



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

February 28, 2007

VIA FACSIMILE & FIRST CLASS MAIL

Benjamin L. Ginsberg  
Mitchell R. Berger  
Benjamin D. Wood  
Patton Boggs  
2550 M Street, NW  
Washington, DC 20037

RE: MUR 5487  
Progress for America Voter Fund

Dear Counsel:

On February 22, 2007, the Federal Election Commission accepted the signed conciliation agreement submitted on your client's behalf in settlement of violations of 2 U.S.C. §§ 433, 434, 441a(f), and 441b(a) provisions of the Federal Election Campaign Act of 1971, as amended ("the Act"). Accordingly, the file has been closed in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). Information derived in connection with any conciliation attempt will not become public without the written consent of the respondent and the Commission. *See* 2 U.S.C. § 437g(a)(4)(B).

Enclosed you will find a copy of the fully executed conciliation agreement for your files. Please note that the civil penalty is due within 30 days of the conciliation agreement's effective date. If you have any questions, please contact me at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Ann Marie Terzaken".

Ann Marie Terzaken  
Assistant General Counsel

Enclosure  
Conciliation Agreement

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**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of )  
 ) MUR 5487  
Progress for America Voter Fund )

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
OFFICE OF GENERAL  
COUNSEL  
2007 FEB 15 A 11:46

**CONCILIATION AGREEMENT**

This matter was generated by a complaint filed with the Federal Election Commission ("the Commission"). See 2 U.S.C. § 437g(a)(1). The Commission found reason to believe that Progress for America Voter Fund (hereinafter, "PFA-VF") violated 2 U.S.C. §§ 433, 434, 441a(f), and 441b(a) of the Federal Election Campaign Act of 1971, as amended ("the Act") by failing to register as a political committee with the Commission, by failing to report contributions and expenditures, by knowingly accepting contributions in amounts exceeding \$5,000 from individuals, and by knowingly accepting corporate and/or union contributions, and an investigation was conducted.

NOW, THEREFORE, the Commission and the Respondent, having participated in informal methods of conciliation, prior to a finding of probable cause to believe, do hereby agree as follows:

- I. The Commission has jurisdiction over the Respondent and the subject matter of this proceeding.
- II. Respondent has had a reasonable opportunity to demonstrate that no action should be taken in this matter.
- III. Respondent enters voluntarily into this agreement with the Commission.
- IV. The pertinent facts in this matter are as follows:

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Applicable Law

1. The Act defines a political committee as “any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year.” 2 U.S.C. § 431(4)(A).

2. The Act defines the term “contribution” as including “anything of value made by any person for the purpose of influencing any election for Federal office.” 2 U.S.C. § 431(8)(A)(i); *see also, FEC v. Survival Education Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995) (where a statement in a solicitation “leaves no doubt that the funds contributed would be used to advocate [a candidate’s election or] defeat at the polls, not simply to criticize his policies during the election year,” proceeds from that solicitation are contributions).

3. The Act defines the term “expenditure” as including “anything of value made by any person for the purpose of influencing any election for Federal office.” 2 U.S.C. § 431(9)(A)(i).

4. Under the Commission’s regulations, a communication contains express advocacy when it uses phrases such as “vote for the President,” “re-elect your Congressman,” or “Smith for Congress,” or uses campaign slogans or words that in context have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates, such as posters, bumper stickers, or advertisements that say, “Nixon’s the One,” “Carter ‘76,” “Reagan/Bush,” or “Mondale!” *See* 11 C.F.R. § 100.22(a); *see also FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986) (“[The publication] provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than “Vote for Smith” does not change its essential nature.”). Courts have held that

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“express advocacy also include[s] verbs that exhort one to campaign for, or contribute to, a clearly identified candidate.” *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 62 (D.D.C. 1999) (explaining why *Buckley v. Valeo*, 424 U.S. 1, 44, n.52 (1976), included the word “support,” in addition to “vote for” or “elect,” on its list of examples of express advocacy communication).

5. The Commission’s regulations further define express advocacy as communication containing an “electoral portion” that is “unmistakable, unambiguous, and suggestive of only one meaning” and about which “reasonable minds could not differ as to whether it encourages actions to elect or defeat” a candidate when taken as a whole and with limited reference to external events, such as the proximity to the election. 11 C.F.R. § 100.22(b). “Communications discussing or commenting on a candidate’s character, qualifications or accomplishments are considered express advocacy under section 100.22(b) if, in context, they have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question.” *Explanation and Justification*, 60 Fed. Reg. 35291, 35295 (Jul. 6, 1995).

6. The Supreme Court has held that “[t]o fulfill the purposes of the Act” and avoid “reach[ing] groups engaged purely in issue discussion,” only organizations whose major purpose is campaign activity can be considered political committees under the Act. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 79 (1975); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986) (“*MCFL*”). It is well-settled that an organization can satisfy *Buckley*’s “major purpose” test through sufficient spending on campaign activity. *MCFL*, 479 U.S. at 262-264; *see also Richey v. Tyson*, 120 F. Supp. 2d 1298, 1310 n.11 (S.D. Ala. 2002). An organization’s “major purpose” may also be established through public statements of purpose. *See, e.g., FEC v. Malenick*, 310 F. Supp. 2d 230, 234-36 (D.D.C. 2004); *FEC v. GOPAC*, 917 F. Supp. 851, 859 (D.D.C. 1996).

7. The Act requires all political committees to register with the Commission and file a statement of organization within ten days of becoming a political committee, including the name, address, and type of committee; the name, address, relationship, and type of any connected organization or affiliated committee; the name, address, and position of the custodian of books and accounts of the committee; the name and address of the treasurer of the committee; and a listing of all banks, safety deposit boxes, or other depositories used by the committee. *See* 2 U.S.C. § 433.

8. Each treasurer of a political committee shall file periodic reports of the committee's receipts and disbursements with the Commission. *See* 2 U.S.C. § 434(a)(1). In the case of committees that are not authorized committees of a candidate for Federal office, these reports shall include, *inter alia*, the amount of cash on hand at the beginning of the reporting period, *see* 2 U.S.C. § 434(b)(1); the total amounts of the committee's receipts for the reporting period and for the calendar year to date, *see* 2 U.S.C. § 434(b)(2); and the total amounts of the committee's disbursements for the reporting period and the calendar year to date. *See* 2 U.S.C. § 434(b)(4).

9. The Act states that no person shall make contributions to any political committee that, in the aggregate, exceed \$5,000 in any calendar year, with an exception for political committees established and maintained by a state or national political party. *See* 2 U.S.C. § 441a(a)(1)(C). Further, the Act states that no political committee shall knowingly accept any contribution in violation of the limitations imposed under this section. *See* 2 U.S.C. § 441a(f).

10. Pursuant to 2 U.S.C. § 441b(a), it is unlawful for any political committee to knowingly accept or receive, directly or indirectly, any contribution from a corporation.

Factual Background

11. PFA-VF was formed as an Internal Revenue Code Section 527 organization on May 27, 2004. In its own words, PFA-VF was formed to “[f]ocus primarily on TV & radio in key battleground states serving as [sic] counter-balance to liberal 527 committees.”

12. PFA-VF has not registered as a political committee with the Federal Election Commission.

13. Between May 27, 2004 and the November 2, 2004 General Election, PFA-VF raised \$44.9 million in corporate and individual contributions, over 70% of which came from just thirteen donors according to IRS reports, and spent \$26.4 million on nine television advertisements in Arkansas, Florida, Iowa, Minnesota, Missouri, Nevada, New Hampshire, Massachusetts, New Mexico, Ohio, Pennsylvania, Wisconsin and on national cable networks.

14. All of these advertisements praised George W. Bush’s leadership as President and/or criticized Senator Kerry’s ability to provide similar leadership. Examples of these television advertisements include:

**Finish It**

Audio: Announcer: These people want to kill us.

On screen: Images of Mohammed Atta, Osama bin Laden, Khalid Sheik Mohammed, Nick Berg's killers and victims of terrorist attacks.

Audio: They killed hundreds of innocent children in Russia. Two hundred innocent commuters in Spain. And 3,000 innocent Americans.

On screen: Pictures showing 9/11 attack on Twin Towers and terrorist attacks in Russia and Spain.

Audio: John Kerry has a 30-year record of supporting cuts in defense and intelligence and endlessly changed positions on Iraq.

On screen: Still Picture of Kerry; 30 years of cuts in defense and intelligence.

Audio: Would you trust Kerry against these fanatic killers? President Bush didn't start this war, but he will finish it.

On screen: Would you trust Kerry? Pictures of President Bush addressing the US military.

Audio: Progress for America Voter Fund is responsible for the content of this message.

On screen: PFAvoterfund.com. Paid For By Progress For America Voter Fund & Not Authorized By Any Candidate Or Candidate's Committee; 877-792-3800; Progress for America Voter Fund Is Responsible For The Content Of This Ad.

### **Ashley's Story**

On screen: Lynn Faulkner; picture of Wendy Faulkner with her two daughters.

Audio: Lynn Faulkner: My wife, Wendy, was murdered by terrorists on Sept. 11.

On screen: Picture of Ashley reading a book; Bush at a campaign rally in Ohio.

Audio: The Faulkners' daughter Ashley closed up emotionally. But when President George W. Bush came to Lebanon, Ohio, she went to see him as she had with her mother four years before.

On screen: Linda Prince; Family Friend.

On screen: Ashley Faulkner.

On screen: President Bush embracing Ashley Faulkner.

Audio: Linda Prince: He walked toward me and I said, "Mr. President, this young lady lost her mother in the World Trade Center."

Audio: Ashley Faulkner: And he turned around and he came back and he said, "I know that's hard. Are you all right?"

Audio: LINDA PRINCE: Our president took Ashley in his arms and just embraced her. And it was at that moment that we saw Ashley's eyes fill up with tears.

ASHLEY FAULKNER: He's the most powerful man in the world and all he wants to do is make sure I'm safe, that I'm OK.

On screen: Lynn Faulkner; picture of President Bush with a firefighter.

Audio: LYNN FAULKNER: What I saw was what I want to see in the heart and in the soul of the man who sits in the highest elected office in our country.

Footage of a newspaper with President Bush embracing a girl captioned "Bush Comforts Daughter Of 9/11 Victim."

Audio: Progress for America Voter Fund is responsible for the content of this message.

On screen: PFAvoterfund.com. Paid For By Progress For America Voter Fund & Not Authorized By Any Candidate Or Candidate's Committee; 877-792-3800; Progress for America Voter Fund Is Responsible For The Content Of This Ad.<sup>1</sup>

15. In October 2004, PFA-VF also spent \$500,000 on Spanish-language television advertisements praising George Bush and \$900,000 on Spanish-language radio advertisements in Nevada, New Mexico, and Florida supporting the Republican Party and opposing the Democratic Party.

16. Between October 14 and the General Election on November 2, 2004, PFA-VF also spent \$1.5 million on direct mail pieces, over \$600,000 on email communications, and more than \$170,000 on Internet banner advertisements. All of these materials supported George Bush and/or attacked John Kerry.

17. The Commission concludes that PFA-VF intended these communications to influence the 2004 presidential election. For example, to solicit funds for PFA-VF's advertisements in Pennsylvania, PFA-VF stated in a direct mailing, "So please, help us promote President Bush's agenda in Pennsylvania with the greatest possible strength *between now and November 1<sup>st</sup>*. Your generous support will help us raise the \$2.5 million we need to dominate the Pennsylvania airwaves and have a crucial impact on public opinion." Further, in a memorandum

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to PFA-VF personnel, PFA-VF media consultant Larry McCarthy opined as to the impact “What If?” would have on the election: “Based upon data and experience, I believe “What if” could produce a 5% net swing toward support for the President and his policies in polling data in the battleground states where the issues debate is being watched most intensely.”

18. According to IRS reports, as of April 15, 2006, PFA-VF has raised \$4,675,029 and spent \$11,239,723 since the 2004 presidential election.

#### Contributions

19. The Commission concludes that the language used in fundraising solicitations sent by PFA-VF preceding the 2004 General Election clearly indicated that the funds received would be targeted to the election or defeat of a specific federal candidate.

20. Although PFA-VF made most solicitations by email communication, it also solicited funds in two direct mailings, on its website, and through private meetings and conversations. Virtually all of the email solicitations reference George Bush and John Kerry and state that “Liberal 527 Organizations” are outspending President Bush by a significant margin. The Commission concludes that they also make clear that the funds received will be used to counter “liberal 527 Organizations” by running advertisements supporting George Bush and/or criticizing John Kerry in specific states.

21. For example, an email solicitation sent to potential donors in July 2004 claimed that “Liberals [were] outspending President Bush 2 to 1 in key media markets” and that PFA-VF needed help to “raise \$1 million per week for the rest of the year in order to help offset the Liberals’ spending advantage.” The solicitation also claimed that PFA-VF “already has the

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<sup>1</sup> In post-election materials, PFA-VF praised “Ashley’s Story” as the “most important and successful part of PFA-VF’s efforts.” In fact, of the \$26.4 million spent on television advertisements, PFA-VF spent \$16.5 million on media buys for “Ashley’s Story” in eleven states and national cable television.

Kerry campaign on the run . . . . **CONTRIBUTE NOW TO KEEP KERRY CHASING US!**"

*Id.* (emphasis in original).

22. Similarly, the two direct mail solicitations, which PFA-VF sent to approximately 1,600 potential donors, reference George Bush and make clear that the funds will be used for media buys in "key states" up to the day before the election. The first mailing includes the line: "So please, help us promote President Bush's agenda in Pennsylvania with the greatest possible strength between now and November 1<sup>st</sup>." The second mailing also includes the line, "So please, help us promote President Bush's agenda with the greatest possible strength between now and November 1<sup>st</sup>." The Commission concludes that these solicitations clearly indicate that the funds received would be targeted to the election of George W. Bush in the 2004 General Election.

23. With regard to PFA-VF's website, during the 2004 election cycle, the homepage stated that "PFA-VF is a conservative issue advocacy organization dedicated to keeping the issue record straight on the campaign trail and serving as a 'Political Truth Squad.'" Immediately next to this message was a solicitation for contributions to pay for television advertisements, accompanied by a picture of President Bush on a television screen. This same picture of Bush on a television screen appeared on the contribution webpage where PFA-VF specifically stated that donors' contributions will "help launch TV ads." The Commission concludes that, similar to the email solicitations and direct mailings, the solicitations on the website made clear that the funds received would be used to fund "TV ads" supporting George Bush on the "campaign trail."

24. The Commission concludes that at least some of the solicitations made by PFA-VF in meetings and private conversations with large donors clearly indicated that the funds

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received would be used to elect George W. Bush. For example, Alex Spanos, who gave \$5 million to PFA-VF and fundraised on its behalf, gave the last \$4 million on August 19, 2004, two days after attending a "briefing" by PFA-VF in California, the invitation to which stated, "Your participation is critical to our success in November!," and two weeks after receiving a written solicitation stating that George Soros said he would become poor to beat Bush and that "We cannot let that happen!"

25. PFA-VF claims that it "cannot identify the total number of persons to whom it provided the solicitation materials, the total amounts received in response to these solicitations or even estimate the positive response rate as such data was not recorded." Nevertheless, considering that PFA-VF raised \$44.9 million in the five months before the 2004 General Election, there is no genuine doubt that the funds received in response to its email solicitations and direct mailings far exceed \$1,000. Further, PFA-VF received \$475,895 in contributions through its website and an additional \$7.75 million, collectively, from three donors.

26. Accordingly, the Commission concludes that contributions received in response to these solicitations caused PFA-VF to surpass the \$1,000 statutory threshold. *See* 2 U.S.C. § 431(4)(A).

#### Expenditures

27. The Commission concludes that certain television advertisements run by PFA-VF before the 2004 General Election expressly advocated that recipients vote for, campaign for, or contribute to a clearly identified candidate. For example, "Veterans" was run in eight battleground states in September 2004, less than two months before the General Election, at a total cost of \$1.56 million.

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**“Veterans”**

Four veterans from the frontlines of Iraq and Afghanistan. President Bush will be the best man to lead us in the war against terror. President Bush sticks to his policies. I’d ask Senator Kerry why would you vote to go to war but vote not to support troops over there. I don’t think that Senator Kerry has what it takes. He doesn’t have the resolve. Progress for America Voter Fund is responsible for the content of this message.

28. In addition, “Why do we fight?” was run in five battleground states in July 2004 at a total cost of \$521,524.

**“Why do we fight?”**

Why do we fight? Years of defense and intelligence cuts left us vulnerable. We fight now because America is under attack. Positions are clear. A president, who fights to defeat terrorists before they can attack again. Or the nation’s most liberal senator with a 30-year record of supporting defense and intelligence cuts. The war is against terror. And President Bush has the strength and courage to lead us to victory. Progress for America Voter Fund is responsible for the content of this ad.

Progress for America Voter Fund’s Major Purpose

29. The Commission concludes that PFA-VF’s statements and activities demonstrate that its major purpose was to defeat John Kerry and elect George Bush. In the press release announcing the creation of PFA-VF, the President of PFA-VF, stated, “Although PFA (the 501(c)(4) organization) has worked since 2001 to advance the conservative issue agenda, the establishment of the PFA Voter Fund will give us the additional flexibility we need to affect the political process.”

30. In solicitation materials, PFA-VF described itself as “a conservative issue advocacy organization dedicated to keeping the issue record straight *on the campaign trail* and serving as a ‘Political Truth Squad’” and stated that “With your support, PFA-VF will rebut the

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liberal 527 committees and level the playing field on television *in the battleground states.*”

(emphasis added).

31. In solicitation materials and on its website, PFA-VF described the three goals of its media campaign before the 2004 General Election as:

1. Level the playing field on ads — it may not be possible to out raise even George Soros alone, but the PFA Voter Fund must try to reduce the lopsided advertising advantage the Democratic 527s have on the campaign trail today.
2. Reinforce the message of conservatives across the nation – we have messages we know will work and energize the base; we just need the resources to deliver these messages.
3. Become a major factor in the battleground states, and also advertise on targeted national cable networks. To effectively air one thirty second TV ad in every battleground state will cost \$9.3 million per week.

We believe we can play a critical role in the following eleven states (Arizona, Florida, Iowa, Minnesota, Missouri, Nevada, New Hampshire, New Mexico, Ohio, Pennsylvania, Wisconsin). To do this we must be on the air from Labor Day straight through to the election.<sup>2</sup>

32. Further, in email communications made to donors in October 2004, PFA-VF stated that it “continues to win the 527 battle against liberal organizations like MoveOn.org, The Media Fund, Americans Coming Together & others. PFA-VF is outspending George Soros and dozens of liberal 527 groups on television for the month of October in key states across the country. But we still have a long way to go to increase support for President Bush’s agenda & expose John Kerry’s record as the most liberal member of the U.S. Senate!”

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<sup>2</sup> The first two goals are still provided on PFA-VF’s website. See <http://pfavoterfund.com/docs/aboutus> (last visited December 1, 2006). Just below the two stated goals on the website is the statement: “As a diverse coalition of concerned citizens, nonprofit organizations, and other players in the political process, PFA-VF is dedicated to educating the American people regarding the public policy positions of candidates for federal, state, and local office

33. The Commission concludes that PFA-VF spent virtually all of its money on federal campaign activity. PFA-VF spent \$26.4 million out of the \$44.9 million it raised before the 2004 General Election, or nearly 60%, on nine television advertisements run in swing states that praised George Bush and were critical of John Kerry.

34. PFA-VF spent an additional \$1.4 million on Spanish-language television and radio advertisements in Nevada, New Mexico, and Florida promoting George W. Bush or the Republican Party and \$2.3 million on direct mailings, email communications, and Internet banner advertisements promoting George Bush in "Ashley's Story."

35. PFA-VF also spent at least \$20,000 on Internet banner advertisements that attacked John Kerry.

36. During the entire 2004 election cycle, the only other disbursements made by PFA-VF were for fundraising, administrative costs, and consulting/professional fees. PFA-VF made no disbursements in connection with state or local elections during the 2004 election cycle.

37. Respondent contends that it made its fundraising communications with the good faith belief that they did not constitute solicitations for contributions under 2 U.S.C. § 431(8)(A)(i), and further contends that the language used in its fundraising solicitations did not clearly indicate that the funds received would be targeted to the election or defeat of a specific federal candidate. In addition, Respondent contends that it made the communications described herein for the purpose of influencing the issues debate that was heightened during the 2004 Presidential election and with the good faith belief that they did not contain express advocacy

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and mobilizing conservative voters. These activities provide the American people with the information they need to see through the misleading public policies and campaign themes of liberal politicians." *Id.*

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under either 11 C.F.R. §§ 100.22(a) or (b) and that disbursements spent thereon did not constitute expenditures under 2 U.S.C. § 431 (9)(A)(i).

V. Solely for the purpose of settling this matter expeditiously and avoiding litigation, without admission with respect to any other proceeding, and with no finding of probable cause by the Commission, PFA-VF agrees not to contest the Commission's conclusions that Respondent violated the Act in the following ways:

A. Respondent violated 2 U.S.C. §§ 433 and 434 by failing to register and report as a political committee.

B. Respondent violated 2 U.S.C. § 441a(f) by knowingly accepting contributions in amounts exceeding \$5,000 from individuals and 2 U.S.C. § 441b(a) by accepting prohibited corporate contributions.

VI. Respondent will cease and desist from violating 2 U.S.C. §§ 433 and 434 by failing to register and report as a political committee. Respondents will cease and desist from violating 2 U.S.C. §§ 441a(f) and 441b(a) by accepting contributions in excess of the limits as set forth in the Act or from prohibited sources. Respondent agrees to register with and report to the Commission as a political committee in the event that it should engage in activities that the Commission has concluded would trigger federal political committee status in connection with future elections, and will comply with any and all applicable provisions of the Act and Commission regulations.

VII. Respondent will pay a civil penalty to the Federal Election Commission in the amount of Seven Hundred Fifty Thousand Dollars (\$750,000), pursuant to 2 U.S.C. § 437g(a)(5)(A).

VIII. Respondent will file reports with the Commission containing all information required to be disclosed by federal political committees for its activities from May 27, 2004 until January 31, 2007. The Commission agrees that PFA-VF may fulfill this obligation by submitting copies of reports filed with the Internal Revenue Service for activities during this period, if supplemented with additional information required of federal political committees. Such supplementation would include, but not be limited to, the information contained on the summary pages of reports filed by political committees.

IX. The Commission, on request of anyone filing a complaint under 2 U.S.C. § 437g(a)(1) concerning the matters at issue herein or on its own motion, may review compliance with this agreement. If the Commission believes that this agreement or any requirement thereof has been violated, it may institute a civil action for relief in the United States District Court for the District of Columbia.

X. This agreement shall become effective as of the date that all parties hereto have executed same and the Commission has approved the entire agreement.

XI. Respondent shall have no more than 30 days from the date this agreement becomes effective to comply with and implement the requirements contained in this agreement and to so notify the Commission.

*Continued on the next page*



XII. This Conciliation Agreement constitutes the entire agreement between the parties on the matters raised herein, and no other statement, promise, or agreement, either written or oral, made by either party or by agents of either party, that is not contained in this written agreement shall be enforceable.

FOR THE COMMISSION:

Lawrence H. Norton  
General Counsel

BY: *Rhonda J. Vosdigh*  
Rhonda J. Vosdigh  
Associate General Counsel  
for Enforcement

*2/28/07*  
Date

FOR THE RESPONDENT:

*Bryan S. Kirby*  
(NAME)  
(POSITION) *Counsel*

*Feb. 15, 2007*  
Date

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