



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Christopher P. Collins, Esq.
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1905 Wyoming Boulevard NE
Albuquerque, NM 87112

MAY 29 2009

RE: MUR 6120
Darren White

Dear Mr. Collins:

On November 5, 2008, the Federal Election Commission notified your client, Darren White, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On May 20, 2009, the Commission found, on the basis of the information in the complaint, and information provided by you, that there is no reason to believe Darren White violated 2 U.S.C. § 441a(f). 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 finding, is enclosed for your information.

If you have any questions, please contact Kathryn Lefebvre, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

A handwritten signature in cursive script that reads "Susan L. Lebeaux".

Susan L. Lebeaux
Assistant General Counsel

Enclosure

Factual and Legal Analysis for Darren White and Darren White for Congress

1 **FEDERAL ELECTION COMMISSION**

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3 **FACTUAL AND LEGAL ANALYSIS**

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7 **RESPONDENTS:** Darren White **MUR 6120**
8 Darren White for Congress and Angie McKinstry,
9 in her official capacity as treasurer
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11 **I. INTRODUCTION**

12 This matter was generated by a complaint filed with the Federal Election Commission by
13 Brian S. Colón, Chairman of the Democratic Party of New Mexico. *See* 2 U.S.C. § 437g(a)(1).
14 The complaint alleges several violations of the Federal Election Campaign Act of 1971, as
15 amended (“the Act”), stemming from a television advertisement, “Can’t Trust,” criticizing
16 Martin Heinrich, a candidate for U.S. House of Representatives in New Mexico’s First
17 Congressional District. Specifically, the complaint alleges that “Can’t Trust,” reported as an
18 independent expenditure by the Republican Campaign Committee of New Mexico (“RCCNM”),
19 was coordinated with Darren White and Darren White for Congress (“White Committee”),
20 Martin Heinrich’s opponent, resulting in an excessive contribution. Complaint at 3. Based on
21 the coordination allegation, the complaint also alleges that the White Committee may have failed
22 to properly report coordinated communications to the Commission. *Id.* The response from
23 Darren White denies any coordination.

24 As discussed in more detail below, it appears that “Can’t Trust” was not a coordinated
25 communication because it does not meet the conduct prong of the Commission’s coordinated
26 communications regulations. Therefore, the Commission finds no reason to believe that Darren
27 White or the White Committee, accepted an excessive contribution in violation of 2 U.S.C.
28 § 441a(f). Further, the Commission finds no reason to believe that the White Committee failed

1 to properly report the coordinated communication in violation of 2 U.S.C. § 434(b), and closes
2 the file.

3 **II. FACTUAL AND LEGAL ANALYSIS**

4 **a. Facts**

5
6 “Can’t Trust” began airing on October 14, 2008, on New Mexico television stations. The
7 advertisement features images of candidate Martin Heinrich and states “[w]e just can’t trust
8 Martin Heinrich.” The advertisement further claims that “it’s a disgrace” that Heinrich smeared
9 his opponent, a former soldier, and discusses Heinrich’s stance on issues related to troops in Iraq.
10 The RCCNM disclosed to the Commission on its 2008 Pre-General Report that it made
11 disbursements of \$240,000 and \$100,000 on October 14 and 15, 2008, respectively, to Stevens,
12 Reed, Curcio & Potholm (“SRCP”), the media firm that created “Can’t Trust,” for independent
13 expenditures that oppose Martin Heinrich’s candidacy.

14 The complaint’s allegation that the RCCNM coordinated with Darren White and the
15 White Committee in producing “Can’t Trust” is based on White’s New Mexico Republican Party
16 (“NMRP”) Executive Committee membership. Complaint at 4. It asserts that as a result of this
17 affiliation, the RCCNM, the federal committee of the NMRP, would not have aired an
18 advertisement without assent, material involvement of, or substantial discussion with, White or
19 one of his agents. *Id.* Attached to the complaint is a list of the thirty-nine NMRP Executive
20 Committee members, including White. *Id.*, Attachment 1. The complaint alleges that because of
21 the purported coordination, RCCNM made, and White and the White Committee accepted, an
22 excessive, in-kind contribution. *Id.*

23 The response from White denies any coordination related to “Can’t Trust.” Darren White
24 asserts that the complaint assumes coordination based only on his involvement in the NMRP

1 Executive Committee. White Response at 2. White maintains, however, that the NMRP
2 Executive Committee has not had a meeting since December 2007, well over a year before the
3 advertisement aired, and that White did not even attend that meeting. *Id.* According to
4 information obtained by the Commission, the RCCNM hired an independent consultant, Ben
5 Burger at SRCP, to run its independent expenditure program separate from the RCCNM. Burger
6 avers that he hired his own staff, designed the ads, hired and supervised the media consultants
7 who bought the time and filmed the ads, and supervised the selection of the stations and
8 broadcast times for the ad. The information obtained by the Commission also shows that the
9 RCCNM maintained a firewall to prevent coordination with White and the White Committee.
10 The firewall strictly prohibited Burger and his staff from contacting or receiving information not
11 publicly available from any of the benefiting campaigns or their agents about any aspect of the
12 campaigns' strategy or political advertising. Only RCCNM's legal counsel was authorized to
13 contact Burger for legal compliance purposes.

14 Finally, the complaint alleges that the White Committee may have failed to properly
15 report its alleged coordinated communication to the Commission. Complaint at 4. White denies
16 this allegation because he maintains that there was no coordination in conjunction with "Can't
17 Trust."

18 **b. Legal Analysis**

19 **1. Coordination**

20 The central issue in this matter is whether the RCCNM's advertisement, "Can't Trust,"
21 was coordinated with Darren White or the White Committee resulting in an excessive
22 contribution. The Act provides that coordinated communications, those made by any person "in
23 cooperation, consultation, or concert, with or at the request or suggestion of," a candidate, the

1 candidate's authorized political committee, or of a state committee of a political party, are
2 considered a contribution to that candidate or committee. 2 U.S.C. § 441a(a)(7)(B)(i) and (ii),
3 11 C.F.R. § 109.21(b)(1). As described in more detail below, it appears "Can't Trust" was not a
4 coordinated communication, and therefore did not constitute a contribution to White's
5 campaign.¹

6 Under the Commission's regulations, a political party communication is coordinated with
7 a candidate, a candidate's authorized committee, or agent of the candidate and therefore
8 constitutes an expenditure on behalf of the candidate, when the communication satisfies the
9 three-pronged test set forth in 11 C.F.R. § 109.37: (1) the communication is paid for by a
10 political party committee or its agent; (2) the communication satisfies at least one of the content
11 standards set forth in 11 C.F.R. § 109.37(a)(2); and (3) the communication satisfies at least one
12 of the conduct standards set forth in 11 C.F.R. § 109.21(d).

13 "Can't Trust" satisfies the first prong of the political party coordinated communications
14 test because the RCCNM paid for "Can't Trust." It also meets the content prong because the
15 television advertisement was a public communication that referred to candidate Martin Heinrich,
16 and was publicly disseminated in Heinrich's jurisdiction on or around October 14, 2008, fewer
17 than 90 days before the November 4, 2008, general election. *See* 11 C.F.R. § 109.37(a)(2), *see*

¹ The U.S. District Court for the District of Columbia held that the Commission's revisions of the 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 enjoin the Commission from enforcing the regulations. *See Shays v. F.E.C.*, 508 F. Supp. 2d 10 (D.D.C. 2007) (granting in part and denying in part the respective parties' motions for summary judgment). The D.C. Circuit affirmed the district court with respect to, *inter alia*, the current 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. F.E.C.*, 528 F.3d 914 (D.C. Cir. 2008).

1 *also* 11 C.F.R. § 100.26 (a “public communication” includes “a communication by means of any
2 broadcast, cable, or satellite communication”).

3 While “Can’t Trust” meets the first and second prongs of the coordination test, it does not
4 meet the conduct prong. The third prong requires one of six types of conduct to occur: (1) the
5 communication is “created, produced, or distributed at the request or suggestion of a candidate or
6 an authorized committee,” or the communication is created, produced, or distributed at the
7 suggestion of the payor and the candidate or authorized committee assents to the suggestion;
8 (2) the candidate, his or her committee, or their agent is materially involved in the content,
9 intended audience, means or mode of communication, the specific media outlet used, or the
10 timing or frequency of the communication; (3) the communication is created, produced, or
11 distributed after at least one substantial discussion about the communication between the person
12 paying for the communication or that person’s employees or agents, and the candidate or his or
13 her authorized committee, his or her opponent or opponent’s authorized committee, a political
14 party committee, or any of their agents; (4) a common vendor uses or conveys information
15 material to the creation, production, or distribution of the communication; (5) a former employee
16 or independent contractor uses or conveys information material to the creation, production, or
17 distribution of the communication; and (6) the dissemination, distribution, or republication of
18 campaign materials. 11 C.F.R. § 109.21(d).

19 White’s membership on the Executive Committee of the NMRP is the sole basis for the
20 complaint’s allegation that White and the White Committee coordinated “Can’t Trust” with the
21 RCCNM, the NMRP’s federal committee. Complaint at 4. However, in his response, White
22 denies any coordination between himself and the RCCNM, and maintains that he had no part in
23 creating nor did he assent to the creation and airing of “Can’t Trust.” We have no evidence to

1 the contrary, and no information that any of the other conduct standards have been met. *See*
2 MUR 5754 (MoveOn.org Voter Fund)(finding no reason to believe coordination between
3 MoveOn.org and John Kerry for President Inc. had occurred because there was no specific
4 information that suggested the conduct prong had been triggered).

5 Since it appears that “Can’t Trust” was not a coordinated communication under the
6 Commission’s regulations, the advertisement was not an in-kind contribution to White or the
7 White Committee. Therefore, the Commission finds no reason to believe that Darren White or
8 Darren White for Congress and Angie McKinstry, in her official capacity as treasurer, accepted
9 an excessive contribution in violation of 2 U.S.C. § 441a(f), in connection with “Can’t Trust.”²

10 **2. Reporting**

11 The remaining allegation, that the White Committee failed to properly report
12 coordination to the Commission, is based on the complaint’s coordination allegation. Since it
13 appears that “Can’t Trust” was not a coordinated communication, the Commission finds no
14 reason to believe that Darren White for Congress and Angie McKinstry, in her official capacity
15 as treasurer, failed to properly report coordinated communications to the Commission in
16 violation of 2 U.S.C. § 434(b).

² The only allegation involving Darren White for Congress and Angie McKinstry, in her official capacity as treasurer, is based on the alleged acts of the candidate, as the Committee’s agent. Since the candidate did not engage in coordination, neither did the Committee.