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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

SECRET

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FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 5410

DATE COMPLAINT FILED: February 13, 2004

DATE OF NOTIFICATION: February 23, 2004

DATE ACTIVATED: May 10, 2004

EXPIRATION OF SOL: July 11, 2008

COMPLAINANT:

Tim Timoney, Chairman,
Democratic Party of Sangamon County

RESPONDENTS:

James D. Oberweis
Oberweis for U.S. Senate 2004, Inc. and
Richard G. Hawks, as treasurer
Oberweis Dairy, Inc.

**RELEVANT STATUTES
AND REGULATIONS**

2 U.S.C. § 441b
2 U.S.C. § 434(b)
11 C.F.R. § 109.21
11 C.F.R. § 114.9

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The complaint alleges that James D. Oberweis knowingly and willfully used the corporate funds of Oberweis Dairy, Inc. to finance his federal campaign in violation of 2 U.S.C. § 441b. Mr. Oberweis is Chairman of Oberweis Dairy, Inc. ("Oberweis Dairy") and was a 2004 candidate for U.S. Senate in Illinois. Oberweis Dairy is a 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.

1 The complaint alleges that Oberweis Dairy ran coordinated television advertisements
2 featuring Mr. Oberweis and targeting Illinois voters within 120 days of the March 16, 2004,
3 primary election. The complaint further alleges that Oberweis for U.S. Senate 2004, Inc.
4 ("Oberweis Committee") used Oberweis Dairy products and facilities for "meet and greet" events
5 and a campaign-sponsored sweepstakes without paying for them. Finally, the complaint argues
6 the violations were knowing and willful because Mr. Oberweis and his committee sought the
7 advice of counsel before engaging in the illegal activity.¹

8 Based on the available information, it appears that at least one Oberweis Dairy
9 advertisement was a prohibited coordinated communication under 11 C.F.R. § 109.21.²
10 However, the information does not show that goods and services provided by Oberweis Dairy to
11 the Oberweis Committee were prohibited in-kind contributions pursuant to 2 U.S.C. § 441b.

12 Accordingly, we recommend the Commission find reason to believe respondents violated
13 2 U.S.C. §§ 441b and 434(b) in connection with the coordinated communication.

¹ The complaint alleges that the activity at issue is similar to MUR 4340 (TWEETZERMAN Corp.) and MUR 3918 (Hyatt Legal Services), prior enforcement actions involving the candidate's use of his company to influence the election. Because these matters were decided under the pre-BCRA coordination standards, their analyses do not apply to this matter.

² The U.S. District Court for the District of Columbia recently found defective several Commission regulations, including the coordinated content regulations at 11 C.F.R. § 109.21(c), however, the court did not enjoin the Commission from enforcing the regulations. *See Shays v. FEC*, --- F. Supp. 2d ---, 2004 WL 2097498 (D.D.C. Sept. 18, 2004) (NO. CIV. A. 02-1984 (CKK)) (granting in part and denying part the respective parties' motions for summary judgment). The court subsequently denied the Commission's petition for a stay pending appeal but confirmed that the regulations were still in effect. *See Shays v. FEC*, Civ. No. 02-1984 (CKK), slip op. at 2 (D.D.C. Oct. 19, 2004).

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II. FACTUAL AND LEGAL ANALYSIS

A. Oberweis Dairy, Inc. Appears to Have Run At Least One Television Advertisement that was a "Coordinated Communication" under 11 C.F.R. § 109.21.

Under the Act, corporations may not make contributions "in connection with" a federal election and corporate officers may not consent to such contributions. 2 U.S.C. § 441b(a). Moreover, federal candidates and political committees may not knowingly accept or receive such contributions. *Id.* A contribution includes a gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing a Federal election. 2 U.S.C. § 431(8)(A)(i). The term "anything of value" includes in-kind contributions. 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). Following the enactment of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), the Commission promulgated a new "coordinated communication" regulation at 11 C.F.R. § 109.21. Under this regulation, a communication is coordinated if it: (1) is 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 at 11 C.F.R. § 109.21(c); and (3) satisfies one or more of the six conduct standards set forth at 11 C.F.R. § 109.21(d).

In the summer of 2003, Oberweis Dairy, under the guidance of President and CEO Robert Renault, began its first television advertisement campaign in its 75-year history. The campaign consisted of four television advertisements that aired in the Chicago area on local and cable

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1 television shows.³ Oberweis Dairy acknowledges that it ran one of the four television
2 advertisements, "Sunny Side Up," in December 2003 and January 2004, which was within 120
3 days of the March 16, 2004, primary election. Oberweis Dairy claims that none of the other
4 three advertisements ran within the 120-day period and so do not fall within the definition of
5 prohibited coordinated communications. In the absence of conflicting information about the
6 ending airdates of the other three advertisements, those advertisements do not appear to meet any
7 of the content requirements of 11 C.F.R. § 109.21(c) and thus our reason to believe
8 recommendation is not based on them. Accordingly, the legal analysis focuses solely on the
9 "Sunny Side Up" advertisement.

10 **1. The "Sunny Side Up" Advertisement Meets the first Prong of the**
11 **Coordination Test at 11 C.F.R. § 109.21.**
12

13 Oberweis Dairy admits that it paid for the production and airing of the television
14 advertisement. Oberweis Dairy Response at 3. Thus, the advertisement meets the first prong of
15 the coordination test at 11 C.F.R. § 109.21(a)(1)(communications paid for by a person other than
16 the candidate or candidate's committee).

17 **2. The "Sunny Side Up" Advertisement Appears to Meet the Content**
18 **Requirement of 11 C.F.R. § 109.21(c).**
19

20 The goal of the content standard is to establish a bright line test that requires "as little
21 characterization of the meaning or the content of communication, or inquiry into the subjective
22

³ The ads, entitled "Grandpa," "Love at First Sight," "Sunny Side Up," and "It's Your Morning," all feature Chairman Jim Oberweis as spokesperson for the company. Complaint Attachment B "Grandpa" featured Oberweis talking to his granddaughter. "Love at First Sight" showed a pair of high school students who find love at an Oberweis Dairy Store. "Sunny Side Up" featured Jim Oberweis making breakfast for a pair of home delivery customers. In "It's Your Morning," an Oberweis driver brings his customers the morning paper and pours cream in their coffee.

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effect of the communication on the reader, viewer, or listener as possible.” Explanation & Justification, *Coordinated and Independent Expenditures*, 68 Fed. Reg. 421-01, 430 (Jan. 3, 2003) (“Coordination E&J”). Thus, under 11 C.F.R. § 109.21(c), a communication satisfies the content standard if it: (1) is an electioneering communication; (2) disseminates or republishes campaign materials; (3) expressly advocates the election or defeat of a clearly identified candidate; or (4) is a public communication that (i) refers to a political party or clearly identified candidate for Federal Office, (ii) is disseminated within 120 days of an election, and (iii) is targeted to voters in the jurisdiction of the clearly identified candidate. As discussed below, based on the currently available information, this fourth content standard applies to the “Sunny Side Up” advertisement. 11 C.F.R. § 109.21(c)(4).

As a threshold matter, the advertisement appears to be a public communication. Respondents state that “Sunny Side Up . . . was broadcast in the television markets encompassing Champaign, Springfield, Peoria and Bloomington, Illinois.” Oberweis Dairy Response at 3. A news report attached to the complaint states that Oberweis Dairy ads were aired on television and cable, during programs “such as The Today Show and The Oprah Winfrey Show, and cable networks including HGTV, Lifetime, TLC and The Food Channel.” Complaint, Attachment B at 1. Thus, this advertisement meets the definition of a public communication because it was disseminated “by means of any broadcast, cable, or satellite communication.” 11 C.F.R. § 100.26.

Next, Mr. Oberweis is clearly identified in the “Sunny Side Up” advertisement. 11 C.F.R. § 109.21(c)(4)(i). The definition of “clearly identified candidate” includes, *inter alia*, the name or photograph of the candidate. See 11 C.F.R. § 100.17. Contrary to respondents’ assertions, there is no requirement that the candidate be clearly identified as a candidate running

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1 for office or that the advertisement contain any political message. In addition, the fact that the
2 candidate may be referred to by another title, such as chairman of a company, does not render the
3 candidate any less clearly identified. Thus, the element is satisfied if the person running for
4 office appears in the communication. In this case, respondents concede that Mr. Oberweis
5 appeared in Oberweis Dairy's advertisements. Oberweis Response at 3; Oberweis Dairy
6 Response at 4. Newspaper articles report that the "Sunny Side Up" spot features Mr. Oberweis
7 making breakfast for a pair of home delivery customers. *See* Attachment 1.

8 Additionally, 11 C.F.R. § 109.21(c)(4)(ii) is satisfied because Oberweis Dairy admits it
9 ran this advertisement within 120 days of the March 16, 2004 primary election. Oberweis Dairy
10 stated, "the 'Sunny Side Up' advertisement ran after November 2003, and it ceased running in
11 January 2004." Oberweis Dairy Response at 4. Thus, the advertisement clearly meets this
12 bright-line test of the content standard.

13 Finally, "Sunny Side Up" was targeted to Illinois voters within the meaning of 11 C.F.R.
14 § 109.21(c)(4)(iii). Contrary to respondents' suggestion, there is no requirement that, in order to
15 satisfy this element, the communication must be disseminated statewide. Rather, a
16 communication is "directed to" voters in the jurisdiction of a Senate candidate if it is distributed
17 or broadcast anywhere within the state in which the candidate is running. Coordination E&J, 68
18 Fed. Reg. 421-01, 431. *See also* Advisory Opinion 2004-29. As stated above, Oberweis Dairy
19 acknowledges that the advertisement was broadcast in Illinois, specifically in the Champaign,
20 Springfield, Peoria and Bloomington, Illinois television markets. Oberweis Dairy Response at 3.

21 Thus, because Oberweis Dairy aired the "Sunny Side Up" television advertisement,
22 which clearly identifies Mr. Oberweis, in Illinois within 120 days of the primary election, the
23 "content" element of section 109.21 appears to be satisfied.

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3. The "Sunny Side Up" Advertisement Appears to Meet the Conduct Requirement of 11 C.F.R. § 109.21(d).

Communications that meet the conduct standards of section 109.21(d) include: those made at the request or suggestion, or with the material involvement, of a candidate or his or her agents; communications that involve substantial discussions between the person paying for the communications and the candidate or his or her agents; or the involvement of a common vendor, independent contractor, or former employee. The conduct standard that likely applies here is the "material involvement" standard. 11 C.F.R. § 109.21(d)(2).⁴

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 Opinions 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.

Based on the above, it appears that: Oberweis Dairy, Inc. violated 2 U.S.C. § 441b by making prohibited in-kind contributions to Oberweis for U.S. Senate 2004, Inc. and Richard G. Hawks, as treasurer; Oberweis for U.S. Senate 2004 and Richard G. Hawks, as treasurer, violated 2 U.S.C. § 441b by knowingly accepting prohibited in-kind contributions from Oberweis Dairy,

⁴ The complaint alleges that I Imagine, the D C -based political consulting firm that produced the coordinated advertisements, also produced the ads for Mr Oberweis' unsuccessful 2002 senatorial campaign. There is no evidence or allegation at this point, however, that Mr Oberweis used I Imagine for his 2004 campaign. Thus, there is insufficient evidence at this time to apply the "common vendor" conduct standard. *See* 11 C.F.R. § 109.21(d)(4).

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1 Inc. and 2 U.S.C. § 434(b) by failing to report such contributions; and James D. Oberweis
2 violated 2 U.S.C. § 441b by consenting to the making of prohibited contributions and by
3 knowingly accepting such contributions. It appears Robert Renaut, President and CEO of
4 Oberweis Dairy, Inc., also violated 2 U.S.C. § 441b because, according to Oberweis Dairy's
5 response, he authorized the production of the broadcast television advertisement for Oberweis
6 Dairy.⁵ Oberweis Dairy Response at 2.

7 **B. Oberweis for U.S. Senate 2004, Inc. Paid Oberweis Dairy, Inc. for Other**
8 **Products and Services Provided to the Oberweis Committee.**
9

10 In addition to the allegations regarding coordinated communications, complainant alleges
11 that Oberweis Dairy made prohibited in-kind contributions to the Oberweis Committee because
12 the Oberweis Committee failed to pay Oberweis Dairy for its products and the use of its facilities
13 in connection with "meet and greet" events and a sweepstakes. However, based on the available
14 information, it appears that the Oberweis Committee paid Oberweis Dairy for these goods and
15 services.

16 The Commission's regulations define "anything of value" to include all in-kind
17 contributions, including the provision of goods or services without charge or at a charge which is
18 less than the usual and normal charge for such goods or services. 11 C.F.R. § 100.52(d)(1). For
19 purposes of section 100.52(d)(1), "usual and normal charge for goods" means the price of those
20 goods in the market from which they ordinarily would have been purchased at the time of the
21 contribution. 11 C.F.R. § 100.52(d)(2). The provision of any goods or services without charge
22 or at a price less than the usual and normal charge for such goods or services is an in-kind
23 contribution. *Id.*

⁵ Robert Renaut would be an internally generated respondent

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1 Oberweis Dairy argues that it did not make contributions because the Oberweis
2 Committee paid the "usual and normal charge" for the ice cream used at the events as well as any
3 incidental overhead costs associated with the operation of the store. Oberweis Dairy Response at
4 7-8. Respondents provided copies of checks showing disbursements by the Oberweis Committee
5 to Oberweis Dairy for the events.⁶ As reflected in the attached chart, disclosure reports filed by
6 the Oberweis Committee show that the Oberweis Committee disbursed nearly \$16,000 to
7 Oberweis Dairy, Inc., during the period from September 2003 to March 2004 for "meet and
8 greet" events. *See* Attachment 2. These disbursements appear to have been timely made and
9 properly reported, and they contradict complainant's assertions that only a few small payments
10 were made. Complaint at 4. Furthermore, complainant presents no evidence that the payments
11 were for less than the "usual and normal charge."

12 Oberweis Dairy also contends that the sweepstakes was sponsored by and paid for the
13 campaign. Oberweis Dairy Response, pages 6-8. The entry form states that the maximum retail
14 value of the prize is \$2,500. *Id.* The disclosure reports show that the Oberweis Committee made
15 a single payment of over \$2,700 for "[I]ce cream for life sweepstakes." Thus, the disbursement
16 reports also contradict complainant's assertion that the sweepstakes was a prohibited in-kind
17 contribution.⁷

⁶ According to Oberweis Dairy, the "meet and greet" events were held at the stores for two hours during the regular business hours of the store, the events were not exclusive to the campaign (because the stores continued to conduct their ordinary business during the course of these events) and the campaign paid full price for all ice cream served, a price designed to cover the cost of the ice cream sold as well as any incidental overhead costs associated with the operation of the store. Oberweis Dairy Response, pages 6-8

⁷ If Oberweis Dairy was handing out sweepstakes forms during regular business hours, the Dairy employees' work in distributing the forms could constitute an in-kind contribution to the committee, however, it appears that the entry forms were only available during campaign events when campaign staff would have been present. News reports attached to the complaint state that the sweepstakes forms were made available in conjunction with Oberweis' "meet and greet" campaign events at the stores. In addition, the sweepstakes rules state, "[T]o enter, go to an Oberweis event location listed during the designated times and complete a brief survey regarding the issues that are most important to you. Or, you may enter by filling out the survey online by going to www.oberweis2004.com"

Accordingly, we recommend the Commission find no reason to believe the respondents violated 2 U.S.C. § 441b in connection with the "meet and greet" events and the sweepstakes.

C. Conclusion

Based on the above, this Office recommends that the Commission find reason to believe Oberweis Dairy, Inc. violated 2 U.S.C. § 441b by making prohibited in-kind contributions, in the form of a coordinated communication, to Oberweis for U.S. Senate 2004, Inc. and Richard G. Hawks, as treasurer; Oberweis for U.S. Senate 2004 and Richard G. Hawks, as treasurer, violated 2 U.S.C. § 441b by knowingly accepting prohibited in-kind contributions from Oberweis Dairy, Inc.; James D. Oberweis, in his capacity as Chairman of the Oberweis Dairy, Inc. Board, violated 2 U.S.C. § 441b by consenting to the making of prohibited contributions and, in his capacity as a federal candidate, by knowingly accepting such contributions; and Robert Renaut, President and CEO of Oberweis Dairy, Inc., violated 2 U.S.C. § 441b by consenting to the making of prohibited in-kind contributions to Oberweis for U.S. Senate 2004.

Counsel for James Oberweis and the Oberweis Committee and counsel for Oberweis Dairy both assert that knowing and willful findings are not warranted because their clients acted in good faith and relied upon the advice of counsel that the advertisements would not violate the Act. Based on counsel's representations and absent contrary information, we do not recommend knowing and willful findings at this time.⁸ See *FEC v. Friends of Jane Harman*, 59 F. Supp. 2d 1046 (C.D. Cal. 1999) (finding that reliance on the advice of counsel is evidence of good faith

⁸ Counsel for James Oberweis and the Oberweis Committee asserts that "Illinois legal counsel" advised that the proposed, "[A]dvertisements complied with the FECA." Oberweis Response at 3. Counsel for Oberweis Dairy asserts that "outside counsel" advised that advertisements that were not aired within 30 days of the primary election would not violate the Act. Oberweis Dairy Response at 6. The wording of these assertions appears to suggest that persons other than the current counsels provided the legal advice regarding the advertising.

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1 belief that conduct was not illegal

2
3 **III. INVESTIGATION AND CONCILIATION**

15
16 **IV. RECOMMENDATIONS**

- 17 1. Find reason to believe Oberweis Dairy, Inc. violated 2 U.S.C. § 441b.
- 18
- 19 2. Find reason to believe Oberweis for U.S. Senate 2004, Inc. and Richard G.
- 20 Hawks, as treasurer, violated 2 U.S.C. §§ 441b and 434(b).
- 21
- 22 3. Find reason to believe James D. Oberweis violated 2 U.S.C. § 441b.
- 23
- 24 4. Find reason to believe Robert Renaut violated 2 U.S.C. § 441b.
- 25
- 26 5. Find no reason to believe the above respondents violated 2 U.S.C. § 441b in
- 27 connection with the ice cream "meet and greet" events and the sweepstakes
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- 29 6. Approve the appropriate factual and legal analyses.

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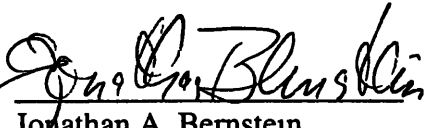
Lawrence H. Norton
General Counsel

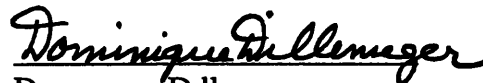
Rhonda J. Vosdingh
Associate General Counsel
for Enforcement

11/12/04

Date

BY:


Jonathan A. Bernstein
Assistant General Counsel


Dominique Dillenseger
Attorney

Attachments:

1. "Mediapost" website appearing to show frame from "Sunny Side Up."
2. Chart showing expenditures by the Oberweis Committee to Oberweis Dairy.

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MediaPost's Out to Launch

Wednesday, Jul 23, 2003



Out to Launch

by Amy Corr

Scottrade debuts a campaign. The Army increases their brand awareness. Oberweis Dairy kicks off their first TV campaign. Those are just a few of the campaigns launched this week. Read on for more details.



In conjunction with National Ice Cream Month, **Oberweis Dairy** is kicking off their first ever TV campaign with four new spots that will be airing on Chicago-area network and cable programs throughout the summer. "Grandpa," "Love at First Sight," "Sunny Side Up," and "It's Your Morning" all feature Chairman Jim Oberweis as spokesperson for the

family-owned company. All of the spots use humor to drive home the dairy's old-fashioned American values. "Grandpa" features a heartfelt conversation between Oberweis and his real-life granddaughter. "Love at First Sight" shows a pair of high school students who find love at an Oberweis Dairy Store. "Sunny Side Up" features Oberweis making breakfast for a pair of home delivery customers. And "It's Your Morning" has an Oberweis driver bringing his customers the morning paper and pouring cream in their coffee. The ads began airing July 13, and will be on heavy rotation in Chicago for eight weeks during television programs such as "The Today Show" and "The Oprah Winfrey Show," and cable networks including HGTV, Lifetime, TLC and The Food Channel. The spots were created by **I Imagine**.

ATTACHMENT 1
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Expenditures to "Oberweis Dairy" from Oberweis for U.S. Senate 2004, Inc.

Date on Report	Amount	Purpose of Disbursement
9/5/03	\$ 204.98	Campaign event, food
9/29/03	\$ 333.51	Cell phone
11/15/03	\$ 257.16	Ice cream for campaign event
12/8/03	\$ 31.94	Ice cream for campaign event
12/31/03	\$ 310.43	Ice cream for campaign event
1/9/04	\$ 2,754.00	Ice cream for life sweepstakes
1/11/04	\$ 282.41	Ice cream tour, Oswego
1/16/04	\$ 25.83	Ice cream for campaign event
1/18/04	\$ 218.83	Ice cream tour, Bartlett
1/18/04	\$ 169.46	Ice cream tour, Arlington Heights
1/20/04	\$ 293.59	Ice cream tour, Naperville
1/20/04	\$ 376.01	Ice cream tour, Elgin
1/20/04	\$ 369.07	Ice cream tour, Mt. Prospect
1/21/04	\$ 236.39	Ice cream tour, Addison
1/24/04	\$ 246.11	Ice cream tour, Hoffman Estates
1/24/04	\$ 514.59	Ice cream tour, Schaumburg
1/24/04	\$ 4.46	Ice cream tour, late arrivals
1/25/04	\$ 441.91	Ice cream tour, Bollingbrook
1/25/04	\$ 272.52	Ice cream tour, Downers Grove
1/26/04	\$ 116.30	Ice cream tour, Lake Zurich
1/26/04	\$ 55.62	Ice cream for campaign event
1/27/04	\$ 244.42	Ice cream tour, Bloomingdale
1/28/04	\$ 321.21	Ice cream tour, Glenview
1/28/04	\$ 129.24	Ice cream for campaign event
1/29/04	\$ 221.61	Ice cream tour, Glen Ellyn
1/30/04	\$ 162.80	Ice cream tour, Rolling Meadows
2/2/04	\$ 24.90	Ice cream tour, Glenview
2/2/04	\$ 415.86	Ice cream tour, Park Ridge
2/3/04	\$ 277.29	Ice cream tour, Wheaton
2/4/04	\$ 384.40	Ice cream tour, North Aurora
2/4/04	\$ 55.62	Ice cream for campaign event
2/18/04	\$ 3,491.70	Ice cream tour, downstate locations
2/20/04	\$ 562.50	Ice cream for fundraising event
3/6/04	\$ 460.99	Ice cream for campaign event
3/15/04	\$ 100.00	Ice cream for campaign event
3/17/04	\$ 40.00	Ice cream for campaign event
3/25/04	\$ 4,305.40	Ice cream for campaign event

TOTAL \$ 18,713.06