

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

April 17, 2012

Jeff S. Jordan, Esq.
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

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Re: MUR 6533

Dear Mr. Jordan:

The undersigned represent the respondents, Perry Haney, Perry Haney for Congress, Perry Haney for Congress Exploratory Committee ("Committee") and Gertrude Weltig as Treasurer.

This matter was generated by a Complaint filed by the Colorado Republican Committee. The sole fact alleged is that the Committee's YouTube channel, <http://www.youtube.com/user/HaneyForCongress>, was created on August 19, 2011, and the first video was uploaded to the YouTube channel on August 31, 2011 with links to www.perryhaneyforcongress.com and www.sendachiropractortocongress.com. Because Perry Haney filed his Statement of Candidacy for the U.S. House of Representatives for the 6th Congressional District with the Commission on December 14, 2011, the Complainant alleged that the YouTube channel and video violated the testing of the waters provisions 11 CFR § 100.72(a) and 100.131(a).

As described in more detail below, Perry Haney made relatively few public appearances to test the waters before publicly announcing and filing his Statement of Candidacy on December 15, 2011. At each appearance, he stated that he had not yet decided whether to run for office and would not decide until: the Congressional District lines became final and (2) he had determined that his medical practice would survive his candidacy. The Respondents created a private YouTube channel and uploaded videos to that private channel with the intention of making the videos public only if Dr. Haney announced he would run for office. The dates described in the Complaint are the dates supplied by YouTube to record the creation the private channel and the uploading of the videos to the private channel. The channel and its contents were not made public until December after which, it appears, that the complainants viewed the videos. Accordingly, the Respondents did not violate the testing of the waters provisions.

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BACKGROUND

Dr. Haney began thinking about running for Congress in early 2011. Snyder Decl. ¶ 1. Throughout most of 2011, the description of the 3rd and the 6th Congressional Districts borders were not final and under review by the Colorado courts. It was possible that Dr. Haney could have qualified for either or both depending on the final decision by the courts. Furthermore, Dr. Haney's decision to run was contingent upon whether the redrawn lines created a viable path for him as a candidate for Congress. *Denver Post*, December 15, 2011. In addition, Dr. Perry's decision was dependent on his analysis of the effect of his candidacy on his medical practice, its employees and its patients. *Denver Post* February 15, 2012.

In February 2011, Dr. Perry hired Tony Snyder to be his general consultant and began testing the waters. Snyder Decl. ¶ 1. He met with voters in Denver a few times and traveled to other sites in Colorado approximately ten times between February and December to determine whether he would have support if he decided to run for Congress. *Id.* ¶ 5. Mr. Snyder and other consultants repeatedly recommended that he announce his candidacy. *Id.* ¶¶ 3, 4. However, Dr. Perry steadfastly refused to make a decision until he knew what the Congressional District borders would be. *Id.* In fact he was criticized by the online blog *ColoradoPols.com* for not declaring his candidacy. *Id.* ¶ 9. At meetings with voters, he told them that he had not made up his mind whether to run for office and would not until the district boundaries were settled. *Id.* ¶¶ 5, 6. Dr. Haney, a licensed chiropractor, also met with other chiropractors to determine if they would contribute to his campaign. *Id.* ¶ 8. They were also told he had not yet decided whether to run. *Id.* During this period, Dr. Haney agreed to only one press interview and that was with the *Denver Post* on June 8, 2011, the only state-wide daily newspaper. *Id.* ¶ 7, *Denver Post* February 15, 2012. He also told the reporter that he had not made up his mind whether to run for office, and that interview was not published. *Id.* ¶ 7. Indeed, a search of the *Denver Post* web site for "Perry Haney" produced no stories until December 15, 2011. The Colorado Supreme court finalized the Congressional District lines on December 5, 2011, and Dr. Haney filed his Statement of Candidacy with the Commission and issued a press release announcing his candidacy on December 14, 2011. *Id.* ¶ 10, *Denver Post* December 15, 2011.

As part of the effort to determine if there was support for his candidacy and to be prepared if he decided to run, a video of his mother was shot and put on a private channel on YouTube for review by campaign staff and consultants, as all are all advertisements before they are released to the public. Snyder Decl. ¶11. The YouTube account was created using the "Unlisted: anyone with the link can view" option. Revare Decl. ¶ 2. This option limits access to account holders with log in information and individuals who were sent a private, custom hyperlink. *Id.* About 3-5 videos of 30 to 120 seconds were recorded by a staffer with a hand held consumer-grade recorder of Perry Haney's mother talking about raising her son and his qualities as a person. *Id.* ¶3. The video was uploaded to the campaign's YouTube account using the "Unlisted: anyone with the link can view" option on August 31, 2011. *Id.* ¶ 4. Videos using this option cannot be searched for, do not show on the account holder's channel and are not available for viewing without special permission of the account holder. *Id.* YouTube applies the date that the video was uploaded regardless of the privacy setting.

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The only people who had access to the video were with a small group of advisors, interested election officials, a few donors and campaign supporters active in the exploratory committee who were sent a private, custom hyperlink. *Id.* ¶¶ 5, 6. The purpose of sharing the video with these people was to obtain their reaction and advice just like pre-viewing a television advertisement before it is aired. *Id.* ¶ 7. The purpose of creating the video was to be prepared to distribute it through email, social media and other online venues once the exploratory phase of the campaign ended if Dr. Haney announced his candidacy. *Id.* ¶¶ 8, 12. Snyder Decl. ¶ 11. Because these videos were designed to be made public after Dr. Haney announced his candidacy, they included the phrase "Perry Haney For Congress" and references to the campaign's future website. Revare Decl. ¶ 9. Every effort was made to keep the videos out of the public arena until Dr. Haney announced his decision. *Id.* ¶ 13, Snyder Decl. ¶ 11.

The YouTube channel and videos were made available to the public in December 2011 but were marked by YouTube with the original creation and upload date even though they were originally created and uploaded under the "Unlisted: anyone with the link can view" option. Revare Decl. ¶ 10. Since then, there have been only approximately 200 visits to that YouTube site. *Id.* ¶ 11, Snyder Decl. ¶ 11.

Dr. Haney announced that he was dropping out of the race on February 15, 2012 because: "My medical practice just isn't where it needs to be for me to be absent and campaign full-time." "It is not what I anticipated, but I cannot in good conscience risk my colleagues' and staff employment and healthcare benefits while I pursue a run for Congress." *Denver Post* February 15, 2012. His medical practice included four to five other doctors, and a total staff of approximately 45.

DISCUSSION

The Commission's regulations exempt a variety of activities to assist in making a determination of whether to become a candidate for federal office from the definition of expenditures under the act.

Funds received and payments made solely for the purpose of determining whether an individual should become a candidate are not contributions. Activities permissible under this exemption include, but are not limited to, expenses incurred for: conducting a poll, telephone calls and travel, to determine whether an individual should become a candidate. The individual should keep records of all such funds received and payments made. If the individual subsequently becomes a candidate, the funds received and payments made are contributions and expenditures subject to the limitations, prohibitions and requirements of the Act. Such contributions and expenditures must be reported with the first report filed by the principal campaign committee of a candidate, regardless of the date the funds were received or the payments made. This exemption does not include funds received or payments made for general public political advertising; nor does the

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exemption include funds received or payments made for activities designed to amass campaign funds that would be spent after the individual becomes a candidate. 11 CFR § 100.7(b)(1), see also the parallel exemption to the definition of expenditure at 11 CFR § 100.8(b)(1).

AO 1982-3. "These limited exemptions, commonly referred to as 'testing the waters' exemptions, were included in Commission regulations so that an individual would not be discouraged from pursuing a variety of activities to determine whether candidacy for federal office is feasible." AO 1981.32. Exemptions are available to determine political support should one become a candidate, and funds spent during a period when one is evaluating a candidacy. *Id.* "Accordingly, it is apparent that the regulations seek to draw a distinction between activities directed to an evaluation of the feasibility of one's candidacy, as distinguished from conduct signifying that a private decision to become a candidate has been made." *Id.*

Examples of approved activity include: travel for the purpose of speaking to political and nonpolitical groups to determine whether potential financial support exists; and employment of political and public-relations consultants; preparation and use of letter head stationary and correspondence with persons who have indicated an interest in a possible campaign, but not mailings to the general public. *Id.* The Commission has also examined statements by potential candidates to determine whether or not the candidate has made a decision to run for office or was merely testing the waters. The Commission has determined that "conditional statements of candidacy, based upon a future action by another person, failed to establish that [the potential candidate] had decided to run. Where an individual conditions his own candidacy upon an incumbent's decision, the individual cannot be said to have decided to run until a condition precedent occurs." MUR 5930 Statement of Reasons of Commissioners Petersen, Hunter, McGahn and Weintraub at 2. The Commission has also determined that certain ambiguous statements about a future candidacy may be also be made while testing the waters. Examples include: "We are going to be getting in if we get in, and of course, we are in the testing the waters phase;" "We are going to be making a statement shortly that will cure all of that. But yeah, we'll be in traditionally when people get in this race;" "We are going to be making a statement shortly;" "We will be in traditionally when people get in this race;" and "If we get in, and of course, we are in the testing the waters phase." MUR 5934 Statement of Reasons of Commissioners Petersen, Hunter, McGahn and Weintraub at 2.

Dr. Haney's and his team's activities fit easily within the Commission's testing of the waters regulation. Dr. Haney stated repeatedly whenever he spoke to the public that he had not decided to run and would not decide whether to run until after the Congressional District borders were final. He also steadfastly refused to follow the advice of his advisors to announce his candidacy and told them that he would not make a decision until after the Congressional District borders were final. He did not seek press coverage of his travels, and the one time he gave an interview, he told the reporter that he had not and would not make a decision whether to run for office until the Congressional District borders were final.

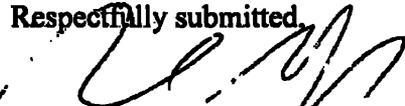
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The sole fact alleged in the Colorado Republican Committee complaint dated February 7, 2012 was that the Committee's YouTube channel, <http://www.youtube.com/user/InneyForCongress>, was created on August 19, 2011, and the first video was uploaded to the YouTube channel on August 31, 2011 with links to www.perryhaneyforcongress.com and www.sendachiropractortocongress.com. Based on the date of the complaint, it appears that the complainant viewed the YouTube channel after Dr. Haney filed his candidacy on December 14, 2011. However, as described above, YouTube added the date the non-public channel was created and the date that the non-public video was uploaded to the non-public channel – not when the channel or the video became available to the general public. The only individuals, who had access to the video while it was in the “Unlisted: anyone with the link can view” option, were a few advisors and supporters who were asked for their opinion of the video. The channel and the video were intentionally kept confidential by the Committee, i.e. there was no general distribution to the public. Even after the video was made available to the public there were probably less than 200 viewers. Thus, the Respondents never made any statement that Dr. Haney intended to run for office until he filed his Statement of Candidacy on December 14, 2011.

Furthermore, the expenditure for the videos were *de minimus*. There were a few short, less than two minute, videos of the candidate's mother shot by a volunteer with a consumer grade, hand-held recorder uploaded to a YouTube channel.

In view of the above, the Respondents request that Commission dismiss the complaint and close the file.

Respectfully submitted,



Stephen E. Hershkowitz
Neil P. Reiff

Counsel for Perry Haney,
Perry Haney for Congress, Perry Haney for
Congress Exploratory Committee and
Gertrude Weltig as Treasurer.

Enc:

Denver Post, December 15, 2011
Denver Post, February 15, 2012

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Perry Haney enters Colorado's 6th Congressional District race

By Kurtis Lee *The Denver Post* *The Denver Post*
Posted:

DenverPost.com

Perry Haney, a physician and small-businessman from Greenwood Village, announced Wednesday he will enter the primary election against Democratic state Rep. Joe Miklosi in Colorado's 6th Congressional District — hoping to eventually face two-term Republican Rep. Mike Coffman in a general election.

In a news release, Haney said he is running "because the career politicians have made a mess of things."

"This country has been too good to me to sit on the sidelines and let the mess in Washington continue."

Speculation had grown as to whether another Democrat would join the race after the Colorado Supreme Court affirmed a district judge's decision that made the 6th District, once a Republican stronghold, much more winnable for Democrats.

Haney is a third-generation Coloradan and graduate of the University of Colorado School of Medicine.

Haney originally considered a run in the 3rd District and a primary against state Rep. Sal Pace, a Pueblo Democrat. Haney said that once the redistricting lines were solidified, he made his decision to run in the 6th District.

"My patients are proud residents of the 6th, and I know what people are facing every day as they are forced to bail out Wall Street and deal with their political leaders' inability to get things done," Haney said.

The new district lines encompass some of the south Denver suburbs and all of Aurora, and the district is split in thirds between Republicans, Democrats and unaffiliated voters.

Haney owns SpineOne Inc., a medical facility employing 45 people in Lone Tree.

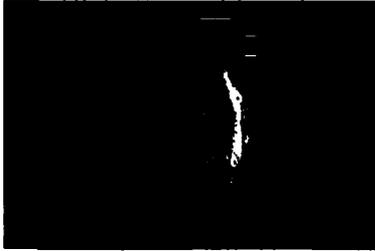
Kurtis Lee: 303-954-1655, klee@denverpost.com or

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I. Haney drops out of 6th Congressional District race after GOP complaint

Posted: 02/15/2012 01:31:35 PM MST
Updated: 02/15/2012 08:28:18 PM MST

By Kurtis Lee
The Denver Post



Denver Post conference room photo of Perry Haney during a June 8, 2011 interview. (John Prieto, The Denver Post)

Less than 24 hours after Colorado's Republican Party filed a formal complaint with the Federal Election Commission about the campaign practices of Democrat Perry Haney, the 6th Congressional District candidate said he's withdrawing from the race.

In an interview prior to sending an email blast to supporters, Haney told The Denver Post that he's been trying to get out of the race for weeks and that it's not due to the GOP complaint.

"My medical practice just isn't where it needs to be for me to be absent and campaign full-time," said Haney, a Greenwood Village physician who announced his candidacy in December.

"It is not what I anticipated, but I cannot in good conscience risk my colleagues' and staff employment and



Blog: The Denver Post's political and editorial writers dish daily on local, state and national politics and policy.

healthcare benefits while I pursue a run for Congress," Haney said in the statement to supporters. "While I have no doubt that I could have ran a great race and changed the tone in Washington, the cost to my employees would have been too great.

Haney plans to meet Monday with his former Democratic challenger, state Rep. Joe Miklosi of Denver, to discuss a potential endorsement.

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Miklosi is now the lone Democrat vying to unseat two-term Republican Rep. Mike Coffman.

The announcement comes after the Colorado GOP chairman Ryan Call sent a scrupulously crafted open-letter to the FEC's general counsel— which references federal election legislation from the 1970s — regarding the campaign practices of Haney.

Call cites two FEC reports from June and July of 2011 that reveal Haney contributed \$51,000 to his campaign without formally filing with the FEC until several months later.

Under the Federal Election Campaign Act an individual becomes a candidate and triggers registration and reporting responsibilities once campaign activity exceeds \$5,000 in either contributions or expenditures.

Earlier today Haney provided a statement about the complaint via email, saying that his attorney looked at it and says "it's the most bogus complaint he's ever seen." He said after his withdrawal announcement that he stands by that statement.

Moreover, Call noted in the complaint that Haney — who has never run for political office — had both an exploratory committee and a congressional committee simultaneously, and in August created a YouTube channel where he uploaded a video about his run for office with links to both his campaign and exploratory committee websites.

According to the FEC, individuals exploring the possibility of a congressional bid are allowed to "test the waters," and explore the feasibility of becoming a candidate.

But the FEC notes that certain actions indicate an individual has decided to become a candidate and is no longer merely testing the waters. Those, among others, consist of raising funds in excess of amounts reasonably required for exploratory activity, and the uses of public political advertising to publicize his or her intention to campaign.

"Once he paid thousands of dollars to his campaign he's breaking that threshold and law by not formally filing with the FEC," said Chuck Poplstein, executive director of the state Republican party. "And you need to know what you're doing. What's he hiding and why is he hiding behind exploratory rules and breaking them?"

Initially, Haney was weighing a potential bid in the 3rd Congressional District, but once the new redistricting maps were affirmed he decided to run in the more Democrat friendly 6th District.

When asked today if the state's Republican Party saw Haney as a threat to unseating Coffman — he has more money in the bank, \$352,938, compared to Miklosi's \$173,700 — Poplstein said that when a potential opponent to Coffman is trying to skirt FEC laws, voters need to know if he's hiding anything.

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