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1 opponent, Bill Yellowtail, the Democratic candidate for Montana's single congressional
2 seat. On August 10, 2001, this Office hand-delivered to counsel for the respondents the
3 General Counsel's Brief recommending that the Commission find probable cause to
4 believe that the Committee violated 2 U.S.C. §§ 434(b) and 441a(f), or alternatively that
5 the Committee violated 2 U.S.C. §§ 434(b) and 441b. The GC Report, which sets forth
6 the evidence on which these recommendations are based, is incorporated herein by
7 reference.²

8 On August 27, 2001, the Committee responded to the GC Brief ("the Response")
9 The Response requests that the probable cause recommendation be rejected and that the
10 case against the respondents be dismissed. The Response argues that the material as
11 presented in the GC Brief is unbalanced and ignores the testimony of the Committee that
12 it did not ask any third party to expend funds to prepare issue ads or operate phone banks.
13 The Response also claims that the testimony is "universal" that the Committee was blind-
14 sided by the CR ad campaign and feared losing the election because the subject matter
15 was one that Rick Hill had pledged not to bring up during the campaign. It also asserted
16 that not enough weight was given to the Committee's having filed a complaint with the
17 Commission, designated as MUR 4568, against CR soon after the ads began to air.³

²

³ The respondents claim in a footnote that, as of October 31, 1996, the date on which the Committee filed a complaint about the ads with the FEC, they "had no idea that Triad was in any way affiliated with Citizens for Reform." However, the fact that Triad, an organization well known to the Hill Committee, was managing the CR anti-Yellowtail advertising effort had been reported in the Montana press prior to the campaign filing their complaint. Bob Anez, *D.C. Group Finances Yellowtail Attack*, The Montana Standard, Oct. 25, 1996, A6.

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1 The Response argues that the coordination theory as presented in the Brief is
2 suspect as it is based chiefly on circumstantial evidence. The respondents contend that
3 the evidence presented in the GC Brief relating to the contacts between the Hill
4 Committee and CR does not establish that the anti-Yellowtail advertising program was
5 coordinated under the standard set forth in *FEC. v. Christian Coalition*, 52 F. Supp. 545,
6 85 (D.D.C. 1999) or by the Commission's recently adopted regulations on Coordinated
7 General Public Political Communications, 11 C.F.R. § 100.23, which became effective on
8 May 9, 2001.

9 The Response admits many of the most basic facts relating to the contacts
10 between the Committee and representatives of Triad. For example, the Response admits
11 that Rick Hill and members of his staff met with Triad, that Committee staff engaged in
12 telephone contact with Triad, and that the campaign may have provided Triad with press
13 clippings highlighting negative events from Bill Yellowtail's past. Response at 19-20.

14 Moreover, the Response does not:

- 15 ■ provide any explanation for the Committee's continued consideration, during
16 the general election campaign, to "go negative" on Bill Yellowtail, despite Mr.
17 Hill's public position on that issue;
- 18 ■ dispute that Carlos Rodriguez's audit report that Carlos Rodriguez's audit
19 report stated that a "third party was needed to expose" Bill Yellowtail and that
20 the key "anti-Yellowtail" issues cited therein were virtually identical to those
21 highlighted in one particular ad and the phone bank run by Triad-managed
22 CR;
- 23 ■ deny that another Triad representative, Jason Oliver, called the Hill
24 Committee to inquire what issues it would like to see raised in a third-party
25 issue ad; and/or
- 26 ■ deny that the same negative Yellowtail information gathered during the Triad
27 audit and by Jason Oliver and memorialized in a chart created by Mr. Oliver
28 for distribution to Triad's vendors appears to be the same as those in the
29 advertising program sponsored by CR.

Below this office will analyze the factual and legal arguments made in the Hill Response.

III. ANALYSIS

As stated above, the Response contends that the GC Brief lacks the necessary evidence to sustain its burden of proof in this matter. The Response seeks to ignore sworn testimony, which is corroborated by strong circumstantial evidence. Circumstantial evidence can be quite compelling, and has been used to support countless criminal convictions, which are subject to a higher burden of proof than the probable cause standard that the Act establishes for the Commission's determination in this matter.

The Response claims that the Committee never veered from the pledge Rick Hill took during the primary race not to exploit certain incidents in Mr. Yellowtail's background, specifically his criminal record, allegations of spousal abuse, and child support violations, during the general election campaign. The Committee insists that there was a fear that any exploitation of Mr. Yellowtail's past, even by a third party, might reflect badly on Rick Hill and end up costing him the election.⁴ However, the Response does not address contrary evidence set forth in the GC Brief, including Mr. Hill's own testimony in which he admitted that there were those amongst his staff who supported using Mr. Yellowtail's past problems to benefit the campaign; the telephone notes from a July 31, 1996 telephone conversation between the Committee's

⁴ As support, the respondents point to several independent polls referenced in press reports which indicated that Mr. Hill had taken a lead in the race. The Response attached one newspaper article, that is identified only by its date of October 26, 1996, which references a poll indicating that personal revelations might be hurting Bill Yellowtail more than Rick Hill. The Committee's own polling, however, showed that during that same period the race was in a dead heat. It was not until after the CR ads started running that the Committee's polling started showing Mr. Hill in the lead; the November 1, 1996 Moore poll showed Mr. Hill leading 44%-39%.

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1 pollster, Bob Moore, and campaign official Larry Akey which indicate that two discussed,
2 among other topics, the legitimacy of the public record and "Yellowtail personal stuff," a
3 document showing that, as late as August 1996, the Committee's media vendor,
4 Cottington Marti, was proposing a "Bill Yellowtail hard jamming spot" highlighting Mr.
5 Yellowtail's burglary convictions, spousal abuse and failure to make child-support
6 payments; and the Hill Committee's compilation and distribution of news stories
7 concerning these matters.

8 The Response does address the meeting between Mr. Hill and Triad in
9 Washington, D.C., but takes issue with the evidence in the GC Brief that Mr. Hill
10 introduced the topic of Mr. Yellowtail's history of spousal abuse. Response at 17-18.
11 The Response, however, ignores Ms. O'Rourke's statement that "I remember they did tell
12 us that the other gentleman had hit his wife or something like that." When asked directly
13 whether Mr. Hill told them this she replied, "Yes." That it was Mr. Hill who brought up
14 this subject is further supported by Ms. O'Rourke's response to hearing this information,
15 which was that she was "upset about it." O'Rourke dep. at Vol II, pp. 487-488.⁵ This
16 reaction and the fact that it was Ms. O'Rourke's recollection that Ms. Malenick didn't say
17 anything to Mr. Hill about it, because "[i]t was a professional meeting and it was just
18 something Carolyn and I discussed afterwards," casts doubt on the Response's
19 suggestion that it was Triad that introduced this subject at the meeting or that Mr.

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⁵ Ms. O'Rourke testimony as it relates to the September 12, 1996 meeting also discredits the Response's claim that by that point in time Jason Oliver had created his chart of issues preferenced by the campaign. Response at 18. Moreover, the chart references, in part, information likely gathered during Carlos Rodriguez's audit, which had not yet taken place. To the extent the Response relies on Ms. O'Rourke's testimony concerning CR's plans or activities, she was not fully familiar with them, characterizing CR in her deposition as "Carolyn's business." O'Rourke dep. at p. 158.

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1 Yellowtail's past problems were "widely known." O'Rourke dep. at p. 499. Moreover,
2 Jason Oliver's initial research and report on Montana's congressional race, which was
3 completed by the time of this meeting, was actually part of a larger report on Republican
4 primary races and does not even mention Bill Yellowtail, making it more probable that it
5 was Rick Hill who introduced this issue to Triad.⁶

6 The Response does not refute that the Committee and Triad, through Rodriguez &
7 Company, were in phone contact between the Washington D.C. meeting and the Triad
8 audit, which took place on September 24, 1996. The Response, however, explains the
9 eleven phone calls by stating that "[m]eetings don't set themselves up." Response at p.7,
10 fn. 7. While it is possible that discussions of logistics took place during these phone
11 calls, that possibility does not mean that substantive discussions did not also occur.

12 With respect to Carlos Rodriguez's testimony, the Response does not present any
13 evidence that contradicts that set forth in the GC Brief at pp. 13-16. Significantly, the
14 Response does not address the private meeting that Mr. Rodriguez had with Larry Akey
15 during the course of the audit or provide any explanation for the seven minute telephone
16 call between Rodriguez & Company and Larry Akey (at his Target Communications
17 office) after the audit, on October 3, 1996.⁷ The Response also ignore Jason Oliver's
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⁶ The fact that Jason Oliver's initial report on the Montana race mentions nothing about the democratic challenger and the statement made by Ms. O'Rourke that she didn't know whether or not these allegations against Mr. Yellowtail were well known in Montana also casts doubt on the respondents assertion that Triad was well aware of this either through their own research or the public record.

⁷ The records do not support the contention that continued contact between Triad and the Committee concerned the campaign's receipt of contributions from Triad clients. Contributions checks from Triad clients began arriving at the campaign during the last few weeks in October. Apart from a letter, dated October 18, 1996, which contained contribution checks, there were only two short telephone calls from Triad to the Committee that could possible relate to this subject. These calls occurred on October 21, 1996 and October 31, 1996, after the CR ad campaign began running in Montana.

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1 testimony that "it was in Carlos' notes and in that [audit] report that [Hill] said they
2 wanted—or his campaign said—someone from his campaign said—who I don't know—
3 in notes asked that that [anti-Yellowtail] issue be raised." Oliver dep. at pp.194, 195.⁸

4 The Response also attempts to refute that information obtained through the audit
5 was used as a basis for the CR ad campaign by referencing Carlos Rodriguez's testimony
6 that he did not think that Triad knew, in September 1996, that it going to do "issue
7 education" advertising, and further that the Montana ads were a late addition to the CR ad
8 campaign. Response at pp. 14-18. However, Triad began soliciting and accepting money
9 on behalf of CR for the specific purpose of funding a series of advertisements on or about
10 September 5, 1996, well before the Hill audit or indeed the September 12, 1996 meeting
11 with Mr. Hill. Although Triad may not have secured a funding source for the Montana
12 ads until early October, this delay does not detract from the conclusion that Triad/CR
13 earlier intended to run such ads if funding could be found. GC Brief at p. 8; Dresner dep.
14 at p. 76. The Response's assertion that because the section of Jason Oliver's chart
15 designated "MTAL" lacks a budget figure and has the word "NO" in the "Targets" block
16 underneath the word "Women" proves that CR "had no plans of doing an ad for Rick
17 Hill" is wrong. The reason that there was no budget outlined for Montana, and the
18 placement of the word "NO" on the chart, is that this particular version of Mr. Oliver's
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⁸ The Response disputes that Mr. Oliver had any credible knowledge of what went on during the Montana audit. However, Mr. Oliver testified that he and Mr. Rodriguez discussed Mr. Rodriguez's notes (which he stated were often taken on tape) of the audit during the editing process. Oliver dep. at pp. 195-196.

1 chart was being faxed to one of the vendor's who did not work on the Montana
2 campaign.⁹

3 In discussing the legal standard for coordination, the Response relies on the
4 *Christian Coalition* case, as does the GC Brief. The Response, however, contends that
5 the GC Brief fails to present evidence that the Hill Committee had substantial discussions
6 or negotiations with Triad relating to the content, timing, placement, or volume of the ads
7 sponsored by CR required for coordination. Hill Response at pp. 2-5. This conclusion
8 ignores that the coordination here occurred when the Hill Committee provided Triad,
9 through its agents Mr. Rodriguez and Mr. Oliver, with a discrete list of issues that they
10 would like to see featured in advertisements. The continuing communications, which
11 included telephone calls and faxes, in the Fall of 1996 between the Hill campaign and
12 Triad presented further opportunities for discussion. The Response points out that the
13 issues highlighted on the chart, the audit report and the ads were in the public domain.
14 However, that is not a defense to coordination. The salient point is that when given the
15 opportunity, the Hill Committee was able to select which issues it wanted highlighted in a
16 third party ad campaign, and to have an outside group sponsor ads placing Rick Hill's
17 opponent, Bill Yellowtail, in a decidedly negative light. Finally, while the Response
18 states that no one associated with the Hill campaign has admitted asking Triad/CR to run
19 the anti-Yellowtail ads, as the GC Brief points out, given the candidate's public stance, it
20 would be surprising for there to be such admissions.

⁹ The successor to the Greg Stevens Company produced this document in response to a subpoena. The only budgetary information included is for those campaigns on which the Greg Stevens Company, and Gannon, McCarthy, Mason, Ltd were working together. The PC on the chart stands for Paul Stevens, who worked for the Greg Stevens Company, and the LM, stands for Larry McCarthy of Gannon, McCarthy, Mason, Ltd.

1 **IV. DISCUSSION OF CONCILIATION AND CIVIL PENALTY**

12 **V. RECOMMENDATIONS**

- 13 1. Find probable cause to believe that the Rick Hill Committee and Gary F.
14 Demaree, as treasurer, violated 2 U.S.C. §§ 434(b) and 441a(f), or in the
15 alternative;
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17 2. Find probable cause to believe that the Rick Hill Committee and Gary F.
18 Demaree, as treasurer, violated 2 U.S.C. §§ 434(b) and 441b,
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20 3.
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4. Approve the appropriate letter.

9/14/01
Date

Lois G. Lerner by AAS
Lois G. Lerner
Acting General Counsel

Staff Assigned: Marianne Abely