



FEDERAL ELECTION COMMISSION
WASHINGTON, D C. 20463

JUN 13 2007

John C. Peterson
Peterson, Berk & Cross, S.C.
200 E. College Avenue
Appleton, WI 54912-5159

RE: MUR 5806
Kagen 4 Congress and Kenneth E. Flood, Jr.,
in his official capacity as treasurer

Dear Mr. Peterson:

On September 14, 2006, the Federal Election Commission notified your clients, Kagen 4 Congress and Kenneth E. Flood, Jr., in his official capacity as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On May 9, 2007, the Commission found, on the basis of the information in the complaint, and information provided by you, that there is no reason to believe your clients Kagen 4 Congress and Kenneth E. Flood, Jr., in his official capacity as treasurer, violated 2 U.S.C. §§ 434(b), 441a-1(b)(1)(C) and 441b(a). 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 more fully 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

BY: Ann Marie Terzaken
Acting Associate General Counsel
for Enforcement

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Kagen 4 Congress and
Kenneth E. Flood, Jr., in his official
capacity as treasurer

MUR: 5806

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission by Rick Wiley, the Executive Director of the Republican Party of Wisconsin. *See* 2 U.S.C. § 437g(a)(1). The complaint alleges that the Kagen 4 Congress Committee violated the Federal Election Campaign Act of 1971, as amended (“the Act”), by accepting an in-kind contribution from the Kagen Allergy Clinic (“Clinic”). According to the complaint, the in-kind contribution resulted when the Clinic provided to the Committee, without charge, two pages of website content relating to a health initiative promoted by the candidate. The complaint alleges that this activity may have resulted in the Clinic making a prohibited in-kind corporate contribution to the Committee or, in the alternative, the candidate, Dr. Steven L. Kagen, making an unreported expenditure from his personal funds in circumvention of the so-called “Millionaire’s Amendment” of the Bipartisan Campaign Reform Act of 2002.

As set forth more fully below, based upon all of the available information, there is no reason to believe that Kagen 4 Congress and Kenneth E. Flood, Jr., in his official capacity as treasurer (“Committee”), violated the Act in connection with this matter.

II. FACTUAL BACKGROUND

Dr. Steven L. Kagen was a candidate for Wisconsin's 8th Congressional District seat in the 2006 election, and the Kagen 4 Congress Committee was his principal campaign committee. Kagen, a medical doctor and owner of the Kagen Allergy Clinic, developed the "No Patient Left Behind" health initiative as the cornerstone of his campaign.¹ As part of this initiative, the Committee included a subpage entitled "Join the Kagen Campaign for a Healthy America" on its website, kagen4congress.com. This subpage, which is accessed by clicking on the "Why I'm Running" link from the homepage, outlines the substance of Kagen's "No Patient Left Behind" initiative via a power-point type presentation with voiceover narration by Kagen. *See* <http://www.kagen4congress.com/nopatientleftbehind.html> (last accessed April 9, 2007²); *see also* Complaint at Exhibit A. The Committee's web address appears in large font at the bottom of the page. The narrated text concludes with a link to another subpage entitled "Declaration of Health: No Patient Left Behind," which invites the reader to sign a petition in support of the initiative. *Id.*

Similarly, the website for the Kagen Allergy Clinic, kagenallergy.com, contains a link from its homepage entitled "Learn More – No Patient Left Behind," which brings the website's visitor to a subpage that is materially identical to the "No Patient Left Behind" subpage on the Committee website, except that the Clinic's web address rather than the Committee's appears in large font at the bottom of the page. *See* Complaint at Exhibit B. The Clinic's homepage also contains a link to a subpage that appears identical to the "Declaration of Health: No Patient Left

¹ *See* <http://www.kagen4congress.com/NEWS/pressreleases/060922.html> (last accessed April 9, 2007).

² As of approximately May 1, 2007, the Kagen Committee changed its campaign website and removed the "No Patient Left Behind" content, however, accurate printed copies of the website text were attached to the complaint in this matter.

Behind” subpage on the Committee website. Dr. Kagen’s candidacy is not mentioned anywhere on the kagenallergy.com website, including on the “No Patient Left Behind” subpages, and the Clinic’s website does not contain any links to the Committee’s website. The clinic website does not appear to contain any advertisements.

The Committee’s disclosure reports indicate that the Committee paid approximately \$32,158 for the set-up, media creation, updates, and hosting of kagen4congress.com during the 2006 election cycle.³

The complaint alleges that the website content shared by kagen4congress.com and kagenallergy.com “serve[d] as advertisements for Kagen’s congressional campaign.” *See* Complaint at 1. Specifically, the complaint contends that if the Clinic is a corporation and provided this information to the campaign without charge, it made a prohibited, corporate in-kind contribution to the Committee. *See* 2 U.S.C. § 441b and 11 C.F.R. § 114.2. In the alternative, the complaint asserts that if the Clinic is a sole proprietorship, then the Committee should have reported the amount of the in-kind contribution as an expenditure from the candidate’s personal funds. *See* 2 U.S.C. § 441a-1(b)(1)(D) and 11 C.F.R. § 400.22(b). The complaint suggests that Kagen may have failed to report the funds associated with the website content in order to avoid triggering the “Millionaire’s Amendment.” 2 U.S.C. § 441a-1(b)(1)(C); 11 C.F.R. § 400.21(b).

In its sworn response to the complaint, the Committee states that it paid for and reported the creation of the website content at issue. According to the Committee, the expense of setting

³ This amount includes a \$1,000 in-kind contribution from Bradley DePasse for “web site set up.” *See* 2005 October Quarterly Report, Schedules A and B. DePasse is the owner of Ark Studios, a multi-media company located in Appleton, Wisconsin. The Committee’s disclosure reports indicate that Ark Studios served as its computer consultant, and the available information indicates that Ark Studios was the registrant and administrative contact for the Committee’s website.

up the Committee's website included placing the "No Patient Left Behind" content onto the Clinic's website. *See* Response at 1. The Committee states that it did not charge the Clinic, which is owned and operated by Kagen as an unincorporated sole proprietorship, any rental or operating charges for posting the health initiative information on the Clinic's website, and neither Kagen himself nor the Clinic expended any funds in connection with the website content.⁴

The Committee's disclosure reports show no apparent disbursements to Kagen or the Clinic for the placement of the subject website content onto the Clinic's website. The Committee's reports also show that Kagen made loans to his Committee in excess of the \$350,000 "Millionaire's Amendment" threshold on December 21, 2005. Kagen made his first loan to his campaign in the amount of \$50,000 on July 5, 2005, and made a second loan to his campaign of \$200,000 on September 30, 2005, for a total of \$250,000. Kagen exceeded the threshold on December 21, 2005, when he made a third loan to his campaign in the amount of \$1,000,000 and timely filed FEC Form 10. *See* FEC Form 10 dated Dec. 21, 2005; 2005 Year-End Report, Schedule C.

III. ANALYSIS

The complaint alleges that the Clinic made an in-kind contribution to the Committee by providing it with content for its website, free of charge. The complaint further avers that if the Clinic is a corporation, the in-kind contribution would result in the Clinic making, and the Committee accepting, a prohibited corporate contribution in violation of the Act. *See* 2 U.S.C. § 441b(a). In the alternative, if the Clinic was not a corporation, the complaint alleges that

⁴ According to Dun & Bradstreet and Westlaw reports, the Clinic is not registered as a corporation or other statutory business entity, such as a limited liability company.

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Kagen, as sole proprietor of the Clinic, may have made an unreported expenditure of his personal funds in violation of the "Millionaire's Amendment."

As an initial matter, it does not appear that the Clinic made an in-kind contribution to the Committee in connection with the "No Patient Left Behind" website content. Rather, the available information indicates that the Committee, and not the Clinic or Kagen, paid for the subject website content. The Committee stated, through Kagen's sworn affidavit, that it paid for the "No Patient Left Behind" website content that appeared on both the kagen4congress.com and kagenallergy.com websites and that the costs associated with creating the website content and posting it on the Clinic's website were included in the Committee's reported website-related expenditures. Although the Committee did not identify the specific amount it paid to create the website content and have it posted on the Clinic's website, the Committee's disclosure reports show that the Committee made website-related expenditures in excess of \$32,158. *See* 2 U.S.C. § 434(b).

Nor does it appear that the Clinic made an in-kind contribution to the Committee by providing the Committee with space on the Clinic website to display the Committee's campaign materials. Under the Act, the term "contribution" includes giving "anything of value" for the purpose of influencing an election. *See* 2 U.S.C. § 431(8)(A)(1) and 441b(b)(2); 11 C.F.R. § 100.52(a) and 114.1(a)(1). The provision of any goods or services without charge or at a charge that is less than the usual and normal charge is a contribution. *See* 11 C.F.R. § 100.52(d)(1). The value of in-kind contributions is based upon the usual and normal charge for the goods and services at the time of the contribution. *See* 11 C.F.R. § 100.52(d)(2).

In this matter, it does not appear that the Clinic normally sells advertising space on its website, and therefore there is no "usual and normal charge" for the space on kagenallergy.com

on which the “No Patient Left Behind” content appeared.⁵ As such, the Clinic’s provision of the website space free of charge would not result in an in-kind contribution. *See* 2 U.S.C.

§ 431(8)(A)(1) and 441b(b)(2); 11 C.F.R. § 100.52(a) and 114.1(a)(1).

Even if the Commission were to conclude that the Clinic made an in-kind contribution to the Committee in connection with the “No Patient Left Behind” website content, it appears that the Clinic is not a corporation, but rather a sole proprietorship. As discussed on page 4 and note 4, *supra*, the respondents state in their sworn response to the complaint that the Clinic is a sole proprietorship, owned and operated by Dr. Kagen, and this assertion is supported by the registration information available on several business databases. Since the Commission treats funds expended from a candidate’s sole proprietorship as personal funds of the candidate, funds expended by the Clinic would not be corporate funds subject to the prohibitions in 2 U.S.C.

§ 441b. *See* Advisory Opinion 1990-9 (Music Street Publishing).

Finally, had the Clinic made a contribution to the Committee in connection with the “No Patient Left Behind” website content, the contribution would not have affected the date on which the candidate was required to file an initial FEC Form 10. Candidates for federal office may make unlimited expenditures from personal funds. *See* 11 C.F.R. § 110.10. If a House candidate makes an aggregate expenditure of personal funds with respect to an election in excess of \$350,000, the candidate’s authorized committee must file a notification (FEC Form 10) within 24 hours of exceeding that threshold. *See* 2 U.S.C. § 441a-1(b)(1)(C); 11 C.F.R. § 400.21(b).

⁵ The Commission noted, in the Explanation & Justification to the *Internet Communications* regulation, that there may not be an ascertainable industry “norm” for determining the “usual and normal charge” for Internet advertising, and that the amount may be dependent upon the customary business practice of a particular website. *See Internet Communications*, 71 Fed. Reg. 18,589, 18,599 (April 12, 2006).

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In this matter, Kagen initially loaned his campaign \$50,000 on July 5, 2005, and made a second loan to his campaign of \$200,000 on September 30, 2005 for a total of \$250,000. Thus, any *de minimus* expenditure for the website content would not have triggered the requirement that Kagen file an FEC Form 10.⁶ He did not exceed the threshold until December 21, 2005, when Kagen made a third loan to his campaign in the amount of \$1,000,000 and promptly filed the requisite FEC Form 10 to disclose it. See FEC Form 10 dated Dec. 21, 2005; 2005 Year-End Report, Schedule C.

Aside from the unsupported allegation in the complaint, we have no information to suggest that the Clinic paid for the “No Patient Left Behind” website content, nor do we have information that the Clinic conferred anything of value on the Committee by allowing the “No Patient Left Behind” content to be placed on kagenallergy.com. Thus, it does not appear that either Kagen or the Clinic made any contributions in connection with the website content and accordingly it does not appear that Kagen made an attempt to circumvent the increased contribution limits for his opponents under the so-called “Millionaire’s Amendment.” Therefore, there is no reason to believe that Kagen 4 Congress and Kenneth E. Flood, Jr., in his official capacity as treasurer, violated 2 U.S.C. §§ 434(b), 441a-1(b)(1)(C) and 441b(a).

⁶ The Explanation and Justification to the Commission’s *Internet Communications* regulations note that the costs associated with placing information on a website is “generally insignificant.” See 71 Fed. Reg. 18,594.