

# SANDLER, REIFF, YOUNG & LAMB, P.C.

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2011 DEC 13 PM 3:34

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VIA EMAIL

November 7, 2011

Jeff S. Jordan, Esq.  
Supervisory Attorney  
Complaints & Legal Administration  
Office of the General Counsel  
Federal Election Commission  
999 E Street N.W.  
Washington, D.C. 20463

RE: MUR 6502

Dear Mr. Jordan,

On behalf of the Nebraska Democratic State Central Committee<sup>1</sup> and Gerry Finnegan, in his official capacity as Treasurer ("collectively referred to as "NDP"), we write in response to the complaint in MUR 6502. The complaint involves four issue advertisements (two radio and two television) focused on the national budget debate, sponsored by the NDP and featuring Senator Ben Nelson, the state's most senior Democrat. In its complaint, the Nebraska Republican Party ("NRP") alleges that these ads, which were aired more than a year before the Senator's general election, are coordinated communications. The complaint also alleges that the ads were in violation of the Act's disclaimer requirements. As explained further below, there is no merit to the complaint, and the Commission should immediately dismiss it.

## STATEMENT OF FACTS

The NDP is a State Committee of a political party as defined by 2 U.S.C. § 431(15). From mid-July 2011, to mid-September 2011, the NDP ran a series of advertisements designed to inform Nebraskans about issues before Congress. The advertisements feature Senator Ben Nelson, the state's most senior Democrat who is a candidate for reelection in November, 2012. These issue advertisements coincided with the historic debate in congress about whether to cut entitlement programs like Social Security and Medicare, and how to lower the national debt. The ads warned Nebraskans

<sup>1</sup> We note that the complainant was affiliated to the Nebraska Democratic Party, which as explained *infra*, is interchangeably used with the Nebraska State Central Committee.

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about proposals to cut these programs and urged them to take action by signing a petition to protect the programs. Additionally, they assured Nebraskans that Senator Nelson would fight to protect Medicare and Social Security while working for a responsible fiscal policy.

The ads were sponsored by the NDP, and featured Senator Nelson who appeared and delivered his message as the only Nebraska Democrat directly involved in the federal debate. The ads were not contributions nor coordinated expenditures in support of the Senator's campaign.<sup>2</sup>

The NRP alleges that these are coordinated party communications because they "disseminate, distribute, or republish... campaign materials" prepared by Senator Nelson. The basis of their allegations is that the content prong was met when he appeared in the ads and that his campaign sent two "tweets" on the same budget issues as those discussed in the ads. As explained below, the content prong has not been met. As discussed below, the NDP did not violate any disclaimer requirements as required by 2 U.S.C. § 441d.

## ARGUMENT

### 1. The Advertisements Do Not Meet the Content Prong to Be Coordinated.

To be coordinated, a party sponsored ad must meet the payment, conduct and content prong, the last of which is at issue here. To meet the content prong, a state party communication must either: (1) disseminate, distribute, or republish campaign materials; (2) contain express advocacy, as defined by 11 C.F.R. § 109.22; or (3) refer to the candidate, or another candidate for the same office, within 90 days of his election, while being distributed in the jurisdiction in which he is running.<sup>3</sup> 11 C.F.R. § 109.37(a)(2)(ii).

The complaint does not allege that any of the advertisements that are subject of this complaint contain express advocacy or any direct reference to a federal candidate within 90 days of an election, as these advertisements were aired in July and August 2011, long before the start of any 90-day window applicable to Nebraska elections in 2012. Specifically, four ads referenced in the complaint do not contain express advocacy. The advertisements discuss the NDP and Senator Nelson's position on the budget crisis as well as the position of Republican leaders on these issues. Based upon the timing of the ads, the fact that there is no exhortation for a listener to elect or defeat any candidate,

<sup>2</sup> The fact that the ads may have been paid for with funds transferred from a national party committee is completely irrelevant to any analysis in connection with this matter. Party committees are free to transfer unlimited funds to a state party committee and a state party committee may use such funds for issue advocacy. 2 U.S.C. § 441a(b)(4).

<sup>3</sup> It should be noted that, although the Commission revised the content standard for non-party groups to encompass ads that are the "functional equivalent of express advocacy," the change was not made to the relevant party regulations. See 109.21(c)(5). See also *Coordinated Communications*, 75 Fed. Reg. 55947, 55948 ("The Commission is not, at this time, adopting a safe harbor for certain public communications paid for by non-profit organizations described in 26 U.S.C. 501(c)(3) ("501(c)(3) organizations") or revising the rules concerning party constituted communications at 11 CFR 109.37.")

nor any reference to the election or character of any federal candidate, these advertisements could not, in any way, "be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates." 11 C.F.R. § 100.23(b).

The NRP alleges that the advertisements are republications of tweets disseminated by the campaign of Senator Nelson. The complaint alleges two alternative theories of republication, neither of which is supported by Commission rules. First, the NRP alleges republication by virtue of the fact that Senator Nelson is the speaker in these advertisements. Second, the NRP alleges that the themes in the advertisements are consistent with tweets disseminated by the Nelson campaign several months prior to the dissemination of the ND! advertisements.

Under Commission rules, republication is triggered when a third party uses pre-existing graphics, video or audio materials. However, republication does not occur when a third party creates graphics, video or audio materials. In MUR 6044 (Morgan), the Commission held that republication did not exist when the Democratic Senatorial Campaign Committee created an advertisement featuring a candidate who appeared and spoke to the camera. The Commission stressed that the party produced and disseminated its own material, rather than distributing materials produced by the campaign.

In MUR 6037 (Merkley), the Commission found there was no republication, even when the candidate himself appeared in a state party ad and even when there were some similarities between his own campaign materials and language in the state party ad.

Here, the NDSCC created the advertisements, hired consultants to draft the script and shoot and edit footage. The NDSCC did not use any pre-existing graphics, video or audio materials produced by Senator Nelson's campaign. Senator Nelson's involvement is consistent with the Commission's guidance, and does not constitute republication.

With respect to the content of the tweets, in MUR 6037 (Merkley), a federal candidate appeared in a Democratic Party of Oregon advertisement and stated that we should give our troops "the respect they deserve," which was the same language used in a previous press release by his campaign committee. However, the General Counsel concluded that the overlap in such a short, common phrase was not sufficient to satisfy the republication requirement. MUR 6037, First General Counsel's Report, p. 11-12.

Like the Merkley phrase, "on the backs of seniors" is also commonly used by elected officials. The phrase does not belong to the Nelson campaign, or any campaign. It is a short, common, often used phrase that does not satisfy the republication requirement.

Based upon the above, the advertisements in this matter do not meet the content prong of the Commission's three part test and, therefore, cannot be deemed to be a coordinated communication.

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2. The Disclaimer Error was Inadvertent and Due Entirely to a Vendor Error.

The complaint alleges that one the ads had an incomplete disclaimer. The Act requires any communication paid for by a political party committee authorized by a candidate for Federal office to "state clearly that the communication has been paid for by such authorized political committee." 2 U.S.C. § 441d(1); 11 C.F.R. § 110.11.

The respondents acknowledge that, during the initial post-production of the "Nelson Ad," there was an inadvertent vendor error where the word "Democratic" was omitted from the written disclaimer at the end of the advertisement. This error was discovered after the ad had been shipped to stations but before the advertisement had begun to air. A corrected version of the advertisement was sent to stations prior to the airing of the advertisement to replace the erroneous version. Apparently, one or more stations may have aired the advertisement before the corrected version replaced the erroneous version. We do not believe that the erroneous version ran more than one or two times.

The Nelson Ad included other oral and written identifying information that would not have misled the public as to who paid for and approved the ad. Senator Nelson explicitly said that he approved of the message and the on screen disclaimer included his authorization. There was no attempt to mislead the public through the omission of "Democratic" in the disclaimer, and the NDP had made every effort to fix the error before it was aired. In any event, it was clear that the NDP sponsored the ads and any allegation that the error was intentional is nonsensical.

Generally, the Commission has not held a Committee liable for the failure to place a disclaimer on a communication when the failure was caused by a vendor error or when the disclaimer substantially complied with the requirements. Therefore, the Commission should dismiss this matter as it has done in previous cases where there has been an inadvertent vendor error. See MURs 4566, 5133, 5887, and 6109.

3. The Nebraska Democratic Party Disclaimer is Proper.

The complaint also alleges that the ads "Promise" and "Wrong Way" contained improper disclaimers as they said paid for by the "Nebraska Democratic Party" instead of the Nebraska Democratic State Central Committee. The "Nebraska Democratic Party" is used interchangeably with the "Nebraska Democratic State Central Committee" to describe the NDP and both names fully comply with the Act and regulations. As a general matter the NDP refers to itself as the "Nebraska Democratic Party" and all materials, as well as its website refer to the organization in this manner. See NDP website at [www.nebraskademocrats.org](http://www.nebraskademocrats.org). Therefore, the committee used this disclaimer in connection with its July radio advertisements. When the committee created the September television advertisements, it was advised to use its FEC registered name in the disclaimer. Notwithstanding this advice, both approaches fully comply with the requirements of the FEC's regulations. The FEC regulations merely require that the "full" name of the committee sponsoring an advertisement be disclosed in the

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advertisement. 11 C.F.R. § 110.11(a)(3). The regulation does not specify that it must be the registered name of the committee but rather the full name of the committee. Here, since the NDP commonly refers to itself as the "Nebraska Democratic Party," there could have been no confusion as to who sponsored the advertisements.<sup>4</sup>

#### CONCLUSION

For the foregoing reasons, the MUR 6502 should be dismissed.

Sincerely,



Neil Reiff  
Counsel for the Nebraska  
Democratic State Central Committee  
and Gerry Finnergan, in his official  
capacity as Treasurer

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<sup>4</sup> It should be noted that the NDP is planning to incorporate itself as a not-for-profit corporation as the "Nebraska Democratic Party" and will also be amending its registered name with the Federal Election Commission to be the "Nebraska Democratic Party" shortly.



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STATEMENT OF DESIGNATION OF COUNSEL  
Please use one form for each Respondent/Entity/Treasurer  
FAX (202) 218-3923

MUR # 6502

NAME OF COUNSEL: Neil Reiff

FIRM: Sandler, Reiff, Young + Lamb, P.C.

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Washington, D.C. 20005

TELEPHONE- OFFICE (202) 477-1111

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The above-named individual and/or firm is hereby designated as my counsel and is authorized to receive any notifications and other communications from the Commission and to act on my behalf before the Commission.

*Rev Jeff dk on  
12/13/11*

10/26/11  
Date

Nebraska Democratic State Center/Committee  
Respondent/Agent - Signature

Title (Treasurer/Candidate/Owner)

NAMED RESPONDENT: Nebraska Democratic State Center/Committee

MAILING ADDRESS: 1327 H St  
(Please Print)

Lincoln, NE 68508

TELEPHONE- HOME (402) 706-8019

BUSINESS (402) 434-2180

Information is being sought as part of an investigation being conducted by the Federal Election Commission and the confidentiality provisions of 2 U.S.C. § 437g(a)(12)(A) apply. This section prohibits making public any investigation conducted by the Federal Election Commission without the express written consent of the person under investigation

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MUR # 6502

NAME OF COUNSEL: NEIL REIFF

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TELEPHONE- OFFICE (202) 479-1111

FAX (202) 479-1115

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10-26-11  
Date

IN OFFICIAL CAPACITY AS TREASURER  
Respondent/Agent Signature

TREASURER  
Title (Treasurer/Candidate/Owner)

OF NEBRASKA DEMOCRATIC STATE CENTRAL COMMITTEE

NAMED RESPONDENT: GARRY FINNEGAN

MAILING ADDRESS: 1327 H. ST. SUITE 200 LINCOLN NE 68508  
(Please Print)

TELEPHONE- HOME ( \_\_\_\_\_ ) \_\_\_\_\_

BUSINESS (402) 434-2180

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