SULLIVAN & ASSOCIATES, PLLC

ATTORNEYS AT LAW

1010 Wisconsin Ave., N.W • Suite 725 • Washington, D.C. 20007 • Phone: 202 338.4700 • Fax: 202.338 7060

January 18, 2005

Dominique Dillenseger, Esq.
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: MUR 5410 Response Brief to RTB Findings

Dear Ms. Dillenseger:

Enclosed please find our response brief to the Commission's Reason to Believe ("RTB") Findings in MUR 5410, concerning James Oberweis, Sr. and the Oberweis for U.S. Senate campaign committee.

If you have any questions, please contact me at your convenience.

Very truly yours,

Paul E. Sullivan
Sullivan & Associates, PLLC

cc Scott E Thomas, Chairman
Michael E. Toner, Vice Chairman
David M Mason, Commissioner
Danny L McDonald, Commissioner
Bradley A Smith, Commissioner
Ellen L Weintraub, Commissioner

BEFORE THE FEDERAL ELECTION COMMISSION

Oberweis for U.S. Senate 2004 and) Richard G. Hawks, as treasurer) James D. Oberweis, Sr.))	MUR 5410 Response to RTB Findings

Pursuant to 2 U.S.C. § 437g, Oberweis for U.S. Senate 2004 and Richard G. Hawks, as treasurer ("Committee"), and James D. Oberweis, Sr. ("Oberweis"), who collectively shall be referred to herein as "Respondents," file this response to the Reason To Believe ("RTB") findings made in the above-referenced matter.

I. FINDINGS

On November 30, 2004 the Federal Election Commission ("FEC" or "Commission") found RTB against the Committee for a violation of 2 U.S.C. §§ 441b and 434(b) and against Oberweis for violations of 2 U.S.C. § 441b arising from the "Sunny Side Up" advertisements ("Ad")[1] in which Oberweis made an appearance and which were produced and paid for by the Oberweis Dairy ("Dairy").[2]

The General Counsel's Factual and Legal Analysis ("GCA") claims that the Ad constituted a coordinated communication as defined at 11 C.F.R. § 109.21 and as such is required to be treated as an in-kind contribution by the Dairy to the Committee.

The GCA has based its findings upon 11 C.F.R. § 109.21, concluding specifically that the Ad, paid for by the Dairy, was a "public communication" that was "coordinated" with the Committee. As such, the GCA contends it is required to be considered an in-

[1] A copy of the Ad on a CD is included for your review and reference

[2] The Commission also made a "No RTB" finding for allegations in the Complaint relating to ice cream "meet and greets" and a sweepstakes sponsored by the Committee.

kind contribution subject to the prohibitions and limits of the Act.

To meet the standards of a "coordinated communication," a public communication must:

1) Be paid for by a person other than the candidate, his authorized committee, or an agent thereof,

2) Satisfy at least one (1) of the "content standards" set forth in § 109.21(c), and

3) Satisfy at least one (1) of the "conduct standards" set forth in § 109.21(d).

Respondents do not contest that the first prong of this standard has been met, since the Dairy has acknowledged it paid for the production and time buys for the Ads. However, as will be noted below, the GCA fails to set forth sufficient factual findings to justify the § 109.21(d) "conduct" standard that is at the heart of the allegation. In addition, the provisions of § 109.21(c), as applied in this matter, are beyond the intended scope of the underlying statutory provisions; as such, the GCA has also failed to meet the requirements of the content standard.[3]

II. ARGUMENTS

A. James Oberweis's Appearance in the "Sunny Side Up" Commercial Was Not Reasonably Related to a Federal Election.

1 James Oberweis has a long history of appearing in advertisements for businesses with which he is involved

For more than twenty years, James Oberweis has made personal appearances in advertisements for businesses with which he is involved. This practice began in the early 1980s, after the advertising agency for Oberweis Securities suggested that it would help

[3] We note at this time that the Regulations on which the GCA relies have been remanded by the District Court for revision consistent with the court's opinion in *Shays v FEC*, 337 F Supp 2d 28 (2004)(*stay denied*, 340 F Supp 2d 39) We make this note to preserve these issues should they be raised in the revised Regulations.

business to use Oberweis's image in the company's print advertisements in *Barron's* and the *Wall Street Journal*.[4]

Realizing the benefits of the "personal touch" following the success of that initial print ad campaign, Oberweis continued to appear in his companies' advertisements over the next two decades. Beginning in 1986, Oberweis appeared in television commercials for Oberweis Securities on FNN, the precursor to the CNBC network. These ads continued through 1988, and like the print ads before them, proved to be an effective means of increasing business for the company.[5]

In 1999 or 2000, Oberweis was featured in television commercials for Oberweis.net, the Internet site for Oberweis Securities. These commercials were aired on CNBC and a variety of other stations.[6] In addition, Oberweis appeared in a video promoting the Oberweis Dairy, the business that was founded by his grandfather over seventy years ago.[7]

Based on the success of the Oberweis Securities ads that bore his image, beginning in 1998, Oberweis began to recommend to the management committee of Oberweis Dairy that it undertake an advertising campaign for the Dairy on broadcast television.[8] The Dairy did begin a cable advertising campaign around that time, in addition to its print and radio advertising.

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[4] Affidavit of James Oberweis, Sr ("Affidavit") § 4 This affidavit has been signed, and a faxed copy is attached However, it was inadvertently not notarized at the time it was signed by Mr Oberweis. A notarized version will be provided to you for the record as soon as we receive it.

[5] Affidavit § 5

[6] *Id* § 6

[7] *Id* § 7, *see also* Oberweis Dairy, "How It All Began," *available at* http://www oberweisdairy com/web/history asp (last visited Jan 16, 2005)

[8] Affidavit § 8.

Thus, contrary to the GC's assertion that the "Sunny Side Up" commercial ("Ad") was the Dairy's first foray into televised advertising, by the time the Ad aired in 2003, the Dairy had an established history of media advertisements, and Oberweis had an even longer history of appearing in advertisements.

2 The Ad aired when it did for in order to attract business for the Dairy, not votes for Oberweis

Although the Dairy did run advertisements on cable television, the management committee was initially reluctant to begin airing its commercials on broadcast television. In 1998, when Oberweis began to encourage going on TV, the Dairy's market was smaller: its stores were in a more concentrated area, and it was unable to make home deliveries to significant parts of the Chicago metropolitan area.[9] In addition, broadcast advertising rates were significantly more expensive than cable rates. Therefore, because broadcasting would have cost too much and reached too wide a region, the Dairy initially refrained from investing in broadcast advertisements.

By 2003, times had changed. The Oberweis Dairy had more than doubled its number of stores and expanded its distribution network to make home delivery available to virtually all of the Chicago area.[10] However, the federal "Do Not Call" list that was to become effective in fall 2003 threatened to curtail further growth, as the Dairy had acquired over 90% of its home delivery customers in response to telemarketing efforts.[11] The Dairy therefore had to look to other sources of new customers, and so the time was finally ripe to launch a series of broadcast television commercials for the Dairy.

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[9] *Id* §§ 7-8

[10] Affidavit § 9

[11] *Id* § 10.

The management committee of Oberweis Dairy voted early in 2003 to authorize the disbursement of funds for the production of television commercials for the Dairy.[12] Robert Renaut, the President and CEO of Oberweis Dairy, and Mark Vance, the Vice President of Advertising, searched for a production company to produce the ads, interviewing at least two companies.[13] Oberweis suggested that they consider Don Walter for the position, because Walter had done good work on the advertising for Oberweis Securities and his 2002 Senate campaign.[14] Oberweis did not interview any production companies himself, nor did he in any way guide, direct, oversee, or manage the process of finding a producer. That decision was made by the management committee.[15]

Renaut and Vance ultimately decided to hire Aspect Media, Inc., where Walter now worked, to produce the Dairy commercials.[16] Walter was no longer with the company he had worked for when he produced the ads for Oberweis's prior Senate campaign, and neither he nor Aspect Media, Inc. were involved in Oberweis's 2004 Senate campaign.[17]

Aspect Media produced four ads for the Dairy in the late spring or early summer of 2003. Jim Oberweis appeared in each of these ads as the chairman and spokesman of the Oberweis Dairy. Oberweis had no involvement in the conceptualization, content

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[12] *Id*

[13] *Id* § 11

[14] *Id*

[15] *Id*

[16] *Id* § 12

[17] *Id*

selection, or content development of any of the ads. He did not even see the scripts until he arrived on the set for filming, and made no changes to the scripts apart from suggesting minor word corrections. His sole involvement in production of the ads was as an actor, playing himself as the Chairman of Oberweis Dairy.[18]

The ads began to appear in certain markets in the summer of 2003, based on the Dairy's customer profiles. For example, some of the ads ran during the Oprah Winfrey show, when likely customers were predicted to be watching television. The times the ads aired were determined solely by the production firm, and Oberweis was not involved in the process of deciding when the ads would run.[19]

It is admitted by Respondent that the "Sunny Side Up" commercial remained on the air until January 2004, which fell within 120 days before the Illinois Republican primary election.

3 The Ad made no reference to Oberweis's candidacy or to any political position espoused by Oberweis

The Oberweis Dairy has been owned and operated by the Oberweis family ever since its inception more than seventy years ago.[20] James Oberweis is the grandson of Peter Oberweis, who founded the Dairy and gave it its name. He serves as its Chairman today. Especially when taken in light of his twenty-year history of appearing in advertisements for Oberweis Securities, it was entirely natural and not at all unusual for Oberweis to appear in television advertisements as the "public face" of the Oberweis Dairy.

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[18] *Id* § 13

[19] *Id* § 14

[20] *See* "How It All Began," *supra* note 4

The Ad is a completely innocuous commercial advertisement, completely devoid of any political content whatsoever. Its message is simple: the Oberweis Dairy provides friendly, convenient home delivery of various dairy products. The Ad contains no reference to any election, political office, legislation, initiative, regulation, news article, or political issue, however defined. The only action it urges is to call the Dairy's toll-free number to order home delivery of products such as milk, eggs, butter, and ice cream.

Clearly, this is a far cry from the "sham issue advertisements"[21] that Congress and the courts were attempting to bring within the FECA jurisdiction as communications intended to a "influence" a federal candidate's election.

B. The GCA has not provided a sufficient set of facts to meet the "material involvement" component of the Conduct Standard.

The conduct standard sets forth six (6) different criteria, any one (1) of which is sufficient to meet the conduct standard for determining coordination. The GCA has relied upon only one of those six criteria[22] in its attempt to meet the conduct standard. And to meet its burden of proof for this single criterion, the GCA proffers not a single fact that demonstrates Oberweis or the committee was "materially" involved in the decisions regarding the production or airing of the Ads. Instead, the GCA summarily concludes this standard has been met based *solely* upon the appearance of Oberweis in the Ad, and relies upon inapplicable Commission advisory opinions as the sole legal

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[21] *See, e g , McConnell v FEC*, 251 F Supp. 2d 176, 351 (D D C , 2002)("*McConnell I*")(Kollar-Kotelly, J , concurring), *Id* at 757 (Leon, J , concurring)

[22] The other five (5) conduct standards consist of the following 1) The candidate requests or suggests the communication be created, produced or distributed, 2) The communication is created, produced or distributed after substantial discussion about the communication between the candidate and those paying for it, 3) The person paying for the communication and the candidate had a common vendor, 4) The communication involves a former employee or independent contractor of the person paying for the communication and the candidate, and 5) Distribution or republication of candidate's campaign materials 11 C F R § 109 21(d)(1), (3)-(6) (2005)

authority for this claim.

The GCA has failed to provide a factual or a legal basis upon which to claim Oberweis was "materially" involved in the Ad and therefore the conduct standard has not been met.

1. The facts demonstrate that neither Oberweis nor the Committee was materially involved in the Ads

The premise of the GCA is that the Ads were produced with Mr. Oberweis appearing in them in order to "influence" his then-pending nomination for the Republican Party U.S. Senate candidacy from Illinois. In an attempt to demonstrate that the purpose of the Ads was to influence the Republican primary election, the Regulations envision considering the facts as to whether or not the candidate or the committee were materially involved in the production and airing of the spots; if so, it would be a component to consider in determining whether the purpose of airing the Ads was to influence the election of Oberweis.[23]

As detailed in section A above, Mr. Oberweis has had a long history of appearing in all forms of advertising for the companies with whom he was affiliated. As Chairman of the board and the third generation namesake of the Dairy, it is not surprising that he would once again be selected to appear in the Ads notwithstanding his Senate candidacy.

That having been said, the mere appearance in the Ads by Mr. Oberweis, in essence, as an actor, does not in an of itself meet any of the six (6) enumerated elements for determining "material involvement" as set forth in the Regulations.[24] The determinations of whether the candidate was materially involved in developing the

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[23] *See generally* FEC, "Explanation & Justification," 68 Fed Reg 424 at 431-41 (Jan 2003)("E&J")

[24] 11 C F R § 103 21 (d)(2)(i)-(vi) (2005)

content of the Ad, the intended audience, the mode of the communication, the specific media outlets to be used, or the timing, frequency, or duration of the airing, must be answered with facts or evidence supporting the claim; yet the GCA offers none.

To the contrary, as set out above, Mr. Oberweis has proffered evidence about his long background of making such appearances in corporate advertisements, both media and print. With specific reference to this Ad, it is abundantly clear that Mr. Oberweis did not participate in the Ad to the level of "material involvement."

- Though he was a longtime advocate of having the Dairy advertise on television, it was the management committee of the Dairy who decided to commence the television advertising.
- It was Bob Renaut, the President and CEO of the Dairy, and Mark Vance the Vice-President of advertising, who interviewed and selected the creative and production company.
- Don Walter and Aspect Media, neither of whom constituted an agent of the Committee nor Mr. Oberweis, created and produced the Ads and selected the time buys.
- Mr. Oberweis was not involved at all, let alone to a "material" level, in the conceptualization, content selection or content development of the Ads.

In view of these facts and the failure of the GCA to claim any facts in support of the six components of meeting the "material involvement" standard, there is no factual basis whatsoever for the Commission to find that Oberweis has met the material involvement components in order to invoke the Conduct Standard.

2 *The Advisory Opinions cited are clearly distinguishable from the current matter and must give way to the factual record establishing no material involvement by Mr Oberweis*

The GCA summarily relies upon Advisory Opinion 2003-25 and subsequent opinions citing it with support (AOs 2004-1 and 2004-29) for the proposition that the mere appearance of a person in a business-related commercial (a "public

communication"), when that person also happens to be a candidate, is "sufficient to conclude that the candidate was materially involved in decisions regarding that communication."[25] As discussed below, those advisory opinions are factually and legally distinguishable from the current issue involving Mr. Oberweis, and cannot and should not be relied upon as the sole basis upon which to determine "material involvement" in this matter.

The rationale for this presumption of material involvement in AO 2004-1 is summarized as follows:

> Given the importance of and potential campaign implications for each public appearance by a Federal candidate, it is *highly implausible* that a Federal candidate would appear in a communication without being materially involved in one or more of the listed decisions regarding the communication. (emphasis added).

Given the factual situation in the three Advisory Opinions cited it was perhaps "highly implausible" that there would not be a material involvement of the candidate. However, that does not automatically cause every appearance by a candidate in a commercial to constitute a *per se* case of material involvement by the candidate. If that is the standard the GCA is attempting to make, it is misplaced. At best the GCA could contend that it raises it to the level of a presumption, but it is clearly a rebuttable presumption; and in this case the facts clearly rebut the conclusion of the GCA. The concept and each of the opinions are distinguishable from the issues in the pending matter.

First, each of the cited advisory opinions involved a candidate who was appearing in the *campaign* advertisement of another candidate (2003-25 and 2004-01) or in a ballot

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[25] Advisory Opinion 2003-25, at 4

initiative (2004-29). In contrast, Oberweis made an appearance in the Ads which were strictly of a commercial business nature: home delivery of milk products. The "potential implications for each public appearance" may be present for a candidate when appearing in other entities' political campaign commercials, but in this case, the script for the sale of home delivery of milk products does not raise it to the same level of concern since it was neither intended to be for political purposes nor to "influence" the Committee's activities or the election of Oberweis.

Second, each of the candidates in the cited opinions affirmatively stated that they would maintain control of and review and approve the script for the advertisements. In AO 2003-25 the requester states that they assume Senator Bayh will approve the script in advance of shooting the advertisement. ("You assume, however, that Senator Bayh or his representative will review the final script 'for appropriateness' in advance of the Senator's appearance in the advertisement.").[26]

In AO 2004-29, the candidate Congressman Akin affirmatively states he would control and approve the script of the advertisement for the ballot initiatives ("You state that Representative Akin wishes to appear in advertisements that will be paid for by a ballot initiative committee, and that he will 'retain control over his appearance in any radio or television advertisement' and would either submit to the ballot committee, any statement to be attributed to him, or would review any statement attributed to him" at page 5).

Similarly, in AO 2004-1, the Opinion clearly states that because agents for the campaign committee of President Bush would review the scripts for accuracy and

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[26] *Id* at 2.

consistency with the President's position, such involvement would constitute a material involvement that is sufficient to meet the conduct standard:

> You state in your request that "[a]gents of the President will review the final script in advance of the President's appearance in the advertisements for legal compliance, factual accuracy, quality, consistency with the President's position and any content that distracts from or distorts the 'endorsement' message that the President wishes to convey." This involvement by the President's agents, whenever it occurs, would constitute material involvement for purposes of the conduct standard.[27]

In each of these opinions there is a specific acknowledgement that the candidate and/or candidate's agent (*e g* , his authorized committee) had the power to review and approve, and therefore exercise authority to edit or change, the scripts. It is on that basis that the opinions found the candidate's involvement to meet the "material involvement" component of the conduct standard. The *facts* in each of those cases supported the finding of material involvement. Invoking the comment cited above from AO 2003-25 that the mere appearance by the candidate would make it "highly implausible" that there was not material involvement was unnecessary to the holding and the findings in the opinion. It was offered as a general rebuttal to the requestor's contention that the appearance of the candidate did not cause the advertisement to meet the material involvement issue. The Commission already had the facts to meet the material involvement component when it stated it was assumed the Bayh committee would review the script in advance for "appropriateness."

In the case of Oberweis, the testimony provides a case that is materially distinguishable from those Advisory Opinions cited above. The "Sunny Side Up" ads were of a commercial nature for a business and did not involve the political committee of

[27] AO 2004-1 at 4

Oberweis. In addition, Oberweis was not appearing in his capacity as a candidate, as was clearly the case with all the other candidates referenced in the cited advisory opinions.

The testimony of Oberweis sets out a completely different fact pattern. He did not have control over the approval of the script or its content. He did not exercise a power of approval or make material edits to the script. His review of the script was not to approve, disapprove or edit, but merely to study it since he was an actor in the Ad. In addition, no agent for the Committee reviewed, approved, or edited the scripts for the Ad. Whereas the facts and acknowledgements by the candidates in the above-referenced advisory opinions demonstrated the candidates' approval of the scripts, the contrary is evidenced by the testimony of Oberweis.

For those reasons, the advisory opinions cited in the GCA provide no precedent upon which the Commission can or should rely for determining whether there was material involvement. The Commission must rely upon the components in the Regulations that are offered as items to consider to determine whether there have been activities by the candidate that demonstrate a "material involvement" in the Ads by the candidate. The facts and the testimony clearly evidence that the actions of Oberweis do not measure up to the level of material involvement. For that reason, the GCA has failed to produce facts that meet the conduct standard.

C. <u>The GCA has failed to narrowly apply the § 109.21 coordination standards to communications that constitute expenditures, which by definition are made to influence an election.</u>

1 The courts are in agreement that the coordination standard under the BCRA amendments was deemed to meet the narrow tailoring standard based upon the fact the communications in question were

found to be of a political nature and attempted to influence the election of a candidate.

Contrary to a statement in the GCA, it is abundantly clear from the language in the District Court's opinion in *McConnell v Federal Election Commission*, 251 F. Supp. 2d 176 (D.D.C., 2002) and Supreme Court's opinion (540 U.S. 93, 2003) that when it came to the issue of "coordination" to determine whether a communication was being made to "influence an election," the scope of the communications that were envisioned to be subject to the BCRA standards were those that were attempting to influence an election not legitimate advertising about issues, let alone the home delivery of dairy products as is the case with Oberweis.

The GCA, in its discussion of the content standard, states that with reference to the Ads, "There is no requirement that the candidate be clearly identified as a candidate running for office or *that the advertisement contain any political message*."[28] The historical context of § 109 and, more importantly, the manner in which the application of the coordination standard has been applied by the courts, clearly demonstrate a narrower interpretation of the standard than the GCA would suggest.

The language at § 109.21 was promulgated in response the provisions of BCRA that expressly repealed the prior regulations that set forth the components to be considered to determine whether an expenditure was coordinated.[29] This previous regulation was adopted in response to the opinion of *FEC v Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999), which had developed a new term: "expressive coordinated

[28] GCA at 3 (emphasis added)

[29] *See* 11 C F R § 100 23 (2000)

expenditures."[30] As the Commission is well aware, in that case the court reviewed communications that were of a general political nature rather than express advocacy, and the court determined which types of activities would constitute "coordination" for purposes of determining whether a communication was an in-kind contribution and therefore subject to a contribution limit, or an independent expenditure not subject to such limits.

This coordination standard was narrowly applied by the court to those communications that were of a "political" nature, not merely any communication that refers to a legislator or a legislative issue. Those regulations at § 100.23 reflected the court's narrow terminology by referring to "coordinated general public political communications."[31] The communications were subject to this "political communication" threshold determination prior to applying the coordination criteria.

Not satisfied with what was viewed by some supporters of BCRA as an overly narrow definition of "coordination," the BCRA amendments expressly repealed the regulations at § 100.23 and directed the Commission to draft new regulations that would define "coordinated communications." The concern by the authors of BCRA was not the scope of the messages to which the coordination standard would apply, *i.e.*, "political communications," but rather the scope of the activities occurring between the entity paying for the communications and the candidate and/or his authorized committee. The Congress stated that the new regulations "shall not require agreement or formal collaboration to establish coordination."[32] This was underscored by Congress'

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30 *FEC v Christian Coalition*, 52 F Supp 2d 45, 85 (D.D C. 1999)

31 *See* E&J, 422

32 BCRA § 214(c) (2002)

specification of four (4) items it wanted the Commission to address—none of which dealt with the scope of the message delivered in the communication, but rather which dealt with the activities that would be considered in determining whether coordination occurred.

This same limitation on the scope of the message is found in the District Court's opinion in *McConnell* in a variety of contexts. The Court noted its understanding that there was a clear delineation between legitimate issue ads and those that, though not expressly advocating a candidate's election or defeat, were intended to influence the candidate's election. It was only this latter type of advertisements that the Court was attempting to bring within the guise of the FECA's jurisdiction.[33]

The Supreme Court's opinion in *McConnell* makes it clear that the application of the "coordination standard" was limited to those communications that were aimed to influence a candidate's election. The standard was not meant to draw such a broad stroke as to include *every* communication in which a candidate may be referenced or appear:

> [The argument that the definition of express advocacy should not be expanded] fails *to the extent that* the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the *functional equivalent* of express advocacy. The justifications for the regulation of express advocacy apply equally to ads aired during those periods *if the ads are intended to influence the voters' decisions and have that effect.*[34]

The Court clearly indicates that its rationale for regulating communications that do not meet the "express advocacy" standard of *Buckley* is based upon the expressed limitation of the content of the communications The Court was directing its attention

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[33] *See, e g*, the concurring opinions of Judge Leon at 793-96 and Judge Kollar-Kotelly at 548-549, and the appendices of both concurring opinions, which discuss in detail the distinction between "genuine" and "sham" issue advertisements.

[34] *McConnell v FEC*, 540 U S 93, 206 (2003)("*McConnell II*")(emphasis added)

only to those communications that were attempting to disguise themselves as "issue ads" when in fact their purpose was to influence a candidate's election. Addressing the issue that express advocacy need not be present for a communication to "influence an election," the Court clearly limits its concerns and its constitutional restrictions to those communications that do not meet the express advocacy standard, yet are still in such a context that they are deemed to be intended to influence an election:

> And although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election.[35]

The decisions of both the Supreme Court and the lower court in *McConnell* recognize that "legitimate" issue ads need not be subjected to the restrictions of the FECA, including the "coordination" standard at issue in this matter. The Supreme Court even explicitly left open that possibility: "[W]e assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads."[36]

As elucidated by the *McConnell* courts, the coordination concern was only to apply in cases in which the communication is first established to be for purposes of influencing an election. The issue of coordination is then and only then addressed, to determine whether it is a contribution and therefore subject to the limits of the Act, or an independent expenditure and not subject to those same contribution limits.

On this point, in explaining that the Court is not limited to the express advocacy words found in *Buckley*, the Court stated:

> BCRA § 202 pre-empts a possible claim that § 315(a)(7)(B) is similarly limited, such that coordinated expenditures for communications that avoid

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[35] *Id* at 193

[36] *Id* at 206, note 88

> express advocacy cannot be counted as contributions. As we explained above, see *supra*, at 83-86, Buckley's narrow interpretation of the term "expenditure" was not a constitutional limitation on Congress' power to regulate federal elections. Accordingly, there is no reason why Congress may not treat *coordinated disbursements for electioneering communications* in the same way it treats all other coordinated expenditures."[37]

Note the Court's careful use of the terms: it does not speak in terms of coordinated expenditures in this context, but rather "coordinated disbursements," and then limits it to such disbursements that are made for electioneering communications. This theme of limiting the restrictions to "electioneering speech," as the Court often refers to it, resonates throughout the opinion. The Court's intent is not to bring communications such as the Dairy's "Sunny Side Up" ads under the scrutiny of the FECA: such communications are yet another step beyond the "legitimate issue ads" that the Court distinguishes from those ads that attempt to influence an election.

Therefore, the GCA's attempts to broaden the scope of the coordination restrictions to any type of communication, by claiming the communication need not "contain any political message," is a bold, but improper expansion of the scope of the application of the coordination standards. The communication must first come within the ambit of communications that attempt to influence an election, whether as an express advocacy message or a "sham issue ad" described by the *McConnell* courts as being for purposes of influencing an election. That threshold has not even been addressed, let alone explained, by the GCA.

Respondents submit that the Dairy's communication seeking its viewers to purchase services for home delivery of milk products is woefully short of the type of

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[37] *Id* at 202

communication envisioned by the courts to be an electioneering type of communication deemed to influence an election, and in turn subject to the "coordination standards" that determine whether it qualifies as an in-kind contribution.

2 The Commission's regulations are currently structured to recognize this content limitation to apply the coordination standards only to those communications that are first adjudged to be for purposes of influencing an election

The coordination regulations at §§ 109.20 and 109.21 currently contain provisions that evidence the Commission's ability to limit the coordination standards application to "electioneering speech" as envisioned by the courts.

The definition of "coordination" is set out at § 109.20 and it is that definition that underlies and must be applied to the § 109.21 definition of "coordinated communication." That regulation speaks in terms of, "Any *expenditure* that is coordinated within the meaning of paragraph (a)...."[38] Moreover, the Supreme Court has construed coordinated communications to be a form of expenditure: "there is no reason why Congress may not treat coordinated disbursements for electioneering communications in the same way it treats *all other coordinated expenditures*."[39]

As the Commission is well aware, the term "expenditure" is a term of art, well defined within the context of the Act and the Regulations. It is limited to payments, distributions, loans or the like made "for the purpose of influencing any election for Federal office."[40] The Commission could have used a broader term here, such as "disbursement," but instead chose a specific term that is by definition limited to those

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[38] 11 C F R § 109 20(b) (2005).

[39] *McConnell II* at 202

[40] 2 U S.C § 431(9)(A)(i) (2005), 11 C.F R § 100 111(a) (2005)

payments or distributions made for purposes of influencing an election. This structure reflects the same limitations captured in the *McConnell* courts' opinions.[41]

The GCA is therefore required to demonstrate, as it would with any communication, that the "Sunny Side Up" commercial was reasonably intended to be made to influence an election. The coordination standard cannot be applied for that purpose lest it lead to a circular argument. The coordination standard may only be applied to determine whether the communication is an in-kind contribution. If not an in-kind contribution, the disbursement for the communication could be classified as an independent expenditure or "electioneering communication," each of which have their respective reporting obligations. But § 109.21 is *not* intended to determine whether or not a particular disbursement meets the threshold criteria that would make it constitute an "expenditure."

The purpose of the § 109.21 was to implement the new BCRA statutory provisions at 2 U.S.C. § 441a (a) (7) (B) (i)-(ii).[42] Respondents are aware of the portion of the E&J that claims the Commission will determine a payment to be an expenditure if it meets the coordination standard.[43] That rationale, however, flies in the face of the plain reading of the statute. The language at § 441a (a) (7) (B) (i)-(ii) speaks of "expenditures made by a person" other than a candidate or committee, that are made in "cooperation, consultation or concert" with a candidate or committee, and says they are to be considered contributions. The § 109.21 regulations define the criteria of what constitutes

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41 The Commission, too, states that its purpose in drafting these regulations was "to limit the new rules to communications whose subject matter is *reasonably related to an election*" E&J at 427 (emphasis added)

42 *See* E&J at 425-27.

43 *Id* at 427

"coordination": i.e., that which equates to "cooperation, consultation or concert." An activity or communication must first be considered an "expenditure" as a threshold issue before reaching the application of the criteria that constitute "coordination." Relying on the definition of "coordination" to define "expenditure" makes no sense from the perspective of statutory construction.

Commissioners Thomas and McDonald apparently concur with this approach and note that first determining whether the communication is made to influence an election is the appropriate statutory construction. In their concurring opinion in A.O. 2003-25 the Commissioners make the argument, and properly so, that when considering the coordinated communication regulations it is the appropriate approach to first determine whether the text of the message constitutes an "expenditure": *i e* , whether it was "for purposes of influencing" or "in connection with" a Federal election.[44]

This modified statutory and regulatory construction is available for the Commission to employ in this matter. As noted above, the Advisory Opinions upon which the GCA is basing its argument are distinguishable from the facts in the pending matter. In addition, as the General Counsel's office so often reminds the Commission, advisory opinions are not binding upon the Commission for enforcement matters pending before it, but rather are only binding upon the Commission relative to the future activities of the requestor and based upon the specific facts as set out in the advisory opinion request.[45]

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[44] *See* AO 2003-25 at 6, note 3 (Com'rs Thomas and McDonald, concurring) It should be noted that, in adopting this construction, other "bright line" elements of the coordination regulations, such as the 120-day rule in § 109 21(c)(4)(iii), would not be affected

[45] 2 U S.C. § 437f(c)(1) (2005)

III. CONCLUSION

In view of the clear fact that the "Sunny Side Up" ads were for commercial business purposes and not "electioneering speech" or an attempt to influence an election, the payment for the Ads did not constitute an expenditure and therefore the Commission need not reach the issue of whether the Ads were coordinated with the candidate or his agents.

In addition, the Advisory Opinions upon which the GCA solely and exclusively rests its argument for determining "material involvement" are factually distinguishable from the case pending in this matter and are of no precedential value. In addition, the Respondent has affirmatively proffered testimony as evidence that, contrary to the assumptions of the GCA, there had been no material involvement by Mr. Oberweis in the production of the Ads.

For these reasons, the Commission should close the file on this matter.

Respectfully submitted,

Paul E. Sullivan
Counsel for Respondents

FEDERAL ELECTION COMMISSION

MUR 5410

RESPONSE TO RTB FINDING

AFFIDAVIT OF

JAMES D. OBERWEIS, SR

Federal Election Commission
MUR 5410

AFFIDAVIT OF JAMES OBERWEIS

NOW COMES James Oberweis, the undersigned affiant being of majority and a resident of the State of Illinois, who does state and testify as follows:

1. I am James Oberweis, and I have personal knowledge of the facts as set forth herein.

2. I am Chairman of Oberweis Dairy, Inc. a for-profit business entity incorporated in the State of Illinois.

3. I appeared in the Oberweis Dairy "Sunny Side Up" advertisement at issue in MUR 5410. However, during the past 20 years, it has been a regular and routine part of my involvement to appear in television and print advertisements for my business enterprises.

4. By way of example, in the early 1980s, the advertising agency for Oberweis Securities suggested that using my image in print advertisements for Oberweis Securities would increase the response to those ads. Pursuant to their advice, my picture appeared in ads for Oberweis Securities in the *Wall Street Journal* and *Barron's* magazine.

5. In addition, I appeared in television advertisements for Oberweis Securities on FNN, the precursor to the CNBC network, in 1986, 1987, and 1988. I found that these ads, like the print ads before them, were an effective means of increasing business for the company.

6. In 1999 or 2000, I was featured in television advertisements for Oberweis.net, the on-line stockbrokerage firm now known as Oberweis Securities. Don Walter, who produced the "Sunny Side Up" ad, had also placed these commercials, buying time slots for them on CNBC and other stations.

7. Contrary to what was stated in the General Counsel's Factual and Legal Analysis, the "Sunny Side Up" advertisement was part of a long history of advertisements by the Dairy, which over the years has included producing a variety of advertisements on cable television. In addition, I recall being featured in a video produced by and about Oberweis Dairy.

8. Since 1998, I have encouraged the management committee of Oberweis Dairy to produce advertisements for the Dairy on broadcast television. However, there was an initial reluctance to do so. During those early

years, there was an expressed concern that Oberweis Dairy did not have enough stores to justify marketing to such a wide segment of the population, and was unable to make home deliveries to certain parts of the Chicago area.

9. By 2003, Oberweis Dairy had a greater number of stores, and had expanded its home delivery service area to include most of the Chicago region. The market base now justified the use of broadcast television advertising.

10. Additionally, serious new restrictions on telemarketing were soon to go into effect via the advent of "do not call" lists. Since in the past Oberweis Dairy had attracted most of its home delivery customers by telemarketing, it needed a new way to continue attracting customers. The Dairy's management decided in early 2003 to produce and air a series of television advertisements.

11. Bob Renaut, the President and CEO of Oberweis Dairy, and/or Mark Vance, V.P. of Marketing, interviewed at least two production companies to create the advertisements. Because Don Walter had done good work on the advertisements for Oberweis Securities and my 2002 Senate Campaign, I had suggested that Don Walter be considered to do the ads, but I was otherwise uninvolved in the selection process. The decision as to who would be hired to produce the ads was made by the Dairy's management committee, not by me.

12. Ultimately, the management did decide to have the ads produced by Don Walter, who was now at Aspect Media, Inc., a company which was never involved in any of my campaign advertising. Furthermore, Don Walter was not involved personally, nor was his company involved, in my 2004 Senate campaign.

13. In the spring of 2003, four television advertisements ("Grandpa," "It's Your Morning," "Love at First Sight," and "Sunny Side Up") were produced for Oberweis Dairy by Aspect Media, Inc. My only involvement in these ads was to appear and act in them. I was not involved in the conceptualization, content selection, or content development of any of the ads. I do not recall seeing any of the scripts for the ads before they were ready to be filmed, and made no changes to the scripts apart from suggesting minor word corrections.

14. In the spring or early summer of 2003, the ads began to be broadcast in the Chicago market. Time buys were selected based on Oberweis Dairy's customer profiles. For example, some of the ads ran during the Oprah Winfrey show, when likely customers were predicted to be watching

television. These time buys were selected solely by the production firm and I did not have any input as to the time buy selection.

SO SAY I.

I swear that the statements contained in this affidavit are true and correct to the best of my knowledge.

James O. Oberweis

James Oberweis
Affiant

On the 14 day of January, 2005, James Oberweis came before me and swore that all the statements in this affidavit were true and correct to the best of his knowledge.

"OFFICIAL SEAL"
SARAH PRAH
Notary Public, State of Illinois
My Commission expires 03/26/05

Sarah Prah

Notary Public

3-26-05

Date my commission expires