No. COA 12-455 THIRTY-B DISTRICT

NORTH CAROLINA COURT OF APPEALS

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Friends of Joe Sam Queen, a political committee, Plaintiff	)	
v.	)	From Haywood County No. 11-CVS-89
Ralph Hise for NC Senate, a political committee; and North Carolina Republican Party, a political committee, Defendants	)	

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DEFENDANTS-APPELLEES' BRIEF

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STATEMENT OF THE FACTS

During the 2010 General Election, both the North Carolina Democratic Party ("NCDP") and the North Carolina Republican Party ("NCGOP") made significant contributions to candidates for the North Carolina General Assembly to assist those candidates with the production and airing television advertisements. The contest for North Carolina State Senate between incumbent Democratic Senator Joe Sam Queen ("Senator Queen") and challenger Republican Ralph Hise ("Senator Hise"), is the subject of this action. As demonstrated below, the trial court's order dismissing Plaintiff's claims should be affirmed because (1) Defendants' actions were lawful and (2) the efforts by the NCDP and the NCGOP to support these two candidates and assist their respective campaign committees, the Friends of Joe Sam Queen ("Queen Committee") and Ralph Hise for NC Senate ("Hise Committee"), were legally equivalent.

I. BOTH THE NCDP AND NCGOP ENTERED INTO AGREEMENTS WITH MEDIA PLACEMENT COMPANIES FOR THE BENEFIT OF STATE SENATE CANDIDATES DURING THE 2010 GENERAL ELECTION

A. The N.C. Democratic Party's Agreement with Envision Communications, Inc.

In October 2009, then-Democratic Senate Majority Leader Tony Rand signed an agreement on behalf of the NCDP with Envision Communications, Inc. ("Envision") under which Envision agreed to "write, direct, and produce all radio

and television spots," "place all radio and television advertising at a flat commission of 12.5% for all media placed," and "pass along, without mark-up, all radio and television production charges directly to" the NCDP. (Tab 4, Ex. 6.)[1] In return, the NCDP promised to "[r]etain Envision Communications as the sole agency for the production and placement of radio and television advertising for each campaign **assigned** to Envision Communications for the duration of that campaign." (*Id.*) (emphasis added). **No** Democratic state senate candidate, or their respective campaign committee, including Senator Queen or the Queen Committee, was a party to this agreement. In fact, Senator Queen testified that he had never seen a copy of the contract between Envision and the NCDP before his deposition. (Tab 9, p 19.)

B. The N.C. Republican Party's Agreement with American Media & Advocacy Group

In April 2010, the NCGOP received a similar media placement agreement from American Media & Advocacy Group ("American Media").[2] Like the NCDP contract with Envision, the American Media agreement was for the benefit of any

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[1] All citations to "Tab x, p y" or "Tab x, Ex y" are references to deposition transcripts and exhibits included in the Rule 9(d)(2) documentary exhibits that were filed with the Court along with the Record on Appeal. All excerpts from the deposition transcripts and exhibits cited herein are included in the Appendix to Defendants-Appellants' Brief.

[2] The agreement was arranged before the May 2010 Primary Election which determined the Republican nominees in each State Senate district but was not formally executed until August 16, 2010.

Republican Senate candidates who wanted to use American Media's services to place TV ads for their campaigns. (R pp 95, 99-100.) This agreement reflected the terms by which any Republican Senate candidate could use American Media's services.

American Media agreed to assist interested Republican state senate candidates with "media research planning and placement services during the 2010 General Election." (R pp 99-100.) American Media charged a fee of 3.25 percent of all "gross advertising placed." (*Id.*) Additional amounts of 6.25 percent and 2 percent of all "gross advertising placed" were withheld in the candidates' escrow accounts with American Media to pay the candidates' outside consultant and to offset ad production costs. (*Id.*) No Republican state senate campaign, including the Hise Committee, was a party to this agreement. Senator Hise, however, was informed of the terms of the American Media agreement during a meeting with Republican State Senate candidates after the 2010 Primary Election. (Tab 7, pp 13, 45-47.) No Republican state senate candidate was obligated to use the services of American Media. (R p 96.)

II. USE OF OUTSIDE VENDORS AND PARTY-AFFILIATED CONSULTANTS BY THE QUEEN AND HISE COMMITTEES FOR TELEVISION AD PRODUCTION AND PLACEMENT

A. The Roles of Envision Communications, Buying Time, and N.C. Democratic Party Senate Caucus Director Krista Anderson in the Production and Placement of TV Ads for the Queen Committee

The Queen Committee relied upon two companies for TV ad production and placement services during the 2010 General Election. Envision, owned by Peter Cari, produced the TV ads aired by the Queen Committee and provided advice on message, volume, budget, and placement strategy. (Tab 9, p 15; Tab 4, pp 20-22, 26, 38.) Envision, in turn, hired a subcontractor, Buying Time LLC ("Buying Time"), to purchase the TV air time and place the ads for the Queen Committee and other Democratic candidates assigned to Envision with TV stations. (Tab 9, pp 21, 64; Tab 4, p 21.) In addition, NCDP Senate Caucus Director Krista Anderson ("Ms. Anderson") testified that she was an all-purpose campaign consultant for the Queen Committee and assisted the Queen campaign with "any campaign-oriented role that they would see themselves in." (Tab 4, pp 12, 16.)

Regarding the production and placement of TV ads, Ms. Anderson had discussions with the Queen Committee about how much would need to be spent on TV ads during the 2010 General Election. (Tab 9, p 8; Tab 4, pp 13, 15, 18-19.) After the Queen Committee's TV ads were produced, Ms. Anderson served as a "messenger" who communicated Senator Queen's authorization for the purchase of

TV air time to Envision Communications. (Tab 4, p 24.) Ms. Anderson testified that she communicated this authorization to Buying Time, Queen's media buyer, through Mr. Cari at Envision because neither the Queen Committee nor she had any direct communication with Buying Time. (Tab 4, pp 30-31; Tab 9, Ex 48 p 7.)

B. The roles of American Media and N.C. Republican Party Senate Caucus Campaign Director Jim Blaine in the production and placement of TV ads for the Hise Committee

The Hise Committee's relationship with American Media and Senator Hise's consultant during the 2010 General Election, Jim Blaine, was similar to the Queen Committee's relationship with Envision Communication and Ms. Anderson. Following the May 2010 Primary Election, Senator Hise selected American Media and Jim Blaine as his campaign consultants for the 2010 General Election. (Tab 7, pp 13, 45-47.) Like Ms. Anderson, Mr. Blaine worked with the Hise Committee's media placement company, American Media, to determine the volume of TV ads the Hise Committee would need to run a successful campaign and the cost of airing these ads. (R p 96.)

In addition, Mr. Blaine generally communicated Senator Hise's authorization of TV ads to American Media. (Tab 7, p 60; R p 94.) Like Ms. Anderson's employment with the NCDP, Mr. Blaine served as the campaign director for the NCGOP Republican Senate Caucus during the 2010 election cycle.

III. THE TV ADS PRODUCED AND AIRED BY QUEEN AND HISE

A. The Queen Committee's TV ads

The Queen Committee ran three TV ads during the 2010 General Election. (Tab 7, p 27; Tab 4, Ex 7, 15, 18.) The NCDP paid Envision Communications directly for the cost of producing these TV ads. (Tab 4, p 30; Tab 9, p 28.) Production costs paid by the NCDP were reported by the NCDP on its campaign finance reports as a "coordinated party expenditure." (Tab 4, pp 43-44, 50-51, Ex 1, 3.) The Queen Committee reported these payments by the NCDP as "in-kind" contributions. (Tab 4, Ex 4-5.)

B. The Hise Committee's TV ads

The Hise campaign also ran three TV ads during the 2010 General Election. (Tab 7, p 15.) The ads were produced by a media company called Innovative Advertising. (Tab 7, p 17.) The NCGOP paid Innovative Advertising directly for the costs of producing these ads. (Tab 8, Ex 6-8.) The NCGOP's payments to Innovative Advertising were disclosed on the campaign finance reports of both the NCGOP and the Hise Committee as "in-kind" contributions to the Hise Committee for "media production." (Tab 7, Ex 7-8; Tab 8, Ex. 6-8.)

IV. THE PURCHASES OF AIR TIME FOR TELEVISION ADS

A. The purchases of air time by the Queen Committee

During a six-week period in September and October 2010, the NCDP funneled funds to Buying Time through the Queen Committee's bank account six times to purchase air time for Senator Queen's ads. Each of these fund transfers were prompted by invoices for the purchase of TV air time that Buying Time prepared and sent to Envision. The invoices listed Envision—not the Queen Committee—as the customer. (Tab 4, Ex 21, 25, 28, 31, 32, 37, 38, 41.) Envision then sent the invoices to Ms. Anderson at the NCDP, not to the Queen Committee. (Tab 9, pp 63-66; Tab 4, Ex 21, 25, 28, 31, 32, 37, 38, 41.)

After receiving these invoices, Ms. Anderson would contact the Queen Committee to find out how much of each invoice the Queen Committee could "cover." The NCDP would then send the funds needed to "cover" the remaining portion of the invoice the Queen Committee could not pay. (Tab 4, p 138, Ex 32.) Before sending a contribution to the Queen Committee, Ms. Anderson and the Queen Committee agreed that the funds provided by the NCDP would be used to buy TV air time. (Tab 4, pp 133-34.) Accordingly, each time the NCDP sent funds to the Queen Committee's bank account, the Queen Committee almost immediately wired these funds to Buying Time.

For example, at 4:38 p.m. on 20 September 2010, the NCDP wired $55,000 to the Queen Committee's bank account. (Tab 4, pp 106-19, Ex 21-24; Tab 9, pp 29-37.) At 4:49 p.m. the same day—**11 minutes later**—the Queen Committee wired $55,150.00 to Buying Time to cover an invoice for air time received by the NCDP (and not the Queen Committee) for TV ads that ran between September 22 and September 27. (*Id.*) Four days later on Friday, 24 September 2010, at 1:27 p.m., the NCDP wired $55,000 to the Queen Committee's bank account. (Tab 4, pp 122-27, Ex 25-27; Tab 9, pp 37-40.) The following Monday, 27 September 2010, at 12:20 p.m., the Queen Committee wired $57,000 to Buying Time to cover an invoice sent to the NCDP for air time for TV ads that ran between September 28 and October 4. (*Id.*)

The pattern continued each week leading up to the 2 November 2010 General Election. On 4 October 2010 at 1:12 p.m., the NCDP wired $48,000 to the Queen Committee's bank account. (Tab 4, pp 128-35, Ex 28-30; Tab 9, pp 41-45.) One hour and 48 minutes later at 1:12 p.m., the Queen Committee wired $58,910.00 to Buying Time to cover an invoice sent to the NCDP for air time for TV ads that ran between October 5 and October 11. (*Id.*)

On 12 October 2010 at 2:24 p.m., the NCDP wired $56,000 to the Queen Committee's bank account. (Tab 4, pp 135-42, Ex. 31-36; Tab 9, pp 45-51.) At 4:08 p.m. the same day—1 hour and 26 minutes later—the Queen Committee

attempted to wire $63,160.00 to Buying Time to cover an invoice sent to the NCDP for air time for TV ads that ran between October 12 and October 18. (*Id.*) Due to a problem that prevented the first wire transfer from going through, the Queen Committee made a second, ultimately successful attempt, at wiring the same funds to Buying Time on 14 October 2010. (Tab 9, pp 59-60.)

On 18 October 2010 at 10:09 a.m., the NCDP wired $65,500 to the Queen Committee's bank account. (Tab 4, pp 143-47, Ex 37-40; Tab 9, pp 51-54.) At 1:50 p.m. the same day—3 hours and 41 minutes later—the Queen Committee wired $70,411.00 to Buying Time to cover an invoice sent to the NCDP for air time for TV ads that ran between October 19 and 25. (*Id.*)

The final transaction occurred on 22 October 2010, when at 9:45 a.m., the NCDP wired $66,000.00 to the Queen Committee's bank account. (Tab 4, pp 147-49, Ex 41-43; Tab 9, pp 54-57.) At 3:39 p.m. the same day—five hours and 54 minutes later—the Queen Committee wired $71,613.00 to Buying Time to cover an invoice sent to the NCDP for air time for TV ads that ran between Oct. 22 and Nov. 1. (*Id.*)

The total amount of funds sent to Buying Time by the Queen Committee during the 2010 General Election was $376,244. From this total, $345,500, or 91.8 percent, according to Krista Anderson and Joe Sam Queen, originated from the NCDP's transfers identified above. (Tab 4, pp 67-68, Ex 2A; Tab 9, p 25.)

During his deposition, Senator Queen admitted that the Queen Committee could not have paid *any* of the Buying Time invoices without the funds it received from the NCDP *immediately prior to each purchase of air time*. (Tab 9, pp 30-57, Ex 56; Tab 4, Ex 23, 24, 27.) Each of the wire transfers made by the NCDP to the Queen Committee's bank account were reported as contributions to the Queen Committee. However, neither the campaign finance reports of the NCDP nor the reports of the Queen Committee disclosed that these transfers were made to assist the Queen Committee with media purchases. (Tab 4, Ex 1, 3-5.)

B. <u>The purchases of air time by the Hise Committee</u>

Between August and October 2010, the NCGOP and the Hise Committee sent funds to American Media that were used to purchase TV air time by the Hise Committee. (R p 77-78, 85.) Like any normal vendor, American Media placed these contributions into an escrow account American Media maintained for the Hise Committee. (R pp 77-78.)

The Hise Committee's method of purchasing TV air time during the 2010 election was similar to the processes used by the Queen Committee. American Media directed invoices[3] to the NCGOP so the NCGOP would know the amount of

[3] Unlike the NCDP and the Queen Committee, all invoices were addressed to the Hise Committee and listed the Hise Committee—not the NCGOP or American

money to contribute to the Hise Committee to assist the Hise Committee with its purchase of TV air time. (R pp 97, 102-07.) Like the Queen Committee, the Hise Committee requested that the NCGOP cover any balance due to American Media that the Hise Committee had been unable to independently raise. (R p 96.)

Between 19 August 2010, and 21 October 2010, the NCGOP wired a total of $277,142.15 to American Media which American Media credited to the account it maintained for the Hise Committee. (R pp 78, 85.) During the same time frame, the Hise Committee wired a total of $49,327.36 to American Media which American Media credited to its Hise Committee's account. (R p 78, 85.) As with any political contribution, after the NCGOP sent its contributions to the Hise Committee, the NCGOP no longer had control over these funds. (R p 96; Tab 8, p 45.) Following these transfers, the NCGOP sent letters to the Hise Committee notifying it of the amount of each "in-kind" "contribution for media placement" to the Hise Committee the NCGOP had sent to American Media between August and October 2010. (Tab 8, p 15, Ex 2.)

The NCGOP then reported these contributions sent to American Media on its Third and Fourth Quarter campaign finance reports as "in-kind" contributions to

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Media, Senator Hise's ad production company—as the customer. (R pp 97, 102-07.)

the Hise Committee for "media."[4] (Tab 8, Ex 6-8.) Based upon the letter received from the NCGOP, the Hise Committee reported each of the contributions made by the NCGOP to its American Media account on its Third and Fourth Quarter campaign finance reports as in-kind "media placement contributions" from the NCGOP. (Tab 7, pp 37-39, Ex 6-8.)

No goods or services were purchased by the NCGOP from American Media. (R p 78, 96.) American Media did not purchase air time or place TV ads until it received authorization to do so from the Hise Committee. (R p 78, 97.) Similarly, while American Media was entitled to a commission of 3.25 percent of gross media placed as provided in the written agreement with the NCGOP, this commission was not earned until American Media received authorization from the Hise Committee to purchase air time. (R pp 78-79, 90.) Accordingly, on certification forms sent to television stations, American Media accurately stated that payments for the air time it reserved on behalf of the Hise Committee was "furnished by" the Hise Committee. (R pp 79, 87-88.)

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[4] Based upon advice received from the State Board of Elections, the contributions made to the American Media account for the Hise Committee were originally reported on the NCGOP's Third Quarter campaign finance report as "coordinated party expenditures." (Tab 8, pp 30-31.) The NCGOP later amended its Third Quarter report to identify these contributions as "in-kind" contributions rather than "coordinated party expenditures." (Tab 8, pp 36-37.) This amendment made the reporting of these contributions consistent with the way both Plaintiff and Defendants reported in-kind contributions for TV ad production. However, unlike Plaintiff and the NCDP, Defendants reported that the purpose of these contributions was for "media." (Tab 8, Ex 6-8.)

Senator Hise authorized every purchase of air time and the placement of each TV ad that ran on behalf of the Hise Committee during the 2010 General Election. (Tab 7, pp 58-59.) No funds from American Media's account for the Hise Committee were used to purchase air time or to run advertisements authorized by the NCGOP. (R p 79.) Neither the Hise Committee nor the NCGOP sent any funds directly to any TV station. (Tab 7, p 30.)

After the 2010 General Election, all funds that remained in the American Media escrow account were refunded to the Hise Committee. (R p 79, 90.) These funds were refunded to the Hise Committee regardless of whether they originated from the NCGOP or the Hise Committee. (*Id.*) No funds were refunded to the NCGOP. (*Id.*; Tab 8, p 45.)

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

A. Summary of Applicable Statutory Provisions

1. Contributions Limitations Do Not Apply to Contributions to Candidate Committees by Political Parties

By law, individuals, candidate campaign committees, and political action committees are prohibited from contributing more than $4,000 per election to the campaign committee of any candidate for a state office in North Carolina. N.C.G.S. § 163-278.13(a)-(b). Political party committees such as the NCDP and

NCGOP, however, are treated differently than ordinary political committees in that they are not subject to these same contribution limitations. N.C.G.S. § 163-278.13(e). In fact, political party committees are permitted to make (and receive) **unlimited contributions of any kind** to (or from) any candidate's campaign committee. *Id.* These contributions can be made either in the form of a direct monetary contributions to a candidate's campaign committee or through so-called "in-kind" contributions and "coordinated party expenditures." N.C.G.S. § 163-278.6(6).

2. The Ambiguous Disclosure Requirements of N.C.G.S. § 163-278.39A

In 1999, the North Carolina General Assembly enacted N.C.G.S. § 163-278.39A, the statute on which Plaintiff's Complaint is based, as a part of the Campaign Reform Act of 1999. The statute requires that a candidate whose campaign committee "purchased" a television "advertisement" "supporting or opposing the nomination or election of one or more clearly identified candidates" to appear on the ad. The candidate is also required to speak the disclaimer using specific language in the statute stating that the candidate "sponsored" the ad. N.C.G.S. § 163-278.39A(b)(1).

Similarly, the statute requires "the chair, executive director, or treasurer" of a political party organization that "purchased" an "advertisement" to appear on the ad and to speak the statutory language that the political party organization

"sponsored" the ad. N.C.G.S. § 163-278.39A(b)(2). Where a television ad is "jointly sponsored," "the disclosure statement shall name all the sponsors and the disclosing individual shall be one of those sponsors. If a candidate is one of the sponsors, that candidate shall be the disclosing individual, and if more than one candidate is the sponsor, at least one of the candidates shall be the disclosing individual." N.C.G.S. § 163-278.39A(e1).

Many essential statutory terms in these requirements are undefined and ambiguous. Specifically, the term "purchase" is not defined anywhere in Chapter 163. While the term "sponsor" is defined, the definition sheds no light on who is responsible for the disclaimer in an ad because a "sponsor" is defined only as "a candidate, candidate committee, political party organization, political action committee, referendum committee, individual, or other entity that **purchases** an advertisement." N.C.G.S. § 163-278.38Z(10) (emphasis added). Because the statute does not define the term "purchase," and because a "sponsor" is defined as the "purchaser," as a practical matter, neither term is defined.

Given this statutory ambiguity, it is useful to look to similar provisions of federal law found in the Federal Communications Act ("FCA"). Section 317 of the FCA—portions of which are incorporated by reference in N.C.G.S. § 163-278.39A—sets out general sponsor identification requirements applicable to all advertising, including political advertising. 47 U.S.C. § 317 (2011). The Act

requires the broadcaster to identify the person or entity which "paid for" the ad. 47 U.S.C. § 317(a)(1) (2011). The Federal Communications Commission has interpreted "paid for" as meaning the person who authorized or had "editorial control" over the ad. *In re VOTER*, 46 Rad. Reg. 2d (P & F) 350 (1979).

Under the FCC's long-standing interpretation of Section 317, the entity "behind" the payments—the ultimate funding source—is not a sponsor, unless there is a principal-agent relationship between the funding entity and the spending entity. Rather, the FCC focuses on "editorial control" over the content of the advertisement. The FCC also considers the funder's control, if any, over the spender's discretion in how the funds are spent. *In re VOTER*, 46 Rad. Reg. 2d (P & F) 350; *see also National Welfare Rights Organization*, 41 FCC2d 187 (1973) (no sponsorship by funding group where spending group determined content of advertisement).

3. Statutory Requirements Under N.C.G.S. § 163-278.39A

To maintain a cause of action under N.C.G.S. § 163-278.39A, a party pursuing damages must show: (1) the opposing party violated the statute's disclaimer requirements and (2) the party seeking damages "complied with the television and radio disclosure requirements throughout that candidate's entire campaign." N.C.G.S. § 163-278.39A(f). For the reasons stated below, Plaintiff is not entitled to any recovery under N.C.G.S. § 163-278.39A because the

Defendants complied with the requirements of the statute. However, even if Defendants violated N.C.G.S. § 163-278.39A, Plaintiff engaged in legally equivalent conduct and is therefore barred from recovering any damages.

B. Defendants Complied with the Requirements of N.C.G.S. § 163-278.39A

Both the NCGOP and the Hise Committee complied with requirements of N.C.G.S. § 163-278.39A. The NCGOP did not purchase any good or service when it wired funds to American Media for the Hise Committee. Nor did the NCGOP send money for any air time purchase directly to any TV station.[5] Instead, the NCGOP sent its Hise Committee contributions to American Media. American Media then escrowed these contributions to an account it maintained for the Hise Committee. The contributions were not disbursed to TV stations until American Media was authorized to do so by the Hise Committee. Contrary to Plaintiff's strained logic, it was the Hise Committee or American Media (acting as an agent for the Hise Committee) who "purchased" air time, not the NCGOP.

The Queen Committee's contention that Defendants violated N.C.G.S. § 163-278.39A is based upon two erroneous assumptions. First, Plaintiff contends that the NCGOP "purchased" the advertisements because it did not "park" its

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[5] Defendants do not concede that direct payments by the NCGOP to TV stations would have made them a "sponsor" or "purchaser" of the TV ads that ran. A direct payment to a television station for the purchase of air time authorized by Senator Hise would constitute an "in-kind" contribution similar to the payments made by both political parties to the Queen and Hise ad production companies.

contributions in the Hise Committee's campaign bank account for a few minutes prior to sending the funds to American Media. (Appellant's Br. at 13, 22.) Aside from drawing a nonsensical distinction, Plaintiff's theory ignores the critical factors regarding who authorized the purchase of air time, who had editorial control over the ad, and to whom refunds of any balance remaining with American Media after the election were made. Furthermore, Plaintiff's theory finds no support in any plain reading of the statute.

Here, no principal-agent relationship existed between the NCGOP and the Hise Committee. The NCGOP did not control the Hise Committee. Moreover, it is undisputed that the Hise Committee, and specifically Senator Hise himself, exercised sole and ultimate editorial control over the content of his advertisements and when and how the NCGOP contributions received by American Media were expended. Highlighting the Hise Committee's control over the funds in the American Media escrow account is the fact that all of the unexpended funds contributed by the NCGOP were refunded to the Hise Committee, not the NCGOP. Accordingly, if the Court construes the vague statute at issue here consistently with its federal analogue, then the disclaimer on all of the Hise Committee's advertisements were correct, and this lawsuit must be dismissed.[6]

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[6] If the Court declines to interpret the statute consistently with federal law, then the state statute will be preempted as a matter of law. In this context, a state statute is preempted when, among other things, it "obstructs the federal purpose" behind the

Second, Plaintiff erroneously and without authority *assumes* that the purchase of TV **air time** equates to the purchase of an **"advertisement."** Even assuming that the NCGOP "purchased" TV airtime by sending funds directly to American Media as Plaintiff contends, nothing in N.C.G.S. § 163-278.39A or Chapter 163 defines the "purchaser" of an advertisement as the person or entity who purchases only the **air time** for the ad.

Unlike the term "purchase," the statute defines "advertisement" as "any message appearing in the print media, on television, or on radio that constitutes a contribution or expenditure under this Article." N.C.G.S. § 163-278.38Z(10). Thus, a television "advertisement" requires at least two things: (1) a message and (2) air time on which to broadcast that message. Plaintiff argues that the entity that

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sponsorship identification requirement of the Communications Act. *KVUE, Inc. v. Austin Broadcasting Corp.*, 709 F.2d 922, 934 (5th Cir. 1983). The purpose of the Communications Act sponsorship requirement, as interpreted by the FCC, is to clearly identify the person or entity that authorized or had editorial control over a political advertisement. As interpreted by Plaintiff, the statute at issue in this case would require an entity to orally state that the sponsor is someone other than the person or entity with editorial control. This clearly obstructs and confuses the federal purpose behind the Communications Act. Because of the similar language required by each statute to communicate the disclaimer ("paid for by" in the federal law and "sponsored by" in the state law), the conflicting oral and visual legends would muddy the waters to the point where in fact neither act's purpose is furthered. Viewers would see one disclaimer suggesting the candidate is responsible for the advertisement but hear another disclaimer suggesting that the political party was responsible for the ad. The confusion inherent in that situation guarantees that the viewer really will not know who is responsible for the advertisement. The Court can avoid the preemption issue by interpreting the North Carolina disclaimer law consistent with federal law.

purchases the TV air time is the only relevant inquiry in determining who "purchased" the "advertisement" because "a video created but never aired on television would not be a valid trigger for a lawsuit based upon improper disclosures." (Appellant's Br. at 24.) But this argument proves nothing because a video that is never aired is not, by definition, an "advertisement." Moreover, applying the same logic, an entity that purchases TV air time but never uses that air time to run a "message" also could not be liable for violating N.C.G.S. § 163-278.39A. Neither argument changes the fact that an "advertisement," by statute, consists of **both** a message and air time.

In determining whether an entity has "purchased" an "advertisement," it is therefore necessary to determine which entity or entities purchased the message **and** the air time. Plaintiff concedes in its brief that "payments for production costs of an advertisement" do not constitute the "purchase" of an "advertisement" because such payments do not constitute "sponsorship." (Appellant's Br. at 24.) As such, the NCGOP's payments to Innovative Advertising for the costs of producing of the TV ads run by the Hise Committee does not mean that the NCGOP "purchased" the ads run by the Hise Committee. Accordingly, even if the NCGOP "purchased" the **air time** for the TV ads run by the Hise Committee, which it did not, that alone would not mean that the NCGOP "purchased" the TV

ads run by the Hise Committee such that NCGOP was a "sponsor" of these ads and subject to the disclaimer requirements of N.C.G.S. § 163-278.39A.

Plaintiff argues that by reporting the contributions the Hise Committee received as in-kind contributions, Defendants have admitted that the NCGOP "paid for" the ads run by the Hise Committee. (Appellant's Br. at 27-28.) Although this sweeping assumption lies at the core of its claims in this action, Plaintiff has cited no authority—and Defendants are aware of none—supporting the proposition that the way a contribution is characterized in campaign finance reports determines who "purchased" a television ad under N.C.G.S. § 163-278.39A. North Carolina law makes no distinction between "in-kind" contributions and monetary contributions. Both types of contributions are subject to the same contribution limitations which, in the case of political party committees like the NCDP and NCGOP, are none at all. Just like a monetary contribution, an in-kind contribution is within the control of the committee that receives it after it is made. Here, the undisputed facts show that the Hise Committee controlled the funds sent to American Media on its behalf because it had to authorize any purchase of air time by American Media.

Finally, although Plaintiff's sole claim against the Defendants in this action is that the disclaimer on the Hise Committee's television ads was incorrect, Plaintiff concedes in its brief that it does not know which of the various