BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MURs 4322 and 4650
Joseph P. Waldholtz	)	
Enid Greene	)	
Dunford Forrest Greene	)	
Enid '94 and Enid Greene, as treasurer	)	
Enid '96 and Enid Greene, as treasurer	)	

GENERAL COUNSEL'S REPORT

I. BACKGROUND

This matter concerns the 1994 and 1996 congressional campaigns of former Representative Enid Greene Waldholtz, who won the 1994 election for Congress in Utah's Second Congressional District. An investigation conducted by the Federal Bureau of Investigation and the U.S. Attorney's Office for the District of Columbia showed that almost $2 million used to finance Ms. Greene's campaigns, in the guise of personal funds, in fact came from her father, Dunford Forrest Greene (a/k/a D. Forrest Greene), a millionaire stock broker who had a seat on the Pacific Stock Exchange in San Francisco, California. The funds were directed into the campaigns by Ms. Greene's former husband, Joseph P. Waldholtz, the treasurer of her 1994 campaign committee, Enid '94, and her 1996 reelection committee, Enid '96.[1]

On July 21, 1998, this Office sent a probable cause brief to Mr. Waldholtz, who did not respond.[2] The Brief recommends that the Commission find probable cause to

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[1] Joseph Waldholtz was indicted on May 2, 1996 on 27 counts of bank fraud. He pleaded guilty to bank, election and tax fraud in the U.S. District Court in Washington, D.C. on June 5, 1996 and was sentenced to 37 months in prison on November 7, 1996.

[2] At the time, Mr. Waldholtz, who is unrepresented in this matter, was serving his prison sentence at the federal prison in Allenwood, Pennsylvania. Since then he has been transferred to a half-way house to complete his sentence.

believe that Joseph Waldholtz knowingly and willfully violated the following provisions of the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act"): 2 U.S.C. § 432(b)(3), 2 U.S.C. § 434(b), 2 U.S.C. § 441a(f), 2 U.S.C. § 441b(a), 2 U.S.C. § 441f, and 2 U.S.C. § 441g. The Brief also recommends that the Commission find no probable cause to believe that Joseph Waldholtz knowingly and willfully violated 2 U.S.C. § 441a(a)(1)(A) and (a)(3).

On July 21, 1998, this Office also sent a probable cause brief to Ms. Greene and Mr. Greene jointly and a separate joint brief to Enid '94 and Enid '96 ("Committees"). The joint Brief to Ms. Greene and Mr. Greene recommends that the Commission find probable cause to believe that Enid Greene violated 2 U.S.C. § 441f, and that D. Forrest Greene violated 2 U.S.C. § 441a(a)(1)(A) and (a)(3), and 2 U.S.C. § 441f. The joint Brief to the Committees recommends that the Commission find probable cause to believe that Enid '94 and Enid Greene, as treasurer, and Enid '96 and Enid Greene, as treasurer, violated the following provisions of the Act: 2 U.S.C. § 434(b), 2 U.S.C. § 441a(f), 2 U.S.C. § 441f, and 11 C.F.R. § 110.4(c)(2). The Brief also recommends that the Commission find probable cause to believe that Enid '94 and Enid Greene, as treasurer, violated 2 U.S.C. § 441b(a).

The Greenes and the Committees, who are represented by the same counsel, requested a forty-five (45) day extension to submit reply briefs. On September 28, 1998, reply briefs were submitted on their behalf.[3]

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[3] Due to the voluminous nature of the reply briefs, which this Office understands already were circulated to the Commission, this Office has not attached copies of the reply briefs to this report. Copies of the briefs are available in the General Counsel's Office.

II. DISCUSSION

The General Counsel's Briefs of July 21, 1998 provide a full analysis of each respondent's violations in this matter, and those Briefs are incorporated in this report as if they were fully set forth herein.

The available evidence clearly shows that $1.8 million of Mr. Greene's funds were used to finance Ms. Greene's 1994 and 1996 campaigns. The bulk of the funds ($1.5 million) were contributed to Ms. Greene's winning 1994 campaign between August and November of 1994 based on a questionable real estate transaction between Ms. Greene and Mr. Greene ("Asset Swap").[4] The funds were reported to the Commission as Ms. Greene's personal funds or involved unreported disbursements.

Mr. Waldholtz acknowledged responsibility for his role in the violative activity. Despite their assertions to the contrary, as discussed more fully below, the Greenes and the Committees are also liable for their roles in the violative activity, notwithstanding Mr. Waldholtz's apparent misdeeds. In particular, Ms. Greene, apparently motivated by her acute need to fund her 1994 congressional campaign, was a conscious participant in the activity at issue. She authorized Mr. Waldholtz to make the contributions in her name, initially out of unverified funds and later based on the purported Asset Swap. Similarly, Mr. Greene was aware that he was providing funds to Ms. Greene's campaigns

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[4] Under the purported Asset Swap, Mr. Greene was assigned one-half interest in the sale proceeds of real estate in Pittsburgh, Pennsylvania worth $2.2 million, which Mr. Waldholtz had inherited. The arrangement was based on the understanding that Ms. Greene was entitled to one-half ($1.1 million). based on her marriage to Mr. Waldholtz and that there was a ready buyer for the property. Ms. Greene then proceeded to obtain funds from Mr. Greene with the understanding that Mr. Greene would be repaid from the sale proceeds of the property. There was no record or documentation of the assignment. As it turned out, there also was no real estate. *See* General Counsel's Brief (Greenes) at 13-16.

by late August of 1994, under the Asset Swap. Finally, the Committees are liable for Mr. Waldholtz's actions, as treasurer and agent of the Committees.

A. Joseph Waldholtz

Joseph Waldholtz did not respond to the General Counsel's Brief. Since in his deposition Mr. Waldholtz admitted to the activity described in the Brief, this Office recommends that the Commission find probable cause to believe that Joseph Waldholtz knowingly and willfully violated 2 U.S.C. § 432(b)(3), 2 U.S.C. § 434(b), 2 U.S.C. § 441a(f), 2 U.S.C. § 441b(a), 2 U.S.C. § 441f, and 2 U.S.C. § 441g. The investigation revealed that the funds at issue came from Mr. Greene, and therefore were not excessive contributions from Mr. Waldholtz. Accordingly, this Office also recommends that the Commission find no probable cause to believe that Joseph Waldholtz violated 2 U.S.C. § 441a(a)(1)(A) and (a)(3).

B. Enid and D. Forrest Greene

In their reply briefs, the Greenes reasserted the same factual arguments they made in their response to the Commission's reason to believe notification. Counsel also questioned the intent standard required for a knowing violation of section 441f of the Act. Since a determination regarding the requisite legal standard of intent is crucial to the ultimate conclusion of whether violations exist in this matter, this Office will address that issue initially.

1. Knowingly Standard

The General Counsel's Brief recommends that the Commission find probable cause to believe that Ms. Greene knowingly permitted her name to be used to make contributions in the name of another, in violation of section 441f. Counsel argues that the

"knowingly" language of section 441f requires proof "that a respondent is a knowing participant in a plan to circumvent FECA's regulatory scheme, i.e., that the respondent knew the law and intentionally sought to violate it." Enid Greene Reply Brief at 25. Counsel further asserts that, to support a finding of probable cause in this matter, it must be demonstrated "that it is more probable than not that Ms. Greene knew both that (1) funds contributed to Enid '94 in her name had in fact come from Mr. Greene, and (2) she was participating in a deliberate plan to evade FECA's regulatory scheme." Enid Greene Reply Brief at 26. Counsel bases his arguments on the erroneous premise that, unlike section 441a, section 441f is derived from a criminal statute, and therefore, qualifies for the higher criminal standard of intent.[5] Enid Greene Reply Brief at 24.

Close scrutiny shows that counsel's arguments are based on overstatements and a misinterpretation of relevant authorities. As set forth more fully below, the Commission has taken the position that all that is required to satisfy the "knowingly" language of section 441 of the Act is knowledge of the operative facts of the activity, not knowledge of the legality of the activity. Both the legislative history and relevant case law supports the Commission's position on this issue.

a. Legislative History

Counsel's interpretation of the term "knowingly" is inconsistent with the legislative history of the FECA. To support his interpretation, counsel confuses, and essentially merges, two intent standards set forth in the Act; the "knowingly and

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[5] Counsel's argument that section 441a has always been a civil statute is erroneous. The pertinent legislative history of section 441a clearly shows that, like section 441f, the current section 441a is derived from a criminal statute, 18 U.S.C. § 608. *See* S. Rept. 93-1237, at 49 (1974), *reprinted in* Federal Election

willfully" standard, when there is knowledge that the action involved is in violation of the law, and the "knowingly" standard, where no such knowledge is necessary. The Act clearly distinguishes between "knowing" violations of law (as set forth in sections 441a(f), 441b(a), 441c(a), and 441f of the Act) and "knowing and willful" violations, as set forth in section 437g(a)(5)(B) and (6)(C). The legislative history of the 1976 amendments demonstrates that Congress intended that there be a fundamental difference between these two standards. Pertinent language in the House Report (No. 94-917) states:

> The bill [H.R. 12406] distinguishes between violations of the law as to which there is not a specific wrongful intent which are subject to injunctive relief and civil penalties of up to $5,000 or the amount in question, whichever is greater, and violations as to which the Commission has clear and convincing proof that the acts were committed with a knowledge of all the relevant facts and a recognition that the action is prohibited by law, which are subject to injunctive relief and a penalty of $10,000 or twice the amount in question.

H. R. Rep. No. 94-917, 94th Cong., 2d Sess. 4-5 (1976) (emphasis added). *See* MUR 1360, General Counsel Brief at 14-16.

In conformity with the above legislative history, as early as 1978, the Commission concluded that a "knowing" violation may be shown when it is demonstrated that the party knew the facts involved in the violation. In MUR 515, this Office addressed the issue of "whether the term 'knowingly accepted' in section 441a(f) implies knowledge that the contributions were illegal or merely knowledge of the facts of the situation which

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Campaign Act Legislative History Series: Section 320 [2 U.S.C. Sec. 441a]: Limitations on Contributions and Expenditures, at 142 (1979).

bring the contribution within the prohibitions of the statute." This General Counsel's Report concluded:

> Broadly speaking [sic] we believe the latter interpretation to be that generally used in interpreting civil statutes and regulations. In support of this position we note a 1971 opinion of the U.S. District Court for Oregon interpreting an Oregon usury statute: "the word 'knowingly' ordinarily means that the act or omission was intentional. It is not necessary that the actor intended to break the law. It is enough that he intended the act. One may be ignorant of the law, and yet be found to have violated its demands." Citing American Timber & Trad. Co. v. First Nat. Bank of Oregon 334 F. Supp. 888, at 890 (1971). (citation omitted)

MUR 515, General Counsel's Report dated July 14, 1978 at 3. In a footnote in MUR 515, the General Counsel's Report also noted the criminal origin of section 441a(f) and concluded that:

> Although it may be argued that since 2 U.S.C. § 441a(f) was originally enacted as a criminal statute (18 U.S.C. § 608(h)) the criminal definition of "knowingly" should be applied, we believe the removal of the criminal penalties and the statute's transfer to Title 2 indicates that such an interpretation is no longer required.

In this MUR, the Commission found reasonable cause to believe that a committee violated section 441a(f) by knowingly accepting an excessive contribution from guarantors of a loan to the committee, even though the committee was not aware of the guarantors' individual responsibility for repayment of the loan.

b. Case Law

Contrary to counsel's assertions, the court cases which have addressed this issue also do not support counsel's position. Counsel acknowledges that two separate courts have upheld the Commission's interpretation of the term "knowingly" in cases involving section 441a(f). *See* Federal Election Commission v. John Dramesi For Congress, 640

F. Supp. 985 (D.N.J. 1986); Federal Election Commission v. California Medical Association, 502 F. Supp. 196 (N.D. Cal. 1980). *But see* In re Federal Election Campaign Act Litigation, 474 F. Supp. 1044 (D.D.C. 1979).[6] Notwithstanding such judicial precedents, counsel attempts to distinguish those cases on the erroneous basis of section 441f's distinct criminal origin and cites to FEC v. Rodriguez, No. 86-687 Civ-T-10(B) (M.D. Fla. May 5, 1987) (unpublished order) in support of his position. However, the Rodriguez decision does not stand for the proposition that counsel espouses. The Rodriguez court concluded that the respondent, who solicited individuals to serve as conduits on behalf of the true contributor and who also delivered some of the reimbursement checks to the conduits, could not be held liable for knowingly accepting a contribution under section 441f because he was neither a candidate nor an agent of a candidate. Slip op. at 2. The court focused on the "accepting" language of section 441f, not the "knowingly" language, as counsel contends. In fact, the court recognized that the respondent violated section 441f, just not the particular language that the Commission asserted in the case. Slip op. at 3. Accordingly, the Commission was permitted to amend its complaint, and in a later opinion the court granted the Commission a default judgment

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[6] In this case, the U.S. District Court for the District of Columbia, in dicta, appears to have taken a different view of the "knowingly" language in section 441a(f), indicating that it is necessary to show that candidates "must have been aware of the illegal nature of the contributions." Id. at 1047 n.3. Nevertheless, in addressing a similar issue in the more recent case of FEC v. Re-Elect Hollenbeck to Congress Committee, et al., Civil Action No. 85-2239 (D.D.C. June 16, 1986), the same court noted the conflicting opinions of California Medical Association and In re Federal Election Campaign Act Litigation but specifically did not resolve the conflict. Instead the court concluded that the FEC was estopped from pursuing a 441a(f) violation where the respondent had complied with the FEC's "best efforts" regulations at 11 C.F.R. §.103.3(b)(1). Slip op. at 3. It is noteworthy that in a supplemental opinion in Hollenbeck, the court also concluded that the Commission's reliance on Dramesi was substantially justified, in rejecting respondent's request for attorneys' fees under the Equal Access to Justice Act ("EAJA"). FEC v. Re-Elect Hollenbeck to Congress Committee, Civil Action No. 85-2239, 1987 WL 13359, at *2 (D.D.C. June 25, 1987). That decision is particularly pertinent here in light of counsel's threats to file for fees under the EAJA should the Commission pursue this matter in court.

against the respondent for a violation of section 441f for knowingly assisting in the making of contributions in the name of another. FEC v. Rodriguez, No. 86-687 Civ-T-10 (M.D. Fla. October 28, 1988) (unpublished order). [7]

c. Commission's Regulations

Counsel misconstrues the Commission's regulation at 11 C.F.R. § 110.4 (b)(1)(iii), when he argues that "the Commission ratified the Rodriguez decision that a person can only knowingly violate section 441f if he or she is aware that they are participating in a plan to circumvent FECA's regulatory scheme." Enid Greene Reply Brief at 25-26. Counsel incorrectly construes the regulation as restrictive, contending that it applies "only to those who initiate or instigate or have some significant participation in a plan or scheme to make a contribution in the name of another." Id. However, the regulation was promulgated to address the deficiency in section 441f that the Rodriguez court pointed out in its earlier opinion. Actually, the regulation is expansive; it supplements the first clause of section 441f, *no person may make a contribution in the name of another*, to include third parties like the respondent in the Rodriguez case. Explanation and Justification, 54 Fed. Reg. 34098 at 34105, col. 1 (Aug. 17, 1989, as amended by 55 Fed. Reg. 2,281, col. 2 (Jan. 23, 1990.)

In sum, counsel's attempt to distinguish between the "knowingly" language of section 441a and that of section 441f and to apply a criminal standard of intent to 441f

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[7] *Cf.* Central Bank of Denver, N.A. v. First Interstate Bank of Denver, 511 U.S. 164, 191. (In that case, the Supreme Court held that a private plaintiff may not maintain an aiding and abetting suit under Rule 10b-5 of the Securities and Exchange Commission's regulations when the text of the prevailing statute, section 10(b) of the Securities Exchange Act of 1934, does not prohibit aiding and abetting.)

cases based on that section's purported distinct criminal origin is seriously flawed.[8] Both provisions are derived from criminal statutes; both have been incorporated into the FECA, a civil statute; and both can be prosecuted civilly and criminally. Therefore, there is no basis for applying a different standard to section 441f, as counsel contends.

2. Waldholtz's Misdeeds and Fraudulent Documents

Counsel argues that Ms. Greene and Mr. Greene should not be held liable for the violative activity because Mr. Waldholtz deceived them both: he deceived Ms. Greene into believing that she had the personal wealth to make the contributions at issue and deceived Mr. Greene into giving him the funds. Enid Greene Reply Brief at 30.

In support of his assertions, counsel provided this Office with a substantial amount of documentation evidencing Mr. Waldholtz's fraudulent misdeeds, not only with respect to this matter but regarding other nonelection matters. In particular, counsel provided falsified documents allegedly manufactured by Mr. Waldholtz as part of a scheme to deceive Ms. Greene. Among these documents are tax returns showing more than $250,000 annual income from a "Waldholtz Family Trust," a financial statement showing a balance of more than $4 million available to Ms. Greene from a "TWC Ready Assets" mutual fund account, and several draft documents allegedly retrieved from Mr. Waldholtz's personal computer. Counsel also provided documents showing that

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[8] Counsel's contention is also inconsistent with the normal rule of statutory construction which assumes that identical words used in different parts of the same statute are intended to have the same meaning. *See* Commissioner of Internal Revenue v. Lundy, 516 U.S. 235, 249 (1996); Gustafson v. Alloyd Co., Inc., 513 U.S. 561 (1995); Sullivan v. Stroop, 496 U.S. 478, 484 (1990); and Sorenson v. Secretary of Treasury of the United States, 475 U.S. 851, 860 (1986). The rule has been characterized as a "basic" canon of statutory construction. Cowart v. Nickolos Drilling Co., 505 U.S. 469, 478 (1992). Although this construction is not absolute, NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 261 (1995), the principle is applicable here where the words evidence a similar legislative intent and purpose.

Mr. Waldholtz defrauded several of his own family members, including his mother and grandmother, friends, and acquaintances of significant amounts of money.

Counsel imputes a nefarious purpose to the fact that the General Counsel's Brief did not include references to that information. This Office does not dispute Mr. Waldholtz's significant fraudulent activities or counsel's evidence of them. However, this Office does not believe that Mr. Waldholtz's actions alleviate Ms. Greene's and Mr. Greene's legal liability under section 441f for their own conduct in this matter, and hence the briefs focused on the testimony of Ms. Greene and Mr. Greene. In particular, contrary to counsel's assertions, Ms. Greene and Mr. Greene never saw the computer generated fraudulent documents until after Mr. Waldholtz disappeared on November 11, 1994, over one year after the Asset Swap. Enid Greene Dep. at 233, 236. Therefore, Ms. Greene and Mr. Greene could not, and did not, rely on those documents in undertaking the Asset Swap, which was the major vehicle used to generate funds for Ms. Greene's 1994 campaign.[9]

3. Waldholtz's Deposition Testimony

Counsel also questioned this Office's motives in omitting references to Mr. Waldholtz's testimony in the Brief and pointed to certain statements by Mr. Waldholtz which counsel claims completely exonerated Ms. Greene and Mr. Greene. Enid Greene Reply Brief at 2, 6. However, in addition to admitting to his unlawful conduct in his deposition on August 13, 1997, Mr. Waldholtz implicated both Ms. Greene and Mr. Greene in the contribution scheme. Mr. Waldholtz testified that Ms. Greene was determined to win the 1994 election and was aware that money from her father was going

into her campaign. Joseph Waldholtz Dep. at 42, 43, 51, 53, 69, 102-04, 107, 109-10, 115-16, 118, 129, 142. Mr. Waldholtz also testified that, although Ms. Greene did not review her 1994 committee's reports, she was aware of how much money was being reported in her name. Joseph Waldholtz Dep. at 139-41. Mr. Waldholtz also admitted that he told Ms. Greene that he was wealthy, that he had given her a $5 million gift, and that he had the real property which was the basis of the Asset Swap. Joseph Waldholtz Dep. at 146-47. However, Mr. Waldholtz also stated that Ms. Greene and her father "knew it wasn't real." Joseph Waldholtz Dep. at 147, 174.[10]

With respect to counsel's claim that Mr. Waldholtz admitted that "he and he alone committed the section 441f violations at issue," (Enid Greene Reply Brief at 5), Mr. Waldholtz testified that what he really meant was that he alone was responsible for his criminal conduct: "I accepted responsibility for what I did." Joseph Waldholtz Dep. at 190-92. In fact, Mr. Waldholtz specifically stated that he did not act alone with respect to the contributions at issue. Joseph Waldholtz Dep. at 188-89. Notwithstanding, considering Mr. Waldholtz's questionable credibility, this Office did not rely on his testimony in support of its recommendations against either Ms. Greene or Mr. Greene.

4. Enid Greene's Liability

In accordance with the Dramesi decision and Commission precedent, this Office is of the opinion that Ms. Greene possessed the requisite knowledge to satisfy the "knowingly" standard of section 441f. In this instance, all that is legally required to

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[9] The documents also raise certain authentication and chain of possession questions.

[10] Mr. Waldholtz also disavowed knowledge of the draft documents allegedly retrieved from his personal computer. Joseph Waldholtz Dep. at 171-73, 175-78. Mr. Waldholtz did admit that he prepared

establish that Ms. Greene knowingly permitted her name to be used to make a contribution in the name of another is a showing that Ms. Greene knew Mr. Waldholtz was making contributions in her name.

The evidence clearly shows that Ms. Greene knew Mr. Waldholtz was making contributions in her name. Ms. Greene testified that from the beginning of her 1994 campaign she authorized Mr. Waldholtz to transfer funds from her supposedly $5 million gift from her husband into her campaign as necessary. *See* General Counsel's Brief at 12. Furthermore, Ms. Greene clearly authorized Mr. Waldholtz to use the funds from Mr. Greene after the purported Asset Swap in August of 1994 for her campaign as her personal funds. *See* General Counsel's Brief at 14. In fact, Ms. Greene was the one who suggested the arrangement. *See* General Counsel's Brief at 14-15. Ms. Greene acknowledged that she was in dire need of campaign funds after being advised by Mr. Waldholtz that her $5 million was unavailable, and she was looking for a way to obtain money to fund the last push of the campaign in late August when she undertook the Asset Swap.[11] In fact, the bulk of the contributions were made after the Asset Swap, during the August to November election period. *See* General Counsel's Brief at 21.

It is also significant that, although ignored by counsel, Ms. Greene previously participated in a similar questionable real estate financing arrangement with her father to finance her losing 1992 congressional campaign. In that instance, she sold to her father for $300,000 a house which he had previously given to her. Like the instant matter, the

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the July 20, 1995 memo regarding the Merrill Lynch "Ready Asset Account" in order to buttress the financial claims made on Ms. Greene's annual congressional financial disclosure form.

[11] Counsel cites to Advisory Opinion 1984-60 in support of his contention that the Asset Swap was legal. However, that Opinion was based on the proviso that the real estate transfer between a candidate and

payments were made periodically, between April and December of 1992. In addition, there was no documentation of the transaction, except for a document entitled Letter of Intent, which Enid Greene signed on February 15, 1993 showing that she was paid the $300,000 in full. Furthermore, the deed of sale transferring the property to D. Forrest Greene and his wife, Gerda Greene was executed on May 24, 1994, about a year and a half after D. Forrest Greene paid for the property. *See* General Counsel's Brief at 17-18. In short, Ms. Greene was a conscious participant in the contributions at issue; she clearly was aware of the operative facts that constitute the violations at issue. Not only did she know that contributions were being made in her name, but she clearly benefited from the contributions.

Based on the above, Ms. Greene is liable for a knowing violation of section 441f notwithstanding her lack of knowledge of Mr. Waldholtz's apparent substantial fraudulent activities.[12] To conclude otherwise would permit Ms. Greene to do indirectly what she could not have done directly without liability. Conceivably, if Ms. Greene made the contributions in her name personally, she would have borne the responsibility of making sure that she had the funds to make the contributions. However, rather than make the contributions directly from her purported $5 million gift, she delegated the task

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a family member qualifies as an *arms-length transaction.* There is a serious question whether the Asset Swap at issue would qualify as such.

[12] Counsel also pointed out that under FEC v. Gus Savage for Congress '82 Committee, 606 F. Supp. 541, 546-47 (N.D. Ill. 1985), as the candidate, Ms. Greene has no legal duty to supervise the actions of the campaign's treasurer and that it is the treasurer and the treasurer alone who is legally responsible for any violations of FECA. Enid Greene Reply Brief at 52. Counsel distorts the holding of that case. Actually, the court concluded that the treasurer alone was legally responsible for a campaign's reporting violations. *Id.* at 547. This Office's recommendation regarding Ms. Greene is based on her conduct regarding nonreporting violations with which she was involved. The Commission may hold candidates responsible for nonreporting FECA violations when there is evidence that the candidate was personally involved in the activity or transaction which produced the violation. MURs 3650, 3093, and 2619.

to Mr. Waldholtz. To avoid abuse of the Commission's regulation at 11 C.F.R. § 110.10(a), which allow candidates to contribute unlimited funds to their campaigns, it is appropriate to hold a candidate responsible when she authorizes contributions to be made in her name and those contributions turn out to be unlawful. *See* MURs 4128/4362 (Grant M. Lally). Therefore, this Office recommends that the Commission find probable cause to believe that Enid Greene violated 2 U.S.C. § 441f.

5. D. Forrest Greene's Liability

In addition to the same intent standard arguments discussed *infra,* pages 4-10, counsel claims that the Commission's regulation at 11 C.F.R. § 110.4 is not applicable to the present facts. D. Forrest Greene Reply Brief at 20-21. Counsel argues that, since Mr. Greene did not make the contributions at issue directly, Mr. Greene cannot have made contributions in the name of another. At most, he could only have *knowingly assisted* in the making of the contributions. D. Forrest Greene Reply Brief at 21-22. Counsel claims that, although Mr. Greene acknowledges providing the funds to Mr. Waldholtz, he was unaware that some of the funds were being used on Ms. Greene's campaigns. D. Forrest Greene Reply Brief at 21.

Even if Mr. Greene was unaware that the initial funds he had provided to Mr. Waldholtz were being used in the campaigns, Mr. Greene became aware that he was providing funds to Ms. Greene's campaign in late August of 1994 under the Asset Swap. *See* General Counsel's Brief at 22-23. Ms. Greene testified that Mr. Greene was advised of the purpose of the Asset Swap. *See* General Counsel's Brief at 15-16. In addition, Mr. Greene acknowledges engaging in the Asset Swap, and presumably would not have done so without an understanding regarding the use of the money that he was providing

to Ms. Greene. *See* General Counsel's Brief at 16. Furthermore, Mr. Greene had previously participated in a similar questionable real estate arrangement with Ms. Greene to fund her unsuccessful 1992 campaign. Therefore, as Mr. Greene knew that he was providing funds to Ms. Greene's campaign through the Asset Swap, Mr. Greene is in violation of section 441f of the Act under the Dramesi decision. It is not necessary to show that Mr. Greene knew that he was making a contribution in the name of another, only that he was aware that the funds he provided through the Asset Swap were being used to fund Ms. Greene's campaign.

This Office takes the position that, based on Mr. Greene's role in the violative activity, he is liable for making contributions in the name of another. In addition, since the contributions exceeded the individual limits on contributions, Mr. Greene is also in violation of sections 441a(a)(1)(A) and (a)(3) of the Act. Accordingly, this Office recommends that the Commission find probable cause to believe that D. Forrest Greene violated 2 U.S.C. § 441a(a)(1)(A) and (a)(3), and 2 U.S.C. § 441f.

Counsel further argues that the Commission is collaterally estopped by Mr. Greene's civil judgment against Mr. Waldholtz from concluding that Mr. Greene violated section 441f. D. Forrest Greene Reply Brief at 36. Mr. Greene filed the lawsuit in May 1, 1996. Mr. Waldholtz filed an answer on June 6, 1996 invoking his Fifth Amendment rights. The court subsequently took an adverse inference and granted Mr. Greene summary judgment on July 25, 1996.

There are several reasons why the judgment does not preclude the Commission from accepting the recommendations set forth in the General Counsel's Brief. First, collateral estoppel is inapplicable here where the Commission was not a party to

Mr. Greene's state court case. *See Restatement (Second) of Judgments* § 27 (1980). *See also* Voss v. Shalala, 32 F.3d 1269, 1271 (8th Cir. 1994) (The court held that an administrative law judge was not bound by a state probate court judgment where the Department of Health and Human Services was not a party to the state court proceeding.) Second, the court did not adjudicate the FECA violations at issue, and indeed, it is well established that the Commission has exclusive jurisdiction with respect to the civil enforcement of the FECA. 2 U.S.C. § 437c(b)(1). Finally, the fact that the funds were provided to Mr. Waldholtz based on fraud does not negate Mr. Greene's intention to provide money to Ms. Greene's campaign through the Asset Swap, and therefore, does not alleviate Mr. Greene from liability under the FECA.

C. Committees

Though he acknowledges that Mr. Waldholtz was an agent of the Committees, Counsel argues that the Committees are not legally liable for the violative activity because Mr. Waldholtz was not acting within the scope of his employment. Committees Reply Brief at 32. Counsel claims that Mr. Waldholtz acted in his own self-interest and that Ms. Greene and the Committees did not benefit from his actions. Committees Reply Brief at 36.

It is well established that when an agent acts within the scope of his express or implied authority, a principal may be held responsible even though the principal lacked knowledge of the agent's actions, or that the agent's action were unauthorized, tortious, or even unlawful. *See* 3 Am. Jur. 2d Agency § 280 at 783. *See also* Veranda Beach Club Ltd. Partnership v. Western Sur Co., 936 F.2d 1364, 1376 (1st Cir. 1991); Local 1814, Int'l Longshoremen's Ass'n v. NLRB, 735 F.2d 1384, 1395 (D.C. Cir.) *cert. denied,* 469

U.S. 1072 (1984). This Office takes the position that the instant Committees are legally responsible for Mr. Waldholtz's actions. Counsel's arguments to the contrary are unavailing in this instance. As treasurer, Mr. Waldholtz clearly was acting within his scope of authority as agent of the Committees. In fact, to some degree, Mr. Waldholtz was acting in accordance with the express direction of the candidate. Ms. Greene acknowledges that she authorized Mr. Waldholtz to make contributions in her name at the onset of her 1994 campaign. She also was directly involved in the Asset Swap arrangement whereby the bulk of the funds realized from the transaction were transferred into her campaigns. Given the candidate's involvement and the clear benefit derived by her and her committees from the illegal activity at issue, the Committees should be held responsible in this instance.[13]

Counsel also argues that the probable cause recommendation in the General Counsel's Brief is contrary to the Commission's long-standing policy of not pursuing enforcement actions against committees when the violations are the result of fraudulent activity by a rogue treasurer. Committees Reply Brief at 16. This argument is somewhat misleading. As counsel implicitly acknowledges, the Commission has held committees liable for acts of their treasurers in similar situations. *See* MURs 2602, 3585.[14] Therefore, to the extent that counsel is claiming that in this instance the Commission

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[13] Counsel asserts that Waldholtz so dominated the Committees that he became their alter ego, and as such, he is solely responsible for the violations. Considering the apparent benefit to Ms. Greene and the Committees and Ms. Greene's involvement in facilitating the dominance that counsel describes, this Office does not find counsel's assertions convincing.

[14] In MUR 3585 (Tsongas Committee), this Office recommended that the Commission make probable cause findings against the respondent committee based on the unlawful acts of its treasurer. *See* MUR 3585, General Counsel's Brief at 13-21. Ultimately, in light of Senator Tsongas's death, this Office recommended that the Commission exercise its prosecutorial discretion and close the file. In so doing,

lacks legal authority to hold the Committees liable for Mr. Waldholtz's actions, counsel is mistaken. It is true, as counsel cites, that in several instances the Commission has not taken action against committees for acts of treasurers. However, the MURs counsel cited indicate a Commission policy of exercising its prosecutorial discretion in not pursuing committees when the circumstances warrant and do not constitute a repudiation of basic agency law principles. In many of those instances, the individuals acted entirely independently of their respective committees and candidates. In this matter, the evidence shows that Mr. Waldholtz did not act entirely independently of the candidate with respect to the contributions at issue.

Accordingly, this Office recommends that the Commission find probable cause to believe that Enid '94 and Enid Greene, as treasurer, and Enid '96 and Enid Greene, as treasurer, violated 2 U.S.C. § 434(b), 2 U.S.C. § 441a(f), 2 U.S.C. § 441f, and 11 C.F.R. § 110.4(c)(2). This Office also recommends that the Commission find probable cause to believe that Enid '94 and Enid Greene, as treasurer, violated 2 U.S.C. § 441b(a).

III. DISCUSSION OF CONCILIATION AND CIVIL PENALTY

however, this Office explicitly reaffirmed its conclusion regarding the Tsongas Committee's liability. *See* General Counsel's Report dated March 4, 1997 at 4.

IV. GENERAL COUNSEL'S RECOMMENDATIONS

1. Find probable cause to believe that Joseph Waldholtz knowingly and willfully violated 2 U.S.C. § 432(b)(3), 2 U.S.C. § 434(b), 2 U.S.C. § 441a(f), 2 U.S.C. § 441b(a), 2 U.S.C. § 441f, and 2 U.S.C. § 441g.

2. Find no probable cause to believe that Joseph Waldholtz knowingly and willfully violated 2 U.S.C. § 441a(a)(1)(A) and (a)(3).

3. Find probable cause to believe that Enid Greene violated 2 U.S.C. § 441f.

4. Find probable cause to believe that D. Forrest Greene violated 2 U.S.C. § 441a(a)(1)(A) and (a)(3), and 2 U.S.C. § 441f.

5. Find probable cause to believe that Enid '94 and Enid Greene, as treasurer, and Enid '96 and Enid Greene, as treasurer, violated 2 U.S.C. § 434(b), 2 U.S.C. § 441a(f), 2 U.S.C. § 441f, and 11 C.F.R. § 110.4(c)(2).

6. Find probable cause to believe that Enid '94 and Enid Greene, as treasurer, violated 2 U.S.C. § 441b(a).

7. Take no further action against Joseph Waldholtz and close the file as to him.

8. Approve the attached joint conciliation agreement and appropriate letters.

12/2/98
Date

Lawrence M. Noble
General Counsel

Attachment
1. Joint Conciliation Agreement

Staff assigned: Kamau Philbert

FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: LAWRENCE M. NOBLE
GENERAL COUNSEL

FROM MARJORIE W. EMMONS/LISA R. DAVIS
COMMISSION SECRETARY

DATE: DECEMBER 4, 1998

SUBJECT: MURs 4322/4650 - Memorandum to the Commission dated December 2, 1998.

The above-captioned document was circulated to the Commission on **Thursday, December 3, 1998.**

Objection(s) have been received from the Commissioner(s) as indicated by the name(s) checked below:

Commissioner Elliott	_
Commissioner Mason	XXX
Commissioner McDonald	XXX
Commissioner Sandstrom	_
Commissioner Thomas	XXX
Commissioner Wold	_

This matter will be placed on the meeting agenda for

Tuesday, December 8, 1998.

Please notify us who will represent your Division before the Commission on this matter.