



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

FEB 17 2009

Brian G. Svoboda, Esq.
Perkins Coie
607 14th Street, NW
Washington, DC 20005

RE: MUR 6050
Boswell for Congress
and Carl McGuire, in his official
capacity as Treasurer.

Dear Mr. Svoboda:

On August 20, 2008, the Federal Election Commission notified your clients of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On February 4, 2009, the Commission found, on the basis of the information in the complaint, information provided by your clients, and other available information, that there is no reason to believe Boswell for Congress and Carl McGuire, in his official capacity as Treasurer, violated 2 U.S.C. §§ 441a(f) and 434(b) by knowingly accepting and failing to report an excessive in-kind contribution. 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 Camilla Jackson Jones, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Mark D. Shonkwiler
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Boswell for Congress and Carl McGuire,
in his official capacity as treasurer
Independent Voices

MUR: 6050

I. INTRODUCTION

This Complaint involves allegations that Independent Voices, an unincorporated association organized under Section 527 of the Internal Revenue Code, coordinated its communications with Boswell for Congress and Carl McGuire, in his official capacity as Treasurer, (the "Boswell Committee"), which resulted in an excessive in-kind contribution from Independent Voices to the Boswell Committee.

The Complaint was filed by a group of ten individuals who allegedly received a mailer from the Boswell Committee and three direct mail pieces from Independent Voices within 90 days of the June 3, 2008 Iowa Primary election. Complainants allege that the mail pieces were sufficiently similar that it led them to conclude that the mailers were part of a coordinated communication effort between Independent Voices and the Boswell campaign. Complaint at ¶ 2. The Complaint provides copies of all four mail pieces as attachments and argues that there is reason to believe the communication efforts were coordinated because: 1) the mailers were received by the same group of constituents, 2) "similar phrasing, similar visual appearance and same typefaces" appear on all four mail pieces, and 3) the same mail house and printer were used for all of the direct mail pieces. *Id.* Finally, the Complaint alleges that the coordinated contributions

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1 resulted in an excessive in-kind contribution from Independent Voices to the Boswell
2 Committee, which the committee knowingly accepted.

3 Respondents contend that the facts at hand do not meet the “conduct” prong of the
4 coordination regulations set forth in 11 C.F.R. § 109.21(d). Specifically, Respondents
5 deny that the mail pieces were part of a coordinated communication effort because: 1) the
6 mailing lists were compiled independently and not using coordinated resources, 2) the
7 mail pieces are substantively and visually different and decisions concerning content,
8 design and typeface were not made in coordination with each other, and 3) there is no
9 evidence supporting coordination based solely on the use of a common vendor for
10 printing and mailing. Response of Boswell for Congress and Carl McGuire, in his
11 official capacity as Treasurer (“Boswell Response”) at 3-4. Consequently, Respondents
12 argue there was no excessive in-kind contribution by Independent Voices to the Boswell
13 Committee. *Id.* at 4; Independent Voices Response at 5.

14 Based on a thorough review of the Complaint, the Responses and other available
15 information, the Commission found no reason to believe that Independent Voices
16 violated 2 U.S.C. § 441a(a)(1) or that Boswell for Congress and Carl McGuire, in his
17 official capacity as Treasurer violated 2 U.S.C. §§ 441a(f) and 434(b).

18 **II. FACTUAL AND LEGAL ANALYSIS**

19 **A. Factual Background**

20 Independent Voices distributed three direct mail advocacy communications
21 during the 2008 primary season, which criticized the Democratic Primary opponent of
22 Leonard Boswell, an incumbent candidate for Iowa’s Third Congressional District. The
23 Boswell Committee was Leonard Boswell’s principal campaign committee. In its

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1 Response, Independent Voices submits declarations from its Chair, Red Brannan, and
2 political consultant Jeff Link asserting that Independent Voices made three issue
3 advocacy communications concerning crime and energy independence, which were not
4 made in communication, cooperation or consultation with the Boswell Committee, and
5 that the mail house and printer played no role in the content, intended audience, timing,
6 means or mode of the direct mail communications. Independent Voices Response, Red
7 Brannan Declaration ("Brannan Decl.") at ¶¶ 2, 5-6 and Jeff Link Declaration ("Link
8 Decl.") at ¶¶ 2, 5-6. Both assert that all decisions for the Independent Voices mailers
9 were made by Link and Brannan, that no Independent Voices employee or consultant had
10 any discussions with Leonard Boswell, the Boswell Committee or any of their agents,
11 and that the printer and mail house vendors provided no information material to the
12 creation, production or distribution of the printed mailers for the Boswell campaign to
13 Independent Voices or its agents. Brannan Decl. ¶¶2, 5-6; Link Decl. ¶¶ 2, 5-6.

14 The Boswell Committee states that it retained the Mack Crounse Group ("MCG")
15 to perform direct mail consulting services for the Boswell campaign. Boswell Response
16 at 1. MCG produced approximately eight direct mail pieces for the campaign in the 2008
17 primary season, including one titled "Let Down," which was attached to the Complaint.
18 Boswell Response, Affidavit of Jim Crounse ("Crounse Aff.") at ¶¶ 2-3. After MCG
19 designed the "Let Down" mailer in consultation with the campaign, it sent the mailer to
20 Carter Printing in Des Moines, Iowa for printing and mailing. *Id.* The Boswell
21 Committee asserts that Carter Printing was selected because it is one of a few print shops
22 that use union labor, which makes it a preferred printer for Democrats and progressive
23 groups. Boswell Response at 4. Carter Printer printed the "Let Down" mailer, stamped it

1 with the bulk mail printer number and indicia of its subcontractor, Data Solutions, and
2 then shipped the mailers to Data Solutions for labeling and mailing. Boswell Response,
3 Affidavit of Ron Hoyt ("Hoyt Aff.") at ¶ 2. The Boswell Committee asserts that it had no
4 way of knowing that the three mail pieces sent by Independent Voices attacking Ed
5 Fallon were also printed by Carter Printing, and also used Data Solutions' bulk mail
6 permit number and indicia. Boswell Response at 4.

7 The Boswell Committee submitted the sworn affidavit of MCG President Jim
8 Crounse, attesting that MCG, in cooperation with the Boswell Committee, made all
9 decisions regarding the content, design and target audience of the "Let Down" mailer and
10 all other mail pieces it produced for the Boswell campaign, that Carter Printing had no
11 input into the content, design or target audience of the "Let Down" mailer, and that no
12 MCG employee or consultant has had any material involvement with communications
13 made by Independent Voices. Crounse Aff. at ¶¶ 2-5. The Boswell Committee also
14 submitted a sworn affidavit by Carter Printing President, Ron Hoyt, attesting that it is
15 Carter Printing's practice to keep client information confidential and that Carter Printing
16 did not convey or share any information about the "Let Down" mailer or any other
17 Boswell direct mail pieces with Independent Voices or its consultant, the Strategy Group.
18 Hoyt Aff. ¶ 5.

B. Analysis

The central issue in this matter is whether the Independent Voices mailers were coordinated with, and thus resulted in an excessive contribution to, the Boswell Committee. *See* 2 U.S.C. § 441a(a)(7)(B)(i); 11 C.F.R. § 109.21(b)(1). The FECA provides that a payment for a communication that is made by any person “in cooperation, consultation, or concert, with or at the request or suggestion of” a candidate constitutes an in-kind contribution to that candidate. *See* 2 U.S.C. § 441a(a)(7)(B)(i), 11 C.F.R. § 109.21(b)(1). During the 2008 election cycle, the Act also prohibited Independent Voices from making or the Boswell Committee from knowingly accepting any contributions in excess of \$2300. 2 U.S.C. §§ 441a(a)(1) and 441a(f).

The Commission’s regulations provide a three-prong test to determine whether a communication is coordinated.¹ All three prongs of the test must be satisfied to support a conclusion that a coordinated communication occurred. 11 C.F.R. § 109.21(a); *see also* Explanation and Justification for Regulations on Coordinated and Independent Expenditures, 68 Fed. Reg. 772 (Jan. 3, 2003).

¹ After the decision in *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) (Court of Appeals affirmed the District Court’s invalidation of the fourth, or “public communication,” content standard of the coordinated communications regulation), the Commission made revisions to 11 C.F.R. § 109.21 that became effective July 10, 2006. In a subsequent challenge by Shays, the U.S. District Court for the District of Columbia held that the Commission’s content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(c) and (d) violated the Administrative Procedure Act; however, the court did not vacate the regulations or enjoin the Commission from enforcing them. *See Shays v. FEC*, 508 F.Supp.2d 10, 70-71 (D.D.C. Sept. 12, 2007) (granting in part and denying part the respective parties’ motions for summary judgment). Recently, the D.C. Circuit affirmed the district court with respect to, *inter alia*, the content standard for public communications made before the time frames specified in the standard, and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications. *See Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008). This decision does not impact this matter, however, because the communication at issue meets other parts of the content standard which the appellate court did not criticize or invalidate.

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1 The first prong of the test provides that the communication must be paid for by a
2 person other than the Federal candidate, the candidate's authorized committee, or
3 political party committee, or any agent of the foregoing. *See* 11 C.F.R. § 109.21(a)(1).

4 The first prong of the coordination test is met because Independent Voices paid for the
5 three direct mail communications. Independent Voices Response at 4.

6 The second prong of the coordination test requires that a communication must
7 satisfy one of the "content" standards in 11 C.F.R. § 109.21(c), which include, among
8 other things, a public communication that refers to a clearly identified candidate and is
9 publicly distributed 90 days or fewer prior to a primary election, which is directed to
10 voters in the jurisdiction of the clearly identified candidate. 2 C.F.R. § 109.21(c)(4)(i).

11 The "content" standard is met here because the Independent Voices direct mail
12 communications clearly identified House candidate, Ed Fallon, and were distributed in
13 the candidate's jurisdiction within 90 days of the primary election. Independent Voices
14 Response at 4.

15 The third prong of the coordination test requires that the parties have engaged in
16 conduct that meets any of the six following standards: (1) the communication is created,
17 produced or distributed at the request, suggestion or assent of a candidate, his authorized
18 committee, a political party or an agent of any of the foregoing; (2) the candidate or
19 authorized committee is materially involved in decisions regarding the content, intended
20 audience, means or mode of communication; (3) there is substantial discussion about the
21 communication between the person paying for the communication and the candidate,
22 authorized committee, political party or agent of the campaign; (4) the person paying for
23 the communication and the campaign share certain types of common vendors who use or

1 convey information about the candidate's plans, projects, activities or needs, in the
2 creation, production or dissemination of the communication; (5) the communication is
3 paid for by a person or by the employer of a person who was an employee or independent
4 contractor of the candidate; and (6) the dissemination, distribution or republication of the
5 campaign materials occurs under circumstances that reflect agreement or formal
6 collaboration between the candidate or his committee and other party. 11 C.F.R.
7 § 109.21(d)(1)-(6).

8 Respondents argue that none of the tests for the "conduct" prong of the
9 coordination test have been met. Boswell Committee Response at 3-4; Independent
10 Voices Response at 4. The Complaint's allegations of coordination rely solely on an
11 alleged similarity in appearance between the "Let Down" mailer and the three
12 Independent Voices mailers, corresponding bulk mailing permit number and indicia, and
13 common mail house and printer vendors. Respondents provided comprehensive
14 responses that address each element of the tests for coordinated communications. For the
15 reasons discussed below, we conclude there is insufficient support for Complainants'
16 claim because the circumstances fail to meet the requirements of the "conduct" prong of
17 the coordination test. *See, e.g.*, Factual and Legal Analysis dated 12/12/06 in MUR 5754
18 (MoveOn.org Voter Fund) (finding no reason to believe coordination between
19 MoveOn.org and John Kerry for President Inc. had occurred because there was no
20 specific information that suggested the conduct prong had been triggered).

21 Nothing in the content or appearance of the mailers indicates there was material
22 involvement or other coordination of the message between the Boswell Committee and
23 Independent Voices. The mailers by Independent Voices and the Boswell Committee

1 address different substantive issues and use different fonts, graphics, pictures and
2 newspaper quotes; the only stylistic similarity is that all of the mailers appear on 8 ½ by
3 11 inch paper. *See* Complaint, Attachments 1-4. The Boswell Committee mailer
4 addresses Ed Fallon’s support of Ralph Nader in the 2000 Presidential election, while the
5 Independent Voices mailers address issues of crime and energy independence. *Id.*
6 Respondents provide statements from the consultants who designed their mailers, which
7 affirm that the direct mail pieces were entirely designed without coordination or
8 cooperation from each other. *See* Crounse Aff. ¶¶ 2, 5 and Link Decl. ¶¶ 4, 6.

9 The mere fact that the Boswell Committee and Independent Voices used two
10 common vendors, Carter Printing and Data Solutions, is noteworthy and accounts for the
11 fact that the mailers contain the same postage permit number and indicia; but is not
12 sufficient to establish coordination by itself. 11 C.F.R. § 109.21(d)(4). The coordination
13 test requires that the common vendor perform one of the services specifically enumerated
14 in 11 C.F.R. § 109.21(d)(4)(ii). These services include: development of a media strategy,
15 selection of an audience, polling, fundraising, developing the content of a
16 communication, producing the communication, identifying voters or developing voter
17 lists, selecting personnel, or consulting or otherwise providing political or media advice.
18 11 C.F.R. § 109.21(d)(4)(ii). Thus, the use of a common vendor, in and of itself, has not
19 been found by the Commission to be sufficient to meet the “conduct” prong of the
20 coordination test. *See, e.g.,* Factual and Legal Analysis in MUR 5609 (Club for Growth)
21 (finding no RTB where common vendor activities did not meet the “conduct” standard);
22 Factual and Legal Analysis in MUR 5691 (Whalen); FLA in MUR 5576 (New Democrat
23 Network).

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1 MCG President Crounse explains that MCG provided all direct mail consulting
2 services for Boswell Committee in the 2008 campaign and that all decisions regarding the
3 content, design and target audience for “Let Down” were made by MCG in consultation
4 with the Boswell Committee. Crounse Aff. ¶ 2. Crounse and Carter Printing President,
5 Jim Hoyt, affirm that MCG contracted with Carter Printing to print and mail direct mail
6 pieces, including the “Let Down” mailer because, as a union shop, Carter Printing is a
7 preferred vendor for Democrat and progressive organizations. Boswell Committee
8 Response at 3-4, Independent Voices Response at 2-3. Respondents declare that Carter
9 Printing kept the Boswells Committee’s information confidential, and did not have any
10 material involvement or share information with Independent Voices, or its agents,
11 regarding any mail pieces or public communications produced by the Boswell
12 Committee. Crounse Aff. ¶¶ 2-5, Hoyt Aff. ¶¶ 2-4.

13 Respondents submit Affidavits and Declarations, which attest that neither Carter
14 Printing nor Data Solutions performed any of the services required by the “conduct”
15 standards. Crounse Aff. ¶¶ 2-3; Hoyt Aff. ¶ 4; Link Decl. ¶¶ 3-6; Brannan Decl. ¶¶3-6.
16 Carter Printing printed the direct mail pieces and Data Solutions labeled and mailed the
17 pieces, but neither vendor was involved in any substantive way in the developing the
18 content, identifying the voters to be included in the distribution list or providing any other
19 consulting, political or media advice to the Boswell Committee or Independent Voices.
20 Crounse Aff. ¶¶ 2-3; Hoyt Aff. ¶ 4; Link Decl. ¶¶ 3-6; Brannan Decl. ¶¶3-6. Moreover,
21 neither vendor had any material involvement or shared information about the Boswell
22 Committee with Independent Voices in the production of its direct mail pieces. Crounse
23 Aff. ¶¶ 2-3; Hoyt Aff. ¶ 4; Link Decl. ¶¶ 3-6; Brannan Decl. ¶¶3-6. Absent any

1 indication that the common vendors may have either participated in developing the
2 content of the direct mail communications or "conveyed material information about the
3 candidate to the entity paying for the communication(s)," both of which are expressly
4 denied here, and we have no information suggesting otherwise, there is insufficient
5 information to support an investigation into the allegations in the Complaint. 11 C.F.R. §
6 109.21(d)(4)(ii) & (iii).

7 Based on the available information, the Commission found no reason to believe
8 that Independent Voices violated 2 U.S.C. § 441a(a)(1) by making an excessive in-kind
9 contribution. Moreover, the Commission found no reason to believe that the Boswell for
10 Congress and Carl McGuire, in his official capacity as Treasurer, violated 2 U.S.C.
11 §§ 441a(f) and 434(b) by knowingly accepting and failing to report an excessive in-kind
12 contribution from Independent Voices.