee claims produced all its communications "mentioning or showing the President," also held itself out as a Bush-Cheney vendor. The Red October website, www.redoctoberproductions.com, states that the Bush Committee is a client and that Ashley O'Connor ("O'Conner"), Red October's "owner and

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President,” “is currently serving as the Director of Production for Bush-Cheney ’04.” According to its website, Red October is “a full service production company” which offers services including “Producing Organized and Affordable Film or Video Shoots,” “Editing Efficient and Attractive TV and Radio Spots,” “Distributing Spots Quickly and Painlessly,”⁴ and “Consulting.” Reportedly, “Red October worked directly with the President’s reelection campaign and was involved in all aspects of pre-production, production, and post-production of numerous television advertisements that were broadcast nationwide on network and cable television.” *Red October Productions Produces Television Ads & Short films for Bush-Cheney Presidential Campaign*, iCOM, Dec. 2004, available at www.icommag.com/december-2004/production-news.html. According to this report, O’Connor “took a leave of absence” from Red October to work exclusively for the Bush Committee and Red October’s executive producer, Doug Dubin, “provided all pre-production, production and post-production services” for the Senate campaign of Mel Martinez.

Finally, Stevens-Schriefer and Red October appear to be closely related, if not in fact the same entity. The Stevens-Schriefer website lists O’Connor as a member of their “staff and production team.” O’Connor’s biographical information on the Stevens-Schriefer website states she is “president of Red October Productions and has been retained by [Stevens-Schriefer] as their exclusive production agent.” The Stevens-Schriefer website further lists Colston Stuart as office manager and states she “provides support for . . . Red October Productions.” An article on www.Variety.com regarding a contract between a union and Red October states that Red October is “the production arm of GOP media-consulting firm Stevens and Schriefer” and that Red October “was preparing to shoot a campaign spot for President Bush at the White House.” Dave

⁴ Distribution includes “work[ing] hand in hand” with the media buyer.

McNary, *IATSE pacts with GOP's ad producer*, Feb. 11, 2004. Moreover, the invoices submitted with the Response show an address and facsimile number for Red October that are the same as that for Stevens-Schriefer.⁵

III. ANALYSIS

Under the Federal Election Campaign Act of 1971 as amended ("Act"), no person may make a contribution, including an in-kind contribution, to a candidate and his authorized political committee with respect to any election for Federal office, which, in the aggregate, exceeds \$2,000. 2 U.S.C. § 441a(a)(1), *see* 2 U.S.C. § 431(8)(A)(i); 11 C.F.R. § 100.52(d)(1). The Act defines in-kind contributions as, *inter alia*, expenditures made by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents." 2 U.S.C. § 441a(a)(7)(B)(i). A communication is coordinated with a candidate, an authorized committee, a political party committee, or agent thereof if it meets a three part test: (1) payment by a third-party; (2) satisfaction of one of four "content" standards;⁶ and (3) satisfaction of one of six "conduct" standards. *See* 11 C.F.R. § 109.21.

⁵ The Bush Committee's disclosure reports show no payments to either Stevens-Schriefer or Red October. However, it appears that Stevens-Schriefer and Red October provided services to the Bush Committee through a third firm, Maverick Media, which served as the Bush Committee's principal media consultant. According to SourceWatch, Stuart Stevens and Russ Schriefer, principals of Stevens-Schriefer, are listed among "Maverick Media's personnel," as is O'Connor, who is listed as Maverick Media's producer. Available at www.sourcewatch.org/wiki.phtml?title=Maverick_Media (citing Advertising Age). At this point it is unknown whether Stevens-Schriefer and Red October were subcontractors to Maverick Media or whether the relationship was structured in some other manner. Maverick Media does not appear to have provided services to the Martinez Committee.

⁶ In *Shays v. FEC*, 02-CV-1984, slip op. at 32-48, 156-57 (D.D.C. Sept. 18, 2004) the District Court invalidated the content standard of the coordinated communications regulation and remanded it to the Commission for further action consistent with the Court's opinion. In a subsequent ruling, the Court explained that the "deficient rules technically remain 'on the books,'" and did not enjoin enforcement of this (or any other) regulation pending promulgation of a new regulation. *Shays v. FEC*, 02-CV-1984, slip op. at 2 (D.D.C. Oct. 19, 2004). The part of the ruling concerning the content standard is now on appeal. *Shays v. FEC*, No. 04-5352 (DC Cir. filed Sept. 28, 2004).

In this matter, the first prong of the coordinated communication test is satisfied because the Martinez Committee is a third-party payor. The second prong of this test, the content standard, is also satisfied because the Advertisement meets the definition of “public communication” under 11 C.F.R. § 100.26, refers to a clearly identified candidate for public office (President Bush), and appeared within 120 days of the Presidential general election.⁷ See 11 C.F.R. § 109.21(c)(4). Therefore, a finding that the Martinez Committee engaged in coordinated communications through a common vendor or vendors depends, at this stage, on an analysis under the “conduct” prong of the coordinated communications test.

Three elements must be present for a commercial vendor to be defined as a common vendor under 11 C.F.R. § 109.21(d)(4). First, the person paying for the communication must have employed or contracted with a commercial vendor to create, produce, or distribute the communication. 11 C.F.R. § 109.21(d)(4)(i). Both Stevens-Schriefer and Red October are engaged in the regular business of media consulting and advertising production; thus they qualify as commercial vendors. 11 C.F.R. § 116.1(c). The Martinez Committee contracted with Red October to produce the Advertisement and with Stevens-Schriefer to produce other communications.

Second, that commercial vendor must have provided any of certain enumerated services to the clearly identified candidate during the current election cycle. 11 C.F.R. § 109.21(d)(4)(ii). Both Stevens-Schriefer and Red October appear to have provided several of the services to Bush-Cheney '04, Inc., including development of media strategies, developing the content of public

⁷ “Public communication means a communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank to the general public, or any other form of general public political advertising. The term public communication shall not include communications over the Internet.” 11 C.F.R. § 100.26. The public communication must be directed to voters in the (footnote continued on next page)

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communications, producing public communications, and media consulting. 11 C.F.R.

§ 109.21(d)(4)(ii)(A), (E), (F), and (I).

Finally, that commercial vendor must have used or conveyed to the person paying for the communication:

(A) Information about the clearly identified candidate'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 an agent of the foregoing, and that information is material to the creation, production, or distribution of the communication.

11 C.F.R. § 109.21(d)(4)(iii). Because the first two parts of the common vendor test are met, there is reason to investigate whether the use or exchange of information occurred as described in 11 C.F.R. § 109.21(D)(4)(iii). If they did, all three parts of the coordination test will be met, and a portion of the costs of the Advertisement or any other coordinated communication would be a contribution from the Martinez Committee to Bush-Cheney '04. 2 U.S.C. § 441a(a)(7)(B)(i). As the portion would likely exceed \$2,000, it would constitute an excessive contribution in violation of 2 U.S.C. § 441a(a)(1)(A).

The Martinez Committee's claim that an ethical wall between Stevens-Schriefer and Red October was in place appears to be at odds with the facts known to us at this time; but even if such a barrier existed, it would not, by its mere existence, be legally sufficient to overcome the common vendor standard. First, the Commission has stated it "does not agree that the mere existence of a confidentiality agreement or ethical screen should provide a *de facto* bar to the enforcement of the limits on coordinated communications imposed by Congress" because such

jurisdiction of the clearly identified candidate. 11 C.F.R. § 109.21(c)(4)(iii). The Commission has defined jurisdiction for a Presidential candidate to be "the entire United States." E&J, 68 Fed. Reg. 421, 431 (Jan. 3, 2003).

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“arrangements are unlikely to prevent the circumvention of the rules.” Explanation and Justification (“E&J”), 68 Fed. Reg. 421, 435 (Jan. 3, 2003).

Second, the applicable rules defining common vendors emphasize substance over form; when entities such as Red October and Stevens-Schriefer are closely related, including overlapping personnel, their particular organizational form will not prevent an investigation of whether the entities used information in the same manner as a common vendor. 11 C.F.R. § 109.21(d)(4). In explaining its regulation, the Commission explicitly addressed situations in which “a commercial vendor may qualify as a common vendor under 11 CFR 109.21(d)(4) even after reorganizing or shifting personnel.” E&J, 68 Fed. Reg. 421, 435 (Jan. 3, 2003). The Commission stated the regulation “focus[es] on the use or conveyance of information used by a vendor, including its owners, officers, and employees, in providing services to a candidate [or committee], rather than the particular structure of the vendor.” *Id.* Both Red October and Stevens-Schriefer personnel were apparently in positions to use and convey material information about the Bush re-election strategy to the Martinez Committee. *See* 11 C.F.R. § 109.21(d)(4)(iii).

Therefore, there is reason to believe that Martinez for Senate and Charles W. Puckett, in his official capacity as treasurer, violated 2 U.S.C. § 441a(a)(1)(A).

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