FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

SENSITIVE

FIRST GENERAL COUNSEL'S REPORT

MUR: 5879
DATE COMPLAINT FILED: November 6, 2006
DATE OF NOTIFICATION: November 14, 2006
LAST RESPONSE RECEIVED: January 8, 2007
DATE ACTIVATED: April 26, 2007

EXPIRATION OF SOL: October 31, 2011

COMPLAINANT:	J.D. Hayworth for Congress
RESPONDENTS:	Harry Mitchell for Congress and John Bebbling, in his official capacity as treasurer Democratic Congressional Campaign Committee and Brian L. Wolff, in his official capacity as treasurer
RELEVANT STATUTES AND REGULATIONS:	2 U.S.C. § 434(b) 2 U.S.C. § 441a 11 C.F.R. § 100.26 11 C.F.R. § 100.29 11 C.F.R. § 109.21 11 C.F.R. § 109.23 11 C.F.R. § 109.37
INTERNAL REPORTS CHECKED:	FEC Disclosure Reports
FEDERAL AGENCIES CHECKED:	None

I. INTRODUCTION

This matter concerns alleged coordination between the Democratic Congressional Campaign Committee ("DCCC") and Harry Mitchell for Congress ("Mitchell Committee"), which was Harry Mitchell's 2006 principal campaign committee for the U.S. House of Representatives for Arizona's Fifth Congressional District. Complainant, J.D. Hayworth for Congress, alleges that the DCCC made an excessive in-kind contribution to the Mitchell

Committee in the amount of $160,358.31 when it aired a television advertisement in support of, and featuring, federal candidate Harry Mitchell, and improperly reported the disbursement made in connection with the advertisement as an independent expenditure to the Federal Election Commission ("Commission"). Complainant's allegations are predicated on the assertion that the Mitchell Committee was materially involved in the creation of the DCCC's advertisement because the advertisement utilizes the same footage of Mitchell that the Mitchell Committee used in one of its own advertisements.

Because it appears that the Mitchell Committee produced the original footage that was used in the DCCC advertisement, we recommend that the Commission find reason to believe that the DCCC violated 2 U.S.C. §§ 434(b) and 441a(a) in connection with its republication of the video footage of the candidate. Further, as discussed in detail below, it appears that the costs associated with the advertisement may have also constituted a coordinated communication between the DCCC and the Mitchell Committee. Therefore, we recommend the Commission find reason to believe that the DCCC made an excessive in-kind contribution and an excessive coordinated party expenditure in the form of a coordinated communication in violation of 2 U.S.C. § 441a(a) and 441a(d), and that the DCCC violated 2 U.S.C. § 434(b) by failing to properly report the communication in its reports to the Commission. We also recommend the Commission find reason to believe that the Mitchell Committee violated 2 U.S.C. §§ 441a(f) and 434(b) by knowingly accepting an excessive contribution from the DCCC and failing to report the contribution in its disclosure reports to the Commission.

II. FACTUAL SUMMARY

On October 31, 2006, the DCCC aired a television advertisement that included footage of Arizona Congressional candidate Harry Mitchell. Mitchell appears in at least three frames of the advertisement, which references an endorsement Mitchell received from *The Arizona Republic*. The next day, on November 1, 2006, the Mitchell Committee aired a television advertisement that appears to include the same footage of Mitchell that the DCCC used in the advertisement that aired 24 hours earlier, and also references the endorsement of Mitchell by *The Arizona Republic*. The overlapping content appears to consist of three screen shots that include identical footage of Mitchell, but display slightly different text on the screen.[1] *See* Complaint, Ex. 1 (Attachment 1).

The complaint alleges that the Mitchell campaign was materially involved in the production of the DCCC advertisement. To support the allegations, the complaint notes that the DCCC and the Mitchell Committee both use the same video footage in two separate television advertisements that aired within 24 hours of each other. Complaint at 2 and Ex. 1. The complaint also asserts that several scenes in the advertisements "were clearly produced in a manner that would necessarily have required Harry Mitchell's material involvement" because he was featured prominently in those scenes. Complaint at 2.

The Mitchell Committee denies that it coordinated the DCCC's October 31, 2006 advertisement, and adds that its own November 1, 2006 advertisement was created independently of the DCCC. The Committee further explains that its own advertisement was created in

[1] The complaint attached screen shots of three frames from the DCCC and Mitchell Committee advertisements. These screen shots confirm that each used the same video footage featuring Harry Mitchell. Complaint, Ex. 1. The Mitchell campaign's television advertisement is still available on its website, along with another advertisement utilizing much of the same footage. *See* http://harry2006.com/Videos.asp (last visited August 13, 2007). However, the DCCC's television advertisement could not be located through publicly available sources.

response to the endorsement Mitchell received from *The Arizona Republic* on October 27, 2006, and attributed the "somewhat similar ads" between the committees as "merely a coincidence." Mitchell Response at 2; *Mitchell over the bully*, ARIZONA REPUBLIC, October 27, 2006, at 8. The Mitchell Committee's response, however, does not in any way discuss the genesis of the video footage at issue. A press report attached to the complaint indicates that a Mitchell Committee representative publicly acknowledged that "[the Mitchell Committee] shot the footage some time ago and placed it on an internet server, making it available to anyone."[2] Complaint, Ex. 2.

In its response to the complaint, the DCCC refers to the possible "visual or thematic similarity" of the advertisements, but like the Mitchell Committee, it fails to discuss any details of the footage, including the source of the footage. The DCCC denies that the advertisement was coordinated with the Mitchell campaign and explains that the advertisement was produced through its independent expenditure program, which worked behind a firewall that was intended to prevent "access to information about candidate plans, projects, activities or needs." DCCC Response at 2 and 4. In an affidavit attached to the DCCC response, the Chief Operating Officer of the DCCC explained that during the 2006 election cycle, the DCCC adopted written procedures that it called the "wall" that were "designed to ensure that nonpublic information about a campaign's plans, projects, activities or needs would not be conveyed to those involved in preparing and distributing the DCCC's independent expenditures." Habershaw Aff. ¶ 2. Those written procedures were distributed to all staff and were also available for review by staff on the DCCC's computer system. *Id.* ¶ 5. Under its firewall procedures, individuals assigned to the DCCC's independent expenditure program were prohibited from having contact with

[2] It is unclear whether this representative was referring to the raw footage of the candidate used in both advertisements, or the resulting advertisement produced by the Mitchell Committee.

campaigns and agents of those campaigns "who would benefit from the independent expenditures" and from discussing those campaigns with DCCC staff outside of the independent expenditure program. *Id.* ¶ 3. The DCCC's firewall procedures also limited access to the DCCC's general files and required vendors to comply with the procedures as well. *Id.* ¶ 4.

III. ANALYSIS

A. REPUBLICATION OF CANDIDATE CAMPAIGN MATERIALS

The Commission's regulations state that the republication of any broadcast or other form of campaign materials prepared by the candidate's authorized committee shall be considered a contribution for the purposes of contribution limitations and reporting responsibilities of the person making the expenditure. 11 C.F.R. § 109.23. However, the candidate who prepared the campaign materials does not receive or accept an in-kind contribution, and is not required to report an expenditure, unless the dissemination, distribution, or republication of campaign materials is a coordinated communication. *Id.*; *see infra* pp. 7-12. Commission regulations also set forth a number of uses of campaign materials that do not constitute a contribution to the candidate, such as the dissemination of campaign materials done using a committee's coordinated party expenditure authority.[3] 11 C.F.R. § 109.23(b). However, such dissemination

[3] The exceptions include the following: 1) the campaign material is disseminated, distributed, or republished by the candidate or the candidate's authorized committee who prepared that material; 2) the campaign material is incorporated into a communication that advocates the defeat of the candidate that prepared that material; 3) the campaign material is disseminated, distributed, or republished in a news story, commentary, or editorial exempted under 11 C.F.R. § 100.73 or 11 C.F.R. § 100.132; 4) the campaign material used consists of a brief quote of materials that demonstrate a candidate's position as part of a person's expression of its own view; or 5) a national political party committee or a State or subordinated political party committee pays for such dissemination of campaign materials using coordinated party expenditure authority under 11 C.F.R. § 109.32.

must not exceed the coordinated party expenditure limits of the Federal Election Campaign Act of 1971, as amended ("the Act"). 2 U.S.C. § 441a(d).[4]

Based on the Mitchell Committee's public admission that it created the original campaign footage the DCCC used in its advertisement and the similarity of the footage used in both advertisements, it appears that the DCCC republished Mitchell's campaign materials, resulting in an in-kind contribution to the Mitchell Committee unless the DCCC used its coordinated party expenditure authority. 11 C.F.R. § 109.23. However, it does not appear that the DCCC used its coordinated party expenditure authority because it claims it created the advertisement independently. Given the cost of the advertisement (i.e., over $196,000), the DCCC may have made an excessive in-kind contribution of approximately $190,000. Even if the DCCC did use its coordinated party expenditure authority, it still would have made an excessive contribution because the applicable coordinated party expenditure limit on behalf of the Mitchell Committee was $39,600. *See* 2 U.S.C. § 441a(a)(2)(A), 441a(d)(3)(B); *Price Index Increases for Coordinated Party Expenditure Limitations*, 71 Fed. Reg. 14218 (March 21, 2006).[5] In disseminating, distributing, or republishing Mitchell's campaign footage, the DCCC made an excessive in-kind contribution to the Mitchell Committee and failed to properly report the communication as a contribution in its reports to the Commission. Therefore, we recommend the Commission find reason to believe that the DCCC violated 2 U.S.C. § 441a(a) and 2 U.S.C.

[4] The use of information obtained from a publicly available source may result in the conduct element of the coordination regulation not being satisfied. However, the respondent committee has the burden of identifying its source for the relevant campaign material. *See infra* p. 10.

[5] The Act requires the Commission to adjust the coordinated party expenditure limits set forth in section 441a(d) annually to account for increases in the consumer price index. Political party committees have separate limits for each candidate. The applicable limits in effect for House candidates in 2006 were calculated by multiplying the base figure of $10,000, set forth in section 441a(d), by the price index (3.961), yielding a limit of $39,600 that a political party committee could spend on the general election campaign of a federal candidate for the House of Representatives. *See* 2 U.S.C. § 441a(c); *Price Index Increases for Coordinated Party Expenditure Limitations*, 71 Fed. Reg. 14218 (March 21, 2006).

§ 434(b). Further, as analyzed fully below, if the DCCC obtained the video campaign footage through coordination with the candidate or his committee, the Mitchell Committee would have knowingly accepted an excessive in-kind contribution.

B. PARTY COORDINATED COMMUNICATION[6]

Under the Act, an expenditure made by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees or their agents" constitutes an in-kind contribution. 2 U.S.C. § 441a(a)(7)(B)(i). A political party communication is coordinated with a candidate, a candidate's authorized committee, or agent of the candidate or committee when the communication satisfies the three-pronged test set forth in 11 C.F.R. § 109.37: (1) the communication is paid for by a political party committee or its agent; (2) the communication satisfies at least one of the content standards set forth in 11 C.F.R. § 109.37(a)(2); and (3) the communication satisfies at least one of the conduct standards set forth in 11 C.F.R. § 109.21(d). The payment by a political party committee for a communication that is coordinated with a candidate must be treated by the political party committee making the payment as either an in-kind contribution to the candidate with whom it was coordinated or a coordinated party expenditure. 11 C.F.R. § 109.37(b). The costs of a coordinated communication must not exceed a political committee's applicable contribution or

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[6] The activity at issue occurred in October 2006 and November 2006. Therefore, this report applies the Commission's amended coordinated communication regulations, which became effective on July 10, 2006. *Coordinated Communications*, 71 Fed. Reg. 33190 (June 8, 2006). The U.S. District Court for the District of Columbia recently held that the Commission's revisions of the content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(c) and (d) violated the Administrative Procedure Act and that the Commission's firewall safe harbor provision failed *Chevron* step 2 analysis and violated the Administrative Procedure Act; however, the court did not enjoin the Commission from enforcing the regulations. *See Shays v. F.E.C.*,— F.Supp.2d —, 2007 WL 2616689 (D.D.C. Sept. 12, 2007) (NO. CIV.A. 06-1247 (CKK)) (granting in part and denying part the respective parties' motions for summary judgment). This Office believes that despite the Court ruling, the relevant content and conduct standards and the firewall provision are still in effect. Further, the standards are appropriately applied to the facts of this matter, particularly given that the advertisement at issue falls within the 90-day window contained in the current content standard – a part of the regulation that was not challenged in the litigation – and because, as discussed *infra*, we are recommending that the Commission reject Respondent's firewall safe harbor defense.

expenditure limits set forth in the Act; specifically, the DCCC could not contribute more than $5,000 to, or make over $39,600 in coordinated party expenditures on behalf of, the Mitchell Committee. *See* 2 U.S.C. §§ 441a(a)(2)(A), 441a(d)(3)(B).

1. Payment

The payment prong of the coordination regulation, 11 C.F.R. § 109.37(a)(1), is satisfied. The DCCC admits that it paid for the communication alleged to have been coordinated. In its response to the complaint, the DCCC states that it produced and distributed the advertisement through its vendor, McMahon Squier and Associates. DCCC Response at 2. Moreover, the DCCC also filed independent expenditure reports with the Commission at the time the advertisement aired reflecting expenditures totaling over $196,000 in support of Harry Mitchell.[7]

2. Content

The content prong of the coordination regulation is also satisfied. At all times relevant to this matter, the content prong was satisfied if the communication at issue met at least one of the following content standards: (1) a public communication that disseminates, distributes, or republishes candidate campaign materials; (2) a public communication that expressly advocates the election or defeat of a clearly identified candidate for federal office; or (3) a public communication, in relevant part, that refers to a clearly identified federal candidate, and is publicly distributed or disseminated 90 days or fewer before the clearly identified candidate's general election. *See* 11 C.F.R. § 109.37(a)(2). A public communication is defined as a communication by means of any broadcast, cable or satellite communication, newspaper,

[7] On October 31 and November 1, 2006, the DCCC disclosed one payment to McMahon Squier and Associates in the amount of $3,635 and two payments to Great American Media in the amounts of $25,020.10 and $168,278.31.

magazine, outdoor advertising facility, mass mailing or telephone bank, or any other form of general public political advertising. 11 C.F.R. § 100.26.

The coordinated communication alleged in the complaint qualifies as a public communication referring to a clearly identified candidate distributed within 90 days of an election. The DCCC's advertisement identified congressional candidate Harry Mitchell and was broadcast on television on October 31, 2006, seven days before the November 7, 2006 General Election. Based on the screen shots provided with the complaint and the Mitchell Committee's public admission that it shot the footage, the DCCC also appears to have republished campaign footage produced by the candidate's committee. *See supra* Section III.A.

3. Conduct

The Commission's regulations set forth the following six types of conduct between the payor and the committee, whether or not there is agreement or formal collaboration, that satisfy the conduct prong of the coordination standard: (1) the communication "is created, produced, or distributed at the request or suggestion of a candidate or an authorized committee," or if the communication is created, produced, or distributed at the suggestion of the payor and the candidate or authorized committee assents to the suggestion; (2) the candidate, his or her committee, or their agent is materially involved in the content, intended audience, means or mode of communication, the specific media outlet used, or the timing or frequency of the communication; (3) the communication is created, produced, or distributed after at least one substantial discussion about the communication between the person paying for the communication, or that person's employees or agents, and the candidate or his or her authorized committee, his or her opponent or opponent's authorized committee, a political party committee,

or any of their agents;[8] (4) a common vendor uses or conveys information material to the creation, production or distribution of the communication; (5) a former employee or independent contractor uses or conveys information material to the creation, production or distribution of the communication; and (6) the dissemination, distribution, or republication of campaign materials.[9]

The material involvement and substantial discussion standards of the conduct prong are not satisfied "if the information material to the creation, production, or distribution of the communication was obtained from a publicly available source." 11 C.F.R. § 109.21(d)(2) and (3). *See also Coordinated Communications*, 71 Fed. Reg. 33190, 33205 (June 8, 2006) (explaining that "[u]nder the new safe harbor, a communication created with information found . . . on a candidate's or political party's Web site . . . is not a coordinated communication"). However, to qualify for the safe harbor for the use of publicly available information, the DCCC "bears the burden of showing that the information used in creating, producing or distributing the communication was obtained from a publicly available source." *Coordinated Communications*, 71 Fed. Reg. 33190, 33205 (June 8, 2006).

As discussed in detail below, there is sufficient reason to investigate whether there was a request or suggestion, material involvement, or substantial discussion in this case.[10] The screen shots provided with the complaint confirm that the candidate was indeed prominently featured in the DCCC's advertisement. The Mitchell Committee advertisement, for example, depicts the

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[8] A "substantial discussion" includes informing the payor about the campaign's plans, projects, activities, or needs, or providing the payor with information material to the communication. *See* 11 C.F.R. § 109.21(d)(3).

[9] The last standard applies only if there was a request or suggestion, material involvement, or substantial discussion that took place after the original preparation of the campaign materials that are disseminated, distributed, or republished.

[10] The complaint does not address the common vendor and former employee or independent contractor standards set forth in 11 C.F.R. § 109.21(d)(4) and (5), and they are specifically rebutted in the committees' responses. DCCC Response at 2; Mitchell Committee Response at 2.

candidate speaking with constituents as well as speaking to the camera. *See supra* fn. 1. Further, the similarity of the advertisements, including the visual images, the themes, and the timing of the media buys, all present genuine questions whether the DCCC advertisement was made at the request or suggestion of, with the material involvement of, or as a result of substantial discussion with, the Mitchell Committee. While it is possible that the DCCC obtained the footage from a publicly available source, such as the candidate's website, the DCCC fails to make any such showing or even assert the DCCC did in fact obtain the footage from the Internet. If the DCCC did not obtain the footage from a publicly available source, it appears that the candidate may have been materially involved with the creation of the DCCC advertisement.[11]

Although the DCCC contends that during the relevant time period it had a firewall in place between its independent expenditure program and its other activities, *see supra* pp. 4-5, both the DCCC's and the Mitchell Committee's responses have one glaring omission: neither one addresses the identical footage used in each of their respective advertisements.[12] As result, we do not have enough information to determine whether the firewall provisions were followed in this instance. In this regard, this case is distinct from other coordination matters where the Commission has accepted a committee's firewall as sufficient evidence that there was no coordination. *See* MURs 5506 (Castor/Emily's List), 5564 (Knowles), 5743 (Sutton for

[11] The Commission has previously found that federal candidates who appear or speak in commercials were materially involved in any decision-making pertaining to the advertisement. *See, e.g.*, Advisory Opinions 2003-25 (Weinzapfel), 2004-1 (Forgy Kerr) and 2004-29 (Akin); MURs 5410 (Oberweis) and 5517 (Stork).

[12] The conduct standards are subject to the safe harbor provisions for the use of a firewall. 11 C.F.R. § 109.21(h). In amendments to the coordinated communications regulations, the Commission created a safe harbor if a political committee established and implemented a firewall to prohibit the flow of information between the committee paying for the communication and the candidate's committee. *Id.* The provision requires that the firewall be described in a written policy and distributed to all relevant employees, consultants, and clients affected by the policy, 11 C.F.R. § 109.21(h)(2), but "does not apply if specific information indicates that, despite the firewall, information about the candidate's or political party committee's campaign plans, projects, activities, or needs that is material to the creation, production, or distribution of the communication was used or conveyed to the person paying for the communication." 11 C.F.R. § 109.21(h).

Congress), and 5823 (Club for Growth). For instance, in MUR 5743 (Sutton for Congress), the Commission found no reason to believe coordination took place where the Respondent committees each submitted affidavits that averred facts regarding their firewall arrangements and *also* identified the source of the photographs in question. Similarly, in MUR 5506, the Castor Committee acknowledged that its media buyers made use of information obtained through public sources. The DCCC's response in this matter lacks the specificity of the responses in those cases.

Instead, because the DCCC has neither asserted nor made a showing that it obtained the video footage from a publicly available source, it appears that despite the DCCC's firewall, information material to the creation of the DCCC's advertisement may have been conveyed to the DCCC. For example, the DCCC's independent expenditure staff could have discussed the footage with DCCC staff outside of the independent expenditure program or the independent expenditure staff could have coordinated directly with the Mitchell campaign. Questions remain regarding how both committees selected the same footage for each of their respective advertisements that aired within 24 hours of one another, just days before the 2006 General Election. Without specific responses rebutting the allegations concerning the footage used in the DCCC advertisement, it is appropriate for the Commission to investigate whether the conduct prong of the coordination standard is met.

Accordingly, we recommend that the Commission find reason to believe that the Democratic Congressional Campaign Committee and Brian L. Wolff, in his official capacity as treasurer, violated 2 U.S.C. § 441a(a) and 441a(d) by making an excessive in-kind contribution and an excessive coordinated party expenditure in the form of a coordinated communication, and violated 2 U.S.C. § 434(b) by improperly reporting the communication to the Commission. We

also recommend that the Commission find reason to believe that Harry Mitchell for Congress and John Bebbling, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(f) and 434(b) by knowingly accepting the excessive contribution and by failing to report the contribution to the Commission.

V. RECOMMENDATIONS

1. Find reason to believe that the Democratic Congressional Campaign Committee and Brian L. Wolff, in his official capacity as treasurer, violated 2 U.S.C. §§ 434(b), 441a(a), and 441a(d).

2. Find reason to believe that Harry Mitchell for Congress and John Bebbling, in his official capacity as treasurer, violated 2 U.S.C. §§ 434(b) and 441a(f).

3. Approve the attached Factual and Legal Analyses.

4.

5. Approve the appropriate letters.

9/24/07
Date

Thomasenia P. Duncan
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Ann Marie Terzaken
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Attachments:
1. Screen Shots of DCCC and Mitchell Advertisements

Mitchell	DCCC
	
	
	

Attachment 1
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