UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

FEDERAL ELECTION COMMISSION PLAINTIFF

v. CIVIL ACTION NO. 3:98CV-549-S

FREEDOM'S HERITAGE FORUM, et al. DEFENDANTS

MEMORANDUM OPINION

This matter is before the Court on the Motion to Dismiss made by two of the Defendants, Freedom's Heritage Forum ("the Forum") and Frank G. Simon, M.D. The Federal Election Commission ("FEC") claims that those Defendants violated various provisions of the Federal Election Campaign Act. The movants assert that Counts I, II, and VII of the Amended Complaint fail to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6).[1] For the reasons below, the Motion to Dismiss will be granted in part and denied in part by separate order.

The Freedom's Heritage Forum is a political committee promoting pro-life and other social issues. According to the FEC, Dr. Simon is the founder, president, and sole officer of the Forum. Dr. Simon allegedly runs the Forum from his home or office, directs Forum volunteers, controls Forum finances, and is said to be the only individual authorized to sign checks and make disbursements on its behalf.

Counts I, II, and VII of the Amended Complaint arise out of events that occurred during the 1994 Republican primary election for Kentucky's 3rd Congressional District. The Forum and Dr. Simon supported Tim Hardy (also a defendant in this action) in the primary against Susan Stokes, who ultimately won that election. Count I of the Amended Complaint alleges that the Forum and

[1] The Defendants moved to dismiss the original Complaint filed in this case. The FEC has since amended their Complaint, so we now apply the Defendants' motion to the Amended Complaint.

Dr. Simon violated 2 U.S.C. § 441a(a)(1)(A) by making $22,515.81 in contributions to the Hardy campaign in excess of the $1,000 limit permitted by that statute. Count II claims that the Forum and Dr. Simon violated 2 U.S.C. § 434(b) by failing to report to the FEC $23,515.81 in contributions to the Hardy campaign. Count VII alleges that the Forum and Dr. Simon violated 2 U.S.C. § 441d(a) by failing to include the disclaimers required by that statute on flyers issued by the Forum during the campaign.

DISCUSSION

In ruling upon a motion to dismiss under Rule 12(b)(6), this Court must assume the truth of all factual allegations in the complaint and can only grant the motion if it is beyond doubt that no facts could be proved that would entitle the plaintiff to any relief. *Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995). We "may not grant a Rule 12(b)(6) motion based on a disbelief of a complaint's factual allegations." *Id*. "However, while liberal, this standard of review does require more than the bare assertion of legal conclusions." *Id*.

Federal Election Campaign Act

The Supreme Court has stated that the primary purpose of the Federal Election Campaign Act, first passed in 1971, is to "limit the actuality and appearance of corruption resulting from large individual financial contributions." *Buckley v. Valeo*, 424 U.S. 1, 26 (1976). To that end, federal campaign laws limit the amount of money that may be contributed by individuals and others to candidates in federal elections. Not only are direct monetary contributions limited, but indirect support that is "coordinated" with a candidate is also limited. The core of the dispute between the FEC and the Forum is: did the Forum make "coordinated expenditures" that are subject to the limitations placed upon contributions to candidates or did it make "independent expenditures" that are not subject to those limitations. The Forum also asserts that it did not violate campaign laws

because the advocacy of the Forum was "issue oriented" rather than "express advocacy" of a particular candidate.

Were The Expenditures Coordinated

It is uncontested that the expenditures in question were incurred by the Forum in connection with planning and holding a political meeting, and by the mailing of four separate political flyers during the primary campaign. The Forum reported these expenditures as "independent expenditures" under 2 U.S.C. § 431(17), which defines "independent expenditures" as those:

> expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.

The FEC maintains that these expenditures were contributions under 2 U.S.C. § 441a(a)(7), which provides that:

> 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, shall be considered to be a contribution to such candidate.

The Forum asserts that actual coordination of a specific disbursement must be shown in order for a disbursement to be characterized as a coordinated expenditure. This assertion finds no support in the statute, the regulations, or the case law. In a regulation, 11 C.F.R. 109.1(b)(4), the FEC has explained "coordinated" within the meaning of coordinated expenditure:

> (i) Means any arrangement, coordination, or direction by the candidate or his or her agent prior to the publication, distribution, display, or broadcast of the communication. An expenditure will be presumed to be so made when it is -
>
> (A) Based on information about the candidate's plans, projects, or needs provided to the expending person by the candidate, or by the candidate's agents, with a view toward having an expenditure made.

However, the FEC has failed to plead sufficient allegations of coordination under the statute and regulation to defeat the Forum's motion to dismiss. A close analysis of the Amended Complaint

demonstrates that it does not contain sufficient facts to support the FEC's conclusion that these expenditures were coordinated. Much of the FEC's Amended Complaint details completely legal activity, such as how much Dr. Simon personally gave to Hardy's election campaign. Where the FEC attempts to allege coordination, it fails to tie together the Forum and Hardy's election campaign.

Specifically, the FEC has alleged two instances of coordination between the Defendants and the Hardy campaign. First, prior to Hardy's entering into the primary campaign, he met with Dr. Simon, and several other persons. According to the FEC, "Dr. Simon asked a number of questions about Mr. Hardy's plans, projects, and needs. As a result, Dr. Simon concluded that Mr. Hardy was serious about running and that he would need assistance with his campaign."Amended Complaint at 7. The FEC does not allege that Hardy actually informed Dr. Simon of his plans, projects, or needs *with a view toward having an expenditure made*.

According to the FEC, the Forum's first coordinated expenditure was a political event on April 19, 1994, at a Louisville facility called the "Swiss Hall." At the Swiss Hall event, the FEC alleges that the Forum provided Hardy an opportunity to deliver a campaign speech in which he explicitly asked for support in getting elected. According to the FEC, the invitations sent out by the Forum stated that one purpose of the dinner was to "plan strategy on how to get Tim Hardy elected." Following Hardy's speech, Simon explained to those in attendance that the Forum would be doing a direct mailing of Hardy literature and would be setting up phone calling of Republican voters asking them to support Hardy. Hardy remained throughout this planning of election strategy. Following the Swiss Hall event, the Forum made four separate direct mailings of campaign literature that supported the election of Hardy.

However, nowhere is it alleged that any of this was at the request or suggestion of Hardy. Hardy's mere presence at the meeting, even if his presence was accompanied by the giving of a campaign speech, is insufficient to make these expenditures coordinated. We find these facts do not

sufficiently allege coordination in order to defeat a motion to dismiss. Accordingly, Count I of the Amended Complaint will be dismissed. Count II of the Amended Complaint, which charges the Defendants with failing to report the contributions, will also be dismissed.

Express Advocacy

I. The Forum contends that its four mailings do not contain "express advocacy" of the election of Hardy and thus cannot constitute contributions to the Hardy campaign. However, there is no requirement that a contribution as defined in 2 U.S.C. § 441a must result in or from "express advocacy," and thus the FEC is not required to so allege.

II. The Forum next argues that its communications do not contain any "express advocacy," and therefore it did not violate 2 U.S.C. § 441d(a), which requires certain disclaimers upon communications which expressly advocate the election or defeat of a candidate. "Express advocacy" is a sometimes elusive term with which courts have been forced to struggle since the Supreme Court first established the standard in *Buckley v. Valeo*, 424 U.S. 1 (1976). In *Buckley*, the Court defined communications containing express advocacy as those "containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'reject.'" *Id*. at 44 n.52. Ten years later, the Court affirmed the express advocacy standard and somewhat clarified its definition in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986).

In *MCFL*, the defendant distributed a "Special Election Edition" of its newsletter urging readers to "vote pro-life" in an upcoming primary election. The newsletter further identified certain candidates in that election as pro-life. In finding that the newsletter constituted express advocacy, the Court stated:

> Just such an exhortation appears in the "Special Edition." The publication not only urges voters to vote for "pro-life" candidates, but also identifies and provides photographs of specific candidates fitting that description. The Edition cannot be

> regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, it provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than "Vote for Smith" does not change its essential nature.

Id. at 249.

Although the FEC has continued to promote a broader interpretation of "express advocacy," the Courts of Appeals that have considered that issue have generally not been receptive. We believe that, although a communication does not have to contain certain specified "magic words" to constitute express advocacy, it will ordinarily contain some sort of functional equivalent of an exhortation, directive, or imperative for it to expressly advocate the election or defeat of a candidate.[2] It is significant that the Supreme Court chose to limit the communications covered to those that "expressly" advocate. Surely, nearly all election communications constitute some sort of message regarding the suitability, or lack thereof, of a candidate or candidates. But the Supreme Court chose to limit the scope of federal election campaign laws to those communications that "expressly" advocate the election or defeat of a candidate, in order to preserve the First Amendment right of free speech on a core aspect of democracy, that being the attributes of those who would lead us. It is with these considerations in mind that we examine the four communications distributed by the Forum to determine whether they contain "express advocacy."

The first mailing, attached as Exhibit 1 to the FEC's Amended Complaint, demonstrates the distinction between "express advocacy" and issue advocacy which necessarily requires the use of candidates' names. While the mailing clearly seeks to paint candidate Susan Stokes in an

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[2] For example, in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), the Ninth Circuit found that the defendant's advertisement, which criticized President Jimmy Carter, expressly advocated Carter's defeat because it included the exhortation "Don't let him do it." But in *FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997), the Fourth Circuit found that the advertisement in question contained no exhortation and thus no "express advocacy," although the innuendo contained within it may be fairly read as critical of the candidates mentioned therein. *See also FEC v. Christian Coalition*, 52 F. Supp.2d 45, 61 (D.D.C. 1999)(communication must contain an explicit directive to constitute "express advocacy").

unfavorable light and opposing candidate Tim Hardy in a favorable one, the reader is not exhorted to vote for Hardy or against Stokes, either directly or marginally less so. Rather, the reader is left to draw her own conclusions, although there is little doubt what message is conveyed about what those conclusions ought to be. Certainly this is advocacy, but it does not constitute "express advocacy," as that term has been viewed by the courts.

Exhibit 2, on the other hand, contains the functional equivalent of an exhortation to vote for Hardy. It includes a completed "sample ballot" identifying the candidates the Forum supports, including Hardy, which states, "*Please* take this sample ballot to the polls and vote on Tuesday." It explicitly urges the reader to vote for the "pro-family" candidates identified. It shows a vote for Hardy, and thereby expressly advocates his election. The message is direct, and clear.

The third mailing, Exhibit 3, contains the following:

> If you can make 10 or more phone calls in the next ten days, put your phone number here: _____ and send this entire letter, including the label, to me TODAY and we will give you the names of frequently voting Republicans who live in your neighborhood to call and *tell you what to say to them*. (emphasis added)

Following the typewritten requests for volunteers and contributions, a handwritten note asks, "Who will help me? Can I call 25,000 Republicans and ask them to vote for Tim Hardy?" It is signed purportedly by Simon. This handwritten section tells the reader what volunteers will saying to those people they will call: vote for Tim Hardy. The mailing is a plea for help in campaigning for Hardy.

But it is not an exhortation, explicit directive, or imperative to "Vote for Hardy." To be sure, this literature assumes that the recipient supports Hardy, and it attempts to cast Stokes in an unfavorable light. It seeks to persuade the reader to get involved in soliciting votes for Hardy and to contribute time and money to the Forum. Yet nowhere is there an express exhortation to the reader to elect Hardy, or to defeat Stokes. We believe that the First Amendment protects the Forum in its effort to gather support and volunteers for its causes, as long as its advocacy is not "expressly"

for the election or defeat of a candidate. There is no imperative in this writing, just a request for help. We conclude that it does not meet the criteria for express advocacy.

The fourth communication, Exhibit 4, reproduces a page from *The Letter,* identifying it as a gay and lesbian newspaper, which urges "all gay and lesbian Republicans to cast their votes for stokes (sic) on May 24." This does not constitute express advocacy. The mailing merely reports the fact that *The Letter* urges support for Stokes in the election. It does not expressly advocate Stokes' defeat. Innuendo alone is not enough. *FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997).

CONCLUSION

Although we do not find any requirement that coordinated expenditures must contain "express advocacy" in order for them to fall within the purview of the statute, we find that the FEC has not sufficiently plead enough facts that allege that the expenditures made by the Forum were coordinated with the Hardy campaign. Review of the particular communications in question leads to the conclusion that Exhibits 1, 3 and 4 do not consitute "express advocacy" as a matter of law. Therefore, the Motion to Dismiss the Amended Complaint of the FEC will be granted by separate order with regard to Counts I and II and granted in part and denied in part by separate order with regard to Count VII.

This _____ day of _____, 1999.

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CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

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ORDER

Defendants Freedom's Heritage Forum and Dr. Frank Simon having made a Motion to Dismiss in this case, for the reasons set forth in the memorandum opinion entered herein this date, and the Court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that the Motion to Dismiss is **GRANTED** in part and **DENIED** in part. Counts I and II of the Amended Complaint are **DISMISSED**. Count VII of the Amended Complaint is **DISMISSED** only with regard to Exhibits 1, 3 and 4 of the Amended Complaint.

IT IS SO ORDERED this _____ day of _____, 1999.

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CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record