SEIGFREID, BINGHAM, LEVY, SELZER & GEE

A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
911 MAIN STREET
SUITE 2900
KANSAS CITY, MISSOURI 64105
816 421-4460
FACSIMILE 816 474-3447

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VIA FAX: 1-202-219-3923
AND FEDERAL EXPRESS

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

Re: MUR # 6147
Our Client: Kansas City Chiefs Football Club, Inc.

Dear Ms. Duncan:

This Firm represents the Kansas City Chiefs Football Club, Inc. ("the Chiefs"). We understand a civil enforcement action ("Complaint") has been brought by David A. Raffel against the alleging violations of the Federal Election Campaign Act of 1971, as amended 2 U.S.C. §§ 431 *et seq.* ("the Act"). Please accept this letter as the Chiefs' official response to Mr. Raffel's Complaint.

Each year, the Chiefs hold a Veterans Day Celebration in honor of American veterans. In 2008 (and at issue in the Complaint), the Chiefs Veterans Day celebration took place on November 2, prior to the game versus the Tampa Bay Buccaneers. The Chiefs Veterans Day celebrations historically contain a military theme and include recognition of notable veterans along with various other military presentations.

The 2008 Veterans Day celebration recognized past, present and future soldiers of the United States Army. Three notable veterans were honored at the celebration. There was a color presentation performed by a local color guard. The national anthem was sung by an Army sergeant. The Chiefs' cheerleaders performed a military-themed routine. Various video messages were shown throughout the game from Chiefs' fans serving overseas. Gene Simmons and Senator John McCain both appeared by video during the pre-game show paying tribute to

veterans. The half-game show featured a giant United States Flag held by 100 Army troops, a tribute to wounded soldiers and an Army induction ceremony. The Chiefs also sold military-themed merchandise.

Mr. Raffel attended the Chiefs game on November 2, 2008 and witnessed the Veterans Day celebration including the pre-game show. Thereafter, Mr. Raffel filed this Complaint with the Federal Election Commission ("FEC") alleging that Senator McCain's video-taped tribute was a violation of the Act. Senator McCain's tribute was shown on screens on the north and south ends of Arrowhead Stadium. Senator McCain's tribute lasted approximately 30 seconds and contained the following message:

> "Today at Arrowhead, we are honoring the fine men and women in uniform who have served and continue to serve this country.
>
> The sacrifice that these men and women make, allow us to enjoy unparalleled personal freedom and quality of life in the United States of America. We should honor those who are currently in harm's way defending our freedom, and the brave families that await their safe return. And to all those who have returned from overseas - welcome home.
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> To all men and women serving in our armed forces, to their families, and to our veterans: you are the best Americans, you are the bravest among us. What you have done for us, we can never do for you. But we are mindful of that distinction, and humbled by it. And our appreciation for your service demands us all to do what we can, in less trying and less costly circumstances, to help keep this nation a place and an idea worthy of the hardships, danger and sacrifices you have born so valiantly for us.
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> Thank you."

Because Senator McCain's tribute was shown two days prior to the 2008 presidential election, Mr. Raffel asserts that "given the proximity to such a hotly-contested presidential election, this free publicity could have amounted to an unreported in-kind contribution that the Kansas City Chiefs organization provided the McCain presidential election campaign efforts." Mr. Raffel further asserts that the incident could have unfairly influenced the outcome of the presidential race in Missouri, and that the Chiefs should not have afforded either candidate the opportunity to make a free presentation before 75-80,000 prospective voters so close to election day. Mr. Raffel's Complaint should be dismissed by the FEC because neither Senator McCain nor the Chiefs encouraged or attempted to influence these fans in the Stadium to take any action with respect to any federal election.

Mr. Raffel fails to cite which sections of the Act he claims the Chiefs violated. The allegations contained in the Complaint could implicate the following Sections of the Act: Section 434 – Reporting Requirements[1], Section 441b - Contributions or Expenditures by National Banks, Corporations, or Labor Organizations, and Section 441d - Publication and Distribution of Statements and Solicitations[2].

Section 441b governs contributions and expenditures by corporations in federal elections. As such, no action taken by the Chiefs can be a violation of the Act if the Chiefs did not violate Section 441b. Section 441b(a) of the Act states, in pertinent part, that "[i]t is unlawful for ... any corporation whatever ... to make a contribution or expenditure in connection with [Federal elections] ... or any officer or director of any corporation ... to consent to any contribution or expenditure by the corporation prohibited by this section." *Id.* "Contribution and expenditure" includes any "direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value...to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section...." 2 U.S.C. § 441b(b)(2).

A literal reading of Section 441b(a) suggests that corporate entities are strictly prohibited from making independent expenditures in connection with federal elections.[3] However, significant judicial interpretation of Section 441b makes the provision's ban less severe than it initially appears. Specifically, before a contribution or expenditure is subject to the prohibition of Section 441b, it must be found to "expressly advocate" the election or defeat of a "clearly identified" federal candidate. *See Federal Election Com. v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986).

The "express advocacy" standard embraced by the Court in *Massachusetts Citizens* was taken from *Buckley v. Valeo*, 424 U.S. 1 (1976), the seminole case addressing the constitutionality of the Act. In *Buckley*, the Court was asked to interpret the scope of the Act's disclosure requirements on expenditures. 18 U.S.C. § 608(e)(1), as amended, 2 U.S.C. § 434(c). In reaching its decision to adopt an "express advocacy" standard, the Court recognized the severe

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[1] *See* 2 U.S.C. §§ 434 (c) and 431 (11) which require all persons, including corporations, other than political committees to file public disclosure statements with respect to all expenditures in excess of $250.00 per calendar year.

[2] 2 U.S.C. § 441d requires any person making a general public political advertisement to inform the viewing public whether such advertisement was authorized by the candidate and how the advertisement was financed. *See Id.*

[3] The Act does not prohibit all political speech by corporate entities. In particular, the Act allows corporations to set up separate segregated funds to collect voluntary contributions in support of or against particular candidates. By earmarking the funds in this manner, it is believed that there will be fewer instances in which general corporate funds are used: (1) to gain actual or perceived influence over candidates; and (2) in a manner antagonistic to the political views of certain shareholders. *See* 2 U.S.C. § 441b(b)(2)(C); *see also* 11 C.F.R. § 114.5 (1995).

impingement on political speech that would occur if the Act was interpreted too broadly. *Id.* Particularly significant to the Court was the inherent difficulty in distinguishing discussions of election issues and candidates from more candid requests to vote for or against a particular individual. *Id.* The *Buckley* Court explained:

> [T]he distinction between discussion of issues and candidates and advocacy of election and defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest. *Id.* at 42. Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussions of those issues, and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections. *Id.* at n. 50.

Therefore, in order for the disclosure requirement to avoid being constitutionally invalid, the *Buckley* Court held that the term expenditure had to be construed to apply "only to expenditures that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 44 (emphasis added). The *Buckley* Court suggested, although not all inclusive, that terms like "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," or "reject" could properly be labeled "express advocacy" under the Act. *Id* at n. 52.

The parameters of the "express advocacy" standard have been addressed by several federal courts in a variety of circumstances.[4] The vast majority of these courts have adopted a strict interpretation of the "express advocacy" standard.[5] Thus, courts generally have been

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[4] *Faucher v. Federal Election Com.*, 928 F.2d 468 (1st Cir.), cert. denied, 502 U.S. 820 (1991) (pro-life voter guide); *Federal Election Com. v. Furgatch*, 807 F.2d 857 (9th Cir.), cert. denied, 484 U.S. 850 (1987) (newspaper advertisements criticizing President Carter); *Federal Election Com. v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2nd Cir.1980) ("Central Long Island Tax Reform") (bulletin criticizing voting record of local congressman); *Federal Election Com. v. Survival Education Fund, Inc.*, 1994 WL 9658 (S.D.N.Y. Jan. 12, 1994) (letters criticizing the Reagan Administration's military involvement in Central America); *Federal Election Com. v. Colorado Republican Fed. Campaign Comm.*, 839 F.Supp. 1448 (D.Colo.1993) (radio advertisement attacking Senate candidate's alleged positions on defense spending and balanced budget issues); *Federal Election Com. v. National Organization for Women*, 713 F.Supp. 428 (D.D.C.1989) (mailings attacking certain members of Congress for their political views in opposition to abortion rights and the ERA); *Federal Election Com. v. American Federation of State, County & Municipal Employees*, 471 F.Supp. 315 (D.D.C.1979) (Nixon-Ford poster distributed to union members criticizing the Watergate pardon).

[5] *See Central Long Island Tax Reform*, 616 F.2d at 53 ("[C]ontrary to the position of the FEC, the words 'expressly advocating' means exactly what they say.... [T]he FEC would apparently have us read 'expressly advocating the

disinclined to entertain arguments that focus on anything other than the actual language used in an expenditure.[6] This is true even, as in this case, when the expenditure is televised or videotaped and shown in close proximity to a federal election. *See FEC v. Christian Action Network*, 894 F.Supp. 946 (W.D.Va. 1995).

In *Christian Action Network*, the Christian Action Network ("CAN") spent monies from its general treasury fund in the weeks leading up to the November 3, 1992 presidential election to produce television and print advertisements to inform the public about an issue which CAN believed affected traditional Christian family values. *Id.* at 948. These advertisements assailed what CAN believed to be the militant homosexual agenda of the Clinton-Gore ticket. *Id.* One advertisement consisted of a 30-second television commercial with Bill Clinton's face superimposed against the American flag. Various pictures depicting advocates of homosexual rights were shown against the backdrop of a dramatic musical accompaniment. *Id.* In the commercial, the narrator discussed the Clinton-Gore alleged agenda for gays and lesbians and finally asked the viewer "Is this your vision for a better America?" *Id.* at 948-9. The FEC brought a civil enforcement action against CAN for violations of the Act. *Id.* With respect to the "express advocacy" standard, the FEC argued that a different analysis is appropriate when a television commercial is at issue because imagery and other more subtle forms of non-verbal communication used in the television medium are sufficient to meet the *Buckley* express advocacy standard. *Id.* at 955. The FEC also argued that the advertisements conveyed a single anti-Clinton/Gore message because they appeared just prior to the general election. *Id.* at 958.

In response to the FEC's argument regarding visual imagery, the *CAN* court stated:

> While the approach to the "express advocacy" standard proposed by the Commission is resourceful, the court cannot accept it. Under the Commission's approach, courts would be asked to consider not only the words used in a television advertisement, but also more nebulous characteristics such as the ad's use of color, music, tone, and editing. The Supreme Court's decision in *Buckley* simply does not permit this type of judicial inquiry. In *Buckley*, the Court recognized that, depending on the audience, the language used in a political communication can be interpreted to have a variety of meanings. What one person

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election or defeat' to mean for the purpose, express or implied, of encouraging election or defeat. This would, by statutory interpretation, nullify the change in the statute ordered by *Buckley*....").

[6] *See Faucher*, 928 F.2d at 472 ("In our view, trying to discern when issue advocacy in a voter guide crosses the threshold and becomes express advocacy invites just the sort of constitutional question the [Supreme] Court sought to avoid in adopting the bright-line express advocacy test in Buckley."); *see also Colorado Rep. C.C.*, 839 F.Supp. at 1456 ("Trying to determine whether the surrounding circumstances, coupled with the implications of the [a]dvertisement, constitute 'express advocacy' leads to the type of semantic dilemma which the [Supreme] Court sought to avoid by adopting a bright-line rule.").

> sees as an exhortation to vote, the Court reasoned, another might view as a frank discussion of political issues. *Id.* at 957. ...
>
> Therefore, in order to avoid the possibility that a speaker's intent or meaning would be misinterpreted, the Court in *Buckley* limited FECA's restrictions to communications containing express words of advocacy. By creating a bright-line rule, the Court ensured, to the degree possible, that individuals would know at what point their political speech would become subject to governmental regulation. *Id.* at 958.
>
> It takes little reflection to realize that messages conveyed by imagery are susceptible to even greater misinterpretation than those that are conveyed by the written or spoken word. Consequently, if courts were to begin considering the images created by a communication to determine if a call to electoral action was present, the likelihood that protected speech would be chilled would be far greater. Given this inevitable result, the court cannot accept the FEC's invitation to delve into the meaning behind an image. To expand the express advocacy standard enunciated in *Buckley* in this manner would be to render the standard meaningless. Such an expansion of the judicial inquiry would open the very Pandora's Box which the Supreme Court consciously sought to keep closed. *Id.*

The CAN court further stated that no extra weight would be given to the FEC's position because the commercial was shown in close proximity to the presidential election. Because "the First Amendment does not include a proviso stating 'except in elections'", the court refused to accept such an approach to the express advocacy standard. *Id.* at 958-9.

Based on the express provisions of the Act and case law addressing the "express advocacy" standard, it is evident that Senator John McCain's tribute to veterans shown at Arrowhead Stadium on November 2, 2008 is not subject to federal regulation. While the *Buckley* "express advocacy" standard seeks to clarify what types of expenditures will be subject to regulation, the facts of this matter do not even warrant such microscopic analysis. It is patently clear that under the *Buckley* standard, the Chiefs did not violate the Act. Senator McCain's tribute did not focus on or otherwise mention voting in any manner. While John McCain appeared in the tribute, the tribute was devoid of any language that directly exhorted the audience to vote. While McCain's presence and support of the military may have raised strong emotions amongst some of the audience, judicial inquiry is strictly limited to the words conveyed in the message not the galvanized emotions of the audience. Nowhere in the tribute was the audience asked to vote for or against any candidate. Senator McCain's tribute, while disturbing to Mr. Raffel, is not the type of speech or expenditure that the Act was promulgated to regulate.

Because Senator McCain's tribute to American veterans was devoid of any admonition to take electoral action, the tribute was not shown in violation of the Act. The Chiefs did not

expressly advocate for any candidate in connection with the 2008 presidential election. Accordingly, the Chiefs did not violate Section 441b or any other section of the Act. The Complaint should therefore be dismissed in its entirety and no further action should be taken by the Federal Election Commission.

Best Regards,

SEIGFREID, BINGHAM, LEVY,
SELZER & GEE, P.C.

By Rachel H. Baker

RHB:mdj
cc: Kenneth W. Spain, Esq.
Mr. Woodie Dixon