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July 21, 2008

BY HAND DELIVERY

Thomasenia Duncan, Esq
General Counsel
Federal Election Commission
999 E Street, N W
Washington, D C 20463

Re: MUR 6021

Dear Ms Duncan

This is the response of Senator John Kerry and Kerry-Edwards 2004, Inc ("the Campaign"),[1] to the complaint filed with your agency by Ralph Nader Over the last several years, Nader and his supporters have brought numerous actions in various forums—including this Commission—alleging a vast, illegal conspiracy to keep Nader off the 2004 presidential ballot Courts and this agency have consistently and repeatedly rejected their claims *See, e g*, *Nader v Democratic National Committee*, No 07-2136, 2008 WL 2174238 (D D C May 27, 2008), *In re Nader*, 588 Pa 450 (2006), *Fulani v McAuliffe*, No 04-cv-6973, 2005 WL 2276881 (S D N Y Sept 19, 2005), MUR 5509 (finding no reason to believe)

Because the Commission has already considered and dismissed a case involving the same activity at issue here, *see* MUR 5509, and because this action is dilatory, the Commission should exercise its prosecutorial discretion and dismiss

In addition, the Commission should dismiss the claims against Senator Kerry and the Campaign because they are wholly without merit Nader accuses Senator Kerry and the Campaign of

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[1] The complaint mentions John Kerry for President, Inc , an entity which has been terminated, but does not name it as a respondent

accepting prohibited corporate contributions in the form of legal services, and failing to report those contributions This is both false and unsupported by the complaint's factual allegations To the extent the Kerry-Edwards Campaign undertook ballot access litigation in 2004, it did so through paid staff and volunteers, in a manner entirely consistent with the Federal Election Campaign Act ("FECA") The complaint provides no specific factual allegations demonstrating otherwise, and therefore must be dismissed *See* Statement of Reasons, MUR 4960

I. Background

This is yet another in a long line of cases in which Ralph Nader and his supporters have wasted valuable court and agency resources with meritless litigation concerning elections in which they garnered almost no support at the ballot box

In 2004, Ralph Nader was on the presidential ballot in 34 states and the District of Columbia In the remaining 16 states, Nader was disqualified, not as the result of some unlawful "conspiracy," but because federal or state courts, after full and fair hearings, determined that he had not qualified in those states,[2] or simply because Nader himself failed to meet the minimum requirements for access to the ballot After all the votes were counted, Nader-Camejo received less than one-third of one percent of the popular vote, with zero electoral college votes[3]

Rather than accepting the voters' decisive rejection of a Nader presidency, Nader and his supporters have repeatedly filed baseless litigation in state and federal courts and agencies, alleging a vast conspiracy and violations of various federal and state laws For example, in 2004, a supporter of Ralph Nader filed a complaint with this Commission, asserting, *inter alia*, that the Kerry-Edwards Campaign and other respondents made impermissible expenditures in an effort to keep Nader off the ballot The Commission found no reason to believe that respondents violated the law *See* MUR 5509

In 2005, supporters of Nader filed a lawsuit against Senator Kerry, the Democratic National Committee ("DNC"), and others in federal district court, alleging that defendants conspired to keep Nader-Camejo off the 2004 ballot in violation of 42 U S C §§ 1983 and 1985 *Fulani*, No 04-cv-6973, 2005 WL 2276881 The court emphatically dismissed the case, stating "'[M]erely resorting to the courts and being on the winning side of a lawsuit does not make a party'

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[2] *See, e g*, *Nader v Connor*, 388 F 3d 137 (5th Cir 2004), *Nader v Keith*, 385 F 3d 729 (7th Cir 2004), *Nader v Brewer*, 386 F 3d 1168 (9th Cir 2004), *Nader v Ill State Bd of Elections*, 354 Ill App 3d 335 (2004), *In re Nomination of Nader*, 580 Pa 134 (2004), *Kucera v Bradbury*, 337 Or 384 (2004)

[3] *See, e g*, Scott Shane, *Nader Is Left With Fewer Votes, and Friends, After '04 Race*, N Y Times, Nov 6, 2004

responsible for depriving a plaintiff of his rights " *Id* at *3 n 4 The court noted that the case was "yet another in a long line of cases in which" the courts were misused to pursue a political agenda that could not be "accomplish[ed] at the ballot box " *Id* at *1

In recent months, Nader himself has filed four complaints about the same alleged conspiracy, wasting significant court resources through a series of manipulative maneuvers and duplicative filings In October 2007, Nader and several of his supporters filed suit in the Superior Court for the District of Columbia against numerous defendants including the Democratic National Committee, the Kerry-Edwards Campaign, and Senator John Kerry Nader alleged that, in violation of state tort law and federal constitutional law, defendants conspired to keep Nader off the Presidential ballot in numerous states through ballot access litigation The very next day, plaintiffs filed a virtually identical complaint in the Eastern District of Virginia, alleging the same facts and causes of action, but naming different defendants *Nader v McAuliffe*, No 1 07-cv-1101 In November, the District of Columbia case was removed to federal court [4] In March 2008, the Eastern District of Virginia transferred the Virginia case to the District of Columbia

In April 2008, plaintiffs initiated yet another action Once again, plaintiffs named as defendants the DNC, the Kerry-Edwards Campaign, and Senator Kerry, among others, and alleged an unconstitutional conspiracy to keep Nader off the ballot

In May 2008, the District Court for the District of Columbia dismissed plaintiffs' first District of Columbia complaint for lack of jurisdiction and for failure to state a claim upon which relief could be granted The court held, *inter alia*, that defendants' ballot access litigation constituted protected First Amendment activity Defendants had petitioned the government for redress of grievances and were immune from liability for such activity under the First Amendment *Nader*, No 07-2136, 2008 WL 2174238 at *11-15 Motions to dismiss in the action originally filed in Virginia, and the most recent District of Columbia action, are currently pending

With this complaint, Nader has filed yet another action about the same alleged "conspiracy " Once again, his complaint should be dismissed without further proceedings

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[4] Nearly two months later, plaintiffs amended their complaint in an effort to evade federal court jurisdiction They changed nothing about the facts or nature of the injury alleged, they simply deleted Counts III and IV of their original complaint, which had alleged violations of 42 U S C § 1983, and then moved to remand Subsequently, they abandoned their effort to remand

II. The Commission Should Exercise Its Prosecutorial Discretion and Dismiss this Duplicative and Dilatory Complaint

Claims that are duplicative of earlier dismissed filings deserve only low priority on the Commission's docket *See* General Counsel's Report, MUR 5699 So too do claims that are stale *Id*, *see also* General Counsel's Report, MUR 4516 Exercising its prosecutorial discretion, the Commission has previously dismissed duplicative and dilatory claims, even when not entirely time-barred *See, e g*, General Counsel's Report, MUR 5699 at 2 ("While respondents may have had reporting obligations that are not time barred, in reviewing both the merits and the procedural posture of MUR 5699, in light of the Commission's previous findings and conciliation agreement in MUR 5225, and in furtherance of the Commission's priorities and resources relative to other pending matters on the Enforcement docket, the Office of General Counsel believes that the Commission should exercise its prosecutorial discretion and dismiss the matter" (citing *Heckler v Chaney*, 470 U S 821 (1985))

Consistent with past practice, the Commission should dismiss this case It is both duplicative of a case previously dismissed, and stale

As noted above, Nader supporters filed a substantially similar complaint to the instant one in 2004 *See* MUR 5509 That case raised different legal claims, but focused on the same activity the ballot access litigation engaged in by various supporters of the Kerry-Edwards Campaign On March 3, 2005, the Commission found that there was no reason to believe that the Kerry-Edwards Campaign or the DNC violated FECA The General Counsel's Report noted that candidates' efforts to deny ballot access to an opponent are "undertaken for the purpose of influencing an election" and are a permissible use of public funds First General Counsel's Report, MUR 5509 at 6 (quoting AO 1980-57) Further, the General Counsel observed that the ballot access activities at issue appeared to "constitute 'volunteer' efforts excluded from the definition of contribution" *Id* at 8 (quoting 2 U S C § 431(8)(B)(i)) Because the Commission has already considered the 2004 ballot access litigation and concluded that there was no reason to believe Senator Kerry or the Campaign committed any violation, this duplicative filing should be assigned low priority

In addition, Nader sat on his supposed FECA claims for nearly four years, filing this complaint only after pursuing, and losing, similar claims in numerous other forums The elapsed time makes it difficult, if not impossible, for the agency to investigate and for respondents to defend In light of the duplicative and dilatory nature of this complaint, consistent with past practice, the Commission should exercise its prosecutorial discretion and dismiss *See* MUR 5699, MUR 4516

III. The Complaint Fails to Set Forth Specific Facts which, if Proven True, Would Constitute a Violation of FECA by Senator Kerry or the Kerry-Edwards Campaign

The complaint against Senator Kerry and the Campaign also warrants immediate dismissal on the merits

A person who believes a violation of the Federal Election Campaign Act (FECA), 2 U S C § 441a(a)(1)(A) has occurred may file a complaint with the Commission *Id* § 537g(a)(1) Only where there is "reason to believe" that a violation has been, or is about to be, committed, does the Commission have power to investigate alleged FECA violations *Id* § 437g(a)(2) The Commission may not find "reason to believe" unless the complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of FECA *See* 11 C F R § 111 4(d)(2), Statement of Reasons, MUR 4960, *see also* First General Counsel's Report, MUR 4545 at 17 ("While the available evidence is inadequate to determine whether the costs of the Train Trip were properly paid, the complainant's allegations are not sufficient to support a finding of reason to believe ") Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true, and provide no independent basis for investigation *See* Statement of Reasons, MUR 4960

A. The complaint alleges scant facts with regard to Senator Kerry or the Kerry-Edwards Campaign.

This complaint fails to satisfy the requirements for further investigation With regard to Senator Kerry, the complaint makes virtually no allegations whatsoever It merely alleges that Senator Kerry told the Associated Press that, although he respected others' efforts to challenge Nader's ballot petitions, he would "never ask another candidate to abandon an election bid," Compl at 49, ¶ 168, and that a law firm that has represented the Senator and his wife in other matters acted improperly while representing another client, the DNC, *id* 49, ¶ 169 The complaint does not assert, even in conclusory terms, that the Senator participated in any litigation whatsoever, or that he in any way violated FECA This is simply not enough to provide a basis for investigation

The complaint is similarly lacking with respect to the Kerry-Edwards Campaign It asserts that the Campaign participated in a vast conspiracy to keep Nader off the ballot, and that this conspiracy was pursued through ballot access litigation But the only factual allegations it presents is that the Kerry-Edwards Campaign was aware of and benefited from the ballot access litigation, and that the Campaign participated in some litigation through paid staff and volunteer lawyers *See, e g , id* at 6, 8, 52, 56, 65, 87 As discussed further below, this simply does not

constitute a violation of FECA or Commission regulations, and is insufficient to meet the standard for reason to believe *See* MUR 4960

B. Ballot access litigation is protected under the First Amendment and a permitted expenditure under FECA.

Litigation to keep an opponent off the ballot is not illegal Rather, it is fully protected by the First Amendment *Nader*, No 07-2136, 2008 WL 2174238 at *1, 11-15 As the D C District Court recognized in its May 27 ruling, the Supreme Court's *Noerr-Pennington* doctrine holds that defendants who petition the government for redress of grievances, including through litigation in court, are "immune from liability for such activity under the First Amendment " *Id* at *11 (citing *Covad Comm'cns Co v Bell Atl Corp*, 385 F 3d 666, 677 (D C Cir 2005))[5] Though sham litigation receives no protection, the D C District Court expressly held that the ballot access litigation engaged in by defendants—i e , the litigation at issue in both this complaint and the dismissed court case—was *not* sham litigation *See id* at *1, 11-15 The Court explained "[A]nticipating a legal campaign in the contingency of a political opponent's entry into a race is different from knowingly filing challenges that one knows *at the time of filing* to be false or baseless The plaintiffs have proffered no evidence nor raised any allegations that the defendants presented claims that they knew to be false or baseless " *Id* at *13 (emphasis in original) (internal citations omitted) "[T]he First Amendment cannot be abrogated simply by alleging that one's political opponent turned to the judicial process for partisan motives " *Id* at *12

Furthermore, Commission regulations permit respondents to spend funds "to further [the] candidate's campaign for election to the office of President or Vice President of the United States " 11 C F R § 9002 11(a)(1) Contesting an opponent's access to the ballot falls squarely within this category *See* MUR 5509

C. Awareness of ballot access litigation and use of volunteers and paid legal services does not constitute a violation of FECA or Commission regulations.

Despite the complaint's hyperbolic and conclusory language, the only specific violation of FECA asserted against the Campaign is that the Campaign accepted prohibited corporate contributions in the form of legal services, and failed to report those contributions *See* Compl , ¶¶ 308-312 This is both false and unsupported by any specific factual allegations

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[5] *See also Cal Motor Transp v Trucking Unlimited*, 404 U S 508, 510 (1972), *United Mine Workers of America v Pennington*, 381 U S 657 (1965), *R R Presidents Conference v Noerr Motor Freight, Inc*, 365 U S 127, 138 (1961)

The complaint states that individuals employed by the Campaign participated in litigation in New Hampshire, *id* at 8, 65, ¶ 232, that individuals who claimed to have some affiliation with the Kerry-Edwards Campaign participated in litigation in Florida, *id* at 56, ¶ 191, and Washington State, *id* at 87, ¶ 294, and that the Campaign was informed about litigation in Arizona, *id* at 52, ¶ 173 The complaint also repeatedly asserts that the Campaign benefited from the volunteer activity of other lawyers and individuals *See, e g*, *id* at 6 None of this constitutes a violation of the Act

The Campaign has every right to pay staffers to engage in ballot access litigation *See supra* at II A It also has the right to use unlimited volunteer lawyers The Act provides that "[t]he value of services provided without compensation by an individual who volunteers on behalf of a candidate or political committee is not a contribution " 2 U S C § 431(8)(B)(i), *see also* 11 C F R § 100 74

The complaint points to no specific facts indicating that the attorneys were not in fact volunteers That they may have continued to receive compensation from their law firms for their other work is immaterial—as long as they were not compensated for their volunteer work *See* AO 1979-58 (law partner's volunteer activity in support of candidate did not constitute contribution from law firm, notwithstanding that partner continued to receive compensation from firm), *accord* AO 1980-107 Nothing in the complaint indicates that the volunteers for the Kerry-Edwards Campaign were compensated in any way for their work

Because the complaint does not provide evidence or specific factual allegations upon which one could reasonably conclude that the Campaign received a prohibited contribution, it does not meet the threshold for reason to believe Unwarranted legal conclusions from asserted facts and mere speculation are simply not sufficient *See* Statement of Reasons, MUR 4960, Statement of Reasons, MUR 4869, Statement of Reasons, MUR 4850

Moreover, not only does the complaint lack the requisite specificity and evidence, but the vast majority of volunteer (and paid) lawyering identified by the complaint was, according to the complaint, performed for the DNC or other organizations or individuals—not for the Campaign In effect, the complaint recognizes that the Campaign engaged in only limited, and wholly permissible, litigation, it seeks to impute the activities of other organizations to the Campaign For example, the complaint emphasizes that the 527-respondents had the intention of benefiting the Kerry-Edwards Campaign Compl at 6 But an intent to benefit a candidate simply does not convert the efforts of a third-party organization into an illegally received contribution on the part of a campaign

Finally, the complaint's effort to manufacture a legal violation by suggesting that there was inappropriate coordination between the DNC and the Kerry-Edwards Campaign is wholly unavailing At most, the factual allegations presented suggest that the Campaign knew of, and approved of, the DNC's litigation strategy *See* Compl at 48, ¶ 167 (describing an email regarding ballot access litigation that was allegedly written by a consultant to the Kerry-Edwards Campaign, and then used by the DNC) But the Commission has never construed the law to require allocation to contribution or expenditure limits of all political party disbursements made with a campaign's knowledge or for its benefit *See, e g*, 11 C F R §106 1(c) (a political committee is not required to attribute its personnel and overhead costs to any particular candidate unless the expenditures "are made on behalf of a clearly identified candidate and the expenditure can be directly attributed to that candidate")

In short, the Kerry-Edwards Campaign's limited involvement in ballot access litigation, and its awareness of the litigation engaged in by others—both on a volunteer and paid basis—simply does not constitute a violation of the Act The complaint completely fails to provide any specific factual allegations, let alone evidence, to support a finding of reason to believe

IV. Conclusion

For the reasons detailed above, the Respondents respectfully requests that the Commission dismiss the complaint and close the matter immediately

Very truly yours,

Marc Erik Elias
Kate Andrias
Counsel to Senator John Kerry and Kerry-Edwards 2004, Inc