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October 28, 1997

By Hand

Lawrence M. Noble, Esquire
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 4594

Dear Mr. Noble:

On behalf of our client China Airlines, Ltd. ("CAL"), we respectfully submit this application, pursuant to 11 C.F.R. § 111.15, to quash the subpoena we received on October 21, 1997 demanding that CAL answer questions and produce documents. CAL moves to quash on the principal grounds that: the Commission lacks authority over the investigation it seeks to conduct because the statute of limitations bars any claim that might arise from the events at issue, which took place more than a decade and a half ago (see Point I below); the information the

Commission seeks is irrelevant because facts already known to the Commission demonstrate that there was no "contribution" "in connection with an election," and, therefore, no violation of the Federal Election Campaign Act ("FECA") (see Point II below); and the subpoena is in whole or in part overbroad, burdensome, and oppressive (see Point III below). Because the Commission has, for the reasons stated, issued a non-enforceable subpoena to gather information where a finding of a FECA violation cannot result, the subpoena imposes an unjustifiable burden on CAL.

Moreover, we question why from a policy perspective the Commission would devote its scarce resources to investigating a trivial, 16-year-old matter involving rental of commercially undesirable space in the back of a rundown shopping plaza to a sometime local official where the record reveals no basis to conclude that it was used in connection with any election. We are particularly puzzled by the Commission's pursuit of this matter, which does not involve any federal election, at a time when it is trying to conserve resources by closing higher profile matters. See Karen Gullo, "FEC Closes Out High-Profile Campaign Money Cases," Associated Press, October 17, 1997. The Commission's reported reasoning in recently dismissing a GOPAC-related investigation that did involve federal elections could not be more on point. The Commission reportedly said it closed the file "*in light of the information on the record, the relative significance of the case and the amount of time that had elapsed.*" Id. (emphasis added). The information on the record in this matter, the utter insignificance of the case, and the sixteen years that have elapsed surely call for dismissal. We recall also the General Counsel's reasoning in the Montana Republican State Central Committee et al. matter (MUR 3204R), which also involved a federal election:

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> The diversion of the agency resources that would be required to investigate this case adequately . . . would detract from the Commission's ability to deal with more current and pressing matters, a result that would be contrary to the public interest in the effective administration of the Act.

Id. at 7. That reasoning also applies a fortiori here. Further pursuit of this matter, which is not current, not pressing, and does not involve a federal election would be a poor use of Commission resources indeed.

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BACKGROUND

On December 6, 1996, CAL received a "reason to believe" letter regarding an alleged violation of 2 U.S.C. § 441e. The letter said the alleged impermissible foreign national contribution resulted from CAL's rental, beginning in 1981, of office space in Honolulu's Chinese Cultural Plaza at below-market rates to Frank Fasi, a former Honolulu mayor. On February 14, 1997, CAL responded to the "reason to believe" letter and urged the Commission to close the matter. CAL stated that it has never had any ownership interest in the Cultural Plaza and the alleged violation, going back approximately 16 years ago, was in any event well beyond the applicable statute of limitations. CAL further presented expert evidence that refuted the staff's erroneous suppositions concerning rental rates for the property and demonstrated that the rental rate Fasi paid was not below market. CAL also noted the apparent lack of any nexus between Fasi's use of the space over many years and any federal, state, or local election during that period. In short, CAL's response demonstrated several insuperable barriers to a finding that CAL violated the FECA.

Despite the absence of a viable claim, CAL complied with the subpoena accompanying the Commission's "reason to believe" letter. Approximately three months later on May 2, 1997, CAL received another request for information. On May 9, it again voluntarily answered in full. On May 14, CAL received yet another set of questions from the Commission staff. On May 22, CAL declined to answer, citing the many reasons detailed in its February submission for why further pursuit of this matter was inappropriate and a waste of time. The pending subpoena followed five months later. In sum, the Commission has now spent almost a full year pursuing a trivial matter dating from another decade that does not involve unlawful conduct or a federal election. Since further cooperation seems pointless in the circumstances, CAL moves to quash the pending subpoena for the reasons set forth below.

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ARGUMENT

I. The Commission Lacks Authority Over This Matter Because the Statute of Limitations Bars Any Claim That Might Arise From It.

Courts will not enforce an agency subpoena when the agency lacks investigatory authority to obtain the information it seeks. United States v. Morton Salt Co., 338 U.S. 632, 652 (1950). FEC subpoenas seeking information outside its subject matter jurisdiction are not enforceable. FEC v. Machinists Non-Partisan Political League, 655 F.2d 380 (D.C. Cir. 1981)(investigation of committee to draft candidate quashed); FEC v. Phillips Publ'g Co., 517 F.Supp. 1308 (D.D.C. 1981)(investigation of newsletter covered by press exemption quashed); see also FEC v. Florida for Kennedy Comm., 681 F.2d 1281 (D.C. Cir. 1982).

The Commission lacks jurisdiction to proceed in matters beyond the applicable statute of limitations. While the FECA itself does not contain an explicit statute of limitations for bringing civil actions, courts considering the issue agree that 28 U.S.C. § 2462, the federal "default" statute of limitations, applies to actions brought by the Commission for civil penalties. FEC v. Williams, 104 F.3d 237 (9th Cir. 1996); FEC v. National Republican Senatorial Comm., 877 F.Supp. 15 (D.D.C. 1995) ("NRSC"); FEC v. National Right to Work Comm., Inc., 916 F.Supp. 10 (D.D.C. 1996) ("NRTWC"). That statute provides that an enforcement action must be brought within five years from the date when the claim first accrued. Under the statute, claims accrue at the time of the alleged offense. Williams, 104 F.3d at 240 (holding the "discovery of violation rule" inapplicable); NRSC, 877 F.Supp. at 20; NRTWC, 916 F.Supp. at 13-14. The statute of limitations would bar the Commission from proceeding here. Assuming arguendo that any FECA violation occurred here, it occurred in 1981 -- sixteen years ago. At that time, Fasi first leased space from the owner of the Cultural Plaza (which was not CAL) and the terms of that leasing arrangement were determined. Those terms were apparently not renegotiated after expiration of the lease, but simply continued on a month-to-month basis for the remainder of his tenancy. Therefore, all of the elements of the purported violation were present when the terms of the rental agreement between Fasi and the Cultural Plaza were set -- in 1981. Any claim of an impermissible contribution resulting from below-market rent, then, accrued at the time the parties entered into the rental agreement -- well over five years ago.

Because the limitations period has already run on the Commission's claims, this matter is beyond the Commission's authority and the subpoena is unenforceable.

II. The Subpoenaed Information Is, in any Event, Irrelevant Because Facts Already of Record Foreclose any Finding of a FECA Violation.

Even apart from the statute of limitations, the Commission cannot in the end proceed against CAL because facts already of record preclude a finding of a FECA violation for two reasons. First, the rental amount reflected the property's fair market value, so there can be no finding that the Cultural Plaza's owner made a "contribution" that would violate § 441e. Second, the evidence in the record negates any inference that the rented Cultural Plaza space was leased "in connection with an election."

A. No Contribution

The Commission's "reason-to-believe" finding is based on wildly erroneous and unsophisticated assumptions concerning rental property in Honolulu (hardly a matter of Commission expertise). As CAL's expert has shown, the rent Fasi paid reflected a reasonable market rate for the very undesirable space leased. See Attachment A to CAL's February Submission, Affidavit of Robert Hastings (certified expert in real estate appraisal with particular expertise in the Honolulu area). The Cultural Plaza is itself commercially undesirable real estate because it is located in an economically depressed section of Honolulu that does not attract many tourists; accordingly, the commercial potential for tenants is very limited. Id. at ¶ 10. Rents at the Cultural Plaza are therefore very low compared to market rates in downtown Honolulu. Id. at ¶ 12. The Cultural Plaza has also been beset by continual structural problems. Id. at ¶ 11. Since, for these reasons, the Cultural Plaza would not qualify as either Class A or B real estate, the Commission's reference to rates published by the Society of Industrial and Office Realtors ("SIOR") is grossly inapposite. Id. at ¶ 15.

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The only appropriate comparison for determining the market rate for the space Fasi rented is to the rates paid by other Cultural Plaza tenants whose space was located near Fasi's space. Id. at ¶ 16. Fasi leased an interior space on the second floor of the Plaza facing a courtyard, away from the foot traffic of shoppers and the street. Id. at ¶ 17. The spaces in this area are the Plaza's least desirable commercial space and command the lowest rents. Id. at ¶ 17. The only tenants in the spaces adjacent to the space Fasi leased, which are of comparable size to his space, are cultural organizations who pay very little, if any, rent. Id. at ¶ 18. Therefore, the record facts preclude any finding that the Cultural Plaza's owner made a "contribution" to Fasi by leasing the space at below-market rates.

B. No Nexus to Election

The Commission cites nothing to suggest that Fasi's space at the Cultural Plaza -- inside, upstairs, and in the back -- was leased "in connection with an election," as required under the statute, see 2 U.S.C. §441e, and the record facts negate any such inference. The lease agreement records Fasi, not a campaign group, as the lessee. Fasi did not lease the space sporadically during election campaign periods, but continuously for more than 15 years. Since campaign offices are usually in existence for only a few months prior to an election, this fact alone undermines any inference that the space was intended to be used in connection with an election. There is no record evidence of campaign activities, nor was this location a likely site for such activities. In sum, the Commission has indicated no basis for its assertion, inherent in its allegation of a FECA violation, that the space was leased to Fasi in connection with an election.

* * * * *

In sum, the subpoena seeks information that is irrelevant because, regardless of what might be produced in response, the facts already of record foreclose the possibility that a violation of the FECA could have occurred. It is well established that an administrative subpoena will not be enforced unless the information sought is "reasonably relevant" to an investigation within the scope of the agency's authority. See, e.g., Morton Salt Co., 338 U.S. at 652. Because the information the Commission seeks cannot lead to a finding of a violation, it is not "reasonably relevant." Without a "contribution" or nexus to an election, there can be no violation of the FECA, regardless of what else might be learned.

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III. The Subpoena Is Overly Broad, Unduly Burdensome, Oppressive, Vexatious, and May Request Production of Privileged or Irrelevant Documents and Information or Documents not in the Possession, Custody, or Control of CAL.

The subpoena is also objectionable on several additional grounds. Without waiving other general and specific objections, CAL here raises the following general objections to each and every interrogatory and document request :

(1) the fourth paragraph of the instructions, which requires that CAL identify "each person capable of furnishing testimony concerning the response given . . ." is overly broad, unduly burdensome, oppressive, and vexatious;

(2) the seventh paragraph of the instructions, which indicates that the discovery requests shall refer to the time period January 1, 1984 to the

present covers, as set forth more fully above, a time period far in excess of the scope of the relevant time period for FEC enforcement purposes under the applicable statute of limitations;

(3) to the extent they seek to include agents or attorneys of CAL, the definitions of "you" and the definition of "Document" as it incorporates the term "you," are overly broad, unduly burdensome, oppressive, vexatious, and may request the production of irrelevant documents or privileged documents or call for documents not in the possession, custody, or control of CAL;

(4) to the extent that it refers to any entity other than CAL or seeks to require CAL to search for documents relating to people or entities of which CAL may have no knowledge, the definition of "Persons" and each question and document request incorporating the definition of "Persons" is vague, ambiguous, overly broad, unduly burdensome, oppressive, vexatious, and may request the production of irrelevant documents or call for documents not in the possession, custody, or control of CAL;

(5) CAL objects to the definition of "documents" and to each document request incorporating such definition to the extent that it is inconsistent with or seeks to alter or expand the requirements of the Federal Rules of Civil Procedure;

(6) CAL objects to each request if and to the extent it requests the production of documents protected against disclosure by the attorney-client privilege,

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the work product doctrine, or any rule of privilege, confidentiality, or immunity provided by law; and

(7) CAL objects to each document request to the extent it requests documents the production of which would violate the privacy rights of individuals or confidentiality agreements, or documents that would result in the disclosure of confidential commercial information, trade secrets, or proprietary information.

CONCLUSION

For these reasons, the Commission should quash the subpoena dated October 17, 1997, and dismiss this matter.

Sincerely,

Roger M. Witten
Jeffrey N. Shane
Margaret L. Ackerley

Counsel for Respondent,
China Airlines, Ltd.

cc: Nancy Bell, Esquire

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