



January 22, 2015

**SENT VIA EMAIL AND FIRST CLASS MAIL**

Federal Election Commission

Audit Division

Mr. Marty Favin

999 E Street, NW

Washington, DC 20463

Audit@fec.gov

**RE: Preliminary Audit Report Gary Johnson 2012, Inc.**

Dear Mr. Favin:

I am writing on behalf of my client, Gary Johnson 2012, Inc. ("GJ2012") in response to the Preliminary Audit Report of the Audit Division ("PAR"). This letter serves as an interim response to the Commission in advance of a full response to the recommendations of the PAR that will be delivered on February 6, 2015, pursuant to our pending request for an extension of time.

**1. Finding Number 1 Net Outstanding Campaign Obligations**

GJ2012 accepts the PAR finding that it did not receive matching fund payments in excess of its entitlement and that no further action is necessary.

**2. Finding Number 2 Amounts Owed to U.S. Treasury**

**A. GJ2012 Did Not Use Matching Funds for Non-Qualifying Campaign Expenses**

Pursuant to 28 U.S.C. § 9038(b), if a candidate uses matching funds to pay for non-qualifying campaign expenses, the candidate must repay the United States Treasury an amount equal to the amount of matching funds so used.

The PAR determined date of ineligibility (DOI) was May 5, 2012. Between May 25, 2012 and December 31, 2012, GJ2012 received a total of \$510,260.98 in matching funds for expenses related to the 2012 primary election. In that same period, according to worksheets prepared by the Audit Division, \$573,379.26 was spent on qualified campaign expenses for the primary. In January of 2013, GJ2012 received an additional \$121,755.77 in matching funds, for a total of \$632,016.75, and spent an additional \$154,222.58 in qualified campaign expenses for the primary, for a total \$727,601.84. This total of qualified campaign expenses – which is restricted to the date range given, and not inclusive of expenses which the Audit Division has incorrectly labeled as general election expenses – exceeds the total matching funds received by \$95,585.09. Thus, no matching funds were used to pay for non-qualifying campaign expenses, and there is no basis for a repayment to the United States Treasury.

Although the Audit Division's worksheets show a total of \$1,220.00 in matching funds used to pay for non-qualifying campaign expenses, this is simply an artifact of the first-in-first-out

allocation used. At the time of each of the four allegedly non-qualifying payments, there were sufficient general election funds in the account to cover expenses as they became due and payable to vendors, so late-arriving matching funds would not have been used. The Act does not prohibit the use of general election funds to pay for invoices incurred prior to the DOI but billed and payable after the DOI in order to ensure vendors receive prompt payment, rather than forcing a commercially unreasonable delay on such vendors until matching fund payments are ultimately received. To do otherwise would work a substantial and commercially unreasonable burden on vendors, negatively impacting the market availability of services and their costs.

GJ2012 is in the process of investigating whether the \$7,301 identified as being unallocated between primary and general election activities was accidentally unallocated in its reports, but in any event, matching funds were not used to pay for those expenses, so there is no obligation to repay that amount.

#### **B. Receipt of Matching Funds**

GJ2012 is in the process of investigating whether the five contributions identified by Audit staff as being improperly matched were accidentally attributed to the wrong spouse. If it is determined that the eligible portion of the contributions were not improperly attributed, and are ineligible, GJ2012 will refund the appropriate amount to the U.S. Treasury.

### **3. Finding Number 3 Use of General Election Contributions for Primary Election Expenses**

GJ2012 used an acceptable accounting method in accordance with 11 C.F.R. § 102.9. GJ2012 designated a separate account for primary election contributions and general election contributions received prior to the date of the primary election.

. While the audit committee reviewed GJ2012's bank statements to determine it did not have the appropriate amount of cash on hand, GJ2012 also maintained several other accounts that processed contributions and required transferring of money from the processing account to the GJ2012 bank account, including Paypal and Fundly. These accounts can take three to five business days before a transfer of funds posts to the GJ2012 bank account.

General election funds (\$12,396) were not spent on primary election expenses prior to the DOI. Prior to the DOI, the PAR provides that the sum of general election contributions was \$22,396 (\$10,000 of which was deposited to the general election account in September of 2011). GJ2012 treated the remaining \$12,396 as an advance against anticipated matching funds, which the FEC notes were not paid to GJ2012 until after the DOI.

### **4. Finding Number 4 Reporting of Debts and Obligations**

GJ2012 is in the process of amending and properly disclosing applicable debts.

The Audit Division recognizes that GJ2012 timely reported \$150,000 (invoiced on December 21, 2012) as a debt on its 2012 Year-End Report. The NSON, Inc. contract does not state that invoices – particularly for the bonus – are due upon the triggering event, but rather Article 2.1 of the contract



specifically states that invoices are due and payable upon receipt. That a vendor did not invoice a particular service in a timely manner does not necessarily create a reportable debt, particularly as the campaign has no invoice on which to base such a filing. To the extent this item may be reportable as a debt, GJ2012 is discussing with its Senior Advisor the option of waiving his personal services to GJ2012 and his bonus commission pursuant to §116.6. To the extent it is a debt, applicable to the primary period, it would be a qualifying campaign expense which necessarily offsets the net of liabilities prior to the DOI, for which matching funds would be available.

## **5. Finding Number 5 Extension of Credit by a Commercial Vendor**

### **A. Credit Extended was in the Normal Course of Business**

Pursuant to 11 C.F.R. 116.3(c)(1)-(3), NSON extended credit to GJ2012 in NSON's ordinary course of business. *See Exhibit A Affidavit of Ron Nielson.* NSON's contract with GJ2012 was offered on the same terms and pursued in the same manner as other NSON clients, political and non-political.

GJ2012 has enclosed redacted NSON contracts with other non-political and political clients of NSON which are of similar size and risk as GJ2012. Note, Article 2.1 of such contracts show identical billing arrangements used for other NSON clients. *See Exhibit B.* Contract 892 is a for profit client of NSON; Contract 989 is a political committee client of NSON; and Contract 1000 is a nonprofit client of NSON. Note, Contract 892 is a 2008 version with a 12% interest which NSON has since increased to 18% as evidenced by Contract 1000. These standard NSON contract provisions, such as billing and debt collection policies and practices, constitute safeguards which show that this was normal business practice for NSON.

The extension of credit conformed to the usual and normal practice in NSON's industry. NSON, and competitors of NSON, frequently extend credit to political and nonpolitical clients seeking consulting, public relations, advertising, and similar services in anticipation that the services performed will help the clients raise money. NSON, and its competitors, would face severe damage to its reputation in the industry if it abruptly stopped providing such services to political and nonpolitical clients, although it does retain the right to do so in its contracts.

NSON followed its established procedures and its past practice in approving the extension of credit to GJ2012. NSON regularly invoiced GJ2012 for all services and received consistent weekly payments from GJ2012 beginning in 2011 through 2012.

### **B. NSON Made Commercially Reasonable Attempts to Collect Outstanding Amounts**

NSON attempted to collect GJ2012 debt. NSON invoiced GJ2012 for interest charges on outstanding amounts, as it may do so at its option – the contract specifically saying “may” and not “shall” – and both parties intend to leverage the waiver of such fees in the overall resolution of outstanding arrears.



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The PAR provides that “on June 18, 2014, GJ2012 submitted several new invoices for interest charged by NSON on debts outstanding from January 2013 through June 2014.” NSON also issued two invoices in October of 2014. *See Exhibit C (Invoice #105662; Invoice #105663).*

NSON did not make an improper in-kind contribution to GJ2012. NSON is currently negotiating for the acceptance of campaign assets in lieu of amounts owed by GJ2012 based on applicable values and may waive interest fees in the ordinary course as is routine in such matters, and where the contract says it “may” assess such fees, providing the commercial vendor reasonable flexibility in its dealings with any applicable client, whether political or not. As a part of commercially reasonable attempts to collect outstanding amounts owed to NSON, NSON has exercised discretion and waived finance charges in the past for other clients, including nonpolitical. *See Exhibit A Affidavit of Ron Nielson.*

#### **Conclusion**

Pending the approval of GJ2012’s request for an extension of time in which to submit this response, GJ2012 reserves the right, and intends to supplement or amend this response by February 6, 2015, after it has had more adequate time to review the PAR findings and relevant data and materials.

Sincerely,

/s/

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February 6, 2015

**SENT VIA EMAIL AND FIRST CLASS MAIL**

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Audit Division  
Mr. Marty Favin  
999 E Street, NW  
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Audit@fec.gov

**RE: Supplement Response to Preliminary Audit Report Gary Johnson 2012, Inc.**

Dear Mr. Favin:

I am writing on behalf of my client, Gary Johnson 2012, Inc. ("GJ2012") to supplement GJ2012's initial response to the Preliminary Audit Report of the Audit Division ("PAR").

**1. Finding Number 1 Net Outstanding Campaign Obligations**

GJ2012 has no further supplement to finding number 1.

**2. Finding Number 2 Amounts Owed to U.S. Treasury**

In response to a question from the Audit Division related to the calculations in GJ2012's initial response to the PAR, the \$7301 figure referenced in GJ2012's initial response is from the PAR, at top of page 14. The remaining calculations used by GJ2012 in the response to the PAR were found in either the "Calculation of unqualified expenses" spreadsheet that the Audit Division provided GJ2012, or in GJ2012's 2013 April quarterly report.

GJ2012 has identified a number of disbursements incorrectly categorized as non-qualifying expenses, and invoices for primary expenses that were not previously reported as debts. These include the \$300,000.00 "Win Bonus" due to NSON/Ron Nielson (pursuant to the finding of the Audit Division see Finding 4), and total to \$548,073.41. See Attached New Debts and Expenses Spreadsheet.

By decreasing the non-qualifying expenses total given in the PAR, the effective matching funds cut-off date is moved forward, and the amount to be repaid to the U.S. Treasury is reduced. If only the \$300,000.00 is accounted for, the cut-off date is moved to 10/4/12, and the amount to be repaid is reduced to not more than \$110,941.76. If all new debts and expenses are accounted for, the cut-off date is moved to 10/22/12, and the amount to be repaid is reduced to not more than \$33,930.70. See Attached Matching Funds Cut-Off Date Calculation Spreadsheet.

**3. Finding Number 3 Use of General Election Contributions for Primary Election Expenses**

GJ2012 has no further supplement to finding number 3.

**4. Finding Number 4 Reporting of Debts and Obligations**

The PAR claims that GJ2012 did not report debts to six vendors; however, GJ2012 properly reported the majority of all debts to those vendors.



The Audit Division's Debt Review spreadsheet claims GJ2012 did not report certain debts to Chris Thrasher and Wagon Works, LLC, but is inconsistent in the amount of the alleged unreported debt. In one place, the Audit Division indicates that GJ2012 did not report debts of \$500.00 and \$2,000.00, and in another instance that GJ2012 did report the same \$2,000.00 but not the \$500.00. GJ2012 in fact properly reported both debts totaling \$2,500: \$2,000.00, inadvertently dated 10/30/12 instead of 10/31/12, and \$500.00 on 11/30/12.

The Debt Review spreadsheet claims GJ2012 failed to report debts to EH2 Consulting in the amount of \$25,158.41. Upon review of all invoices and payments, including unnecessary reporting of certain invoices as debt that need not have been reported at that time as they had not yet matured, and receipt of additional, previously unissued invoices from the vendor, GJ2012 has amended the relevant reports.

The Debt Review spreadsheet claims GJ2012 failed to report debts to Daines Goodwin in the amount of \$7,679.70. GJ2012 reported all debts to this vendor and the relevant payments.

Further, in calculating the alleged unreported debt, the Debt Review spreadsheet does not take into account a disbursement made to Daines Goodwin for \$5,275.00 in July, 2012. GJ2012 wrote two checks to Daines Goodwin in that same amount in July, and properly reported each of the checks, but as four separate disbursements totaling \$10,550.00, that paid three separate invoices reported as debts. The Debt Review spreadsheet only shows two of those disbursements, and has the wrong date for one of the disbursements. GJ2012's FEC filings report two additional payments on 7/17/12, one for \$840.00, and one for \$4,435.00 (note that a separate check for \$4,435.00 was written in August). These calculations show that GJ2012 reported all debts to Daines Goodwin and the relevant payments.

The Debt Review spreadsheet claims GJ2012 failed to report debts to Charles Frohman in the amount of \$6,500.00. However, upon review, only \$2,000.00 of that amount may have been inadvertently omitted from being reported. First, the FEC arbitrarily determined that GJ2012 had an outstanding invoice to Charles Frohman in the amount of \$2000.00 for September, 2012. However, no payment was due for September 2012, nor invoiced for, based on the vendor's actual provision of services, irrespective of the services envisioned in the contract. In addition, the Debt Review spreadsheet seems to improperly account for an invoice dated 12/27/12 twice, thereby incorrectly resulting in the finding of an additional \$2000.00 in alleged unreported debt. GJ2012 reported the \$500.00 invoice dated 11/11/12 as a debt on 11/30/12, but accidentally attributed the debt to Chris Thrasher, who was also owed a debt of the same amount on the same date. GJ2012 has corrected this error in amendments to the relevant report.

The Debt Review spreadsheet claims GJ2012 failed to report debts to Law Office of Douglas C Herbert in the amount of \$32,546.75. However, GJ2012 timely reported \$33,789.62 in debts to Law Office of Douglas C Herbert: \$16,313.76 on 5/31/12, and \$17,475.86 on 7/1/12. While a portion may be reported later than the invoice date, the invoices were not necessarily received from the vendor on the actual invoice date, and the GJ2012 believes it properly reported these debts when the reporting became required.

The Debt Review spreadsheet claims GJ2012 failed to report debts to Jonathan Bydlak in the amount of \$11,109.80, and over-reported debts by \$9,943.13; resulting in a difference of \$1,166.67 of unreported debt. However, GJ2012 has already reported the full amount of all invoices as debts: \$57,188.96 on 6/30/11, \$6,000.27 on 7/1/11, \$4,740.69 on 8/1/11, \$6,846.55 on 9/1/11, and \$3,692.88 on 10/14/11. While a portion may be reported later than the invoice date, the invoices were not



necessarily received from the vendor on the actual invoice date, and the GJ2012 believes it properly reported these debts when the reporting became required.

Deferring to the Audit staff's recommendation that the committee treat the \$300,000.00 primary "Win Bonus" due to NSON/Ron Nielson as a Primary expenditure, GJ2012 has amended its 2012 June Monthly Report to report the remaining \$150,000.00 not previously reported, despite not being invoiced for at such time, and has amended the date the other \$150,000.00 obligation was incurred to reflect the guidance of the Audit staff and, in conjunction with NSON, reallocated prior payments to NSON to this earlier Primary expenditure to ensure that payments were made on a First in-First out basis.

**5. Finding Number 5 Extension of Credit by a Commercial Vendor**

NSON extended credit to GJ2012 in NSON's ordinary course of business and NSON has made commercially reasonable attempts to collect outstanding amounts. GJ2012 has no further supplement to finding number 5.

**Conclusion**

GJ2012 request the Audit Division revise its findings to determine that:

1. GJ2012 owes not more than \$33,930.70, subject to any additional applicable deductions, to the US Treasury;
2. GJ2012 did not use general election contributions for primary expenses in violation of the FECA;
3. GJ2012 satisfactorily reported the majority, if not all, of its debts and obligations and any reporting errors were de minimis; and
4. NSON extended credit to GJ2012 in NSON's ordinary course of business and NSON has and continues to make commercially reasonable attempts to collect outstanding amounts pending the resolution of this audit matter.

Please contact me if you have any questions about this supplement or the initial response.

Sincerely,

/s/

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