BEFORE THE FEDERAL ELECTION COMMISSION

In the Matters of The Viguerie Company and
ConservativeHQ.com, Inc. MUR 5635

RESPONSE BRIEF OF
THE VIGUERIE COMPANY
AND
CONSERVATIVEHQ.COM, INC.

The Viguerie Company (TVC) and ConservativeHQ.com, Inc. (CHQ) jointly respond to the separate briefs filed by the General Counsel on or about May 23, 2005 (the "GC Brief(s)").

I. Introduction.

American Target Advertising, Inc. (ATA) is affiliated with TVC and CHQ by common ownership. ATA filed its brief in this matter on or about May 16, 2005. TVC and CHQ fully incorporate the ATA Brief into this brief. TVC and CHQ also raise and incorporate herein all of the objections made in the ATA Brief.

ATA is a direct marketing agency whose principal, Richard A. Viguerie, pioneered cause-related direct mail fundraising over 40 years ago. His work and the work of his companies literally changed politics because political committees have copied the varied and many techniques and commercial concepts that he first brought to cause-related direct mail fundraising. Where once presidential races were waged with a combined 60,000 donors, now those numbers are dwarfed, and that is all due to Mr. Viguerie and the course of business he and his companies first used and still use.

TVC is the list company; CHQ is the Internet division. The TVC Masterfile contains the names acquired by ATA's direct marketing efforts. Those names are used in prospecting for ATA's other clients, and are rented to third parties, thereby generating income and value in those two different ways.

CHQ also has "names," but they are mostly email addresses but also postal names as well. They are used in a similar manner as the postal names on the TVC file, and thereby generate list rental income. CHQ also conducts Internet fundraising for ATA's clients that wish to raise money through the medium of the Internet.

II. The Extensions of Credit by TVC and CHQ Were Made in Their Ordinary Course of Business.

By the Commission's very own standards, the extensions of credit by TVC and CHQ were made in their ordinary course of business for non-political clients, and are therefore lawful. The fundraising program for the political committee at issue in this matter, Conservative Leadership PAC (CLPAC), was conducted under ATA's no-recourse contract to raise money for an independent expenditure.

The Respondents satisfy the elements of 11 CFR 116.3(c) because they have used no-recourse fundraising contracts for some 98 percent of their non-political clients, mailing over two *billion* letters under that model in the 40+ years of their business. The Respondents virtually created the direct mail fundraising industry, and in its 40+ years have pioneered and established nearly all of the industry standards.

As described in ATA's Brief, the Commission had already authorized the use of no-recourse contracts in AO 1979-36. In that opinion, the direct mail agency (1) extended credit in advance of knowing the results of the fundraising program, (2) incurred third-party invoices in its own name, and (3) the agency and the vendors had no recourse against the political committee if funds raised in the program were insufficient to pay those invoices. The "privity" of the invoices in the present matter and in AO 1979-36 was between the vendors (TVC and CHQ) and the agency (ATA). Therefore, the vendors have no recourse against the committee.

Of all the advisory opinions cited by the GC's Briefs, ***none but*** AO 1979-36 applies to no-recourse direct mail fundraising arrangements in the ordinary course of business. The other AOs, therefore, do not apply to this matter because the standard set in 11 CFR 116.3(c)(3) is extensions of credit "in the commercial vendor's trade or industry." ATA's Brief describes how the GC's Brief mischaracterizes those AOs. In addition, those AOs apply to entirely different trades or industries, such as commercial "900" numbers and the selling of t-shirts, which are distinctly different from the direct mail fundraising profession.

AO 1979-36 acknowledges the industry standard for *direct mail fundraising* going back as far as 1979 of disbursing to clients ***as much as 25 percent of the gross fundraising proceeds*** of the direct mail fundraising program under a no-recourse direct

mail fundraising contract without regard to volume mailed or results of the program. The GC Briefs fail to show that the "industry standards" of the direct mail fundraising industry as recognized and authorized in AO 1979-36 have changed.

T-shirt sellers sell t-shirts. Providers of "900" services have another purpose. Direct mail fundraisers raise money for *their clients*. Inherent in that profession is a professional obligation to disburse money to the clients, as described in ATA's Brief and as recognized in AO 1979-36. The GC Briefs cite AOs other than AO 1979-36 that expressly acknowledge AO 1979-36 as still valid.

The Commission may wish to change the standards for direct mail fundraisers using no-recourse contracts in their ordinary course of business, but that should be done through a rulemaking that expressly invalidates AO 1979-36. The Respondents did not divine that intent from the string of AOs cited in the GC's Briefs that apply to other trades and industries, especially since AO 1979-36 was validated in those AOs.

ATA's previous submissions in this matter showing that the CLPAC program was entirely consistent with its ordinary course of business, including the size of the program's losses, total now well over 400 pages. It is, of course, impossible to document all 40+ years of its ordinary course of business, but it is well documented enough that these extensions of credit and losses were well within ATA/TVC/CHQ's ordinary course of business. The GC Briefs' unsupported insistence that the extensions of credit by ATA/TVC/CHQ were not in their ordinary course of business is simply wrong.

A. The GC Briefs Misconstrue Who Finances the Mail.

The model created by the Respondents which has been copied repeatedly once people understood it, is that the ***mail*** of each respective fundraising program finances the mail ***for that program***. This distinction should be important to, and welcomed by, the Commission. Instead of large corporations or wealthy individuals financing committees, the business model that the Respondents brought to the cause-related direct mail fundraising business is that the mail to many individuals seeking small-dollar donations ***funds itself*** either through netting money on the solicitations, or through the "lifetime value" of the donor files when the solicitations themselves lose money.

The standard of ordinary course of business on its face requires the Commission to give credence to the submissions of the respondents, who certainly know and

understand their ordinary course of business much better than the lawyers at the Commission.

B. The GC Briefs Against TVC and CHQ Suffer Many of the Same Flaws As Described in ATA's Brief.

The GC Briefs against TVC and CHQ bring nothing new to this matter. Instead, they are a continuation of the omissions of material facts and the mischaracterizations of the controlling law that were used in the GC's Brief against ATA.

The numbers presented in the GC Briefs lack proper foundation. As demonstrated in ATA's Brief, perhaps the single most important number (the amount raised) was understated by over $1 million. That demonstrates that the numbers on which the General Counsel asks the Commission to rely lack not only proper substantiation, but are materially untrustworthy if not wrong.

The actual loss of the CLPAC program, after all income and expenses were in through the close of 2001, was $2,209,363 according to ATA's accounting records, not the nearly four million reported in the GC's Briefs.[1]

The alleged numerical violations of program losses represented in the GC's Briefs exceed the difference between (1) income and (2) costs of the program by much more than $2 million.[2] The GC Briefs fail also to credit the higher fees, the value of the names acquired by the respondents, and other forms of valuable consideration, which are omissions of material fact by the General Counsel.[3]

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[1] ATA's Brief, at page 9, shows that the actual income for the CLPAC program was $5,141,307. The initial GC memorandum from October 2004 claims that the program costs were $7,627,079. At worst, the program loss was $2.5 million, but clearly not the $4 million alleged by the recent GC Briefs.

[2] ATA has already objected to the use of such undocumented numbers because the GC Briefs fail to cite sources, and those numbers appear to be wrong.

[3] Also as described in ATA's Brief, the ATA per-piece fees alone for CLPAC were increased to 10 cents per letter. Its standard fee for non-political clients was eight cents (which factors in the "risk"), and for recourse contracts, six cents. Just in ATA's per-piece fees alone, therefore, ATA charged CLPAC more than $440,000 more than its base fee. TVC also charged anywhere from four to 13 cents more per name from its file, therefore, the cumulative higher fees charged to CLPAC were approximately $600,000-plus more than the Respondents' standard fees. The GC Briefs try to allege larger penalties based in part on the higher fees charged by ATA/TVC, which the Respondents suggest is neither the lawful standard nor "fair."

The GC Briefs also fail to argue for a modification of the October 15, 2004 memorandum submitted in this matter by the General Counsel's office. That memo (Exhibit 1, attached hereto), shows that the General Counsel itself admitted that the allegations now raised against TVC and CHQ are wrong as a matter of law and factually.

The October 15, 2004 memorandum clearly shows that the extensions of credit by the vendors, and their resulting inability to collect the balances owed, are not violations of the Act. That memorandum also acknowledged that ATA (and by extension, TVC and CHQ) charged higher fees than what they charged for non-political clients, and got ownership and exclusive marketing rights to the names generated by the CLPAC program.

The failure to ***even recognize*** the General Counsel's own October 15, 2004 memorandum demonstrates a lack of candor now by the General Counsel. The General Counsel does not even try to argue that it might have been wrong in that memorandum; it simply avoids reference to that incredibly damaging contradiction to the GC's Briefs, and seems to hope that the Commission will ignore its existence and its damaging admissions against the validity of the General Counsel's more recent briefs.

C. <u>There is No Recourse against the Committee in a No-Recourse Fundraising Relationship</u>.

Once again, the General Counsel raises a frivolous allegation by insisting that TVC and CHQ should have sued CLPAC or used other recourse under a no-recourse fundraising arrangement. ATA's Brief states that such an argument is refuted by a simple law school reading of the contract. AO 1979-36 expressly authorized such arrangements, and the ATA contract had even more protections for the agency (higher fees, exclusive marketing rights to the names, etc.) than the contract authorized by the Commission in AO 1979-36.

To continue to raise the frivolous allegation that TVC and CHQ should have sued CLPAC demonstrates that the Commission should disregard the credibility of the GC's Briefs.

D. <u>The ATA Brief Describes in Some Detail the Reasons for Mailing in Volume and Why Losses Were Incurred</u>.

Without going into the same level of detail in this brief as the ATA Brief, TVC and CHQ warn again that the Commission should not be fooled by the GC Briefs' finger pointing at the volumes mailed. ATA typically mails in large volume in short periods of time for its non-political clients, and the record demonstrates that vendor losses are sometimes sizeable. The volumes of mail and the losses were entirely consistent with many programs in the 40+ years of these businesses, regardless of whether the General Counsel recognizes that or not.

Prior to mailing for CLPAC, the recent experience of ATA indicated that the CLPAC program would be successful financially. Problems late in the program, however, hurt the fundraising efforts. Those problems were compounded by the 2000 presidential litigation, which hurt substantially the ability to recover those losses by debt-reduction mailings. TVC and CHQ herein rely on the ATA Brief's more detailed and extensive description of all that.

A goal was to make a profit, but as described in the ATA Brief and in some detail herein below, another goal was to develop postal and email names that to this day generate income. These facts are consistent with the ordinary course of business of ATA/TVC/CHQ, and the GC Briefs seem to fail to comprehend, not to mention acknowledge, these facts.

E. The GC's Briefs Ignore the Record: The Losses Incurred by CLPAC Were Not Greater Than Losses for Some of ATA's Nonpolitical Clients.

The record in this matter provides some examples of recent non-political losses that were comparable to, or even larger than, the losses in the CLPAC program. Exhibit 2, attached hereto, is from the March 4, 2004 letter submitted by ATA. That shows losses for three of ATA's clients in years 2002 and 2003. All three clients are 501(c)(4) non-political clients. Exhibit 2 is a portion of that March 4, 2004 letter with the accompanying exhibits to which the partial text refers.

Client T had a 2002 year-end ledger balance of $2,323,411, and the program disbursed $267,100 to the client. Year-end 2003, the ledger balance was $2,501,151, and the client received $350,000. The exhibits to Exhibit 2 show that ATA, CHQ and TVC had balances owed to them alone totaling $1,187,084 and $967,365 for the respective

years (note also the balances owed to the postage lenders, Ben Hart and Mail Fund, Inc., indicating that these postage lenders helped to finance ATA's non-political mail).

Client A had a 2002 year-end ledger balance of $1,377,627, and received $253,532 that year. The 2003 year-end ledger balance was $1,244,640, and the client was disbursed $252,956. The combined invoices owed to ATA/CHQ/TVC were $895,692 and $713,520 respectively (note as well Braintree (Edward Adams) and Mail Fund, Inc. had balances owed).

ATA began mailing for another 501(c)(4) client, "C," in April 2002. The objective of that program was to build a massive grassroots base to petition the Congress to increase federal funding to find cures for cancer and Alzheimer's. The program had a high-profile celebrity signer for the initial prospect letters, and mailed approximately six million letters during the entire program. The "C" program was terminated with its final mailings in March 2003, leaving ATA with a program loss of $1.4 million. The program was done under a no-recourse contract, thus neither ATA nor TVC collected even most of their fees, and were responsible to pay the vendors for their unpaid invoices.

F. The Respondents' Successes Obviously Outnumber Their Failures.

Of course, that the Respondents have been in business for over 40 years indicates, if nothing else, that their ordinary course of business works, even with the fundraising losses that occur in some, even many programs. The Respondent's ordinary course of business is in its model (the "arrangement" as described in ATA's Brief), not in the results because results *cannot be predicted with certainty and are affected by literally thousands of factors.* However, the successes, as in any entrepreneurial business, show that there are certain events, circumstances and the like that do indicate which fundraising programs are *most likely* to succeed.

ATA's oldest client, "H," is a 501(c)(3) organization that provides therapeutic craft kits to hospitalized veterans. The program began over 35 years ago, and the Respondents used their ordinary no-recourse contract. The program initially had large ledger balances, still the client received relatively substantial disbursements from the fundraising program. In the 1990s, however, with the first war in Iraq, the program began to earn more income from donors. With the more recent wars in Afghanistan and Iraq, the program is mailing in its largest numbers and raising the most income.

Currently the program is mailing upwards of 40 million letters annually, raising over $25 million annually and generating annual net income to the client of over $7 million.

A start-up client of ATA's, "S," is based in some ways on the recent successes of the "H" program. "S" is a 501(c)(4) organization set to mail aggressively to generate a grassroots lobby in support of providing additional federal funds to build homes and provide more benefits for disabled veterans. The program, which began this year, will probably mail in excess of 20 million letters this year alone under its no-recourse contract with ATA.

Those are just two examples of when outside circumstances and recent experience dictate when to mail heavily.

G. North for Senate Provides a Reasonably Similar Analogy to CLPAC.

As stated in the ATA Brief, ATA mailed for the North for Senate committee in the 1994 U.S. Senate Race in Virginia. Oliver North was then a former Marine colonel who never held public office and had relatively little personal wealth compared to other U.S. Senate candidates. Colonel North ran against the incumbent, Senator Chuck Robb, himself a former Marine. Senator Robb was well established politically with impressive credentials. The "experts" thought little of the challenge from the political upstart Colonel North.

North for Senate set the record then for the most money raised via direct mail for a U.S. Senate race. Who'd have thought it, given the expert prognostications? ATA was one of four direct mail agencies operating on no-recourse contracts. Of the four, ATA mailed the most, raised the most money, generated the most names for the housefile, and was paid the most in fees.

Similarly to the CLPAC program, the Respondents had relatively recent experience showing that the North for Senate program would succeed financially (Colonel North lost that race). The Respondents had done direct mail fundraising for Colonel North's legal defense fund, showing that he had strong, national grassroots support.

Unquestionably, many of the professional prognosticators and the media would not have thought it wise to mail heavily for the North campaign, but ATA had its own professional data and direct mail fundraising experience that showed otherwise. The

record was established for the most money raised via direct mail for a U.S. Senate race on behalf of a political novice against a highly popular and powerful incumbent, confirming the Respondent's theories.

It is always easy in retrospect to question a direct mail program when it loses money. If it makes money, outsiders either call the direct mailer a "genius" or lucky. The Respondents' ordinary course of business provides no guarantees that the fundraising programs will succeed. However, their volume-based mailing approach is its model, which can lead to some large successes and some large failures; *most* are within that spectrum. Its no-recourse contract does provide safeguards for the failures, including the marketing rights to, and the long-term income from, the names generated.

What the Respondents ***do*** guarantee through their no-recourse contracts used for over 40 years is that if the program loses money, the Respondents, not the client, foot the bill. The long-term income that the names generate from that program is used to pay the losses when they occur. This is a "commercial" model first brought to cause-related marketing by Mr. Viguerie's companies. That model has been copied over and over by the Respondents' competitors, adversaries and many others, which is why files are tens of millions of small-dollar donors larger than they were 40 years ago.

H. Fundraising Losses Are Not a Violation of the Act.

The Respondents have suffered larger program losses, mailed more in shorter periods of time, disbursed fundraising proceeds to its nonprofit clients before all program costs were paid (and even with ledger balances in the millions of dollars) and in every aspect of the CLPAC program conducted its business the same way for over 40 years, which is amply demonstrated in the record.

The GC Briefs attempt to draw a visceral reaction to the size of the program's unintentional losses in an attempt to show that they were intentional. It is apparent from the Commission's own public statements that it may prefer to change the rules that currently authorize no-recourse fundraising contracts. Until the Commission amends its own regulations, however, the Respondents certainly had every reason to believe that the extensions of credit in the CLPAC program were lawful. These fundraising *losses* are not yet a violation of the Act.

III. The CLPAC Names Still Generate Income and Will for the Foreseeable Future.

As explained in ATA's Brief, the GC's Brief failed to even acknowledge, never mind credit financially, the value of the names on the CLPAC housefile. Paragraph 7 of the Contract provide that "[m]ailings under this Agreement shall be defined to include postal and email." Thus, ATA/TVC/CHQ had (1) co-ownership and (2) the exclusive marketing rights to both the postal and email names and addresses on the CLPAC housefile.

These rights acquired by ATA/TVC/CHQ are permanent, which is even more valuable than most of ATA's contracts for its nonpolitical clients that provide for a list license of a limited duration, typically three to four years following the end of the contract. ATA's Brief, at 37, references Judge Posner's description of the value of such names for a direct mail fundraising agency, which may use those names for its other clients' future mailings.

Of even greater value than just access for ATA's own clients, perhaps, is the income those names generate from being rented to third parties, which is why the exclusive marketing rights to the CLPAC names is such a valuable form of long-term consideration. The GC Brief's failure to acknowledge this long-term value and income is fatal to its case, and is an omission of material fact since (1) ATA had repeatedly raised this issue in its prior submissions, and (2) the General Counsel's very own October 15, 2005 memorandum acknowledged the housefile as consideration ("ATA charged CLPAC higher fees, and received rights to and a copy of CLPAC's housefile in exchange for its fundraising services." Exhibit 1, at 4).

Most direct mail files that are not replenished generally lose their value over time by reason of a number of factors. One factor is attrition (some donors die). Other factors involve what's known as "recency and frequency" of donations, change of address, and some others.

The ATA/TVC file is regularly updated by the National Change of Address, thus its addresses are as current as perhaps any cause-oriented fundraising list marketed. Also, there are data processing techniques that allow an "older" list to be matched against more recent donor activity to determine which donors are still "active."

The CLPAC housefile, however, continues to have value, and will continue for the foreseeable future, because among other reasons Senator Clinton remains a national leader and potential Presidential candidate. The CLPAC housefile, therefore, remains quite valuable because it contains many of the most motivated and now easily identifiable conservative donors who either oppose Senator Clinton or oppose the issues with which she is prominently associated.

The GC Brief's failure to acknowledge the value of the CLPAC list seems to further illustrate that it either does not understand direct mail or purposefully avoided this issue and omitted these facts to mislead the Commission.

A. Senator Clinton's May 2005 Fundraising Letter Illustrates What ATA/TVC/CHQ Know about the Long-Term Value of the CLPAC Housefile.

Senator Clinton recently mailed a prospect fundraising letter that validates many of the points already raised by ATA/TVC/CHQ. Exhibit 3 is a letter received May 25, 2005. It is a prospect fundraising letter mailed to Virginia, which indicates its national, as opposed to New York-only, audience. The letter stakes out a national agenda on issues and politics. The recipient (yours truly) has never made a contribution to Friends of Hillary, which is one indicator of a widely cast net of prospecting lists.[4]

The CLPAC housefile is valuable to this day because political committees and other "opponents" of Senator Clinton will continue to rent the names developed by ATA's efforts since the CLPAC donors are proven national donors "against" Senator Clinton, the politician.

More so perhaps, the CLPAC file is valuable because Senator Clinton clearly stakes out an agenda on *issues*, thus cause-related organizations that are not political committees will continue to rent the file for their issues-based mailings in opposition to the issues Senator Clinton raises in her letters, in her speeches and in her many national leadership activities.

[4] Exhibit 3 is also noteworthy for the fact that it is a "survey" package, requesting small-dollar donations, and with a Business Reply Envelope. Some number of the respondents to the letter will reply with no contribution, and the return postage is paid by the committee, which is an expensive technique. ATA's Brief noted that it is a benchmark of prospecting packages to raise 80 percent of their costs, and Exhibit 3 is a good example of a letter not necessarily seeking immediate "profit" but "names" of adherents, which increase the lifetime value of the housefile. The letter also includes many examples of techniques pioneered by the Respondents.

Thus, the CLPAC file will be valuable through not only the 2006 election in which Senator Clinton is running, but the 2008 presidential election since it is the clear public perception that she is the frontrunner for her party's nomination. Those names are very valuable indeed, and more so as long as Senator Clinton is in public life.

That is one reason why it was commercially reasonable for ATA to mail so heavily. The names on the CLPAC file have a superior and longer value than many other lists because of the intensity of the donors and the long-term political and public policy goals of Senator Clinton. In other words, ATA/TVC/CHQ are not even done being compensated for the CLPAC program because the value of those names is actually *increased* as Senator Clinton increases her national role politically and as leader on issues.

Those names are every bit as valuable for 2005 and 2006 as they were in 2000, 2001 and 2002. The respondents expect the value of those names to increase substantially in 2007 and 2008 (and the rental price of those names will be increased as the market bears).

B. The Lifetime Value of the CLPAC Names Compensate ATA/TVC/CHQ for Their Initial Losses.

As stated above, the entire program losses were only $2.2 million, not the four million represented in the GC's Briefs. The October 15, 2004 General Counsel's memorandum gives credit – *as a matter of law* – under the no-recourse contract to the value of various forms a consideration in the contract to compensate ATA/TVC/CHQ for the actual program losses. The respondents respectfully suggest that the Commission need go no further because AO 1979-36 authorizes no-recourse arrangements without knowing the results.[5]

However, it can be demonstrated numerically that the lifetime value of the CLPAC file meets or exceeds the losses of the program.

[5] ATA's Brief distinguishes the poorly designed attempts of the GC's Brief to convince the Commission that subsequent advisory opinions modify AO 1979-36 to the exclusion of this conclusion. The GC's Brief went so far to neglect to mention that two of the opinions cited turned on the fact that the arrangements were expressly not the ordinary course of business for the requesting parties, and that another expressly acknowledged that fundraising entities are distinguished from other types of corporate entities, since fundraising is their business.

There are still over 70,000 postal names that were added to the TVC Masterfile from the CLPAC program. There were Internet addresses added to the CHQ file in addition to the 70,000+ postal names that are now on the TVC Masterfile.

The TVC Mastefile rents out an amount exceeding 40 million names annually. The CLPAC names rent at either $100 or $110 per thousand now, depending on various factors, and that price is likely to increase closer to the next presidential election. The CLPAC file in its entirety rents probably 40 times per year (the number of rentals is higher, but this factors in rentals of less than the entire file).

Through just 2008, therefore, a very conservative approximate "lifetime" value of those names is $2,352,000 (70,000 names times $.105 average price times 40 rentals per year times the eight years those names will be marketed exclusively by ATA/TVC).

This concept of the "lifetime value" of a name is well known by commercial businesses. Companies actually lose money to acquire customers, especially in the magazine and other publishing trades. Those losses are compensated over time. Customer lists are rented, and this provides partial if not complete compensation for those earlier losses.

This is the business model of ATA/TVC/CHQ that has enabled them to suffer through short-term, large fundraising losses for some of its clients for 40+ years. Of course, some programs succeed upfront, and ATA/TVC/CHQ had every reason to believe, as demonstrated in the ATA Brief, that the CLPAC program would not have suffered the program's losses.[6]

Had it not been for the problems late in the fundraising program described briefly above and in more detail in the ATA Brief, the CLPAC fundraising program would have broken even or even generated a $1 to $2 million net program profit at the close of the fundraising. Add to that the value of these names, and the Commission should understand that it was clearly evident to ATA/TVC/CHQ that the CLPAC program was going to be highly profitable.

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[6] ATA's Brief describes how a member of the General Counsel's office chilled the ability of the Respondents to call on others to verify that they use similar practices by stating her intent to have the Commission open investigations against them. Although these practices are standard in the business, certainly this threat of just having to go through an investigation chills the willingness of others to step forward.

Therefore, the General Counsel's failure to even mention the valuable consideration of the file is a serious omission of fact. Whatever the cause of the GC Brief's failure or refusal to honor the facts, the Commissioners should be discouraged by that lack of candor. Such lack of candor is not only misleading, it is legally unethical and perhaps worse since it appears to be an abuse of the special public authority and integrity of the Commission.

As stated in ATA's Brief, direct marketing is a highly skilled profession that takes years of professional study and experience to master. The respondents do not expect the staff lawyers at the Commission to fully understand all of the entrepreneurial elements that direct mail professionals take years to come to understand. However, since its own October 15, 2004 memorandum acknowledges the value of the consideration in a no-recourse contract, the respondents respectfully suggest that this recent omission is, in the best light, disturbing.

(Continued at page 15.)

IV. By the General Counsel's Own Admissions, There Cannot be a Finding of Knowing and Willful Violations of the Act.

ATA's Brief already extensively demonstrates that under the facts, the substantive law and the evidentiary standards, the GC Brief's allegations of knowing and willful violations of the Act are without merit and are frivolous.[7] ATA, in its May 18, 2005 correspondence to the General Counsel (Exhibit 4, attached hereto) urged the General Counsel to withdraw its brief for ethical reasons besides the failed and grossly distorted substantive merits of that brief.

ATA has reasoned that the mischaracterizations of law, omissions of material facts and failed legal arguments demonstrate that the General Counsel has no case. In fact, it appears to the Respondents (and we trust other tribunals would agree) that the misrepresentations of fact and law are designed to mislead the Commission into making findings that are not consistent with the actual merits. Therefore, the GC's Brief violates legal ethics and may be unlawful itself.

A. As a Matter of Law, the Allegations of Knowing and Willful Violations May Not Be Raised Since the General Counsel's Own October 15, 2004 Memorandum States That There Were No Such Violations.

The General Counsel filed its briefs against TVC and CHQ on May 23, after receipt of the ATA Brief and ATA's May 18, 2005 letter (Exhibit 4). Therefore the General Counsel had an opportunity to retract its most recent submissions, but failed to do so.

To continue to raise the same failed allegations of knowing and willful violations at this stage raises the ugly specter that these allegations appear to be raised bad faith especially since the General Counsel was provided notice of those failings.

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[7] The allegation of knowing and willful violations were based on the involvement of the principals in MUR 3841, which proceeded no further than the investigative stage and was dropped. Exhibit 6 to ATA's Brief is a submission in that matter refuting factually the bases for that investigation. Beginning at page 3 of that exhibit, the Respondents provided examples of the client programs showing losses from the tens of thousands to the millions of dollars. It also shows how the Respondents carried and paid for vendor invoices into the high six figures. Thus, it was frivolous for the GC Briefs in this MUR 5635 to bring these allegations when the Respondents already showed in 1994 its ordinary course of business was consistent with the CLPAC program.

The Commissioners must ask themselves, because other tribunals will be asked if this matter were to proceed, how can the General Counsel raise allegations of knowing and willful violations of the Act when, ***by its own admissions, these activities are legally authorized***?

The October 15, 2004 memorandum submitted by the General Counsel (Exhibit 1 hereto) entirely contradicts and undermines not only the General Counsel's more general allegations that the Act was violated in four of the five major allegations raised in this matter,[8] but specifically the allegations of knowing and willful violations. On page three of that memorandum, a major heading reads "Limited Risk Contract as Written ***May Not*** Result in Contributions." (Emphasis added.).[9]

In other words, as a matter of law and as previously admitted by the General Counsel's office, the no-recourse contract does not result in the (1) making of contributions, and (2) the receipt of contributions through extensions of credit under a no-recourse contract now alleged by the General Counsel. That October 2004 memorandum is enlightening because it goes to some length to disagree with and refute the more aggressive and legally incorrect tack taken by the Report of the Audit Division.

If the recent reversal and contradiction of the General Counsel's October 2004 legal conclusions is not proof of bad faith on the part of the General Counsel in now raising these new allegations, we question what could be. That the General Counsel now raises allegations of knowing and willful misconduct ***that its own October 2004 memorandum contradicts*** is, ATA suggests, *prima facie* proof of misconduct ***by the General Counsel.***

B. The General Counsel's Allegations Appear to be Retaliation Against the Respondents

[8] ATA' Brief also demonstrates that the fifth allegation relating to the disbursements to CLPAC fails because of ATA's ordinary course of business, and that had ATA disbursed as much as the Commission authorized in AO 1979-36, CLPAC could have received $800,000 more than what it received.

[9] Respondents urge the Commissioners to read the entire October 2004 memorandum with the caveats described in ATA's Brief that (1) the memorandum's description of the disbursements is flawed, since the contract, like that in AO 1979-36, authorized disbursements before all program costs were paid, and (2) the memorandum's description of the $1,000,000 reserve and the amendment to the contract are not accurate.

PAGES 17 AND 18 HAVE BEEN DELETED

V. Conclusion.

The allegations raised by the GC Briefs against TVC and CHQ fail under the facts, the law and evidentiary standards. In the best light of its case, the General Counsel would have the Commission punish the Respondents for fundraising losses. The Commission's own regulation and rulings authorize no-recourse contracts in the ordinary course of business, and the Respondents have demonstrated in over 400 pages already in the record in this matter that their actions were consistent with their ordinary course of business, despite the sizeable losses.

Before FECA was enacted and long before BCRA, Mr. Viguerie and his companies pioneered and put into practice the functional equivalent of the purposes of those laws. His ordinary course of business increased the national participation of those whom Elihu Root called "plain people of small means of this country." Instead of fundraising from a few wealthy donors and many large corporations, fundraising by groups of all ideologies now reach tens of millions of Americans, asking for small-dollar contributions, and thereby increasing exponentially the actual associational rights of Americans. All that was done with entrepreneurial, constitutional, patriotic and charitable drive before the Commission existed.

Renowned Democrat direct mailer, Hal Malchow, recently described Mr. Viguerie's influence on political direct mail. In the text of his May 5, 2005 speech accepting the 2005 Sisk Award for Direct Marketing Vision, Mr. Malchow said that Mr. Viguerie's "vision changed American politics forever." See Exhibit 5, attached hereto, page 1. Pages one through three show how Mr. Viguerie's business model opened the doors to direct mail fundraising by all groups, parties and ideologies.

Mr. Viguerie's companies opened up national politics like never before to the entire American population through $10, $25, $35, $50 and even no contributions instead of just the wealthy and the powerful. As stated in ATA's Brief, the Commission should applaud this innovation, not try to punish one of the fundraising losses. In these past 40+ years, there have been comparably sizeable and even larger fundraising losses outside of the Commission's jurisdiction.

The Respondents respectfully suggest that the GC Briefs fail to account for the entrepreneurial and professional elements of direct mail fundraising. Worse than that, they have presented incorrect numbers that would artificially inflate the alleged penalties, omitted material facts, and mischaracterized the law. All of that is done with what the Respondents can show as a *prima facie* agenda of an unlawful and perhaps malicious case.

The Respondents understand the seriousness of this matter, and respectfully urge the Commission to understand the Respondents' seriousness about what the Respondents can demonstrate to be an unlawful case being brought thus far.

The Respondents believe that it is indeed a vague and distorted interpretation of 11 CFR 116.3 that suggests the same ordinary course of business was lawful when it set a fundraising record in 1994, but unlawful when it "lost" money in 2000.

The Respondents again respectfully suggest that if the Commission, as a policy, wishes to prevent unintentional *losses* under no-recourse fundraising contracts, it should amend its own regulations through the rulemaking process. Clearly, the Respondents thought that they were acting within the law, and believe that they have demonstrated in great detail that they were in fact operating not only within the law, but consistent with the underlying purposes of the Act.

Respectfully submitted,

Mark J. Fitzgibbons
Counsel for The Viguerie Company and CHQ.com, Inc.
9625 Surveyor Court, Suite 400
Manassas, Virginia 20110
(703) 392-7676

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