

September 9, 2005

VIA FACSIMILE and U.S. MAIL

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OFFICE OF GENERAL
COUNSEL

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**Re: MUR 5225 – Response of Respondents New York Senate 2000 and
Andrew Grossman, in his official capacity as treasurer**

Dear Mr. Norton:

We are writing on behalf of the above-referenced Respondents in MUR 5225. Respondents oppose the Office of General Counsel's recommendation of a finding of probable cause to believe that they violated the Federal Election Campaign Act, as amended, 2 U.S.C. 431 *et seq.* (2005). They respectfully submit that the Commission should take no further action against them in this matter.

I. FACTUAL BACKGROUND

A. New York Senate 2000 and the Hollywood Gala

This matter involves a fundraising event held in Los Angeles on August 12, 2000, to benefit New York Senate 2000 ("the Committee"). Formally titled, "The Hollywood Gala Salute to President William Jefferson Clinton and Hillary Rodham Clinton," the event has been referred to sometimes as the "Hollywood Gala," and is described in Committee records as "Event 39." Held at a private estate, the event was a dinner and a concert honoring President William J. Clinton on the eve of the Democratic National Convention.

New York Senate 2000 is a joint fundraising committee whose participants included Hillary Rodham Clinton for U.S. Senate Committee, Inc., the Democratic Senatorial Campaign Committee, and the New York State Democratic Party. It was one of

September 9, 2005

Page 2

multiple joint fundraising committees organized during the 2000 election cycle with the participation of the DSCC, to help raise funds for Democratic Senate candidates. The treasurer of all of these committees, and of New York Senate 2000, was Andrew Grossman, a DSCC employee.

The DSCC's permanent staff generally administered such joint fundraising committees. However, the anticipated volume of New York Senate 2000's activities led the Committee to retain an outside compliance specialist to handle its activities alone. That specialist was Whitney Burns, an expert in the preparation of Commission reports and in political committee compliance. In addition, the Committee enjoyed the compensated services of several professional fundraisers. Among these was David Rosen, who served also as a fundraiser for Mrs. Clinton's Senate principal campaign committee.

The Hollywood Gala was a unique event; the Committee normally raised funds through small events held in private homes. The idea for an event honoring the President at the Convention was discussed in June 2000; sometime in late June or early July the decision was made to proceed. The principal organizers of the dinner and concert were Peter Paul and Aaron Tonken. Bretta Nock, an event planner who worked for Tonken, handled many of the details surrounding the Gala.

B. The Figures Behind the Hollywood Gala

1. Peter Paul

At the time the Gala was conceived, Peter Paul was well-known as the principal figure behind Stan Lee Media, an Internet firm associated with the creator of Spider-Man and the Fantastic Four. He was also a generous contributor to charities. Just three days after the event, Paul and Stan Lee were recognized for their contribution of \$300,000 to Operation Kids and The Larry King Cardiac Foundation. Melinda Lake-Brey, *Stan Lee Media Donates \$300,000 to Operation Kids, The Larry King Cardiac Foundation*, PR Newswire (August 15, 2000). Paul also controlled an array of other corporations. He apparently hoped that he could use President Clinton to promote 1-12 Interactive, a company that Mr. Paul started in 1991 to promote learning English on a global level using the Internet. However, there is no evidence that Peter Paul's interests were ever communicated to President Clinton.

According to Stan Lee, "[a]s far as I know, Peter Paul was in charge of everything for the event. He hired the caterers and everyone else." FEC Report of Interview with Stan Lee (Feb. 15, 2005). Paul negotiated with event vendors, and paid some of them

September 9, 2005

Page 3

directly. Grant Milford provided services connected with a Tribute Book that was given to some attendees at the event. Mr. Milford told FEC investigators: "I negotiated everything with [Peter Paul]. Based on my past dealings with Aaron Tonken, I told Pat [Waters] I wouldn't accept any checks from Aaron Tonken. I think the first check was from Stan Lee Media for \$2,000 ..." FEC Report of Interview with Grant Milford (Feb. 27, 2005).

At the end of 2000, Stan Lee Media stock plummeted, and it became apparent that Paul had secretly engaged in stock fraud. The company went bankrupt, and Paul fled to Brazil. On June 12, 2001, the United States Attorney for the Eastern District of New York indicted Paul on two felony counts of securities fraud. According to the indictment, Peter Paul had bilked the company and manipulated its stock price. The scheme involved large, secret cash payments from Paul to a stock analyst and promoter, and cost investors more than \$25 million. See U.S. Department of Justice Press Release, *Co-Founder of Stan Lee Media, Wall Street Analyst and Others Charged with Stock Manipulation; Loss to Investors Exceeds \$25 Million* (June 12, 2001).

While Paul was a fugitive in Sao Paolo, Brazil, he caused the instant complaint to be filed with the Commission. He enlisted the conservative public interest group Judicial Watch to represent him both in filing the complaint, and in seeking leniency from the Department of Justice. On July 26, 2001, a federal district court in Los Angeles unsealed a second indictment against Paul, this time for bank fraud and mail fraud. The complaint alleged that Peter Paul and a co-conspirator wrote a series of bad checks to Stan Lee Media from businesses they controlled, and then used the company's credit to obtain cashier's checks for those businesses. On August 3, 2001, Brazilian authorities arrested Peter Paul at the Sao Paolo airport. See U.S. Department of Justice Press Release, *Co-Founder of Stan Lee Media Arrested Today in Brazil; Complaint Charges Him With Bank Fraud* (Aug. 3, 2001).

On March 8, 2005, Peter Paul pled guilty to federal stock fraud charges in the Eastern District of New York.

2. Aaron Tonken

Aaron Tonken was Peter Paul's protégé. They first met in 1993, and apparently reconnected again in 1999. Describing that second meeting, Tonken wrote: "Suddenly, Peter Paul and I were fast friends again. So, naturally, the next thing we did was illegal." Aaron Tonken, *King of Cons: Exposing the Dirty, Rotten Secrets of the Washington Elite and Hollywood Celebrities*, at 267 (Nelson Current 2004).

September 9, 2005

Page 4

It was Tonken who asked Ken Roberts to make his estate the venue for the event. According to Roberts, Tonken's "only motive was to ingratiate himself with the Clintons and all these celebrities ... Tonken is a conniver and a hustler, but he didn't do it for self-gain." FEC Report of Interview with Ken Roberts (Feb. 15, 2005).

Tonken employed a series of individuals who had worked with him on other efforts to assist with the Hollywood Gala. Blossett Kitson helped secure artists for the event, and worked with Tonken to obtain payment from Stan Lee Media for their expenses. "We were always talking to each other. Sometimes I would speak to Aaron, Aaron would go get the check from Peter Paul [for celebrity related expenses], and he'd give it to me. But all of the checks that I received had the Stan Lee Media – it was drawn from their account." Rosen Trial Transcript at 94 (May 18, 2005) (testimony of Blossett Kitson). She said that Peter Paul and Aaron Tonken were "constantly" together. *Id.* at 83.

Alan Krausen of the Travel Authority also worked with Tonken on making travel arrangements for celebrities. He sent event invoices directly to Tonken for payment. Krausen never sent invoices to David Rosen:

Q: Did you send any of the invoices relating to this Gala that we just discussed to Mr. Rosen?

A: No, I did not.

Rosen Trial Transcript at 193 (May 18, 2005) (testimony of Alan Krausen).

Tonken engaged Gary Smith, an Emmy award-winning producer, to produce the concert portion of the Hollywood Gala. Smith, in turn, had Allan Baumrucker serve as the executive in charge of production, logistics and the budget. Smith dealt with Tonken and Paul on budget issues. At the time, Smith did not know who David Rosen was:

Q: With whom were you dealing with in developing this budget from the side of those who wanted to have the event produced?

A: On their side I was dealing with Aaron Tonken.

Q: All right.

A: And maybe a little bit with Peter Paul, but mainly with Aaron Tonken.

Q: Did you know at that time David Rosen?

A: No.

Rosen Trial Transcript at 37 (May 24, 2005) (testimony of Gary Smith). Nor did Smith discuss the concert production costs with David Rosen:

Q: Did you ever have any discussions with David Rosen about the costs of the production of the concert?

A: Never.

Q Were you – whom were you reporting to or liaisoning with dealing with these concerts?

A: Aaron Tonken.

Id. at 70. Smith did not even meet David Rosen until May 2005. "This is going to sound strange, but the first time I think I met – that I really remember meeting Mr. Rosen was a week and a half ago. I don't remember him at all from our event." *Id.*

However, Smith sent Tonken a budget of \$575,000 for the production costs of the concert. According to Smith, the budget changed slightly – "I think I did submit another budget that was just 8- or 9,000 less than that" – but stayed around \$575,000. The final invoice budget rose to around \$611,000. *Id.* at 53.

On December 9, 2003, Aaron Tonken pled guilty to mail fraud and wire fraud. He had falsely represented to donors and underwriters on a number of occasions that their contributions would pay event expenses or would benefit charities. Instead, he used the contributions to pay personal loans and purchase luxury items. He falsely solicited contributions for events that he never produced. On August 23, 2004, Tonken was sentenced to more than five years in prison. The Court ordered him to pay \$3.8 million in restitution to his victims. See U.S. Department of Justice Press Release, *Celebrity Fund-Raiser Aaron Tonken Sentenced to 63 Months in Prison for Defrauding Donors and Underwriters in Connection with Production of Charity Events* (Aug. 23, 2004).

3. Bretta Nock

Of those who worked with Tonken and Paul on the Hollywood Gala, Bretta Nock was perhaps among the most significant. She was Aaron Tonken's event planner. In her own words, "my work is dedicated to orchestrating every aspect of an event from devising time lines and securing venues to drafting budgets and managing costs ... vendor negotiation and selection, oh, creating invitations, creating schedules of activity

events, all on-site logistics from – oh, goodness. Runs the gamut from food and beverage, catering, to the décor, to the parking, absolutely everything." Rosen Trial Transcript at 97-98 (May 18, 2005) (testimony of Bretta Nock).

Among other things, Bretta Nock was responsible for the dinner and reception costs of the Hollywood Gala:

Q: Now, what responsibility did you have in terms of keeping a budget for the dinner and the reception portion of this Gala?

A: Well, absolutely every vendor supplied me with an estimate or an invoice, and that was sent to Aaron Tonken and Stan Lee Media to approve that. Once it was approved, then the planning process would begin, and I was formulating budgets based upon the invoices that I received.

Id. at 108. According to witnesses, Bretta Nock was in charge of the event details. Ken Roberts said: "She coordinated everything, the seats, the people, and the invitations." FEC Report of Interview with Ken Roberts (Feb. 15, 2005). Pat Waters agreed to do work on the invitations because Aaron Tonken told her that Bretta Nock was in charge. *See* Rosen Trial Transcript at 60 (May 18, 2005) (testimony of Pat Waters). She understood that Bretta Nock was responsible for keeping track of the event costs and forwarding them to David Rosen. *See id.* at 65.

One vendor told Commission investigators: "[Bretta Nock] hired me for this, but Aaron Tonken or Peter Paul were paying me. ... Bretta worked very hard to make sure I got paid, because I was not always sure who was going to pay me. I felt that Peter Paul and Aaron Tonken were shady characters, and it strained my relationship with Bretta. I haven't worked with her since." FEC Report of Interview with Debra Parr (Feb. 22, 2005).

Another vendor told Commission investigators, "Bretta seemed to be the central coordinator, I think she was working for Aaron Tonken. He would call on occasion and ask about guests and seating. We were paid by Peter Paul." FEC Report of Interview with Amy Staszko (Mar. 7, 2005).

Ms. Nock herself told Commission investigators that "[s]he presented invoices to Aaron Tonken and he would cut the checks. She didn't give any estimates. Aaron would sometimes write the checks directly to the vendor and there were times when he would write the check to her and then she would pay the vendor." FEC Report of Interview with Bretta Nock (Apr. 29, 2004).

September 9, 2005

Page 7

In at least two separate FBI interviews, Nock stated that she either did not discuss the final costs of the Gala with David Rosen, or that she could not recall such conversations. During an October 31, 2001 interview, she said that she never had discussions with David Rosen about the final costs of the Gala. *See* Rosen Trial Transcript at 172-73 (May 18, 2005) (testimony of Bretta Nock). When interviewed again on January 9, 2002, she could not recall if David Rosen had asked her to get the \$200,000 invoice from Black Ink Productions. *See id.* at 167.

Nock admitted that she left items such as her fee off of the final event budget, and that David Rosen had not instructed her to do so:

The Court: Just answer the question. Did [Mr. Rosen] ever tell you [to take your fee off the budget]?

A: No. My fee was never on the budget.

The Court: Did he tell you take it off?

A: No.

Id. at 161. Nock also testified that Rosen had relied upon her to provide him with invoices and event costs:

Q: Do you agree with me that Mr. Rosen would rely on you to obtain and provide invoices to him and costs to him?

A: Yes. But the – I was working through Aaron Tonken and Stan Lee Media in regards to all my approval of my expenses and the invoices.

Id. at 153.

David Rosen also relied on Bretta Nock to provide information to Whitney Burns for the Committee's FEC reports. "I would refer Whitney to speak to Bretta directly. ... Rather than have [Whitney Burns] call me and then I call Bretta, get the information, and then call Whitney back, I thought they should speak directly." Rosen Trial Transcript at 169 (May 24, 2005) (testimony of David Rosen). Whitney Burns testified that Rosen referred her to Nock because Nock had the detailed information. *See* Rosen Trial Transcript at 125, 136 (May 19, 2005) (testimony of Whitney Burns).

C. MUR 5225 and *United States v. Rosen*

As noted above, Paul filed the complaint in this matter from Brazil as a fugitive on July 13, 2001. Respondents answered the complaint on September 28, 2001. The Commission found reason to believe in the matter on February 3, 2004. At the same time, the Commission initiated an audit of New York Senate 2000 pursuant to 2 U.S.C. § 437g(a)(2) (2005). Respondents cooperated fully with that audit, and made all requested documents and information available to the Commission. Later, when the Office of General Counsel sought testimony, the Committee voluntarily made Andrew Grossman available for deposition. Committee counsel helped the Office of General Counsel arrange interviews with other witnesses associated with New York Senate 2000, such as Terri New and Whitney Burns.

While the Commission was reviewing this matter, the United States Department of Justice was also investigating the circumstances surrounding the Hollywood Gala. That investigation culminated in the indictment of David Rosen on charges that he had caused false statements to be made to the Commission, principally through the omission of Hollywood Gala expenses on New York Senate 2000's FEC reports.

"In the course of the investigation and prosecution of Mr. Rosen, New York Senate 2000 was fully cooperative. Through its attorneys the committee made witnesses and over a dozen boxes of documents available at our request and assisted our review and understanding of those documents and other evidence. In particular, Andrew Grossman, the treasurer for New York Senate 2000, appeared whenever requested and answered any questions asked of him." Letter from Daniel A. Schwager to Sidney Rocke, Esq. (Aug. 19, 2005).

Rosen vehemently denied the Government's allegations. He took the stand in his own defense. After an eight-day trial, and needing only a few hours of deliberation, the jury acquitted Rosen on all counts on May 27, 2005. The General Counsel made the instant recommendation on July 6, 2005. To facilitate the Commission's consideration of this matter, Respondents agreed to toll the statute of limitations and extend the time for response.

II. DISCUSSION

A. The General Counsel's Brief Disregards the Mass of Evidence Showing That Respondents Did Their Best to File Accurate Reports

The General Counsel's Brief identifies three people associated with New York Senate 2000 who would have been involved in the preparation and filing of its reports:

- The first was Whitney Burns. She had day-to-day responsibility for the preparation and filing of the committee's reports.
- The second was Andrew Grossman, New York Senate 2000's treasurer. He is a respondent here solely "in his official capacity as treasurer." This designation can only be understood to mean that the Commission believes he did not intentionally deprive himself of the operative facts giving rise to the alleged violations. *See* Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 3, 4 (2005).
- The third was David Rosen. As noted above, he was acquitted by a jury of charges that he had caused false statements to be made to the Commission in connection with the Hollywood Gala.

Despite the Government's demonstrated belief in the credibility and good faith of Ms. Burns and Mr. Grossman, and despite Mr. Rosen's acquittal by a jury, the General Counsel's Brief repeatedly asserts that New York Senate 2000's reports were inaccurate because of Committee malfeasance. *See, e.g.,* Br. at 2, 9, 11, 12, 13-14, 15, 20-21. In particular, the brief claims that New York Senate 2000 had access to the information that would have permitted it to file complete and accurate reports. *See, e.g.,* Br. at 2, 9, 11-12, 13-14, 15, 20.

These assertions are flatly wrong. Facts known to the Office of General Counsel, and yet omitted from its brief, show that New York Senate 2000 made extensive efforts to collect and report correct contribution and expenditure information for the Hollywood Gala. They show that New York Senate 2000 had nothing to gain from incomplete disclosure, and indeed would have benefited financially from disclosing in-kinds totaling the amount alleged. They show that the Government in the Rosen trial regarded New York Senate 2000 and its participants as victims of the alleged false statements – not the perpetrators – and enjoyed Respondents' full cooperation at every stage of the investigation.

- 1. The recommendation ignores the efforts made by Respondents to collect and report accurate information**
 - a. The facts show that New York Senate 2000 tried in good faith to file correct reports**

Because of the high volume of activity in which New York Senate 2000 was to engage, the Committee retained Whitney Burns, an experienced compliance professional, to maintain its records, and to prepare and file its FEC reports. The quality of Ms. Burns' work is well known to the Commission. She has worked on innumerable political committee reports, audits and responses to requests for additional information.

At the direction of the Committee's treasurer, Andrew Grossman, Ms. Burns established and implemented rigorous procedures to track and accurately report the committee's financial activity. These procedures were consistent with others employed by the committee and its participants to ensure compliance with the law. For example, David Rosen himself was employed under an agreement that required him to comply with the FECA and other applicable laws in the conduct of his official duties. *See, e.g., Rosen Trial, Gov't Exh. 59 (agreement between Hillary Rodham Clinton for Senate and David Rosen); see also Rosen Trial Transcript at 103-05 (May 12, 2005) (testimony of Andrew Grossman).*

Perhaps the best testimony to the reasonableness of the Committee's procedures can be found in the audit that the Commission conducted in this matter pursuant to 2 U.S.C. § 437g(a)(2). That audit included a "review of all records relative to the August 12, 2000 joint fundraising event entitled 'Hollywood Tribute to President William Jefferson Clinton' ..." *See Letter from Chairman Bradley A. Smith to Marc E. Elias (Feb. 9, 2004).* It also involved a complete bank reconciliation of the Committee's 2000 election cycle activities.

Yet that audit generated no findings regarding New York Senate 2000's recordkeeping or the financial accuracy of its reporting, and none whatsoever with regard to the Hollywood Gala.¹ The excellent condition of the records and the paucity of audit

¹ The sole finding presented by the auditors at the Exit Conference involved an assertion that the Committee had not properly itemized its nonfederal individual contributors. New York Senate 2000 disputed this finding in a letter dated August 4, 2004; the finding is not referenced in the General Counsel's Brief.

findings demonstrated the effectiveness of the Committee's procedures, and of Ms. Burns' work in particular.

The Government in the Rosen trial never questioned Ms. Burns' or Mr. Grossman's good faith in adducing and disclosing the Committee's expenses. In fact, in the Rosen trial, the Government relied on Ms. Burns and Mr. Grossman as credible and cooperative witnesses.

In its opening statement, the Government detailed Ms. Burns' persistent efforts to obtain information about the costs of the Hollywood Gala. It noted specifically that she did not simply accept representations about the costs at face value, but instead asked questions about the assumptions underlying them. *See, e.g.*, Rosen Trial Transcript at 10 (May 11, 2005). Ms. Burns' sworn, undisputed testimony was that she did not "know what the validity of the allegations are" as to undisclosed contributions. Rosen Trial Transcript at 169 (May 19, 2005) (testimony of Whitney Burns).

b. The General Counsel Report's claim of willful blindness on the part of New York Senate 2000 is belied by the actual facts

The Office of General Counsel's assertion that New York Senate 2000 "does not appear to have carefully tracked" event costs, Br. at 2, is demonstrably wrong. It is belied by the evidence of Ms. Burns' repeated efforts to report those costs; by the Commission's own audit findings; and even by contemporaneous evidence that David Rosen instructed Aaron Tonken that in-kind contributions were to be tracked and reported. *See* Br. at 6-7. The brief's assertion that New York Senate 2000 "appears to either have been aware of substantial unreported costs or shielded itself from readily available cost information" is also wrong. It is belied by the uncontroverted evidence of Ms. Burns' efforts, as well as by the Commission's treatment of Andrew Grossman as a respondent in his official capacity only.²

² In the midst of its effort to assign responsibility for inaccurate reports to David Rosen – a charge of which he was acquitted by a jury – the General Counsel's Brief presents evidence that he acted diligently to ensure that costs were accurately tracked and reported. For example, the brief cites contemporaneous notes taken by Aaron Tonken's assistant, Joan Yarcusko, saying: "Keep Track – Document filed w/ FEC." Br. at 6-7. These notes, she explained, reflected Rosen's instructions to Tonken and others that "the cost of the event had to be reported to the FEC." *Id.* at 7.

Remarkably, the General Counsel's Brief points to the "specific documentation" that Peter Paul provided with his complaint as facts that should have alerted the Committee to amend its reports. *See* Br. at 20 n.51. It speculates that Paul's complaints, together with the sensational media accounts that he generated when it was filed, made the Committee "aware of the scope of the actual in-kind contributions ..." Br. at 20. From this, it faults the Committee for having "not amended the reports at issue." *Id.*

Facts known to the Office of General Counsel completely undercut this argument. When Peter Paul filed the complaint, he was a fugitive from justice; the complaint was signed and notarized in Sao Paulo, Brazil. *See* Letter from Larry Klayman to the Office of General Counsel (July 23, 2001). The "specific documentation" to which the General Counsel's Brief refers included checks made payable to cash; some were payable to one of Paul's co-conspirators in securities fraud. *See* Letter from Marc E. Elias, *et al.* to Lawrence Norton, Esq., at 4 (Sept. 28, 2001). For all the Committee and its officers knew when the complaint was filed, it was being asked to make a bogus \$2.1 million refund to someone who had just been revealed to be a swindler, a con-artist, and an architect of fraud.³

This fact was not lost on the Office of General Counsel at the time – although its brief entirely ignores it now. When the Commission found reason to believe in this matter, the Office of General Counsel had to make "appropriate adjustments" to Paul's complaint "so as to avoid double-counting any expenses ..." Factual and Legal Analysis, MUR 5225, at 12 (Feb. 9, 2004). It noted that the documents contradicted Paul's "claim that he used personal funds to finance the event." *Id.* It further noted that "some of the checks appear to be duplicates of other checks, and the expense amounts are skewed because one of the corporations involved, Black Ink Productions, Inc., is also named as the payee on several checks from another entity, Paraversal Inc." *Id.*

³ The press comments attributed by the General Counsel's Brief to Howard Wolfson, a Clinton campaign employee who was uninvolved in the details surrounding the Hollywood Gala, signify nothing in this regard. *See* General Counsel's Brief at 20 n.50. Neither the Office of General Counsel nor the Department of Justice, both of whom were presumably aware of the quote in the *Washington Post*, found it necessary to determine whether there were actually any specific facts that led Wolfson to make the comment attributed to him. Wolfson was merely confirming for the reporter that additional costs for the event were in-kind contributions. He was not confirming that the amount of the in-kind contribution was \$1 million. Wolfson was not aware of the amount of the in-kind contribution just four days after the event.

Neither Paul's complaint nor anything else provided the Committee with information that could have served as the basis for accurate amendments. Indeed, after years of investigation, with access to information unavailable to the Committee, a Government forensic accountant was asked – on direct examination by the Government itself – whether he knew "for certain the actual cost to the penny of the August 12th Hollywood Tribute." Rosen Trial Transcript at 26 (May 20, 2005) (testimony of David Smith). His answer was: "No." *Id.*

Even the information about event expenses that was made available to the Committee in the course of the Rosen trial is vague on critical points, such as the identity of the contributor. For example, Peter Paul borrowed \$225,000 from Stan Lee personally to "defray the costs of the Gala he was putting together." Rosen Trial Transcript at 169 (May 20, 2005) (testimony of Stan Lee). Stan Lee never received repayment of the \$225,000. *Id.* at 170. If the funds were actually used for event expenses and not for one of Peter Paul's other schemes or to pay a vendor that Aaron Tonken owed for services provided in connection with another event, then Stan Lee would properly be reported as the contributor. Given Paul and Tonken's criminal history, however, the Committee can not be certain how Paul used Mr. Lee's money.

To help conclude this matter and ensure a more complete public record, the Committee is willing to file amendments in accordance with the General Counsel's specifications. But it cannot – by any stretch of the imagination – be faulted for not having done so yet.

2. The recommendation ignores the fact that Respondents had nothing to gain from an incomplete disclosure.

In choosing to credit the testimony of felons with acknowledged records of dishonesty, the General Counsel's Brief constantly looks to these individuals' presumed motives. For example, it claims at one point that "there is no apparent reason why Paul, Tonken and others would not want Rosen to know just how expensive the event was becoming." Br. at 17.

New York Senate 2000 enjoys the benefit of no such credulity. Yet the question of its motive is highly relevant. New York Senate 2000 had no incentive whatsoever to report incorrectly the source or amount of in-kinds from the Hollywood Gala. Indeed, had New York Senate 2000 disclosed the amount asserted by the General Counsel's Brief, it would have benefited financially.

Because the Committee could accept nonfederal funds, every dollar of additional in-kinds that is alleged by the General Counsel's Brief is a dollar that New York Senate

September 9, 2005

Page 14

2000 could have legally accepted and reported. Moreover, additional nonfederal in-kinds would have allowed the Committee to pay event expenses with a substantially higher share of nonfederal funds, because they would have been counted among the total funds received. *See* 11 C.F.R. 106.5(f) (2000); *see also* 11 C.F.R. 104.3(a)(2) (2000) (defining "receipts" broadly to include "contributions"). At the very least, because the Committee's allocation ratio for the event overstated the federal share of expenses, disclosure of the additional in-kinds would not have adversely affected the ratio.

This is discussed nowhere in the General Counsel's Brief. Yet the General Counsel's investigation apparently found it to be true. In a letter to David Rosen's counsel dated March 11, 2005, the Government said:

We wish to bring to your attention the fact that the Federal Election Commission, in their review of the records for the Gala, has noted that, as the campaign did not re-calculate its *[sic]* cost allocation ratio or re-distribute funds as permitted by law, the amount actually expended by the federal account remains higher than required by law, *even given the true numbers* which were not reported by your client.

Letter from Peter Zeidenberg *et al.* to Paul Sandler, Esq. (Mar. 11, 2005) (emphasis added). When the Rosen defense subpoenaed the Commission for the analysis that yielded this conclusion, the General Counsel produced four spreadsheets in response. *See* Letter from Lawrence H. Norton to Paul Mark Sandler *et al.* (May 17, 2005).

The General Counsel's Brief does not refer to any of these spreadsheets, nor to the analysis that generated them. Like the Commission's audit of the Committee, which demonstrated the disciplined recordkeeping and reporting practices implemented by the Committee through Ms. Burns, it is simply ignored.

Moreover, the General Counsel's Brief provides no explanation for why the Committee would have wanted to overlook the expenses at issue. Because it had a nonfederal account, it could have lawfully accepted them as in-kinds. Because it had overpaid for the Hollywood Gala out of the federal account already, it would have suffered no financial disadvantage by accepting them. Indeed, because the nonfederal in-kinds would have been treated as nonfederal receipts, and factored into the allocation ratio for the event, the Committee would have been able to pay an even greater share of the event expenses with "soft money." Finally, because the Committee had already disclosed a large in-kind contribution from Stan Lee Media, which was closely associated with

Peter Paul in the public eye, nondisclosure would not have helped the Committee distance itself from Paul when stories of his wrongdoing arose.

The General Counsel's Brief hastens to believe the accusations of felons, liars and con-men because it can find no reason why they would lie. Yet it hastens to fault New York Senate 2000 for nondisclosure, when the Committee had every reason to want to tell the truth. Such "analysis" provides an unsound basis for a finding of probable cause.

3. The recommendation stands at stark odds with the Government's repeated assertions that Respondents were victims, and with the full cooperation they gave at all times.

This case has nothing to do with Hillary Clinton ... You will hear no evidence that Hillary Clinton was involved in this in any way, shape or form. In fact, it's just the opposite. The evidence will show that David Rosen was trying to keep this information from the campaign because he was afraid if they found out how much he had spent he would be fired.

Rosen Trial Transcript, at 15 (May 11, 2005) (Government's Opening Statement).

[New York Senate 2000] appears either to have been aware of substantial unreported costs or shielded itself from readily available cost information. Accordingly, this Office is prepared to recommend that the Commission find probable cause to believe ...

Br. at 2.

The position of the United States during the Rosen trial was that New York Senate 2000 was a victim – that even though it had tried to file accurate reports, it had been caused to file false reports unwittingly. See, e.g., Rosen Trial Transcript at 10 (May 11, 2005). Accordingly, in the Government's investigation of the Hollywood Gala, New York Senate 2000 was neither a defendant nor a target. It was a cooperating witness. It produced thousands of pages of documents, made Andrew Grossman and Whitney Burns available for repeated interviews and testimony, and otherwise aided the Government's investigation.

The Department of Justice acknowledged New York Senate 2000's extensive cooperation in a letter to the Office of General Counsel. After indicating its belief that the "compliance officer and treasurer of New York Senate 2000" had been caused to file

false reports only by Rosen's alleged misconduct, and through no fault of their own, the Department went on to say:

In the course of the investigation and prosecution of Mr. Rosen, New York Senate 2000 was fully cooperative. Through its attorneys the committee made witnesses and over a dozen boxes of documents available at our request and assisted our review and understanding of those documents and other evidence. In particular, Andrew Grossman, the treasurer for New York Senate 2000, appeared whenever requested and answered any questions asked of him.

Letter from Daniel A. Schwager to Sidney Rocke, Esq. (Aug. 19, 2005).

The United States is now urged to take an entirely different position in this matter. The Department of Justice told a jury that New York Senate 2000 had been caused to file false reports unwittingly, yet the Office of General Counsel tells the Commission that New York Senate 2000 "shielded itself from readily available cost information." Br. at 2. The Department of Justice acknowledged the cooperation provided by New York Senate 2000 and its officers, yet the Office of General Counsel received the same cooperation and acknowledges it nowhere.

These radically different positions cannot be explained by different legal standards. They cannot be not explained by the fact that "the government in the criminal trial had to show that Rosen had acted knowingly and willfully." Br. at 5 n.8. Nor can they be explained by superior knowledge on the part of the Office of General Counsel. Although the General Counsel's Brief claims to rely "on information supplied by a number of other individuals who were *not* called to testify at the trial", Br. at 5 (emphasis in original), it points to no new facts that would have altered the Government's view of the Committee in the Rosen trial. To the contrary, the Commission made confidential information from this Matter available to the Department of Justice, thus ensuring substantial overlap in the respective investigations.

Rather, these different positions reflect the eagerness of the General Counsel's Brief to disregard facts that show the Committee's good faith. Should this matter proceed to litigation, the contrast between these positions would prove extremely difficult for the Commission to sustain. In some cases, the Commission may even find itself estopped from making factual and legal arguments that are at odds with positions taken previously by the United States in the Rosen trial. As a result, the finding urged by the General Counsel's Brief is imprudent and arbitrary.

B. The Recommendation's Claim of Wrongdoing Relies on the Assertions of Convicted and Accused Felons, and on Those Who Worked for Them

The General Counsel's Brief repeatedly acknowledges its heavy reliance on the testimony of individuals who are not simply acknowledged criminals, but who were found guilty of crimes of dishonesty. One witness, Raymond Reggie, "pleaded guilty to two bank fraud charges ..." Br. at 11 n.24. Another, James Levin, pleaded guilty to charges including fraud. Br. at 4 n.6. Finally, both Peter Paul and Aaron Tonken, the organizers of the event who controlled the information about its costs, were convicted of fraud they engaged in during the same time-period that they were organizing this event. According to the General Counsel's Brief, the consistency and detail of their stories, together with the supposed fact that they had no reason to lie again, make it "appropriate to give this testimony weight." Br. at 17.

Central among these witnesses are Paul and Tonken. The charge that the Committee consciously underreported Hollywood Gala event expenses cannot be weighed without a full understanding of their role in the event. It was Paul and Tonken who issued the checks. *See* Br. at 6, 9. It was they who paid Bretta Nock to plan the event – a woman who worked for Tonken, and with whom New York Senate 2000 had had no other association. *See* Br. at 9. There was little detailed information that either David Rosen or New York Senate 2000 could have obtained about the disbursements associated with the event to which Paul and Tonken did not control access – whether through Nock or on their own. For example, when Whitney Burns needed information about the concert expenses, she and David Rosen turned to Nock, who in turn obtained the \$200,000 invoice from Black Ink Productions. *See* Br. at 11-12.⁴

According to the General Counsel's Brief, "there appears to be conflicting testimony about the extent to which Rosen deferred to Nock for the accuracy of the budget

⁴ Allan Baumrucker confirmed that he spoke to Nock on or around August 22, 2000 about the production cost invoice. Nock told him "that Jim Levin was requesting an invoice in the amount of \$200,000 to cover lost receipts." Baumrucker did not immediately respond to her request. More than three weeks later, he received an urgent phone call from Nock during which she told him she needed the \$200,000 invoice "right away." Rosen Trial Transcript at 130 and 132 (May 19, 2005).

figures," Br. at 9. However, the Brief does not cite any such conflicting evidence.⁵ There is no question from the Rosen trial record that David Rosen and New York Senate 2000 relied heavily – if not entirely – on Nock for the event expenses. As Whitney Burns testified, "[Nock] had the detailed information." Rosen Trial Transcript at 125 (May 19, 2005).

In fact, with respect to the \$200,000 production costs, Nock conceded in her trial testimony that she created the budget document and that she could cite no evidence that the amount came from anyone else but her. Rosen Trial Transcript at 154-158 (May 19, 2005) (testimony of Bretta Nock).

In addition, it is simply not correct to say that the Committee "had access to all invoices and other information from which it could collect and report the actual printing costs." Br. at 13. That information was kept by Bretta Nock after she and Tonken engaged the printer, Pat Waters – another vendor with whom Tonken had previously worked. *See* Rosen Trial Transcript at 60 (May 18, 2005). Waters testified at trial that she had no knowledge of Rosen receiving any invoices showing the final costs of the Gala. *Id.* at 72.

It is also incorrect to say that no "vendors or individuals involved in planning, producing and paying for the event prevented Rosen, Burns, treasurer Grossman or anyone else with New York Senate 2000 from obtaining accurate cost information." Br. at 20. In her Rosen trial testimony, Nock admitted doing just that. For example, when asked by Rosen to obtain an invoice from Black Ink Productions for the concert expenses, she told Black Ink's Baumrucker that "I needed an invoice to reflect the \$200,000 that was in the line item of the final budget." Rosen Trial Transcript at 136 (May 18, 2005) (testimony of Bretta Nock).

The General Counsel's Brief searches in vain for motive on the part of Paul and Tonken to conceal event costs. *See, e.g.*, Br. at 21. One obvious motivating factor for Paul and Tonken to hide costs from Rosen and the Committee is that they never would have approved many of them, particularly costs associated with the celebrities and their travel expenses.

⁵ While we feel the evidence is not conflicting on this point, to the extent that such a conflict could be argued, it would result from the different accounts given by Rosen and Nock at trial. The acquittal of Rosen means that the jury resolved this conflict in his favor.

Tonken described his motive in his book published just last year. "If I could pull this off, and no one interfered with my plans, then maybe I could begin to find my way out of the ongoing financial disaster I was living in. I was broke, deep in debt, breaking laws, when all I wanted to do was establish a solid legitimate base for my business and build an honest reputation." Tonken, *King of Cons* at 297.

Many of the payments Tonken claims he made in connection with this event would never have been approved by this or any other committee, such as:

- \$15,000 to Alana Stewart for helping with the event and first class airfare to Europe;
- \$18,750 to Loree Rodkin who allegedly helped secure Cher to perform. Additionally, Tonken wrote that Cher "would cost me close to a hundred grand before it was all over, in her personal expenses, expense money for her make-up artist, and tens of thousands in free travel that I gave her afterward;"
- \$8,000 worth of gifts to Peter Bloch who was John Travolta's agent in an effort to keep him appeased so that he would not pull his clients from the event;
- \$5,000 to another publicist to secure celebrities to attend; and
- "Tens of thousands of dollars" to Garry Thompson for celebrities.

Tonken, *King of Cons* at 301 to 306.

Further, as discussed above, it is beyond cavil that Paul grossly exaggerated his later claims about the cost of the event. While he asserted that the event costs ranged from \$1.9 million to \$2.1 million, the General Counsel's Brief is only able to support approximately \$1.2 million of these expenses. See Br. at 2. Nearly a million dollars of Paul's alleged expenses were removed at the reason-to-believe stage because of "double-counting." Factual and Legal Analysis at 12 (Feb. 9, 2004). Of course, just two days after the event, Paul informed a Washington Post reporter that he only produced the event and that he had not given or raised any contributions in connection with it. Lloyd Grove, ("The Reliable Source"), *Joining the Family Circus*, The Washington Post (Aug. 15, 2000).

Finally, the investigation found no evidence to substantiate Paul's story that he had communicated to former President Clinton his desire to have the former president work for Stan Lee Media after leaving the White House. Br. at 5 n.10. It is hard to see why the General Counsel's Brief would lend any credibility to Paul's assertions about David Rosen's knowledge, when the General Counsel's investigation has repeatedly shown

other assertions made by Paul to be baseless, if not consciously dishonest. *See Br. at 21. See also Factual and Legal Analysis at 12 (Feb. 9, 2004).*

C. The Continued Pursuit of This Matter Against New York Senate 2000 Serves No Reasonable End

New York Senate 2000 is a defunct joint fundraising committee. It would have terminated long ago but for this MUR. It has no cash and only debts – for legal expenses incurred in connection with the various investigations of the Hollywood Gala. Its treasurer, named solely in his official capacity, cannot be held liable for any civil penalties. Its participants are not respondents.

If the Commission were to find probable cause, and if the Commission were to sue New York Senate 2000 in federal district court as a result, the Committee would be judgment-proof. There would be no way for the Commission to collect any meaningful civil penalties as a result of such litigation. Injunctive relief, too, would serve no meaningful end, because the Committee is defunct for all intents and purposes.

To proceed against New York Senate 2000 would be especially odd, given the Commission's apparent disinclination to proceed against anyone else in this matter. For example, the brief makes no recommendation against Paul or Tonken, even though the Commission has consistently told donors like them that they have a duty to report in-kind contributions. "The donor needs to notify the recipient candidate committee of the value of an in-kind contribution. The recipient needs this information in order to monitor the donor's aggregate contributions and to report the correct amount." Campaign Guide for Congressional Candidates and Committees (Apr. 1999). Robert Bierseck, the FEC's press officer, testified as a government witness and confirmed that committees were expected by the Commission to rely on donors to report the value of in-kind contributions. Rosen Trial Transcript at 44 (May 12, 2005) (testimony of Robert Bierseck).

Given New York Senate 2000's good-faith efforts to prepare and file accurate reports, given the lack of any incentive on its part to underreport, and given its full cooperation with the Government at all phases of this matter, it is hard to see why the General Counsel's Brief singles out New York Senate 2000 – and it alone – for Commission action.

As discussed above, New York Senate 2000 is willing to file amended reports to the General Counsel's specifications, to ensure a complete public record in this matter. It has cooperated with the Government throughout this matter, and has no desire to stop

September 9, 2005
Page 21

now. To assign liability and culpability to this Committee, however, is arbitrary, and profoundly unjust.

III. CONCLUSION

For these reasons, New York Senate 2000 and Andrew Grossman, in his official capacity as treasurer, respectfully request the Commission to reject the General Counsel's probable cause recommendation, and to dismiss them from the complaint.

Very truly yours,

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