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November 12, 2010

Jeff S. Jordan  
Federal Election Commission  
General Counsel's Office  
999 E Street, NW  
Washington, DC 20463

Re: MUR 6379

Dear Mr. Jordan:

On behalf of Congressman Jerry McNerney, McNerney for Congress, and Sue Staley, in her official capacity as Treasurer of McNerney for Congress (collectively, "Respondents"), this letter is submitted in response to the Complaint filed by Donald L. Nelson, dated September 15, 2010. The Complaint alleges that Respondents accepted an illegal corporate contribution when an attorney provided personal volunteer legal services to the campaign. The allegation hinges on the assumption, tendered with no apparent basis, that the attorney was compensated by his employer for this time, or that the firm's overhead otherwise increased. In fact, this assumption is wrong – the attorney was not compensated for his time and his volunteer activity did not result in any costs being incurred by his employer. The Commission should find no reason to believe that Respondents violated the Federal Election Campaign Act of 1971 (the "Act"), as amended, and it should dismiss the matter immediately.

## I. Facts

Jerry McNerney is a Member of Congress representing California's Eleventh Congressional District. He was a candidate for re-election to the House of Representatives during the 2010 general election. His principal campaign committee is McNerney for Congress (the "Committee").

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Jerome Pandell is an attorney with the Pandell Law Firm, Inc. (the "Firm"). *See* Pandell Affidavit ¶ 1.<sup>1</sup> During Rep. McNerney's 2008 election, he had performed volunteer services for the Committee on his personal time. *Id.* ¶ 2.

In September of 2010, the National Republican Congressional Committee ("NRCC") began airing an advertisement that misrepresented Rep. McNerney's position on executive compensation. In response to this advertisement, Rep. McNerney's campaign manager asked Mr. Pandell to volunteer to write and send a short letter to a local television station on the campaign's behalf, asking them to cease airing the advertisement. Mr. Pandell agreed to do so. *Id.* ¶ 4.

Like many attorneys in private practice, Mr. Pandell often works long and irregular hours. Because of this, his employer permits him, from time to time, to take time off during the day to attend to personal matters and appointments. *Id.* ¶ 2. Consistent with this practice, after the Committee approached him, Mr. Pandell told his secretary that he would be unavailable for the next few hours due to a personal matter. *Id.* ¶ 6. None of Mr. Pandell's supervisors asked him to perform this work; he did so as a volunteer to the campaign, at its direct request. *Id.* ¶ 5.

The Committee provided Mr. Pandell with a draft letter containing the basic arguments and Mr. Pandell edited the letter on his personal laptop computer. *Id.* ¶¶ 4, 6. Instead of printing the letter onto firm stationery, he used an electronic template that permitted his letterhead to appear on the electronic document. *Id.* He then emailed the letter in .pdf form to the station manager. *Id.* ¶ 6. Mr. Pandell called the station from his personal cellular phone to follow up with his request. *Id.* ¶ 7. Other than using his business email account and office to prepare and send the letter, he did not use any Firm resources to assist the McNerney campaign, and his work did not increase the Firm's overhead. *Id.* ¶ 9. In total, Mr. Pandell spent approximately 4 hours working on the letter out of his office. Mr. Pandell made up this time by working longer hours later in the week. *Id.* ¶ 8.

On September 15, 2010, complainant Donald L. Nelson filed the present Complaint against the Respondents with the Commission. Without any documentation or basis in fact, the Complaint "presum[es]" that the Firm paid Mr. Pandell to write and send this letter for the Committee.

## II. Legal Analysis

### A. Legal Background

The Act prohibits federal candidates from knowingly accepting or receiving contributions from corporations. *See* 2 U.S.C. § 441b(a). However, the Act and Commission rules expressly allow

<sup>1</sup> *See also* <http://www.pandelllaw.com/Firm%20Info/Lawyers/34157982.aspx>.

individuals, even corporate employees, to volunteer for candidates. The term "contribution" excludes "services provided without compensation by any individual who volunteers on behalf of a candidate." *Id.* § 431(8)(B)(i); 11 C.F.R. § 100.74. If an employee is paid on a salaried basis and is expected to work a particular number of hours per period, no contribution results if the employee engages in political activity during what would otherwise be a regular work day, provided that the time is made up by the employee within a reasonable time. 11 C.F.R. § 100.54(a).

The rules also permit an employee to make occasional, isolated, or incidental use of the facilities of a corporation for his or her individual volunteer activity, as long as the overhead or operating costs of the corporation are not increased. *Id.* § 114.9(a)(1). An employee's use is considered "occasional" as long as the amount of activity does not prevent him from completing the normal amount of work that he usually carries out during the work period. *Id.* The rules contain a safe harbor for activities that do not exceed one hour per week or four hours per month. *Id.* § 114.9(a)(2). An employee may also use his employer's equipment or services to engage in uncompensated Internet activities without triggering a contribution, as long as he completes his normal level of work. *Id.* § 100.94(a).

#### **B. Respondents Did Not Accept a Contribution from the Firm**

For the Commission to find reason to believe that a violation occurred, a complaint must set forth sufficient specific facts which, if proven true, would actually constitute a violation. *See* 11 C.F.R. § 111.4; Commissioners Mason, McDonald, Sandstrom, Smith, Thomas and Wold, Statement of Reasons, MUR 5141; Commissioners Mason, Sandstrom, Smith and Thomas, Statement of Reasons, MUR 4960. "Unwarranted legal conclusions from asserted facts . . . or mere speculation, . . . will not be accepted as true." Statement of Reasons, MUR 5141; *see also* Commissioners Wold, Mason and Thomas, Statement of Reasons, MUR 4850 ("A mere conclusory accusation without any supporting evidence does not shift the burden of proof to respondents."). A complaint may be dismissed if it consists of factual allegations that are refuted with sufficiently compelling evidence provided in the response to the complaint, such as affidavits. Statement of Reasons, MUR 4960.

Because the Complaint is based on speculation that is refuted by sworn testimony, it must be dismissed. The Complaint simply speculates, with no basis in fact or documentation, that Mr. Pandell was paid by his employer to write the letter for the Committee. But, in fact, all of Mr. Pandell's activity fell within the recognized exemptions. Mr. Pandell was not compensated by the Firm to write the letter, as the Complaint alleges. He volunteered to write the letter when asked to do so by the Committee, and was not asked to do so by his superiors. He spent four hours on the letter and related activities and made up the missed time later in the week. Because his activity was wholly voluntary, and because he made up his missed time in a reasonable period, the Firm did not make a contribution to the Committee. 11 C.F.R. § 100.54(a).

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Nor did Mr. Pandell improperly use the Firm's resources. He spent only four hours in his Firm office editing the letter and emailing it to the station. He did not use printed letterhead, he edited the letter on his personal computer, and he made all phone calls from his personal cellular phone. Because his activities did not add to the Firm's overhead, and because he spent only four hours during the month on this activity, this use falls expressly within the FEC's safe harbor. *Id.* § 114.9(a). And his use of his Firm email account and Internet service was permissible uncompensated Internet activity. *See id.* § 100.94(a).

Thus, the Complaint presents no facts to show that Respondents received an illegal corporate contribution. It is based entirely on speculation, and false speculation at that, which must be weighed against the specific evidence now tendered by the Committee through Mr. Pandell's affidavit. The Commission should dismiss it immediately.

#### III. Conclusion

For the reasons set forth above, Respondents respectfully request that the Commission find no reason to believe that they have violated the Act, and dismiss this matter.

Very truly yours,



Brian G. Svoboda  
Andrew H. Werbrock  
Counsel to McNerney for Congress

Enclosure

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