

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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KEAN FOR CONGRESS )  
COMMITTEE, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
FEDERAL ELECTION COMMISSION, )  
 )  
Defendant. )  
\_\_\_\_\_ )

Civil Action No.: 1:04CV00007 (JDB)

**PLAINTIFF'S STATEMENT OF MATERIAL FACTS  
AS TO WHICH THERE IS NO GENUINE ISSUE**

Pursuant to Fed. R. Civ. P. 56(c) and LCvR 7(h), Plaintiff Kean for Congress Committee ("Kean Committee") hereby submits its statement of material facts as to which there is no genuine issue:

1. Plaintiff Kean Committee is an unincorporated political association that is registered with the FEC pursuant to 11 C.F.R. § 102.1(a). First Amended Complaint for Declaratory and Injunctive Relief ("Compl.") ¶ 10; Defendant Federal Election Commission's Statement of Material Facts as to which There Is No Genuine Issue (filed March 15, 2004) ("Def's SMF") ¶ 2; FEC Exh. 2. The Kean Committee was designated by Thomas H. Kean, Jr. as his principal campaign committee for his campaign for the United States House of Representatives from New Jersey's Seventh Congressional District in the 2000 elections. Compl. ¶ 20; Def's SMF ¶ 1; FEC Exh. 1.

2. In 2000, Tom Kean, Jr. ran in the New Jersey Congressional Seventh Republican primary against Mike Ferguson, among other candidates. The New Jersey primary election was held on June 6, 2000. Compl. ¶ 12; Def's SMF ¶ 3.

3. In or about May of 2000, a Virginia corporation known as the Council for Responsible Government, and its so-called "Accountability Project" (collectively, "CRG"), disseminated numerous advertisements advocating the defeat of Tom Kean. Superimposed against of photograph of Mr. Kean wearing a "Tom Kean Jr. for Congress" campaign button in one advertisement is the following statement:

**TOM KEAN, JR.**

No experience. Hasn't lived in New Jersey for 10 years.  
It takes more than a name to get things done.

The second page of the advertisement contains the following statement:

**NEVER.** Never worked in New Jersey. Never ran for office. Never held a job in the private sector. Never paid New Jersey property taxes. Tom Kean Jr. may be a nice young man and you may have liked his dad a lot — but he needs more experience dealing with local issues and concerns. For the last 5 years he has lived in Boston while attending college. Before that, he lived in Washington. New Jersey faces some tough issues. We can't afford on-the-job training. Tell Tom Kean Jr. . . . **New Jersey needs New Jersey leaders.**

In a second advertisement, superimposed against the same photograph of Mr. Kean is the following statement:

For the last 5 years Tom Kean Jr. has lived in Massachusetts. Before that, he lived in Washington, D.C. And all the time Tom Kean lived in Massachusetts and Washington, he never held a job in the private sector. And until he decided to run for Congress — Tom never paid property taxes. No experience. **TOM KEAN MOVED TO NEW JERSEY TO RUN FOR CONGRESS.** New Jersey faces some difficult problems. Improving schools, keeping taxes down, fighting overdevelopment and congestion. Pat Morrissey has experience dealing with important issues. It takes more than a name to get things done. Tell Tom Kean Jr. . . . **NEW JERSEY NEEDS NEW JERSEY LEADERS.**

The second page of the advertisement shows photographs of the following: former basketball player Larry Bird, Senator Ted Kennedy, what appears to be a statue of a Revolutionary War “Minuteman,” and the same photograph of Tom Kean Jr. that appears elsewhere in the advertisements. Superimposed over the four photographs is the statement, “What do all of these things have in common? They all have homes in Massachusetts.” Compl. ¶¶ 14-15; Plf’s Exh. 1, Attachment A.

4. In a May 24, 2000 Newark Star-Ledger newspaper article, Gary Glenn is identified as a CRG Board Member and quoted as stating that “[t]he very purpose of our group is to influence the outcome of elections . . . . The outcome we hope to bring about is the election of a congressman whose values are consistent with our philosophy. Clearly, we believe Mr. Ferguson is a candidate whose record and philosophy is consistent with our philosophy.” Bill Wilson is identified as another CRG Board Member and quoted as stating in this connection that “[a]ll we have done is used our First Amendment right . . . to inject our ideas into the debate . . . It’s that simple.” Compl. ¶ 13; Plf’s Exh. 1, Attachment B at 2. The Star-Ledger article further reports that CRG is “blanketing the 7th Congressional District with leaflets attacking two of the candidates seeking the Republican nomination — Assemblyman Joel Weingarten and Tom Kean Jr.” and that CRG “says it has spent \$65,000 in the district so far and is prepared to spend \$100,000 or more in the next two weeks [in order] to hurt the chances of . . . Kean in June 6 primary, while boosting the chances of Warren Township educator Mike Ferguson.” Plf’s Exh. 1, Attachment B at 1.

5. A May 23, 2000 article by Lawrence Arnold of the Associated Press identifies Gary Wilson as a CRG Board Member and quotes him as stating that CRG hopes to raise and spend \$3 million in 2000 for primary and general election campaigns. Plf’s Exh. 1, Attachment

C at 2. The article further states that “skeptics point out that the group’s hard-hitting fliers have mentioned only three of the four Republican candidates, raising suspicions they are designed to help the fourth candidate, Mike Ferguson.” Id.

6. Mike Ferguson won the election and presently holds the Congressional seat sought by Mr. Kean. Mr. Kean lost the Republican primary by fewer than 3,400 votes. Compl. ¶ 16; Def’s SMF ¶ 3.

7. On or about May 31, 2000, the Kean Committee filed with the FEC a sworn administrative complaint pursuant to 2 U.S.C. § 437g(a) alleging that the campaign mailings disseminated by CRG violated numerous provisions of the FECA. Compl. ¶ 17; Plf’s Exh. 1. The FEC designated the administrative complaint matter under review (“MUR”) 5024. See Plf’s Exh. 2.

8. The FEC’s Office of General Counsel issued its First General Counsel’s Report on September 3, 2003 (“GC’s Report”). The GC’s Report recommended, among other things, that the Commission: (i) find reason to believe that CRG violated 2 U.S.C. §§ 434, 434, 441b(a), and 441d(a); (ii) find reason to believe that two of CRG’s Board Members, Bill Wilson and Gary Glenn, violated 2 U.S.C. § 441b(a); and (iii) approve a document subpoena to CRG, deposition subpoenas to CRG and its Board Members, and written questions to CRG and its Board Members. Compl. ¶ 26; Plf’s Exh. 6 at 18-19. The GC’s Report noted that Messrs. Wilson and Glenn were not made respondents at the time of the administrative complaint, but were internally generated as respondents by the FEC. Plf’s Exh. 6 at 16 n.17.

9. After the vote of 3-3 on the recommendations made in the GC’s Report, the Commission dismissed the matter on a vote of 6-0. Compl. ¶ 27; Def’s SMF ¶ 14; FEC Exh. 10; Plf’s Exh. 2 at 2.

10. By letter dated November 10, 2003, the FEC advised Plaintiff that it “was equally divided on whether to find reason to believe the Counsel for Responsible Government, Inc. & its Accountability Project violated the Federal Election Campaign Act of 1971, as amended,” and that, “[a]ccordingly, on November 4, 2003, the Commission closed the file in this matter”; that “[a] Statement of Reasons providing a basis for the Commission’s decision will follow,” and that “dispositive portions of the file will be placed on the public record within 30 days.” The FEC failed to provide the basis for the Commission’s decision or dispositive portions of the file within the 30-day period, which expired on December 10, 2003. Compl. ¶¶ 3-4; see also Def’s SMF ¶ 14; FEC Exh. 10.

11. Three FEC Commissioners, Ellen L. Weintraub, Scott E. Thomas, and Danny Lee McDonald released their Statement of Reasons on December 16, 2003. These three Commissioners agreed with the legal analysis and recommendations contained in the GC’s Report, which concluded that the communications at issue contained express advocacy and were made in violation of 2 U.S.C. § 441b, stating: “We agreed with the General Counsel’s recommendations and have no doubt that the brochures satisfy the tests for express advocacy laid out at both 11 C.F.R. § 100.22(a) and 100.22(b). It also supported the General Counsel’s view that CRG failed to include an adequate disclaimer in the communications under 2 U.S.C. § 441d, and failed to register and report as a political committee with the FEC under 2 U.S.C. §§ 433 and 434. Compl. ¶ 28; Plf’s Exh. 3 at 4.

12. On January 5, 2004, Plaintiff filed the Complaint initiating this action.

13. Two weeks later, on or about January 16, 2004, three FEC Commissioners, Bradley A. Smith, David M. Mason and Michael E. Toner (“the controlling group”) released their Statement of Reasons reflecting a 3-3 split on whether to find reason to believe that CRG

and two of its Board Members had violated the FECA, whether to approve the GC's Report, and whether to approve discovery on CRG and its Board Members. Compl. ¶ 25; see Plf's Exh. 4.

14. The controlling group's Statement of Reasons concluded that the communications at issue did not contain express advocacy, and therefore were not expenditures in violation of the FECA. The controlling group consequently determined that because it had not found express advocacy, it therefore must reject the Kean Committee's contention that CRG should be forced to register with the Commission, disclose its donors, and observe the FECA's contribution limits and prohibitions as a political committee. The controlling group's Statement of Reasons concluded that "[t]he Commission thus rightly did not approve the Office of the General Counsel's request to conduct what could be an extensive investigation into the corporation's activity, including interrogatories, document subpoenas, and depositions to pursue this untenable theory, and closed the file on the matter." Compl. ¶ 29; Plf's Exh. 4 at 7.

15. The controlling group's Statement of Reasons did not apply the Commission's own regulation — 11 C.F.R. § 100.22(b) — to the facts of this case, even though the regulation is in effect and has not been repealed by the Commission. See Plf's Exh. 4 at 2 n.2.

16. The controlling group's Statement of Reasons did not address the Kean Committee's allegation that CRG might have coordinated its expenditures with other federal candidates. See Plf's Exh. 4.

17. The controlling group's Statement of Reasons did not posit some "other reasonable meaning" that CRG's advertisements might have other than "to urge the . . . defeat of [a] clearly identified candidate" within the meaning of 11 C.F.R. § 100.22(a). See Plf's Exh. 4.

18. The controlling group's Statement of Reasons did not address 2 U.S.C. § 431(4)(A) in connection with its finding that CRG was not a political committee. See Plf's

Exh. 4. Nor did the controlling group's Statement of Reasons address an attachment to the administrative complaint in connection with its finding that CRG was not a political committee, see id., which consisted of a newspaper article reporting that CRG Board Member Gary Glenn made the following statement: "The very purpose of our group is to influence the outcome of elections," that "[t]he outcome we hope to bring about is the election of a congressman whose values are consistent with our philosophy," and that "[c]learly, we believe Mr. Ferguson is a candidate whose record and philosophy is consistent with our philosophy." Exh. 1 at 8 (quoting id. Attachment B at 1-2).

Respectfully submitted,

/s/  
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