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October 27, 1999

Via Federal Express

Lawrence M. Noble, Esq.  
General Counsel  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
OFFICE OF GENERAL  
COUNSEL

OCT 28 10 39 AM '99

**RE: MUR 4929**  
**The Chronicle Publishing Company**

Dear Mr. Noble:

This firm represents The Chronicle Publishing Company, publisher of the San Francisco *Chronicle* ("*Chronicle*"),<sup>1</sup> and on its behalf this letter responds to the complaint filed by Dr. Rhawn Joseph against the *Chronicle* in the above-referenced matter. For the reasons set forth below, the *Chronicle* respectfully submits that the Commission must take no further action in this matter.

**I. Summary of Complaint**

Dr. Joseph apparently seeks to enjoin the *Chronicle* and other news organizations from publishing or broadcasting news stories that report on the statements and activities of

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<sup>1</sup> The Chronicle Publishing Company is also licensee of KRON-TV, Channel 4, in San Francisco, which broadcasts news coverage both as an NBC network affiliate, and through its own, locally-produced news coverage, including political coverage. This response is made on behalf of both the *Chronicle* newspaper and KRON-TV to whatever extent the complaint is deemed to allege violations by or through the news coverage of either of them.

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certain candidates but not others. He generally alleges that these news stories are not actual news, but rather free advertising for candidates. The complaint alleges that they are therefore prohibited corporate contributions under the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431 et seq. ("FECA"). Dr. Joseph never alleges any facts pertaining to the *Chronicle*. His complaint is void of any mention of a news story published by the *Chronicle* or a contribution or expenditure made by the *Chronicle* on behalf of any identified candidate.

II. Dr. Joseph's complaint is defective because he has not specifically alleged in his complaint that the *Chronicle* has violated the FECA.

The FEC regulations provide that a complaint "should contain a clear and concise recitation of the facts which describe a violation of a statute or regulation over which the Commission has jurisdiction." 11 C.F.R. § 111.4(d)(3). Here, Dr. Joseph alleges that the *Chronicle* is one of a list of "many major offenders of the Federal campaign finance laws." Nowhere in the complaint does Dr. Joseph provide allegations *of fact* pertaining specifically to the *Chronicle*. Dr. Joseph fails to mention any article or news story published by the *Chronicle*. He does not allege any contribution or expenditure was made by the *Chronicle* on behalf of an identified candidate. In short, Dr. Joseph alleges a *theory* but no facts whatever that support his charge that a violation was committed by the *Chronicle*. Thus, the complaint is defective and the FEC should take no action.

III. The complaint alleges activity that is exempt from the FEC's jurisdiction.

Even if the complaint were not fatally defective, the complaint falls outside the FEC's jurisdiction because news stories and articles are exempted from the FEC's definitions of a "contribution" and "expenditure". The Act prohibits "any corporation whatever" from making any contribution or expenditure in connection with a Federal election. 2 U.S.C. § 441b(a). The Act and Commission regulations define the terms "contribution" and "expenditure" to include any gift of money or anything of value (including advertising services without charge) for the purpose of influencing a Federal election. 2 U.S.C. §§ 441b(b)(2) and 11 C.F.R. § 114.1(a)(1).

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A. Press activity is exempt from the FEC's definitions of "contribution" and "expenditure" under the FECA.

The Act specifically exempts from the definition of "expenditure": any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate. 2 U.S.C. § 431(9)(B)(i). The Commission regulations similarly exempt costs incurred in connection with covering or carrying a news story, commentary or editorial. 11 C.F.R. §§ 100.7(b)(2) and 100.8(b)(2).

B. As a publisher independent of any candidate or party, the *Chronicle's* news reporting is exempt from FEC regulation.

To determine whether conduct falls within the statute's press exemption, the courts have applied a two-step procedure. The initial inquiry is "limited to whether the press entity is owned or controlled by any political party or candidate and whether the press entity was acting as a press entity with respect to the conduct in question." FEC v. Phillips Publishing Co., 517 F. Supp. 1308, 1312 (D.D.C. 1981). If the press entity is not owned or controlled by a political party or candidate and it is acting as a press entity, the FEC is barred from proceeding with an investigation into the matter. Id.

In Phillips Publishing Co., *supra*, the FEC sought to investigate a publisher that distributed a conservative, anti-communist newspaper when it sent promotional materials to potential new subscribers opposing a political candidate. Id. at 1308. The FEC argued that the questioned communication was not a news story, commentary or editorial, and thus not within the press exemption of 2 U.S.C. § 431(9)(B)(i). Id. at 1310. The FEC did not challenge the publisher's contention that the communications were promotional materials used to seek new subscribers. Id. at 1314. The court found that soliciting new subscribers was a normal press function even where the solicitation material expressed the political viewpoints of the publisher. Id. at 1313. Since the publishing company was neither owned nor controlled by any political party or candidate, and was performing a legitimate press function, the Court held that FEC lacked the necessary statutory authority to proceed with its investigation. Id. at 1314.

In this case, the *Chronicle's* activity of which Dr. Joseph complains falls squarely within the press exemption of the FECA. There is no allegation, nor would it be true if there

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were, that *Chronicle* is owned or controlled by any political party, political committee or candidate. The *Chronicle* newspaper is the largest morning daily newspaper distributed in the San Francisco Bay Area. The VHF-band signal of KRON-TV reaches the fifth largest audience, measured in households, in the nation. Each of them is "acting as a press entity" with respect to the issues raised in the complaint. Each of them report on political campaigns for the purpose of informing their audience of the qualifications of the candidates and the candidates' viewpoints on issues of public concern.

Dr. Joseph does not allege, nor would he be entitled to any credence if he did, that news stories reporting on the activities of the candidates mentioned in his complaint are not a legitimate press function. He merely contends that increased media coverage of a certain candidate over another may have the incidental effect of benefitting that candidate's election. Any news story or editorial published by the *Chronicle* that comments on a political campaign is activity in which the *Chronicle* is "acting as a press entity." The conduct is therefore exempt from FEC regulation under 2 U.S.C. § 431(9)(B)(i).

IV. The *Chronicle's* reporting on candidate activities is protected by the First Amendment of the United States Constitution.

The First Amendment of the United States Constitution prohibits the federal government from "abridging the freedom of speech, or of the press..." U.S. CONST. amend.I. The dissemination of information with respect to candidates and their election-related activities is "integral to the operation of the system of government established by our Constitution." Buckley v. Valeo, 424 U.S. 1, 14 (1976). "The First Amendment affords the broadest protection to such political expression in order 'to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" Id. (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

Congress fully recognized that the FEC's right to regulate any news story or other commentary published by a newspaper is limited to those entities which are owned or controlled by a political party, political committee or candidate. 2 U.S.C. § 431(9)(B)(i). The legislative history of this section states:

[I]t is not the intent of the Congress in the present legislation to limit or burden in any way the first amendment freedoms of the press and of association. Thus the exclusion assures the unfettered right of the ... media to cover and

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comment on political campaigns. Phillips Publishing Co., *supra*, 517 F. Supp. at 1312 (quoting H.Rep.No.93-943, 93d Cong., 2d Sess. at 4 (1974)).

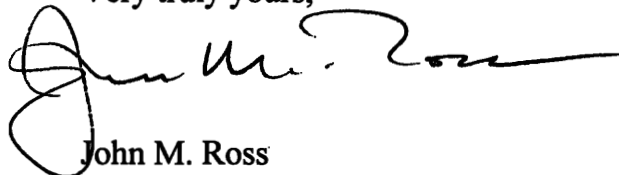
Since the *Chronicle* is independent of any political candidate or entity, Dr. Joseph's request that the FEC regulate and limit the *Chronicle's* publication of candidate and election-related news stories is unconstitutional. To do so would impose unprecedented restraints on First Amendment liberties guaranteed to the press, and infringe on the public's right of access to political viewpoints and its ability to make informed choices among candidates. Thus, an additional reason the FEC should dismiss this complaint against the *Chronicle* is the overriding First Amendment protection afforded to its independent editorial judgments.

#### V. Conclusion

There are no facts pled which identify conduct specifically of the *Chronicle*. But even if there were, there is no principled basis on which the FEC can proceed in this matter. There is no way to avoid, first, the reality that independently published news stories reporting on candidate activities are fully protected by the First Amendment. Second, those activities are exempt under the Act and Commission regulations from treatment as a "contribution." The complaint therefore alleges activities that are outside the FEC's jurisdiction.

With respect we therefore request that the Commission dismiss this action against the *Chronicle*.

Very truly yours,



John M. Ross

Enclosure – Designation of Counsel

cc: W. Ronald Ingram, Esq.  
Jed E. Solomon, Esq.  
Marianne C. Koepf, Esq.

STATEMENT OF DESIGNATION OF COUNSEL

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FEDERAL ELECTION  
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COUNSEL

The above-named individual is hereby designated as my  
counsel and is authorized to receive any notifications and other  
communications from the Commission and to act on my behalf before  
the Commission.

10/26/99  
Date

W. Ronald Ingram  
Signature W. Ronald Ingram  
Vice President & General Counsel  
The Chronicle Publishing Company

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