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August 7, 1997

Via Express Mail
*EF80165339*US

Clerk of the FEC
Office of the General Counsel
Federal Election Commission
999 "E" St., N.W.
Washington, DC 20463

Re: *MUR 4389 and MUR 4652*

Dear Clerk:

Enclosed are the original and one copy of a response brief letter in the above case. Please file the original, conform the copy, and return it in the prepaid envelope provided. Thank you for your assistance.

Very truly yours,

Harumi J. Shintani

Encs.

ORIGINAL

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August 7, 1997

By Overnight Delivery

Eugene Bull, Esq.
Office of the General Counsel
Federal Election Commission
999 "E" Street, N.W.
Washington, DC 20463

Re: MUR 4389 and MUR 4652
Response Brief of Orange County Democratic Central Committee and Edward R. Haskett, as Treasurer

Dear Mr. Bull:

By this letter, Respondents Orange County Democratic Central Committee (the "Committee" or the "Party") and Edward Haskett, as treasurer, hereby formally submit their Response Brief to the Factual and Legal Analysis prepared by the General Counsel's office in the above-entitled MURs, which apparently formed the basis for the Commission's finding that there is reason to believe the Committee and its treasurer violated the Federal Election Campaign Act of 1971 (the "Act").

Simply put, there is neither any factual nor legal basis for finding that the Act was violated by the Committee or its treasurer, and no legitimate purpose would be served by proceeding further against these parties. To the extent that the contribution and expenditure described in Mr. Schroeder's complaint and in the Factual and Legal Analysis may have violated the Act, the Committee and its treasurer were in no way responsible for those actions. The Committee and its treasurer were completely unaware of the actions of Mr. Toledano, who fully admits that he never informed, consulted with, or received the approval of any members of the Committee or its treasurer before receiving and spending the $10,000 contribution from Debra and Paul LaPrade. To the contrary, as noted below, Mr. Toledano appears to have gone to great lengths to conceal his activities from the Committee. Furthermore, as soon as the Committee became aware that a mailer had been distributed, ostensibly under its name, its treasurer so informed the Orange County Registrar of Voters, the California Fair Political Practices Commission, and this Commission, in each instance disclaiming any prior knowledge of Mr. Toledano's unilateral and unauthorized actions, but nevertheless voluntarily providing the relevant enforcement agencies and the public with as much information as the Committee had been able to obtain as expeditiously as possible.

Under these circumstances, no legitimate purpose of the Act would be served by seeking to hold the Committee and its treasurer liable for violations of the Act which they did not commit and which they were utterly powerless to prevent. The Committee and its treasurer have certainly engaged in no conduct that warrants imposition of a fine as *punishment* for any wrongful activities on their part. Nor would any deterrent purpose be served by imposing liability on the Committee and its treasurer, since there is nothing they or other parties in similar circumstances could have done or can do in the future to prevent third parties, like Mr. Toledano, from acting in their name without their knowledge or consent.

Significantly, the General Counsel's Factual and Legal Analysis does not dispute that Mr. Toledano engaged in the activities that allegedly violated the Act without informing or obtaining the approval of the Committee and its treasurer. Rather, the Analysis purports to hold the Committee and its treasurer liable for Mr. Toledano's actions under the novel theory that he acted with "apparent authority" as their agent. As we demonstrate below, that conclusion is both factually and legally flawed. More fundamentally, however, it is absolutely incomprehensible that the Commission would seek to hold the Committee and its treasurer liable in this instance *without seeking to take any enforcement action against Mr. Toledano himself.*[1] The Committee and its treasurer respectfully suggest that both the purposes of the Act and the Commission's resources would be better served by dismissing them from the pending MURs and focusing the Commission's enforcement efforts on those individuals with direct and admitted responsibility for the

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1. Although the General Counsel's staff would not reveal whether the Commission had found reason to believe that any other committees or individuals (in particular, Mr. Toledano) may have violated the Act in connection with the instant contribution and expenditure, counsel for the Committee was able to contact Mr. Toledano, who informed the undersigned that he had not received any notification from the Commission of any pending enforcement action against him in that regard. Mr. Toledano also rejected the undersigned's request that he accept financial responsibility for any fine that the Commission might seek to impose on the Committee as a result of his actions.

alleged violations of the Act.

Factual Analysis

While the Committee has been constrained in its efforts to discover all of the underlying facts by its own complete lack of involvement in any of the events leading up to the receipt of the $10,000 contribution from the LaPrades and its expenditure on a mailer advocating the election of candidate Jim Prince, much of the relevant information has become a matter of public record or is available from subsequently obtained financial records and other documentation. This information completely confirms the General Counsel's conclusion that James Toledano acted without obtaining the approval of the Committee or its treasurer in connection with the activity which allegedly violated the Act. More important, however, this information completely contradicts the General Counsel's conclusion that Mr. Toledano acted with the apparent authority of the Committee. To the contrary, all of the available evidence strongly indicates that Mr. Toledano did everything possible to isolate and affirmatively to conceal his activities from any official Party knowledge or involvement.

For example, we now know that Mr. Toledano received a check from the LaPrades on or before March 6, 1996, approximately three weeks prior to the election. The Committee's investigation into this matter has revealed that the check was sent by overnight delivery from the LaPrades to Harvey Prince (Jim Prince's father) at the Prince campaign headquarters, and was then forwarded by Harvey Prince directly to Mr. Toledano. No one from the Committee had any knowledge of the check, nor did it appear to have passed through the Party headquarters at any point in time.[2]

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2. The Committee has not been able to develop any evidence confirming the LaPrades' claim – apparently accepted at face value by the General Counsel as true – that Debra LaPrade called Mr. Toledano at the Orange County Democratic Party and advised him that she and her husband wanted to make contributions for "voter awareness," leaving the matter "to the good judgment of the Democratic party and its party chairman." The Committee notes that this self-serving claim – that strangers from Arizona would out-of-the-blue call the Orange County Democratic Party headquarters and offer to donate $10,000 for "voter awareness" without any interest or agreement as to how the money would be spent – is not only incredible on its face, but was first made by the LaPrades and Mr. Toledano in an April 2, 1996, *Los Angeles Times* article in which they claimed that "it was barely a week before the primary when LaPrade telephoned Toledano at party headquarters, offering to give $10,000 for a mailer that would educate voters . . . ." This

Contrary to the statement in the General Counsel's Factual and Legal Analysis (and perhaps in a prior communication from the Committee itself), Mr. Toledano did not deposit the LaPrade's check at the bank where the Party had an existing account. The Party had two existing active bank accounts at that time – a checking account at the Federal Credit Union, and a savings account at Fidelity Federal Savings and Loan. Mr. Toledano did not deposit the LaPrades' check at either of those banks, however. Instead, he opened an entirely new account, under the name "Democratic Party of Orange County II (Federal)," at a branch of Marine National Bank located up the block from his law office in Irvine, California (far from the Party's headquarters in Orange).[3] Significantly, not only did Mr. Toledano make himself the sole signatory on this new account (contrary to the Committee's bylaws and *all* past practices), but the address Mr. Toledano provided the Bank for the new account *was not that of the Democratic Party, but of his own law firm*. In this manner, Mr. Toledano was able to continue to conceal from the Committee and its treasurer *the very existence* of the bank account that he had opened without their knowledge and approval.

Mr. Toledano apparently then set about to use the LaPrades' contribution to distribute a mailer to voters in the 46th Congressional District featuring Jim Prince. Again – undoubtedly because Mr. Toledano was aware that the Executive Committee and its individual members had previously specifically rejected a proposal to become involved in the primary election by spending any of the Party's limited resources publicizing its endorsed candidates – Mr. Toledano went to great lengths to separate and conceal his activities from the Committee. Mr. Toledano did not use the union printer that the Committee and the Party had previously used for their prior communications with Party members and voters. Instead, he employed the services of Susan Davis

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assertion is demonstrably false: The bank records show that the check from the LaPrades was deposited by Mr. Toledano three weeks before the primary election, so the initial contact must have occurred even earlier than that.

3. The confusion over the existence of another Party account at this bank apparently stems from the fact that the Party had at one time opened and had briefly maintained a special account, solely for expense attributable to their convention, at a *different* branch of the Marine National Bank. Any activity in that account, however, had ceased months before Mr. Toledano opened the new account on March 6 or 7, 1996, and there is no indication that the officials at the Marine National Bank in Irvine were even aware of the earlier account maintained by the Party at another branch.

Graphic Services, Inc., a consultant previously unknown to anyone on the Committee and who apparently came to Mr. Toledano's attention either at the suggestion of someone from within the Prince campaign or as a result of Mr. Toledano's own prior, unsuccessful, candidacies for state office. The mailer was distributed using the Party's bulk permit number and account, but the authorization to do so did not come from anyone associated with the Committee or the Party, but rather from a "Michelle Fry," who appears to be an employee of the consultant (Action Mailing) hired by Mr. Toledano or Ms. Davis to distribute the flier. The Committee has been informed, but has been unable to definitively confirm, that the names and addresses of the voters to whom the mailer was sent had been obtained by Mr. Toledano on computer disk from the Prince campaign. In any event, the names and addresses certainly did not come from the Committee or the Party, or from anyone associated with the Committee or Party.

As noted previously, the Committee first learned about the mailer only after it had been mailed and it began to be received by voters and Party members on the Saturday and Monday just before the Tuesday, March 26, 1996, election. The Committee's treasurer *immediately* informed the relevant enforcement agencies – local, state, and federal – of the existence of the mailer and of all the information available to the Committee at that time. The Executive Committee also immediately convened special meetings to disavow and to repudiate the actions taken by Mr. Toledano, formally voting "no confidence" in him and requesting his resignation as Party Chair. When Mr. Toledano refused voluntarily to resign his position, recall proceedings were initiated before the full Central Committee in accordance with the Party's bylaws. Although a majority of the Committee voted in favor of the recall, the vote fell short of the required two-thirds needed to force his removal from office. Mr. Toledano ultimately stepped down from office when his term expired following the November, 1996 general election.[4]

Finally, three additional aspects of this matter should be noted. First, despite numerous opportunities to do so, Mr. Toledano never informed a single individual associated with the Committee (much less its treasurer or the Executive Committee as

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4. In the meantime, the Committee's treasurer, David Levy, resigned in protest over Mr. Toledano's actions, and he was replaced by Edward R. Haskett. It should be emphasized that Mr. Haskett, although named as a Respondent in the General Counsel's Factual and Legal Analysis and in the Reason-to-Believe finding, was *not* treasurer at the time any of the alleged violations of the Act occurred and cannot possibly have any liability in this matter.

a body) of his receipt of the LaPrades' check or his plans to spend it on a mailer in the name of the Party. This is so despite the fact that we now know that this was not a last-minute event, hastily conceived during the closing days of the campaign, but had been planned and put into operation *at least* three weeks prior to the election. In fact, Mr. Toledano met with the Executive Committee *less than an hour* after he had deposited the LaPrades' check into the new bank account he opened and *never said a word about it to anyone at the Committee.*

Second, it should be noted that there has been little, if any, prejudice to the integrity of the electoral process or to the objectives of the Act in this case. Mr. Prince did not benefit from the distribution of the mailer endorsing him; he finished third in a field of three candidates in the primary election. Neither of the other candidates filed any complaint or objection; instead, this complaint was instituted by the Chair of the Republican Party, none of whose voters could have been harmed by the violations that allegedly occurred in connection with the Democratic primary election. Moreover, the allegedly illegal contribution and expenditure was effectively reported contemporaneously with the production and distribution of the mailer, and the contribution and expenditure have now received far more publicity than they ever would have had they initially been included in any campaign disclosure report.

Lastly, the Commission should be aware that the Orange County District Attorney's office has been formally investigating a parallel complaint filed by Mr. Schroeder under state law alleging similar violations of the California Political Reform Act. The Committee's counsel has been informed that the District Attorney's office has concluded that there are no grounds for finding any liability by the Committee and its treasurer. While obviously not bound by the District Attorney's conclusions, the Commission should respect the findings by that local fact-finding agency on the identical issues involved in the Commission's consideration of this matter.

Legal Analysis

As noted above, the Factual and Legal Analysis does not dispute that all of the alleged violations of the Act were committed by Mr. Toledano without the knowledge and approval of the Committee or its treasurer. Nevertheless, the Commission seeks to hold the Committee liable for Mr. Toledano's actions on the theory that he acted with "apparent authority" as the Committee's agent.

This legal analysis is fundamentally flawed and is at odds

with all of the case law regarding "apparent authority." As the Restatement and the cases make clear – and as the Factual and Legal Analysis initially declares but then proceeds to ignore – apparent authority can exist only when *the principal* takes some action that leads innocent third parties reasonably to believe that it has authorized an agent to act on its behalf in engaging in specific conduct. See generally Thomas v. INS, 35 F.3d 1332, 1339 (9th Cir. 1994) (apparent authority "arises when a principal causes a third party to believe, correctly or not, that the principal has authorized the agent to engage in particular conduct"); Restatement (Second) of Agency §§ 35, 50. Consequently, several elements are necessary to establish that an agent acted with "apparent authority" so as to attribute liability to the principal (in this case, the Committee) based solely upon the actions of the purported agent:

- Perhaps most important, the representations or acts of the purported agent cannot create the "apparent authority" to act on behalf of the principal. E.g., NUCOR Corp. v. Aceros Y Maquilas de Occidente, S.A. de C.V., 28 F.3d 572, 584 (7th Cir. 1994) ("statements or manifestations made by the agent are not sufficient to create an apparent relationship"); N.L.R.B. v. Local Union 1058, United Mine Workers, 957 F.2d 149, 153 (4th Cir. 1992) ("agent cannot create his own apparent authority"). Rather, apparent authority is created by some verbal or other acts by *the principal* which reasonably give a third party the appearance that the purported agent has authority to conduct the particular transaction at issue. E.g., Essco Geometric v. Harvard Industries, 46 F.3d 718, 726 (8th Cir. 1995); Doxsee Sea Clam Co., Inc. v. Brown, 13 F.3d 550, 553-54 (2nd Cir. 1994). As a result, to determine whether an agent had apparent authority, courts focus on the representations and conduct of the principal, not the acts or omissions of the agent. Illinois Conference of Teamsters & Employers Welfare Fund v. Mrowicki, 44 F.3d 451, 463 (7th Cir. 1994).

- Moreover, only information from the principal that is actually communicated to and known by third parties can form the basis for a finding of apparent authority. Millard Processing Services, Inc. v. N.L.R.B., 2 F.3d 258, 262 (8th Cir. 1993); Doxsee Sea Clam Co., Inc. v. Brown, 2 F.3d at p. 554. Also known as "authority by estoppel," apparent authority occurs only when the actions of the principal induce an innocent third party to believe that the agent has authority to act for the principal, and the third party reasonably relies upon the principal's representations or conduct to change its position to its detriment. See, e.g., Bayless v. Christie, Manson & Woods Int'l, Inc., 2 F.3d 347

(10th Cir. 1993).

- Finally, an agent's apparent authority extends only to those particular transactions which the principal held the agent out as having the authority to engage in. E.g., General Elec. Co. v. G. Siempelkamp GmbH & Co., 29 F.3d 1095, 1098 (6th Cir. 1994); Richards v. General Motors Corp., 876 F. Supp. 1492, 1506 (E.D. Mich. 1995). The authority of an agent to perform a few particular acts cannot be taken as an extension of authority to perform any and all acts, regardless of the agent's actual, more limited, authority. Calabrese Foundation, Inc. v. Investment Advisors, Inc., 831 F. Supp. 1507, 1513 (D. Col. 1993).

In sum, as one court aptly put it in a characterization that is equally applicable here, if an agent is off on a frolic of his own, in a situation where the principal has neither given the agent authority to act for it nor done anything to suggest to others that the agent had such authority, courts will not treat the acts of the agent as acts of the principal. Abbott Laboratories v. McLaren General Hosp., 919 F.2d 49, 52 (6th Cir. 1990).

The General Counsel's Legal and Factual Analysis completely ignores this controlling case law on what constitutes apparent authority. Rather than citing to any conduct or representations made by the Committee to third parties indicating that Mr. Toledano was authorized to receive contributions or to make expenditures on behalf of the Committee — which representations, of course, do not exist — the General Counsel's Analysis focuses exclusively on the beliefs and actions of Mr. Toledano himself, and those of the LaPrades and the bank and campaign vendors he dealt with. But if one thing is absolutely clear under the case law, it is that Mr. Toledano's beliefs and conduct are utterly irrelevant with regard to creating his apparent authority. Mr. Toledano cannot imbue himself with authority to act on behalf of the Committee merely by claiming to others that such is the case. It takes some conduct or communication to third parties by the Committee itself, and it is conceded that no such communications or conduct occurred in this case.[5]

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5. The General Counsel's citation to 11 C.F.R. § 109.1(b)(5)'s definition of "agent" is unavailing here. That section defines "agent" for purposes of determining whether an independent expenditure has been made without cooperation, coordination, or consultation with a candidate or any agent or committee of such candidate. The regulation's definition was not

Nor does the General Counsel's *ipse dixit* declaration that "as Chair of the Democratic Committee, it is hardly disputable that James Toledano was held out by the Democratic Party as one having authority" support a finding of apparent authority in this case. First, as explained above, there must be some communication by the principal to a third party purportedly cloaking the agent with authority, and there is no evidence here that anyone associated with the Party ever even met any of the third parties with whom Mr. Toledano engaged in these transactions, much less that the Party made any representations to them that Mr. Toledano was authorized to act on the Committee's behalf. More importantly, even had the Committee represented to these third parties that Mr. Toledano was the Chair of the Party, that would not be sufficient to indicate that Mr. Toledano was authorized to engage *in these particular acts* on behalf of the Committee.[6]

Indeed, to the extent that the Committee made any representations regarding the scope of Mr. Toledano's authority as Chair of the Party, it has expressly *denied* him the authority to engage unilaterally in the activities that constituted the alleged violations of the Act in this case. The Committee's bylaws unambiguously *prohibit* the Party Chair from depositing any funds received in the name of the Committee into any bank account, much less a new account he alone created and controls. See Bylaws of the Democratic Party of Orange County Central Committee, art. VII, § 2.A (1995) (all funds obtained in the name of the County Committee must be deposited *by the treasurer* in the Committee's *general fund account* or in some appropriately designated account *authorized by the Executive Committee*). Likewise, any expenditures on behalf of the Committee must be

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adopted in the context of, and has no bearing on, the general issue of whether an individual's actions in receiving contributions or making expenditures can be attributed to a political committee he or she is associated with.

6. Nor were any of them innocent third parties who changed their position to their detriment in reliance upon the Committee's representations, another required element for a finding of apparent authority. The LaPrades, the bank, and the political vendors all had their own financial and other interests in wanting to believe that (or not caring whether) Mr. Toledano had the necessary authority to engage in the transactions with them.

provided for in the Party's budget[7] or must be specifically authorized by the Executive Committee. Id., art. VII, § 3.A. All financial transactions must be authorized and controlled by the Treasurer, id., art. VII, §§ 3.B & 3.C, and all County Committee checks must be signed by at least two Committee officers, id., art. VII, § 3.D. Finally, the bylaws explicitly declare that "[n]o member of the County Committee may make any financial commitment involving the expenditure of funds, other than authorized herein, unless such person has been so authorized by a motion passed by the [Executive Committee] or County Committee." Id., art. VII, § 3.E. And to give emphasis to this prohibition, the bylaws warn that "[v]iolation of this provision may constitute grounds for termination of membership."[8]

Thus, the Committee could not have made it any more explicit, either to Mr. Toledano himself or to any interested third parties, that he did *not* possess the authority, even as Chair of the Party, to engage in the specific transactions that are at issue here. It is truly difficult to see what more the Committee could have done to protect itself from the unauthorized conduct that occurred in this case.

Under these circumstances, the Committee and its treasurer respectfully submit that there is no legal or factual basis for finding probable cause to believe that they have violated the Act. The Commission's enforcement efforts should be directed elsewhere, towards those who directly engaged in the allegedly prohibited and illegal conduct.

Sincerely,

Fredric D. Woocher (by RHL)

Fredric D. Woocher

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7. There was no budget permitting expenditures for the 1996 primary election. In fact, not having authorized or anticipated any such political expenditures, the Committee had not even established and registered a political committee for that purpose.

8. In light of these unambiguous provisions, Mr. Toledano's obviously self-serving assertion that he believed his actions to be in accord with *his understanding of* the bylaws is preposterous. Similarly incredible – and untrue – is his unsupported claim that he was acting in accord with *his understanding* of the acts of his predecessor Party Chairs. No prior Party Chair had ever similarly acted to receive and expend political contributions without the authorization and knowledge of the Committee and its treasurer.