

United States District Court
District of Columbia

<p>Wisconsin Right to Life, Inc., <i>Plaintiff,</i></p> <p>v.</p> <p>Federal Election Commission, <i>Defendant,</i></p> <p><i>and</i></p> <p>Sen. John McCain et al., <i>Intervenor-Defendants.</i></p>	<p>Civil Action No. 04-1260 (DBS, RWR, RJL)</p> <p>THREE-JUDGE COURT</p>
--	---

**Plaintiff-Respondent’s Opposition to Defendant’s Motion to Compel
Production of Documents, Requests to Admit, and Responses to
Interrogatories**

Plaintiff Wisconsin Right to Life, Inc., (“WRTL”) opposes Defendant FEC and Intervenor Defendants Motion to Compel Production of Documents, Requests to Admit and Responses to Interrogatories. Defendants seek to compel Plaintiffs to provide information despite valid, reasonable, and applicable objections and, in doing so, attempt to circumvent this Court’s Order limiting the scope of discovery (April 17, 2006). Their motion is untimely and presents an unnecessary burden on the resources of WRTL and the Court.

I. General Discovery Rules Do Not Support the Sweeping and Contentious Discovery Defendants Seek to Compel Here.

The scope of allowable discovery under the federal rules is not as broad as Defendants suggest. First, Under Rule 26(b)(1), there are two categories of discovery: that which is relevant to the claim or defense of a party, and that which is merely relevant to the subject matter. A party

**Plaintiff’s Opposition to
Defendants’ Motion to Compel**

seeking information relevant only to the subject matter must show good cause and seek the court's approval.¹ The advisory committee's notes expressly explain that making "subject matter" discovery dependent on showing good cause and obtaining court approval is "designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery." Fed. R. Civ. P. 26(b)(1) advisory committee's note (2000). The sweeping and contentious discovery sought here is relevant, at most, to the subject matter of the case, and thus Defendants must show good cause to the Court for imposing the burden of such discovery on WRTL and the nonparties.²

In addition to the limitations on the scope of discovery provided by the Court's April 17 Scheduling Order, *see infra*, discovery cannot be "unreasonably cumulative or duplicative, or . . . obtainable from some other source" Fed. R. Civ. P. 26(b)(2)(i). It is limited if "the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought," *id.* at (ii), or the burden or expense of the proposed discovery outweighs its likely benefit, taking into account . . . [inter alia] the importance of the proposed discovery in resolving the issues." *Id.* at (iii). WRTL submits that aside from the patently objectionable requests, many of the requests to which Defendants now seek to compel additional responses are cumulative, or duplicative, request information that they have had ample opportunity to obtain in discovery,

¹Rule 26(b)(1) provides:

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

²Defendants apparently contemplate filing similar motions to compel four nonparties to supplement their responses to their subpoenas. Defs.' Mem. 3 n.1.

and/or request information the benefit of which is outweighed by its lack of importance in resolving the issues at stake in this case. Plaintiff and nonparty vendors have made good faith efforts to comply with Defendants' discovery demands as demonstrated by providing responses in an expedited schedule, supplementing document request responses as new material came to light, and answering requests for admission to which WRTL had originally objected. *See* Letter of Jeffrey P. Gallant to Kevin Deeley and Ben Streeter (June 15, 2006) (a true and correct copy of which is attached as **Exhibit A**).

II. Defendants' Motion Ignores the Court's Order Limiting Discovery.

A. Defendants' Position Relies on a Strained Reading of this Court's April 17, 2006 Order.

The Court's Order allowed discovery only "into the purpose and effect of plaintiff's 2004 advertisements for the 2004 campaign." Defendants' interpretation of the Order makes the "2004 campaign" the subject of the sentence, expands that term to include the primary or general election, and reduces "2004 advertisements" to an expanding descriptor that unfolds into "any public advocacy." Defs.' Mem. at 4.³ WRTL maintains that the subject of that sentence and, consequently, the object of allowable discovery, is the 2004 advertisements. The proper scope is further limited to those advertisements in proximity to the campaign of that year.

B. The April 17 Order's Limit on Discovery Is Justified.

The approach that Defendants take to discovery here is much the same as it proposed during the extended debate over the proper scope of discovery that culminated with the Order. Defendants resort to a position that has already been considered and rejected by this Court and

³Defendants claim that the language allows discovery into "any public advocacy WRTL or its PAC conducted in proximity to the primary or general election." Defs'. Mem. at 5. They only grudgingly limit their questions to events in 2004. *Id.* 5 n.2.

effectively attempt here to overturn the Order. But the limited scope of discovery allowed by the Order is the law of the case and is completely justified.

1. The Order Properly Recognized That The Terms of the Remand by the Supreme Court Limit Relevancy.

The remand of this case from the Supreme Court, *Wisconsin Right to Life, Inc. v. FEC*, 126 S.Ct. 1016 (2006) (“*WRTL II*”), presented two central issues on the merits: (1) what is the standard for identifying genuine grassroots lobbying and (2) whether WRTL’s proposed ads fit the standard. Discovery should not be compelled that would only gather facts irrelevant to the nature of the standard or the application of that standard to WRTL’s ads. Hence, the Order rightly limited discovery to the advertisements at issue, and expressly prohibited discovery into “any historical or planned future advocacy,” that is, other, irrelevant, ads or communications. Much of Defendants’ apparent displeasure with discovery results, *see, e.g.*, Defs.’ Mem. at 5-6, is the result of the necessary and reasonable limit militated by the Court’s instructions on remand.

a. The FEC Should Not Be Allowed to Relitigate *McConnell* Here.

Determining whether WRTL’s advertisements “fit the very type of activity that *McConnell* found Congress had a compelling interest in regulating,” *WRTL II* at 1018, does not require probing even the facts already established in this matter, because the legal effect of such facts has already been established. Based on a factual record already eclipsed by that compiled here, the Court in *McConnell* found that the electioneering communication prohibition’s reach was not so wide as to be facially invalid. The timing of the advertisements’ broadcast near elections, the need to name officeholders in ads, and the effect of the ads on “the electoral climate” were considerations by the district court in *McConnell* and are necessarily encompassed in the Supreme Court’s holding. There was and is therefore no need to spend resources covering

the same ground again.

The upshot of *McConnell* is that sham issue ads are problematic, *see, e.g.*, 540 U.S. 93, 193 n.78 (2003), while genuine grassroots lobbying ads are not. *Id.* at 207 n.88; *WRTL II*, 126 S.Ct. at 1018 (implicitly but necessarily rejecting the assertion that the logic of BCRA’s electioneering communication prohibition meant that no line could be drawn between “genuine” and “sham” issue ads and seeking this Court’s initial guidance in establishing such a line). And this Court has already made an enormous effort to distinguish between the two, forming the basis of the Supreme Court’s holding that “sham” issue ads were regulable as the functional equivalent of express advocacy, and its later holding, in *WRTL II*, that a line must be drawn between sham issue ads and grassroots lobbying ads.

b. The Remand Necessarily Makes Irrelevant Information Outside the Scope of the April 17 Order.

Several guiding principles for the remand are implicit in the Supreme Court’s *WRTL* decision and which the Order limiting the scope of discovery sought to encompass. First, it doesn’t matter that grassroots lobbying ads would be run within 30- and 60-day periods before primary and general elections. If that mattered, the Supreme Court would not have permitted as-applied challenges regarding communications that necessarily fall within the prohibition periods (or there would no as-applied challenge at all). So any effort by Defendants to put on evidence and to argue that genuine grassroots lobbying must be prohibited because it happens in proximity to elections must be rejected. That is a given fact in the very nature of an as-applied challenge to the prohibition and so is irrelevant.

Second, the mere fact that genuine grassroots lobbying might have some possible effect on elections was also implicitly rejected in *WRTL*. Defendants argued to that Court that

McConnell had found that ads run near elections that mentioned candidates might have some effect on elections so there can be no as-applied challenges. Defendants lost. *WRTL* says that there may be as-applied challenges in the face of such evidence, i.e., it is not enough that some expert believes that genuine grassroots lobbying might have some effect on an election.

McConnell required more than that, namely that the ads must be the “functional equivalent of express advocacy,” 540 U.S. at 206, not merely that they have some possible effect on elections. So evidence of a mere possibility of an effect on elections is already assumed in *WRTL* and is irrelevant for this case on remand.

Third, the fact that, and reasons why, *WRTL* chose the broadcast medium for its ads are also irrelevant because by the very definition of electioneering communication there would be no case if they were not broadcast ads. Any exception to the prohibition will necessarily be a broadcast ad. There were no findings in *McConnell* indicating that choosing to use broadcast ads, as opposed to print ads, was somehow any indication of wrongdoing. The simple fact is that Congress extended the prohibition to broadcast ads only (quite obviously because of the medium’s effectiveness for communication), so an exception to the prohibition must necessarily be applicable to broadcast ads, and there is no relevant issue as to the use of, or reasons for choosing, any other type. The necessary implication of the *WRTL* remand is that there may be “genuine issue ads” that are broadcast ads within prohibition periods. So there is no relevance to the fact that *WRTL* wanted to do broadcast ads.⁴

Fourth, the same principle applies to questions about why *WRTL* did not use its PAC or

⁴It is not the role of government to tell citizens how best to communicate: “The First Amendment protects [*WRTL*’s] right not only to advocate [it’s] cause but also to select what [it] believe[s] to be the most effective means for doing so.” *Meyer v. Grant*, 486 U.S. 414, 424 (1988).

what burdens were entailed in using funds from or raising money for the PAC. The short answers are that the PAC didn't have the money for the ads, what money there was available was planned for other uses, and WRTL does not believe that it is constitutionally required to use its PAC funds to exercise its right to petition by grassroots lobbying. But as to discovery, any information about the burden of using a PAC is necessarily irrelevant both because (1) as a matter of law both *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (“*MCFL*”) and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990) held that requiring expenditures to be made through a PAC is a constitutionally cognizable burden in and of itself and (2) the *WRTL* remand opinion implicitly assumes that there will be “genuine issue ads” that are not run with PAC funds. Again, there would be no issue on remand if WRTL chose to use PAC funds, and if the Supreme Court had intended that non-use of PAC funds was the deciding factor, then it would have said there could be no as-applied challenge because WRTL would have been limited to use of PAC funds.

In sum, the Supreme Court in unanimously holding that WRTL may bring an as-applied challenge to the electioneering communication prohibition — on the basis of WRTL's choice to use broadcast grassroots lobbying ads within the prohibition period and without funding them with PAC funds — already took into account both the evidence in *McConnell* and the language of the Court's own opinion in *McConnell* (including the fact that broadcast ads not using PAC funds that are run close to elections might have some effect on elections) and nonetheless said that there could be “genuine issue ads” requiring constitutional protection specifically in the context of the grassroots lobbying protected by the First Amendment right to petition. Hence, the Court was completely justified in limiting discovery to the advertisements themselves.

2. Settled Constitutional Law Requires That a Regulation's Application to Speech Depend Only On the Expression Itself.

It is well-established that the constitution requires that a would-be speaker must know, *based on the meaning of the words he is using*, whether or not his communication is regulable; a regulation of speech that instead relies on surmising the intent or effect suffers a constitutional defect. *Thomas v. Collins*, 323 U.S. 516 (1945); *see also Buckley v. Valeo*, 424 U.S. 1, 43 (1976), *McConnell v. FEC*, 540 U.S. 93, 192 (2003). Subjective intent is not properly a part of any other similar test in the First Amendment area. Accordingly, discovery aimed at uncovering the intent or effect of WRTL's ads does not uncover relevant information and thus offends Fed. R. Civ. P. 26 (b)(2)(iii).⁵ The First Amendment protects those who simply wish to exercise their

⁵In a good faith attempt at obeying this Court's Order and reaching a substantive result in this case, WRTL and the nonparties who provided services in creating and broadcasting the ads have responded in depositions and other discovery to inquiries about "the intent and effect" of the advertisements at issue here. *See, e.g.*, Plaintiff's Statement of Undisputed Facts (Docket # 76-1) 99-100 (WRTL's reason for running the ads); 102-103 (WRTL held no discussion of the effect on Sen. Feingold's campaign and did not think that the ads would have any effect because they were grassroots lobbying and did not mention elections); 215 (Jason Vanderground, account executive for Hanon McKendry, developer of the ads, was not expected to develop the campaign in a way that would lead to a court challenge of the law); 218-219 (Vanderground did not consider the 2004 race for the Senate in Wisconsin in his proposal for the ads, and the desired result of the campaign was to motivate people to call on their senators and exert enough influence to encourage them to vote on the judicial nominees before the U.S. Senate); 224 (WRTL did not tell Vanderground that it hoped the lawsuit over the ads would raise opposition to the McCain-Feingold law); 225 (WRTL never told Vanderground, even in an off hand comment, that the ad campaign had any purpose of affecting the 2004 Wisconsin Senate race); 233 (the timing of the ads had nothing to do with the McCain-Feingold law or a potential court case but with the prevalence and attention already being given to the filibuster issue and the urgency felt about that issue by WRTL); 237-39 (Vanderground, the ad campaign's account executive, has never spoken with anyone about the effect the ad campaign may have had on Sen. Feingold's Senate bid, is not aware of any one else conversing about any effect the ad campaign may have had on Sen. Feingold's Senate bid, and believed that the ads did not, in fact, affect the race because they addressed an issue, had a reasonable, rational tone, and simply encouraged people to call their Senators and encourage them not to filibuster); 240 (Vanderground believed that for the same reasons, the ads would not have affected the Senate race had they continued to run for a long time); 241 (Vanderground did not believe the ads would affect the race if WRTL's

constitutional rights of speech, association, and petition to the fullest extent without risking prosecution or being forced to mount a pre-enforcement lawsuit and then prove its motives “pure” because some critic supposes a nefarious purpose or intent behind the communication.

3. The First Amendment Requires that Investigations into Political Groups and Their Affairs be Narrowly Tailored.

Unique among federal administrative agencies, the Federal Election Commission has as its sole purpose the regulation of core constitutionally protected activity—“the behavior of individuals and groups only insofar as they act, speak and associate for political purposes.” *FEC v. Machinists Non-Partisan Political League*, 210 U.S. App. D.C. 267, 655 F.2d 380, 387 (D.C. Cir. 1981). As a result, Commission investigations into alleged election law violations frequently involve subpoenaing materials of a “delicate nature . . . representing the very heart of the organism which the first amendment was intended to nurture and protect: political expression and association concerning federal elections and office holding.” *Id.* at 388.

AFL-CIO v. FEC, 333 F.3d 168 (D.C. Cir. 2003). At the same time, “[t]he Supreme Court has long recognized that compelled disclosure of political affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation.” *Id.* at 175-76 (citing *Buckley v. Valeo*, 424 U.S. 1, 64-68, (1976); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958)). *See also FEC v. Machinists*, 655 F.2d at 388 n.17 (noting similar First Amendment dangers inherent in FEC factfinding and concluding “[w]e therefore would be remiss if we failed to give the most careful scrutiny to this unprecedented FEC investigation.”). In *AFL-CIO*, the D.C. Court of Appeals specifically noted that forcing disclosure of “descriptions of training programs, member mobilization campaigns, polling data, and . . . strategies will directly frustrate the organizations’ ability to pursue their political goals effectively

PAC had opposed Feingold and his opponents had criticized him for the filibuster issue because nothing in the ads should negatively affect the candidate in the election); 242 (Vanderground had no contact with any candidates running against Sen. Feingold in 2004 or their campaigns).

by revealing to their opponents ‘activities, strategies and tactics . . . pursued in subsequent elections and will likely follow in the future.’” 333 F.3d at 176-77.

Accordingly, the Court’s Order limited the scope of discovery to the ads themselves, and expressly excluded as improper for discovery “historical or planned future advocacy by plaintiff” and “information that is otherwise proprietary.” Yet Defendants complain that Counsel instructed WRTL’s corporate designee not to answer questions about what it mischaracterizes as the “‘Campaign Finance’ portion of its efforts,” Defs. Mem. 7-9,⁶ and that other information about advocacy outside the advertisements was redacted. They now seek to compel production of “[c]opies of all documents from January 1, 2002⁷ through the present communicating WRTL’s (including WRTL PAC’s) support of or opposition to . . . Senator Russ Feingold or one of his opponents,” “all documents related to WRTL’s ‘Campaign Finance’ campaign,” [a]ll documents related to WRTL’s plant to create and broadcast campaign finance advertisements in 2004,” and “[a]ll documents related to the proposed ‘Statewide Survey.’”⁸ Such disclosures would plainly exceed what this Court’s Order ruled as discoverable, and would frustrate WRTL’s ability to pursue their political and educational goals “by revealing to their opponents ‘activities, strategies and tactics.’” *AFL-CIO*, 333 F.3d at 177.⁹

⁶That the “Campaign Finance” communications were to run on August 15, 2004 establishes that they were *not* part of the ad campaign covered by the Order, since those ads did not run after August 14, 2004. Any “Campaign Finance” communications were unequivocally part of future advocacy.

⁷Defendants reluctantly agreed to limit this request to 2004 communications. *See* Defs.’ Mem. at 5 n.2.

⁸The results of the Survey also constitute proprietary information, the production of which the Court’s Order expressly prohibited.

⁹Government agency investigations are especially threatening in this regard when the agencies have no enduring separation from the political opponents of the parties they investigate.

Through Interrogatories 7 through 9, Defendants seek to compel identification of specific corporate donors to WRTL, Defs.’ Mot. 22, while only the fact that there were corporate donations (to which WRTL has attested in discovery responses) is relevant. Moreover, information on the identity of donors is First Amendment privileged. *See AFL-CIO*, 333 F.3d at 177., e.g., *International Action Center v. United States*, 207 F.R.D. 1, 3 (D.D.C. 2002) (denying discovery requests seeking information about “membership and volunteer lists, contributor lists, and past political activities of plaintiffs and of those persons with whom they have been affiliated” as protected by the First Amendment (footnote citations omitted)).

The FEC’s discovery activities are uniquely apt to trample upon core First Amendment rights and its discovery must be narrowly tailored to avoid burdening or chilling political speech or association.¹⁰ *FEC v. Machinists*, 655 F.2d at 388. And the specific information Defendants

Larry Noble, formerly FEC General Counsel, has now joined a law firm that represents Republicans for Choice, an advocacy group opposing much of WRTL’s core positions.

¹⁰Defendants cavalierly assert that “the mere fact that the request involves speech does not mean that it is exempt from production under the normal rules of discovery,” Defs. Mem. at 9, apparently oblivious to the recognized threat that its activities inherently represent. But the First Amendment provides a privilege against compelled disclosure of information through any mode of discovery where the intent or practical effect of enforcing it would chill the rights of speech, association, and petition. *NAACP v. Alabama*, 357 U.S. 449, 466 (1958) (government cannot force disclosure of membership lists); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388-89 (D.C. Cir. 1981) (quashing a government subpoena because of First Amendment concerns); *Black Panther Party v. Smith*, 661 F.2d 1243, 1269-70 (D.C. Cir. 1981) (reversing sanctions where interrogatory responses were withheld based on First Amendment concerns), *vacated as moot*, 458 U.S. 1118 (1982) (This Circuit adheres to the reasoning and analysis of *Black Panther Party*. *See International Action Center*, 207 F.R.D. at 3 n.6.) Denominating chilling intrusions on groups merely wishing to advocate a position on matters of national interest as “normal discovery” does not insulate them from First Amendment concerns.

Nor is the privilege limited, as Defendants suggest, to situations where disclosure “might expose people to intimidation and other threats,” Defs. Mem. at 9. *See AFL-CIO*, 333 F.3d at 176 (noting that the Court concluded in *Buckley* “without considering either the popularity of the parties involved or any specific evidence of retaliation—that disclosure of campaign contributions would chill political activity and therefore place ‘not insignificant burdens’ on First Amendment

seek to compel is recognized as protected from discovery. The Court's Order, while broader than Plaintiff believes is warranted, provides a modicum of necessary tailoring that Defendants should not be permitted to circumvent.

4. WRTL's Right to Petition Limits the Relevance of Discoverable Information.

The legitimacy of a discoverable issue here is limited by WRTL's right to petition. Any application of the electioneering communication prohibition must respect the limits imposed by this fundamental constitutional right. The FEC has sought to discover WRTL's intent in running the advertisements giving rise to this suit, ostensibly on the theory that the electioneering communication prohibition rightly applies, despite WRTL's interest in petitioning, if the requisite intent or motive should be shown. But when the right to petition is at issue, in whatever context it arises, questions of intent or motive are irrelevant to showing whether the action is protected as a legitimate attempt to petition government. In other words, WRTL's intent is of no value in determining whether the government interests in prohibiting electioneering communications sufficiently support the infringement on WRTL's right to petition.

The right to petition is "one of 'the most precious of the liberties safeguarded by the Bill of Rights.'" *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524 (2002) (quoting *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217, 222 (1967)). Grassroots lobbying is a quintessential exercise of the right to petition. *Eastern R.R. President Conference v. Noerr Motor Freight, Inc.*,

rights" and required evidence of intimidation "only after concluding that the disclosure requirements at issue survived strict scrutiny as the least intrusive means of achieving several compelling government interests."); see also *Community-Service Broadcasting of Mid-America v. FCC*, 593 F.2d 1102, 1118 (D.C. Cir.) (*en banc*) (Wright, C.J., joined by Wilkey, J.) (noting that *Buckley* engaged in a full First Amendment analysis despite the absence of concrete evidence of retaliation).

365 U.S. 127, 137-138 (1961); *Liberty Lobby, Inc. v. Pearson*, 390 F. 2d 489, 491 (D.C. Cir. 1968). In addition, as general advocacy of positions in matters of public import, grassroots lobbying is protected under the First Amendment as part of our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Even in the context of federal antitrust and labor relations law¹¹, where no additional First Amendment rights attach, the government cannot prohibit activities that would otherwise violate antitrust or labor law when those actions are ““an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.”” *BE & K*, 536 U.S. at 525 (quoting *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961)). The right to petition trumps the provisions of such laws, even where the petitioners seek to affect the debate over how those very laws do or should apply.

The *Noerr-Pennington* doctrine includes an exception to immunity from prosecution only when the right to petition is not genuinely at issue because the efforts to petition are “sham.” See *Noerr*, 365 U.S. at 144 (in the antitrust context, immunity does not extend to lobbying “ostensibly directed toward influencing governmental action [that] is a mere sham to cover what

¹¹The *Noerr-Pennington* line of cases demonstrates that, in whatever context the right to petition is affected, it enjoys powerful constitutional protection. *Noer* and *Penninton* established that the right to petition trumps otherwise applicable antitrust law. The principle of immunity from prosecution when petitioning government was extended to “situations where groups use . . . courts to advocate their causes and points of view” in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972). The Court later applied the *Noer-Pennington* doctrine in the context of labor relations law in *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 737, 743 (1983). It was applied it to a situation where groups used the court to advocate in the context of labor relations law in *BE & K*, 536 U.S. 516.

is actually . . . an attempt to interfere directly with the business relationships of a competitor.”). The FEC seeks to discover WRTL’s intent in running the advertisements at issue here, ostensibly on the theory that information it gleans will establish that the electioneering communication prohibition rightly applies to WRTL’s grassroots lobbying, despite the First Amendment’s protection of the right to petition. In short, the FEC seeks here to establish an exception to the right-to-petition immunity in the context of the electioneering communication prohibition, and it can do that only if WRTL’s grassroots lobbying is “sham petitioning.”

But the exception to *Noerr-Pennington* petitioner immunity has *two* elements, including a key threshold inquiry. Even where no separate First Amendment speech concerns attach, petitioners’ immunity generally applies regardless of the petitioners’ subjective intent or purpose. In *Professional Real Estate Investors v. Columbia Pictures Industries*, the Court held that whether litigation asserted to be an exercise of the right to petition was “sham” must be determined by a two-part test:

First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail. [footnote omitted] Only if challenged litigation is objectively meritless may a court examine the litigant’s subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals “an attempt to interfere *directly* with the business relationship of a competitor” through the “use [of] the governmental process — as opposed to the *outcome* of that process — as an anticompetitive weapon.”

508 U.S. 49, 60-61 (1993) (citations omitted; emphasis in original); *accord*, *BE & K*, 536 U.S. at 526.

A petition, whether by lobbying or litigation, is *subjectively* a sham if, for example, the intent is to interfere directly with the business relationships of a competitor, *Noerr*, 365 U.S. at

144, or to penalize or retaliate against a protected labor activity, *Bill Johnson's*, 461 U.S. at 743. However, an improper subjective intent, while necessary, is not sufficient to make a petition a sham and trigger the exception to petitioner immunity because there is a threshold requirement.

Protection of the exercise of the right to petition still exists where there is “a concerted effort to influence public officials *regardless of intent or purpose*.” *BE & K*, 536 U.S. at 525 (quoting *Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965)) (emphasis added). “For a suit to [be excepted from petitioners’ immunity], then, it must be a sham *both* objectively and subjectively.” *Id.* at 526 (citing *Professional Real Estate Investors*, 508 U.S. at 60-61) (emphasis in original). The Supreme Court has accordingly held that unless no reasonable litigant could expect success on the merits, even if a labor law litigator intended by his litigation “to retaliate against the defendant for exercising rights protected by the [NLRA],” *Bill Johnson's*, 461 U.S. at 743, the petition effort was not sham and the protection demanded by the federal constitution for the right to petition prevented application of the NLRA. *BE & K*, 536 U.S. at 526.

The transferable concept to the present application of the right to petition is that unless WRTL’s grassroots lobbying ads themselves are objectively without merit as exercising the right to petition, then any finding of a subjective intent to influence elections would not be enough to deny the ads immunity from the electioneering communication prohibition. As the Supreme Court said in *Professional Real Estate Investors*, “only if challenged litigation is objectively meritless may a court [even] *examine* the litigant’s subjective motivation.” 508 U.S. at 60 (emphasis in original). The threshold objective test must be overcome before inquiry may be made into subjective intent.

But Defendants cannot show that the proposed grassroots lobbying is objectively meritless. It is objectively a genuine exercise of the right to petition by the plain terms of the

communication.¹² Accordingly, as the Court held in *Professional Real Estate Investors*, discovery as to possible underlying “motivations in bringing the suit” should be denied because such questions “were rendered irrelevant by the objective legal reasonableness of the litigation [or, in this case, the exercise of the right to petition through communications].” *Id.* at 65-66.

In narrowing the scope of allowable discovery, this Court, after extensive briefing from the Parties, reached a measured conclusion and issued an Order limiting discovery to “the purpose and effect of plaintiff’s 2004 advertisements for the 2004 campaign.” The Court should not now be bullied into abandoning that position after Plaintiff’s brief for summary judgment has been filed by Defendants’ overheated disappointment with the facts that have unfolded.

III. The Defendant’s Second Set of Interrogatories Exceeds Rule 33’s Limitation.

Defendant FEC’s claim that the second set of interrogatories do not exceed Rule 33’s limit because they were served by the Intervenor-Defendants, Defs.’ Mem. 19, is unconvincing. They were styled as propounded by the FEC, were signed by counsel for both the FEC and Intervenor-Defendants and listed FEC counsel first in the signature block. The Intervenor-Defendants have ample and apt representation and could have served interrogatories completely on their own. Instead, WRTL respectfully submits that the FEC is simply using Intervenor-Defendants’ pen to write a demand it cannot write with its own.

The FEC’s position on what constitutes a discrete subpart to determine “compound” interrogatories is likewise unconvincing. First, the advisory committee note to the Rule itself provides the rationale for looking critically at “subparts”— because they are a recognized attempt

¹²Moreover, it also objectively looks nothing like the “sham issue ads” identified as being the “functional equivalent” of express advocacy in *McConnell*. The necessary implication of the *WRTL* remand is that there may be “genuine issue ads,” *McConnell*, 540 U.S. at 206 n.88, that are broadcast within prohibition periods. So inquiry into intent must be rejected.

to evade Rule 33's limitation – and the most authoritative description of an offending subpart. The committee's note sets out those subparts that are *not* a discrete separate subject: those requesting separate responses for the time, place, persons present, and contents of communications of a particular type. *Expressio unius est exclusio alterius*, all other subparts are questions seeking information about discrete separate subjects. "[E]ach piece of information defendants seek in a particular category," Defs.' Mem. 20, *is* a subpart seeking information about discrete separate subjects.

Moreover, even if the Court were to apply a "primary/secondary" standard espoused by Defendants, *id.*, the offending Interrogatories seek information about discrete separate subjects: for example, in Interrogatory number one, "the identification of *various* relevant persons," *id.* (emphasis added), are "totally independent" under the interpretation of the *Estate of Manship* standard they espouse. The identity of the first person can be answered fully and completely without identifying the second person, and the question of the first person's job can be answered fully and completely without describing the second person's job, and any of these questions can be answered without answering the question about where such people live.¹³ Likewise, Interrogatory number two asks for the job descriptions of Marianne Linane, which can be answered fully and completely with answering the job description of Barbara L. Lyons, or Susan Armacost. Under even the Defendants' theory of what subparts seek answers to discrete subjects,

¹³And this does not consider that the Interrogatory is open as to the identity of the persons for which it seeks discrete information: it encompasses "any and all persons who held the following positions (or their functional equivalents) in WRTL at any time from January 1, 2002 to the present."

their seven denominated interrogatories easily eclipse the limits imposed by Rule 33.¹⁴

If the Court finds Defendants' Motion warranted, and WRTL's objection to Defendants' Second Set of Interrogatories to be insufficient, WRTL expressly reserves its right to object on other applicable grounds.¹⁵

IV. The Defendants' Motion to Compel is Not Timely.

The time for discovery ended on June 12, 2006, by virtue of the Court's April 17 Scheduling Order. Summary judgment briefing was scheduled to begin June 23. Defendants notified Counsel for WRTL and the nonparties that it found their objections insufficient on June 14, 2006 and filed their Motion to Compel on June 16, 2006. Defendants were on notice from the outset of the discovery period of any conflict between the Parties as to what the Order intended as the permissible scope and any other disagreements regarding discovery. For example, some of

¹⁴And WRTL's objection on the basis of exceeding Rule 33's limit was timely raised on behalf of the second set of interrogatories. Accordingly, it is at that point, if not sooner, that "another party has asked too many interrogatories," and when the responding party "object[ed] to the ones to which it does not want to respond." *Allahverdi v. Regents of the Univ. of New Mexico*, 228 F.R.D. 696, 698 (D.N.H. 2005).

¹⁵Contrary to the assertion of Defendants, Defs.' Mem. at 21, a respondent waives any objection only when, in the absence of an extension of time or good cause, it fails to answer or object *at all*. *Cahela v. James D. Bernard, D.O., P.C.*, 155 F.R.D. 221, 227 (D. Ga. 1994) (concluding, after surveying the relevant case law, that only "failure to answer or object in a timely manner constitutes a waiver of the right to object" and declaring erroneous the assertion that all objections to be raised must be raised within the time to respond or else they are waived (quoting *Fretz v. Keltner*, 109 F.R.D. 303, 309 (D. Kan. 1985) (emphasis added by court in *Cahela*)); see also *Davis v. Fendler*, 650 F.2d 1154, 1160 (9th Cir. 1981) ("the failure to object to interrogatories within the time fixed by Rule 33, FRCivP, constitutes a waiver of any objection (emphasis added)).

Moreover, no waiver excuses the Defendants to "demand . . . information that is neither relevant to a claim or defense nor likely to lead to information that is." *Caldwell v. Center for Corr. Health*, 228 F.R.D. 40, 44 (D.D.C. 2005). Many of the Interrogatories in the Second Set also suffer from the same irrelevance and general Rule 26 defects noted *supra* with regard to the other discovery requests.

the requests for which they now wish to compel a response, i.e. responses to the First Set of Document Requests # 2, # 4, # 6, and #8, were objected to on May 5, 2006, five weeks before they expressed any dissatisfaction with those responses. Likewise, Plaintiff's response to Defendant's fifth interrogatory in the First Set of Interrogatories was made on that same date. Moreover, the same objections were made in response to various requests at each stage of discovery, and in response to all the different modes it took— document requests, interrogatories, at deposition and in response to requests for admission. Defendants were thus well aware from the outset and throughout all the discovery the existence and substance of Plaintiff's objections to certain of their discovery requests.

If Defendants found a legitimate disagreement, they could have sought clarification or moved to compel immediately, allowing resolution within the discovery period and minimizing subsequent disagreement. Instead, Defendants waited five weeks to move to compel, despite the clear notice of what they apparently now consider deficient responses. On June 23, Plaintiff filed, as scheduled, its summary judgment brief and its Statement of Undisputed Facts (Docket # 76-1). Briefing over discovery issues and the specter of "additional facts" needlessly complicates an already tight schedule and creates an unwarranted burden on the resources of Plaintiffs, the nonparty vendors, and this Court.

If nothing else, equity suggests that Defendants have waived the right to move to compel by waiting five weeks to protest, especially when the discovery schedule is expedited and summary judgment briefing has begun. The delay in compelling responses over clearly stated and repeated objections also raises doubts as to whether this represents a good faith effort to resolve a dispute about allegedly defective answers to discovery requests.

Conclusion

Defendants seek to compel additional responses to various discovery requests to which Plaintiff raised reasonable and timely objections. The information for which Defendants seek resort to the Court is largely irrelevant to a claim or defense and is duplicative and cumulative of that already provided. Many of the objections Defendants find insufficient stem from the requests' exceeding the allowable scope of discovery as provided by this Court in its Order of April 17, 2006. That Order was issued after extensive briefing by the Parties and, while WRTL believes that it did not provide all the protection its interests warranted, it made a good faith attempt to comply with those objectionable requests that the Order allowed. The limitations the Order does provide are well supported, however, and Defendants should not be allowed to circumvent it with a last-minute, belated return to the position it took during debate over the scope of discovery.

This conflict was compounded because Defendants inexplicably delayed in resolving any dispute about the meaning of the Court's Order or the sufficiency of WRTL's and the nonparties' objections despite an expedited schedule and clear and repeated notice of those positions. Now, after discovery has closed and WRTL has filed its summary judgment brief and Statement of Undisputed Facts, Defendants wish to litigate over discovery, and aim to further expend the time and resources of WRTL and the nonparties who provided services. Since discovery is already complete as provided by this Court's April 17 Order, and since Defendants have had extensive discovery of WRTL and non-parties, while at the same time, WRTL's opposition is "truly justified by the significance of the information sought," WRTL respectfully submits that "the expenditure of additional judicial resources that it will take to resolve the motion" be minimized and the motion denied. *Caldwell v. Center for Corr. Health*, 228 F.R.D. 40, 44 (D.D.C. 2005).

Dated June 30, 2006

Respectfully submitted,

M. Miller Baker, D.C. Bar # 444736
Michael S. Nadel, D.C. Bar # 470144
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, NW
Washington, D.C. 20005-3096
202/756-8000 telephone
202/756-8087 facsimile
Local Counsel for Plaintiff

/s/ James Bopp, Jr.
James Bopp, Jr., D.C. Bar #CO0041
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807
812/232-2434 telephone
812/234-3685 facsimile
Lead Counsel for Plaintiff