

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JAMES J. CAREY, *et al.*,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

Civ. No. 11- 259-RMC

ANSWER

DEFENDANT FEDERAL ELECTION COMMISSION'S ANSWER

Defendant Federal Election Commission (“FEC” or “Commission”) submits this answer to the Verified Complaint for Declaratory and Injunctive Relief, filed January 31, 2011. Any allegation not specifically responded to below is DENIED.

1. DENY that the plaintiffs’ rights or donors’ rights are infringed or abridged.

Neither this paragraph’s description of certain statutes nor its legal conclusions require a response.

2. The first sentence is a legal conclusion for which no response is required.

ADMIT that National Defense PAC (“NDPAC”) is a nonconnected political committee. The Commission is without knowledge or information sufficient to admit or deny the other assertions in the second and third sentences of this paragraph.

3. This paragraph contains plaintiffs’ characterization of judicial decisions, to which no response is required.

4. Plaintiffs' characterization of judicial decisions requires no response. DENY that the Commission "has failed to implement the ruling[s] of the D.C. Circuit Court of Appeals and United States Supreme Court." ADMIT that during the advisory opinion process in AO Request 2010-20 that two commissioners supported issuance of Draft A, three supported issuance of Draft B, and one did not vote. (Ver. Compl. Exh. D.) Because the affirmative vote of four members of the Commission is required for the Commission to render an advisory opinion, 2 U.S.C. §§ 437c(c), 437d(a)(7); 11 C.F.R. § 112.4(a), the Commission was unable to render an opinion in this matter. DENY sentences three and four.

5. This paragraph contains plaintiffs' legal conclusions and characterization of a judicial decision which require no response. DENY that the Commission failed to comply with the *EMILY's List* opinion or infringed constitutionally protected rights.

6. ADMIT that the cited statutes provide statutory jurisdiction.

7. ADMIT that venue is proper in this Court.

8. ADMIT that James J. Carey is the founder and treasurer of NDPAC, and has served as treasurer since 2000. The Commission is without knowledge or information sufficient to admit or deny the remainder of the paragraph.

9. The Commission is without knowledge or information sufficient to admit or deny the factual allegations in this paragraph.

10. ADMIT that NDPAC is a "nonconnected political action committee registered with the Commission." The Commission is without knowledge or information sufficient to admit or deny the remainder of the factual allegations in this paragraph.

11. ADMIT that the FEC is the federal agency charged with civil enforcement of the Federal Election Campaign Act and is located in Washington, D.C.

12. ADMIT that NDPAC raises and expends fund in support of candidates for federal office using funds raised subject to the federal amount and source limits. ADMIT that NDPAC makes contributions to federal candidates within the applicable limits. DENY that it makes independent expenditures. The Commission is without knowledge or information sufficient to admit or deny the other factual allegations in this paragraph.

13. Plaintiffs' characterization of judicial decisions and other legal conclusions require no response. The Commission is without knowledge or information sufficient to admit or deny the factual allegations in this paragraph.

14. In this single-sentence paragraph, the first clause contains plaintiffs' characterization of a judicial decision, which requires no response. DENY the second clause.

15-19. ADMIT.

20. ADMIT the first two sentences. DENY the third sentence.

21. DENY that the Commission "refus[ed] to issue an advisory option," but ADMIT that during the advisory opinion process in AO Request 2010-20 two commissioners supported issuance of Draft A, three supported issuance of Draft B, and one did not vote. (Ver. Compl. Exh. D.) Because the affirmative vote of four members of the Commission is required for the Commission to render an advisory opinion, 2 U.S.C. §§ 437c(c), 437d(a)(7); 11 C.F.R. § 112.4(a), the Commission was unable to render an opinion in this matter and plaintiffs have no advisory opinion upon which they can rely under 2 U.S.C. § 437f(c). ADMIT that the advisory opinion process in AOR 2010-20 is complete. DENY that plaintiffs were "deprived of a legal right – to engage freely in constitutionally protected speech and association." This paragraph also contains plaintiffs' characterizations of judicial decisions, which require no response.

22. ADMIT the first sentence. The Commission is without knowledge or information sufficient to admit or deny the factual allegations in the second sentence. ADMIT that NDPAC sought an expedited advisory opinion request and that the Commission issued its response 43 days later. ADMIT that on September 28, 2010, the Commission issued a certification of its vote, but lacked the four votes necessary to be able to issue an advisory opinion. DENY that plaintiff was “required to mute itself and curtail activities during the 2010 cycle.”

23. The Commission is without knowledge or information sufficient to admit or deny the factual allegations in this paragraph. ADMIT that NDPAC is subject to the contribution limits in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3). DENY the last sentence of this paragraph.

24. The Commission is without knowledge or information sufficient to admit or deny the factual allegations in this paragraph. ADMIT that plaintiffs attached Exhibit F to their complaint, which purports to be a proposed advertisement advocating for the defeat of Anthony Weiner.

25. The Commission is without knowledge or information sufficient to admit or deny the factual allegations in the first sentence. DENY the factual allegations in the second and third sentence.

26. The Commission is without knowledge or information sufficient to admit or deny the factual allegations in this paragraph. ADMIT that plaintiffs submitted with their complaint Exhibit G, which purports to be a letter from Kelly S. Eustis stating his wishes to donate “\$6,300.00 to help fund independent expenditure communications against Anthony Weiner” The final clause of this paragraph contains a legal conclusion for which no response is required.

27. The Commission is without knowledge or information sufficient to admit or deny the factual allegations in this paragraph.

28. The Commission is without knowledge or information sufficient to admit or deny the factual allegations in the first sentence of this paragraph. Regarding the second sentence, ADMIT that there were not four affirmative votes on the Commission approving NDPAC's separate bank account request.

29. The Commission is without knowledge or information sufficient to admit or deny the factual allegations in the first and third sentence of this paragraph. Regarding the second sentence, ADMIT that there were not four affirmative votes on the Commission approving NDPAC's separate bank account request.

30. DENY that NDPAC is an unincorporated association; it is incorporated in Virginia. (Ver. Compl. Exh. A, at ECF p. 7 (email from Dan Backer, NDPAC, to William Powers, FEC, Aug. 16, 2010) (confirming NDPAC is incorporated in Virginia). ADMIT that NDPAC is now registered as "a nonconnected political action committee with the FEC." ADMIT that plaintiffs have attached Exhibit H to their complaint which purports to be bylaws of NDPAC and purports to require that any independent expenditures not be coordinated as defined by the Commission. The Commission is without knowledge or information sufficient to admit or deny the other factual allegations in the paragraph.

31. The paragraph contains plaintiffs' conclusions of law to which no response is required. ADMIT that plaintiffs attached Exhibit F to their complaint, which purports to be a proposed advertisement advocating for the defeat of Anthony Weiner. The Commission is without knowledge or information sufficient to admit or deny the remaining factual allegations in this paragraph.

32. The Commission is without knowledge or information sufficient to admit or deny the factual allegations in this paragraph.

33. This paragraph contains conclusions of law to which no response is required.

ADMIT that contributions from Kelly Eustis to NDPAC are subject to the contribution limits in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3).

34. This paragraph contains conclusions of law to which no response is required.

ADMIT that NDPAC is subject to the contribution limits in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3).

35. DENY that the contribution limits in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3)

“limit the type and number of times [NDPAC] could run advertisements.” The Commission is without knowledge or information sufficient to admit or deny the factual allegations in sentences two and three. DENY the fourth sentence.

36. This paragraph contains conclusions of law to which no response is required.

ADMIT that the Federal Election Campaign Act (“Act”), 2 U.S.C. §§ 431-57, prohibits any individual from making contributions that exceed \$5,000 per year to a political committee (that is not a national party committee). 2 U.S.C. § 441a(a)(1)(C). The Act also prohibits any individual from making contributions to political committees (that are not national party committees) that in the aggregate exceed \$46,200 for the 2011-2012 biennial period. 2 U.S.C. § 441a(a)(3)(B). The Act prohibits political committees from knowingly accepting contributions in excess of these limitations. 2 U.S.C. § 441a(f). ADMIT that there are civil and criminal penalties for violating the Act. 2 U.S.C. §§ 431-57.

37. This paragraph contains conclusions of law to which no response is required.

ADMIT that the Act prohibits any individual from making contributions that exceed \$5,000 per year to a political committee (that is not a national party committee). 2 U.S.C. § 441a(a)(1)(C). The Act also prohibits any individual from making contributions to political committees (that are

not national party committees) that in the aggregate exceed \$46,200 for the 2011-2012 biennial period. 2 U.S.C. § 441a(a)(3)(B). DENY that these limits prevent Eustis “from associating with NDPAC and with other like minded individuals, as well as speaking, for the purpose of producing and distributing the advertisements described [in the complaint].”

38. This paragraph contains conclusions of law to which no response is required. ADMIT that the Act prohibits any individual from making contributions that exceed \$5,000 per year to a nonconnected political committee. 2 U.S.C. § 441a(a)(1)(C). The Act also prohibits any individual from making contributions to a nonconnected committee that in the aggregate exceed \$46,200 for the 2011-2012 biennial period. 2 U.S.C. § 441a(a)(3)(B). ADMIT that the Act prohibits political committees from knowingly accepting contributions in excess of these limitations. 2 U.S.C. § 441a(f).

39. This paragraph contains conclusions of law to which no response is required.

40. This paragraph contains conclusions of law to which no response is required.

41. This paragraph incorporates all previous paragraphs. The Commission likewise incorporates its previous responses.

42. DENY.

43. DENY the first sentence. The second sentence contains plaintiffs’ description of a judicial decision, to which no response is required. The third sentence contains legal conclusions and argument for which no response is required.

44-46. The Commission is without knowledge or information sufficient to admit or deny the allegations in this paragraph.

47. This paragraph contains plaintiffs’ characterizations of judicial decisions and statutory provisions to which no response is necessary.

48. DENY.

49. DENY the first sentence. The Commission is without knowledge or information sufficient to admit or deny the second and third sentences.

50. DENY.

51. This paragraph contains plaintiffs' description of a judicial decision, to which no response is required.

52. This paragraph contains plaintiffs' description of a judicial decision, to which no response is required. DENY any factual allegations.

53. This paragraph incorporates all previous paragraphs. The Commission likewise incorporates its previous responses.

54. ADMIT that plaintiffs submitted, with their complaint, Exhibit G, which purports to be a letter from Kelly S. Eustis stating that he wishes to donate \$6,300 to ND PAC. The Commission is otherwise without knowledge or information sufficient to admit or deny the factual allegations in this paragraph.

55. The Commission is without knowledge or information sufficient to admit or deny the allegations in this paragraph.

56. This paragraph contains plaintiffs' characterizations of judicial decisions and statutory provisions to which no response is necessary. ADMIT that Kelly S. Eustis is prohibited from making contributions in excess of the statutory limit to NDPAC.

57. DENY the first sentence. The second sentence contains plaintiffs' description of a judicial decision to which no response is necessary.

58. DENY the first sentence. The second sentence contains plaintiffs' description of a judicial decision to which no response is necessary.

59. DENY the first sentence. The Commission is without knowledge or information sufficient to admit or deny the second and third sentences.

60. DENY.

PRAYER FOR RELIEF

No response is required, but the relief requested by plaintiff should be denied.

AFFIRMATIVE DEFENSES

The Complaint fails to state a claim upon which relief may be granted.

Respectfully submitted,

Christopher Hughey
Acting General Counsel
chughey@fec.gov

David Kolker (D.C. Bar No. 394558)
Associate General Counsel
dkolker@fec.gov

Kevin Deeley
Assistant General Counsel
kdeeley@fec.gov

/s/ Greg J. Mueller
Greg Mueller (D.C. Bar No. 462840)
Attorney
gmueller@fec.gov

Erin Chlopak (D.C. Bar No. 496370)
Attorney
echlopak@fec.gov

Federal Election Commission
999 E Street, N.W.
Washington, DC 20463
(202) 694-1650

April 1, 2011

Certificate of Service

I hereby certify that on this 1st day April, 2011, I caused to be served by e-mail pursuant to Fed. R. Civ. P. 5(b)(2)(E) and Local Rule 5.4(d), with written consent, copies of the Federal Election Commission's Answer on the counsel listed below:

Dan Backer,
PO Box 75021
Washington, DC 20013
dbacker@dbcapitolstrategies.com

Stephen M. Hoersting
700 E Schantz Avenue
Dayton, OH 45429
hoersting@gmail.com

Benjamin T. Barr
10737 Hunting Lane
Rockville, MD 20850
Benjamin.barr@gmail.com

/s/ Greg J. Mueller
Greg Mueller (D.C. Bar No. 462840)
Attorney
gmueller@fec.gov