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for Every Child

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Executive Director

HAND-DELIVERY

November 14, 2006

Kim Collins
Office of General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
2006 NOV 14 PM 4:20

Re: MUR 5855

Dear Ms. Collins:

On November 1, 2006, John Wilson, Treasurer of The NEA Fund for Children and Public Education ("The NEA Fund"), received a letter dated October 27, 2006, from Jeff S. Jordan, Supervisory Attorney of Complaints Examination & Legal Administration for the Federal Election Commission ("FEC"), stating that his office had received a complaint ("Complaint") alleging that The NEA Fund may have violated the Federal Election Campaign Act of 1971, as amended ("FECA"). I have been authorized to represent The NEA Fund in this matter, and this response is submitted on its behalf.

Enclosed with the letter from Mr. Jordan was the Complaint from the J.D. Hayworth for Congress committee ("Hayworth committee") alleging that The NEA Fund had "fail[ed] to file a proper report of independent expenditures within 48 hours of making such expenditures, in violation of the requirements in the Act (2 U.S.C. § 434) and FEC regulations (11 C.F.R. § 104.3 and § 104.4)." The Complaint stated that "[o]n or before October 18, 2006, NEA (sic) began airing television advertisements "attacking J.D. Hayworth," and further alleged, "There is no report of NEA (sic) independent expenditures for any television advertising sponsored by NEA (sic) as of the date of this complaint (October 20, 2006)."¹ (Emphasis in the original.) The Complaint concludes that "NEA (sic) has failed to comply with the requirements of both the statute and the FEC's regulations by failing to provide adequate and proper notice within 48 hours of the independent expenditures for television advertising."

¹ Not to belabor the obvious, but the television ads in question were paid for by NEA's political action committee, The NEA Fund, and not by NEA itself. We presume that the Hayworth committee recognizes this fact, since it has filed its charge against The NEA Fund rather than NEA, and we make note of this only to eliminate any potential confusion.

In brief, the Complaint is entirely groundless, to the point of being frivolous. It appears to be merely part of a larger effort to bully a television station that broadcasts in Arizona's 5th Congressional District into pulling from the air an independent expenditure paid for by The NEA Fund that was critical of Congressman Hayworth. In that sense, the Complaint would be the functional equivalent of an abuse of the process, and should be summarily dismissed by the Commission.

FACTS

The NEA Fund paid several vendors to produce and disseminate television advertisements in both English and Spanish that were critical of Congressman Hayworth and advocated the election of his opponent, Harry Mitchell. These advertisements were created and produced independent of any candidate, candidate's committee, or political party committee in compliance with 2 U.S.C. § 431(17) and 11 C.F.R. § 109.21. Accordingly, they qualified as independent expenditures, as that term is defined under FECA. On October 18, 2006, KTVK-TV, a television station broadcasting in an area that included Arizona's 5th Congressional District – currently represented by Congressman Hayworth – began airing such advertisements. *See* Attachment A. On October 20, 2006, The NEA Fund reported the expenditures associated with those television advertisements. The Commission confirmed receiving that report at 6:13 p.m. on October 20. *See* Attachment B.

On October 18, 2006, the day that the aforementioned television advertisements began airing, legal counsel for the Hayworth committee wrote a letter to the manager of KTVK-TV demanding that it cease broadcasting the ads on the grounds that they allegedly contained false and misleading statements. While that letter focused primarily on legal principles stemming from the Federal Communications Act, the letter added the following:

[T]he NEA has falsified its required report, which was to have been filed within 24 hours of the airing of this advertisement.² A complaint is being filed today at the FEC against the NEA for its false statements related to this expenditure at your station. We will furnish a copy of the FEC complaint upon filing this afternoon. Clearly, the NEA has not been honest and forthcoming with regard to . . . the . . . legally mandated reporting requirements related to this advertisement.

See Attachment C, page 3 of the letter to the station manager.

² Apparently between the time the letter to the station manager was sent, *see* Attachment C, and the date of the Complaint that serves as the basis for MUR 5855, legal counsel for the Hayworth Committee realized that the 24-hour reporting period did not begin until October 19, 2006 – a day after the television ads in question began to air – and so for purposes of the Complaint changed the alleged violation from a failure to report within 24 hours of airing to a failure to report within 48 hours of airing.

DISCUSSION

As a result of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), FECA now provides that every person -- including political action committees ("PACs") -- that makes independent expenditures aggregating \$10,000 or more in connection with an election up to and including the 20th day before the election must report such expenditures to the Commission within 48 hours of the date on which the expenditure was publicly disseminated or distributed. 2 U.S.C. § 434(g)(2)(A). FEC regulations provide that the report must be received by the Commission by no later than "11:59 p.m. Eastern Standard/Daylight Time on the second day following the date on which a communication that constitutes an independent expenditure is publicly distributed or otherwise publicly disseminated." 11 C.F.R. § 104.4(b)(2).

In the instant case, the television advertisements in question began to air on October 18, 2006. *See* Attachment A. Accordingly, The NEA Fund had until 11:59 p.m. on October 20, 2006, to provide the Commission with its report disclosing the expenditures made in connection with that communication. As the Commission's own records clearly show, The NEA Fund submitted that report on October 20, 2006, and the Commission confirmed receiving it at 6:13 p.m. on that date. *See* Attachment B. Thus, there can be no question but that The NEA Fund complied with the 48-hour reporting requirement.

At first blush, it seems puzzling, to say the least, as to why the Hayworth committee filed the Complaint when it is so clear that The NEA Fund did not commit the violation being alleged. In addition, according to the date-time stamp on the face of the Complaint, the Commission's mail operations center received the Complaint at 12:36 p.m. on October 20, meaning that the deadline for filing the 48-hour report was still nearly 12 hours away.

We submit that allegations in the Complaint are disingenuous, and that the Hayworth committee filed the Complaint merely as part of a multi-faceted strategy to pressure KTVK-TV into pulling The NEA Fund's television advertisements from the air. In its October 18 letter to the KTVK-TV station manager, from which we quoted *supra*, the Hayworth committee stated that it would be filing a complaint with the FEC *that day* charging The NEA Fund with failure to file the required report, and that the committee would furnish the station manager with a copy of the complaint once it was filed. *See* Attachment C at p. 3. As we have previously noted, that letter erroneously asserted that The NEA Fund was subject to a 24-hour reporting requirement. However, even assuming *arguendo* that the 24-hour reporting requirement had been in effect at that time, it would not have expired until 11:59 p.m. *on the following day*, October 19. *See* 11 C.F.R. s 104.4(c). Thus, regardless of which provision of FECA served as the basis for the Hayworth committee's complaint against The NEA Fund, the committee intended to file the complaint prematurely.

27044170540

CONCLUSION

The Complaint alleges that The NEA Fund failed to file a 48-hour report disclosing an independent expenditure in the form of television advertisements opposing the re-election of Congressman J.D. Hayworth and supporting the election of his challenger. However, as the foregoing discussion makes clear, the Commission's own records demonstrate conclusively that this charge is factually inaccurate, and that The NEA Fund did timely file that report. Accordingly, the Commission must dismiss the Complaint.

Sincerely,



Richard B. Wilkof

Counsel to The NEA Fund for Children and Public Education

Enclosures

27044170541

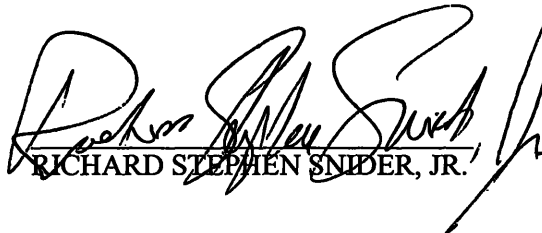
BEFORE THE FEDERAL ELECTION COMMISSION:
MUR 5855 (NEA FUND FOR CHILDREN AND PUBLIC EDUCATION)

AFFIDAVIT OF RICHARD STEPHEN SNIDER, JR.

Richard Stephen Snider, Jr., first being duly sworn upon his oath states the following:

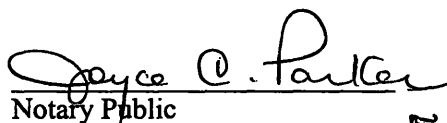
1. I hold the position of Manager of Advertising and Broadcasting in the Public Relations department of the National Education Association ("NEA"), and work in NEA's headquarters in Washington, DC. I have held this position since being hired by NEA in April 2001.
2. During the 2006 election campaign, through our media consultant, Media Strategies and Research, I placed the independent expenditure television advertisement that is at issue in this Matter Under Review. The advertisement began to air on October 18, 2006.

I affirm, under the penalties of perjury, that the foregoing statements are true.


RICHARD STEPHEN SNIDER, JR.

City of Washington)
) ss
District of Columbia)

Sworn to before me this 14th day of November, ^{2006 (JP)}~~2000~~.


Notary Public

My Commission Expires: 4-14-2009

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FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

2006 NOV 14 P 5:07

27044170542



RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

2006 NOV 14 PM 5:06

SCHEDULE E

INDEPENDENT EXPENDITURES

FILING FEC-247255

**Committee: NEA FUND FOR CHILDREN AND PUBLIC
EDUCATION**

Media Strategies and Research

9990 Lee Hwy
Suite 220
Fairfax, Virginia 22030

Purpose of Expenditure: TV Advertising
This Committee OPPOSES The Following Candidate: J.D. Hayworth
Candidate ID: H4AZ06052
Office Sought: House of Representatives
State is Arizona in District 5
Date Expended = 10/18/2006
Person Completing Form: V J Krishna
Date Signed = 10/20/2006

Amount Expended = \$308433.00
Calendar YTD Per Election for Office Sought = \$451452.99

IMS Inc.

1010 Vermont Ave. NW
Suite 200
Washington, DC 20005

27044170543

Purpose of Expenditure: TV Advertising
This Committee OPPOSES The Following Candidate: J.D. Hayworth
Candidate ID: H4AZ06052
Office Sought: House of Representatives
State is Arizona in District 5
Date Expended = 10/18/2006
Person Completing Form: V J Krishna
Date Signed = 10/20/2006

Amount Expended = \$233.00
Calendar YTD Per Election for Office Sought = \$451685.99

Creative Logic

3127 51st Place NW
Washington, DC 20016

Purpose of Expenditure: TV Advertising
This Committee OPPOSES The Following Candidate: J.D. Hayworth
Candidate ID: H4AZ06052
Office Sought: House of Representatives
State is Arizona in District 5
Date Expended = 10/18/2006
Person Completing Form: V J Krishna
Date Signed = 10/20/2006

Amount Expended = \$10375.00
Calendar YTD Per Election for Office Sought = \$462060.99

Chambers Lopez & Gaitan LLC

P.O. Box 5539
Arlington, Virginia 22205

Purpose of Expenditure: TV Advertising
This Committee OPPOSES The Following Candidate: J.D. Hayworth
Candidate ID: H4AZ06052
Office Sought: House of Representatives
State is Arizona in District 5
Date Expended = 10/18/2006
Person Completing Form: V J Krishna
Date Signed = 10/20/2006

Amount Expended = \$1334.00
Calendar YTD Per Election for Office Sought = \$463394.99

Andres Ramirez

4001 China Cloud Drive
North Las Vegas, Nevada 89031

Purpose of Expenditure: TV Advertising
This Committee OPPOSES The Following Candidate: J.D. Hayworth
Candidate ID: H4AZ06052
Office Sought: House of Representatives
State is Arizona in District 5
Date Expended = 10/18/2006
Person Completing Form: V J Krishna
Date Signed = 10/20/2006

Amount Expended = \$241.00
Calendar YTD Per Election for Office Sought = \$463635.99

Interface Media Group

1233 20th St. NW
Washington, DC 20036

Purpose of Expenditure: TV Advertising
This Committee OPPOSES The Following Candidate: J.D. Hayworth
Candidate ID: H4AZ06052
Office Sought: House of Representatives
State is Arizona in District 5
Date Expended = 10/18/2006
Person Completing Form: V J Krishna
Date Signed = 10/20/2006

Amount Expended = \$581.00
Calendar YTD Per Election for Office Sought = \$464216.99

Trice Talent Services

905 West 7th Street
342
Frederick, Maryland 217018527

Purpose of Expenditure: TV Advertising
This Committee OPPOSES The Following Candidate: J.D. Hayworth
Candidate ID: H4AZ06052

Office Sought: House of Representatives
State is Arizona in District 5
Date Expended = 10/18/2006
Person Completing Form: V J Krishna
Date Signed = 10/20/2006

Amount Expended = \$5778.00
Calendar YTD Per Election for Office Sought = \$469994.99

National Education Association

1201 16th Street NW
Washington, DC 20036

Purpose of Expenditure: Payment for staff services
This Committee OPPOSES The Following Candidate: J.D. Hayworth
Candidate ID: H4AZ06052
Office Sought: House of Representatives
State is Arizona in District 5
Date Expended = 10/18/2006
Person Completing Form: V J Krishna
Date Signed = 10/20/2006

Amount Expended = \$769.00
Calendar YTD Per Election for Office Sought = \$470763.99

Media Strategies and Research

9990 Lee Hwy
Suite 220
Fairfax, Virginia 22030

Purpose of Expenditure: TV Advertising
This Committee SUPPORTS The Following Candidate: Harry Mitchell
Candidate ID: H6AZ05067
Office Sought: House of Representatives
State is Arizona in District 5
Date Expended = 10/18/2006
Person Completing Form: V J Krishna
Date Signed = 10/20/2006

Amount Expended = \$154217.00
Calendar YTD Per Election for Office Sought = \$233745.00

IMS Inc.

1010 Vermont Ave. NW
Suite 200
Washington, DC 20005

Purpose of Expenditure: TV Advertising
This Committee SUPPORTS The Following Candidate: Harry Mitchell
Candidate ID: H6AZ05067
Office Sought: House of Representatives
State is Arizona in District 5
Date Expended = 10/18/2006
Person Completing Form: V J Krishna
Date Signed = 10/20/2006

Amount Expended = \$117.00
Calendar YTD Per Election for Office Sought = \$233862.00

Creative Logic

3127 51st Place NW
Washington, DC 20016

Purpose of Expenditure: TV Advertising
This Committee SUPPORTS The Following Candidate: Harry Mitchell
Candidate ID: H6AZ05067
Office Sought: House of Representatives
State is Arizona in District 5
Date Expended = 10/18/2006
Person Completing Form: V J Krishna
Date Signed = 10/20/2006

Amount Expended = \$5188.00
Calendar YTD Per Election for Office Sought = \$239050.00

Chambers Lopez & Gaitan LLC

P.O. Box 5539
Arlington, Virginia 22205

Purpose of Expenditure: TV Advertising
This Committee SUPPORTS The Following Candidate: Harry Mitchell
Candidate ID: H6AZ05067
Office Sought: House of Representatives
State is Arizona in District 5

Date Expended = 10/18/2006
Person Completing Form: V J Krishna
Date Signed = 10/20/2006

Amount Expended = \$666.00
Calendar YTD Per Election for Office Sought = \$239716.00

Andres Ramirez

4001 China Cloud Drive
North Las Vegas, Nevada 89031

Purpose of Expenditure: TV Advertising
This Committee SUPPORTS The Following Candidate: Harry Mitchell
Candidate ID: H6AZ05067
Office Sought: House of Representatives
State is Arizona in District 5
Date Expended = 10/18/2006
Person Completing Form: V J Krishna
Date Signed = 10/20/2006

Amount Expended = \$121.00
Calendar YTD Per Election for Office Sought = \$239837.00

Interface Media Group

1233 20th St. NW
Washington, DC 20036

Purpose of Expenditure: TV Advertising
This Committee SUPPORTS The Following Candidate: Harry Mitchell
Candidate ID: H6AZ05067
Office Sought: House of Representatives
State is Arizona in District 5
Date Expended = 10/18/2006
Person Completing Form: V J Krishna
Date Signed = 10/20/2006

Amount Expended = \$291.00
Calendar YTD Per Election for Office Sought = \$240128.00

Trice Talent Services

905 West 7th Street
342
Frederick, Maryland 217018527

Purpose of Expenditure: TV Advertising
This Committee SUPPORTS The Following Candidate: Harry Mitchell
Candidate ID: H6AZ05067
Office Sought: House of Representatives
State is Arizona in District 5
Date Expended = 10/18/2006
Person Completing Form: V J Krishna
Date Signed = 10/20/2006

Amount Expended = \$2889.00
Calendar YTD Per Election for Office Sought = \$243017.00

National Education Association

1201 16th Street NW
Washington, DC 20036

Purpose of Expenditure: Payment for staff services
This Committee SUPPORTS The Following Candidate: Harry Mitchell
Candidate ID: H6AZ05067
Office Sought: House of Representatives
State is Arizona in District 5
Date Expended = 10/18/2006
Person Completing Form: V J Krishna
Date Signed = 10/20/2006

Amount Expended = \$384.00
Calendar YTD Per Election for Office Sought = \$243401.00

Subtotal of Itemized Independent Expenditures = \$491617.00
Subtotal of Unitemized Independent Expenditures = \$0.00
Total Expenditures This Period = \$491617.00



Generated Fri Oct 20 18:13:25 2006

27044170550

10/19/2006 14:09 FAX 602 207 3597

10/19/2006 10:51 4806141162

JTV SALES

JD HAYWORTH 4 CONG

0002

PAGE 01

FOLEY
FOLEY & LARDNER LLP

ATTORNEYS AT LAW
WASHINGTON HARBOUR
3000 K STREET, N.W., SUITE 500
WASHINGTON, D.C. 20007-5143
202.672.5300
202.672.5399
WWW.FOLEY.COM

cmitchell@foley.com
202.295.4081

MEMORANDUM

URGENT - VIA FACSIMILE

TO: Station Manager

FROM: Cleta Mitchell, Esq.
Counsel to JD Hayworth for Congress
Foley & Lardner LLP

DATE: October 18, 2006

RE: False Advertisement by NEA

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
1 2006 NOV 14 P 5:07
CLIENT MATTER NUMBER
033017418

This firm serves as legal counsel to the JD Hayworth for Congress ("the Committee"), the principal campaign committee of Rep. J.D. Hayworth, Republican congressman for Arizona's 5th congressional district.

I have been advised this evening that your station has aired, is planning to air or is continuing to air, one or more political advertisement(s) produced and/or paid for by the National Education Association Fund for Children and Public Education ("NEA"). The advertisement contains egregiously false and misleading statements regarding Rep. Hayworth's legislative voting records and public position(s) on certain policy and legislative issues, more fully detailed below.

Because of the falsehoods contained in the advertisement, we respectfully demand that the advertisement be stopped immediately and that no further airings on your station be allowed.

The legal basis for our challenge is simple: the sponsor of the advertisement is *not* a federal candidate. As such, this is *not* political advertisement as that term is defined by the Federal Communications Act. Your station is not protected from legal liability for airing false and misleading advertisement sponsored by the NEA.

WASH_1708681.1

NO. 925 P. 3

OCT. 19. 2006 - 5:30PM MEDIA STRATEGIES

27044170551



The false and misleading content in the advertisement is not protected from content review and reasonable access requirements as would be applicable to candidate-sponsored political advertising under Section 312(a)(7) of the Federal Communications Act.

Under Columbia Broadcasting System, 412 U.S. 94 (1973), and its progeny, and Federal Communication Commission precedents, your station is not obligated to air any advertisement from the NEA. See National Conservative Political Action Comm., 89 FCC 2d 626 (1982). These precedents hold that third-party spenders such as these sponsors do not have a guaranteed right of access to air their advertisement on your station.

Your station as a broadcast licensee has a duty to review and to eliminate any false, misleading, or deceptive materials contained in advertising. As the Court in *Cosmopolitan Broadcasting Corporation v. Federal Communications Commission*, Appellee, *American Civil Liberties Union Of New Jersey*, Appellant, *Cosmopolitan Broadcasting Corporation*, Appellant, v. *Federal Communications Commission*, Appellee, 581 F.2d 917 (CA: DC Cir 1987) found, a licensee who fails to properly supervise and stop the airing of (among other things) "false and misleading advertising" can properly be divested of its license for the reason that even seemingly "inconsequential" violations are "probative of an underlying abdication of licensee responsibility." See *Continental Broadcasting, Inc.*, 15 FCC 2d 120, 129-31 (1968), aff'd, 142 U.S. App.D.C. 70, 439 F.2d 580 (1971).

The JD Hayworth Committee submits that your duty includes taking reasonable steps to check the validity of non-candidate commercials and that advertisements containing material misstatements of facts, such as the advertisement at issue here, necessitate the exercise of both your right and your responsibility as a licensee to refuse to air such commercials. We further request that you reject any attempts by the NEA to purchase time for the future airing of the advertisement because of the material misstatements of fact in the ad.

The particular falsehoods and the documented facts regarding Rep. Hayworth's legislative voting record(s) demonstrating the false claims of the advertisement with regard to the issues in the ad follows below.

If your station does not stop airing this advertisement after gaining knowledge that it contains false and misleading statements, you are subjecting your station to potential liability. See 47 U.S.C. § 315 (providing immunity to stations for statements made in legally qualified candidate ads but not extending such protections to third-party ads).

Attached to this letter is an annotated script for the advertisement highlighting the false and misleading statements contained in the advertisement. Since the advertisement at issue contains false and misleading statements, we request that your station immediately cease its airing.

27044170552

10/19/2006 14:09 FAX 602 207 3597

3TV SALES

0004

10/19/2006 10:51 4806141162

JD HAYWORTH 4 CONG

PAGE 03

FOLEY

FOLEY & LARDNER LLP

Should your station insist on continuing to air the advertisement, we request an explanation as to the legal and factual basis of your decision.

Further, please be advised that the NEA has falsified its required report which was to have been filed within 24 hours of the airing of this advertisement. A complaint is being filed today at the FEC against the NEA for its false statements related to this expenditure at your station. We will furnish a copy of the FEC complaint upon filing this afternoon. Clearly, the NEA has not been honest and forthcoming with regard to both the content and legally mandated reporting related to this advertisement.

Please review the documentation hereby provided and contact me at your earliest convenience at (202) 295-4081 to advise as to your station's action(s) with respect to cessation of the airing of the advertisement.

Thank you for your immediate attention to this matter. I will anticipate your prompt response.

CMI:cmi

27044170553