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October 21, 2004

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**VIA HAND DELIVERY**

Mark Allen, Esq.  
Office of General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

Re: MUR 5333 (Evan Bybee, Dennis Gay, et. al)

Dear Mr. Allen:

This office represents G. Evan Bybee, Tamra Bybee, Taige Bybee, Brenn Bybee, Kara Davis, Nicail Gomm (formerly known as Nicail Bybee), Dennis Gay, Gina Gay, Haley Gay, Bodee Gay, Kimm Humphreys (formerly known as Kimm Gay), WinterFox, LLC, and WinterHawk Enterprises, LLC, each of whom has received a letter from Chairman Bradley A. Smith. These letters referenced the complaint ("Complaint") designated Matter Under Review ("MUR") 5333 by the Federal Election Commission (the "FEC" or "Commission").

We hereby file this response

As discussed below, none of our clients made corporate contributions or contributions in the name of another. Moreover, none of the individuals involved made excessive contributions. All charges pending against our clients alleging such infractions should be dismissed.

**FACTS**

On March 29, 2002, Dennis Gay wrote a \$4,000 contribution check to John Swallow for Congress ("Swallow Committee") from WinterHawk Enterprises LLC ("WinterHawk") and listed on the check the individual members of WinterHawk who were making the primary campaign contributions of \$1,000 each. Affidavit of Dennis W. Gay [hereinafter "Gay Aff."] ¶ 5, attached hereto as Exhibit 3. The members listed on the check were Dennis Gay, Gina Gay, Bodee Gay, and Kimm Gay (Humphreys). Id. On June 21, 2002, Dennis Gay wrote a second contribution check from WinterHawk, this time for \$5,000, to the Swallow Committee and listed on the check the individual members of WinterHawk who were making the general campaign contributions of \$1,000 each Id. ¶ 7. The members listed on the June check were Dennis Gay, Gina Gay, Bodee Gay, Kimm Gay (Humphreys), and

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COUNSEL

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Haley Gay (Blackett) Id. Each of the individual family members listed on the contribution checks was (and is) a member of WinterHawk and is an adult. Affidavit of David T. Posey [hereinafter "Posey Aff."] ¶ 4, attached hereto as Exhibit 4; Gay Aff. ¶¶ 2, 5 & 7. In April and September 2002, the family members sent signed sheets to the Swallow Committee indicating that they had made the contributions for the primary and general election, respectively. See Gay Aff. ¶¶ 6 & 8.

On March 28, 2002, Evan Bybee wrote a \$5,000 contribution check to the Swallow Committee from WinterFox LLC ("WinterFox") and listed on the check the individual members of WinterFox who were making the primary campaign contributions of \$1,000 each. Affidavit of G. Evan Bybee [hereinafter "Bybee Aff."] ¶ 5, attached hereto as Exhibit 2. The members listed on the check were Evan Bybee, Tamra Bybee, Nicaïl Bybee, Taige Bybee, and Kara Davis. Id. On June 28, 2002, Evan Bybee wrote a second \$5,000 contribution check from WinterFox to the Swallow Committee and listed on the check the individual members of WinterFox who were making the general campaign contributions of \$1,000 each Id. ¶ 7. The members listed on the June check were Evan Bybee, Tamra Bybee, Nicaïl Bybee, Taige Bybee, and Brenn Bybee. Id. Each of the individual family members listed on the contribution checks was (and is) a member of WinterFox and is an adult. Posey Aff. ¶ 9; Bybee Aff. ¶¶ 2, 5 & 7. In April 2002, the Bybee family members sent signed sheets to the Swallow Committee indicating that they had made the contributions for the primary election. See Bybee Aff. ¶ 6.

### ANALYSIS

#### **1. No Client Made Any Corporate Contributions**

Section 441b(a) prohibits corporations from making contributions or expenditures in connection with a federal election. Per 11 C.F.R. § 110.1(g)(2), a limited liability company is considered a partnership and not a corporation if it files its federal tax returns as a partnership. Partnerships, in turn, may make contributions to federal candidates. 11 C.F.R. § 110.1(e).

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**2. No Client Made Contributions in the Name of Another**

According to 2 U.S.C. § 441f, it is prohibited for any person to “make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution.” As stated, above, LLCs filing federal tax returns as partnerships may make contributions to federal candidates. 11 C.F.R. § 110.1(g)(2) & (e). According to FEC regulations, partnership contributions must be allocated to individual partners or members – either to all partners or to selected partners by agreement Id. § 110.1(e). From the facts in this case, it is clear that none of our clients made a contribution in the name of another and that the LLC contributions were correctly allocated among the contributing members by agreement of the members.

Each of the LLCs allocated an equal portion of each contribution check to the members of the LLCs listed on the respective check. See Posey Aff. ¶¶ 6 & 11; Gay Aff. ¶¶ 5 & 7; Bybee Aff. ¶ 5 & 7. These LLC (and family) members, after discussion among themselves, agreed to make contributions through the LLC in their name and have the contributions reflected in their capital accounts. Gay Aff. ¶ 5 & 7; Bybee Aff. ¶ 5 & 7. The recipient candidate, John Swallow, had served as General Counsel of another family-owned entity and, therefore, was personally known by each of the family members. Gay Aff. ¶ 4; Bybee Aff. ¶ 4.

FEC regulations about partnership contributions state that the contributions must reduce each participating partner’s profits or increase their losses proportionally 11 C.F.R. § 110.1(e)(2). This is exactly what took place in this instance.

Basic partnership accounting principles provide that each member of an LLC (or partner in a partnership) maintains a “capital account,” which is essentially a running balance of the member’s investment in the LLC. See Klig and Sloan, 712-2nd T.M., Partnerships – Taxable Income; Allocation of Distributive Shares, Capital Accounts A-42 (2004) (“Simply stated, a partner’s capital account reflects the amount of equity invested by the partner in the partnership, adjusted on an ongoing basis to reflect the operations of the partnership”) In general, a partner’s

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capital account is increased when the partnership has profits or a partner contributes money or property to the partnership and decreased when the partnership has losses or distributes money or property to the partner.

In this instance, the LLCs, in their check registries, allocated the contributions to each contributing member, thereby reducing each member's capital account as if each member had received a distribution equivalent to the amount contributed. See Posey Aff. ¶¶ 6 & 11. In other words, the checks written by the LLC were, in essence, a distribution to each member named thereon and a subsequent contribution by each such member to the Swallow Committee. According to their accountant, the members of the LLCs were permitted to make (and had so made) draws against their capital accounts in the LLCs for personal expenditures. See Posey Aff. ¶¶ 8 & 13. While the checks written by the LLCs had the effect of constituting a distribution to each named member, the members' capital accounts were not properly reduced to reflect this distribution due to an error of the accountants. See Posey Aff. ¶¶ 7, 12 & 14. Correct capital account reductions will take place in the future as the accountants rectify their admitted errors. See Posey Aff. ¶ 14.

A tax court case demonstrates the concept that payment of a partner's personal expenses by a partnership, in essence, constitutes a distribution to the partner and a subsequent payment by the partner of such expenses. See, e.g., Matthew R. White, T.C. Memo 1991-552 (1991) (determining that payments made by a partnership for construction costs related to an individual partner's property were constructive money distributions even if the partner did not receive the distribution in cash). See also I.R.C. § 752(b) for the proposition that distributions to partners may occur even if the partner does not actually receive any cash ("[A]ny decrease in a partner's individual liabilities by reason of the assumption by the partnership of such individual liabilities, shall be considered as a distribution of money to the partner by the partnership.") (cited in Matthew R. White).

In summary, because the checks written by the LLC are treated as distributions to the named members and therefore reduce each such member's capital accounts, in effect it shows that the member has paid for the contribution from the member's own funds.

The LLC checks to the Swallow Committee indicated that the members of the LLCs were making the contributions. Therefore, none of the members' contributions

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were hidden behind any false names, etc., but, instead, as can be gleaned from the FEC reports involved, the contributions were reported to and by the Swallow Committee as coming from those individuals listed on the checks, all of whom were members of the LLCs involved and knew of and authorized the contributions. In fact, those contributors who were asked by the Swallow Committee to affirm their personal contributions did so by signing a sheet or sheets provided by the Swallow Committee and submitted by the Committee to the FEC in this Matter. Gay Aff. ¶¶ 6 & 8; Bybee Aff. ¶ 6. Nowhere do the facts suggest (nor can they suggest) that the LLCs failed properly to allocate the contributions; therefore, absent the accountant's mistake, the contributions were attributed according to the FEC rules, all contributing members were disclosed, and no contribution or contributor was hidden from public view by the donors. As a result, no client made contributions in the name of another, and any allegations to the contrary should be dismissed.

### **3. No Individual Made Excessive Contributions**

In the Factual and Legal Analysis prepared by the Commission's staff and attached to the letters from Chairman Smith, the staff allege that Evan and Taige Bybee and Dennis and Gina Gay violated 2 U.S.C. § 441a(a)(1)(A), which limited to \$1,000 per election in 2002 contributions by any person to a federal candidate. The staff apparently reach such a conclusion because the Utah public records to which they referred solely listed Taige and Evan Bybee as members of WinterFox and solely listed Dennis and Gina Gay as members of WinterHawk.

With the facts provided by the affiants, it is clear that there are more than two members in each LLC. In fact, WinterFox has nine members, and WinterHawk has six members. Posey Aff. ¶¶ 4 & 9; Gay Aff. ¶ 2; Bybee Aff. ¶ 2. By oral agreement among the members, the individual members who were listed on each check instructed the LLCs (through the managing partners) to have a \$1,000 portion of each contribution attributed to his or her interest in the LLC, and this was how the LLCs allocated the contributions in their check registry. See Posey Aff. ¶¶ 6 & 11; Gay Aff. ¶¶ 5 & 7; Bybee Aff. ¶ 5 & 7. Subsequently, the LLCs' accountants failed properly to record these transactions in the tax returns of the LLCs. See Posey Aff. ¶¶ 7 & 12. The mistakes made by the accountants on the LLCs' tax returns will, in the words of the accountants, be corrected to reflect the books of the LLCs. See Posey Aff. ¶ 14. In the interim, the mistakes of the accountants should not be attributed to the managing partners or other members of the LLCs for campaign finance purposes. The LLCs and all of the individual donors had

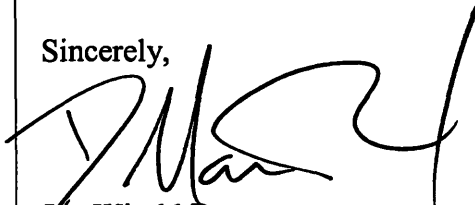
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correctly followed FEC requirements in that the LLCs allocated the contributions, within the limits set by Congress, to the participating members. See Posey Aff. ¶¶ 6 & 11. To attribute the accountant's mistake to the members or managing partners without any evidence of wrongdoing on the members' or managing partners' part and in light of the admitted accounting tax error would be unjustified. As a result, Evan and Taige Bybee and Dennis and Gina Gay did not make excessive contributions to the Swallow Committee.

Please feel free to contact us if you have any further questions or concerns.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jan Baran', with a large, stylized flourish extending from the end of the signature.

Jan Witold Baran  
D. Mark Renaud

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of Winterfox L L C , G Evan Bybee, )  
et al )

MUR No 5333

Affidavit of G. Evan Bybee

1 My name is G Evan Bybee, and I make the following statements to the best of my knowledge and belief

2 In 1993, my wife and I and seven of our children established WinterFox L L C ("WinterFox") Each family member is a "member" under Utah law in WinterFox and owns an equal share of the enterprise The individual members are as follows G Evan Bybee, Tamra Bybee, Taige S Bybee, Kara Davis, Shalane E Kerr, Nicaill J Bybee, Lant M Bybee, Brenn D Bybee, and Keve E Bybee I serve as Managing Partner of WinterFox

3 WinterFox files with the IRS as a partnership and has done so since 1993

4 WinterFox holds a nearly 50% interest in Basic Research, LLC John Swallow served as General Counsel of Basic Research from January 1998 to November 2001 and was known personally by myself and the other family members

5 In early 2002, I, my wife and adult children discussed whether we would support Mr Swallow's candidacy for the United States House of Representatives through a partnership contribution to John Swallow for Congress ("Swallow Committee") for the primary My wife and I and three of our adult children agreed to make such a partnership contribution for the five of us Thereafter, I wrote a \$5,000 check on March 28, 2002 from WinterFox to the Swallow Committee, listing those individual members of WinterFox who were making a primary election contribution of \$1,000 each G Evan Bybee, Tamra Bybee, Nicaill Bybee, Taige Bybee, and Kara Davis

6 In April 2002, G. Evan Bybee, Tamra Bybee, Nicaill Bybee, Taige Bybee, and Kara Davis signed a sheet from the Swallow Committee, indicating that we had made a contribution to the committee for the primary election

7. Later in 2002 the family members again conferred as to whether we would contribute in a similar fashion to Mr Swallow's general election campaign My wife and I and three of our adult children agreed to contribute -On June 28, 2002, I wrote a \$5,000 check from WinterFox to the Swallow Committee, listing those individual members of WinterFox who were making the general election contribution of \$1,000 each G Evan Bybee, Tamra Bybee, Nicaill Bybee, Taige Bybee, and Brenn Bybee

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8 At all times, we each believed that the above-described contributions were donations from each individual within legal limits

Under penalty of perjury and any other penalties possibly applicable under law, I swear that the foregoing statements are true to the best of my knowledge, belief, and recollection, and after due investigation of all my records

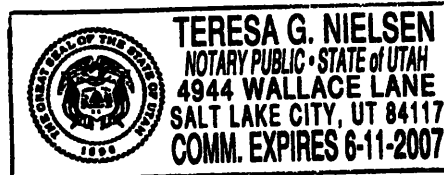
  
G Evan Bybee

10-20-04  
Dated

Sworn and subscribed to  
Before me this 20 day of  
October, 2004

  
Notary Public

My Commission expires 12/11/07



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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of WinterHawk Enterprises L L C , Dennis )  
W Gay, et al )

MUR No 5333

Affidavit of Dennis W. Gay

1 My name is Dennis W Gay, and I make the following statements to the best of my knowledge and belief

2 In 1993, I and five of my children established WinterHawk Enterprises L L C ("WinterHawk") Each family member is a "member" under Utah law in WinterHawk and owns an (almost) equal share of the enterprise The ownership shares have remained unchanged since 1993 The individual members are as follows Dennis W Gay, Gina Jo Gay, Kimberly N Humphreys, Bodee Gay, Haley Gay (Blackett), and Bryant Gay I serve as Managing Partner of WinterHawk

3 WinterHawk files with the IRS as a partnership and has done so since 1993

4 WinterHawk holds a nearly 50% interest in Basic Research, LLC John Swallow served as General Counsel of Basic Research from January 1998 to November 2001 and was known personally by myself and the other family members

5 In early 2002, My adult children and I discussed whether we would support Mr Swallow's candidacy for the United States House of Representatives through a partnership contribution to John Swallow for Congress ("Swallow Committee") for the primary Three of my adult children and I agreed to such a partnership contribution from the four of us Thereafter, I wrote a \$4,000 check on March 29, 2002 from WinterHawk to the Swallow Committee, listing those individual members of WinterHawk who were making a primary election contribution of \$1,000 each Dennis Gay, Gina Gay, Bodee Gay, and Kimm Gay (Humpherys)

6 In April 2002, Dennis Gay, Gina Gay, Bodee Gay, and Kimm Gay (Humphreys) signed a sheet from the Swallow Committee, indicating that we had made a contribution to the committee for the primary election


7 Later in 2002 the family members again conferred as to whether we would contribute in a similar fashion to Mr. Swallow's general election campaign Four of my adult children and I agreed to such a general election contribution On June 21, 2002, I wrote a \$5,000 check from WinterHawk to the Swallow Committee, listing those individual members of WinterHawk who were making the general election contribution of \$1,000 apiece Dennis Gay, Gina Gay, Bodee Gay, Kimm Gay (Humpherys), and Haley Gay (Blackett)

8 In September 2002, Dennis Gay, Gina Gay, Bodee Gay, and Kimm Gay (Humpherys) signed a sheet from the Swallow Committee, indicating that we had made a contribution to the committee for the general election To my knowledge, Haley Gay was not asked for a signature or any other information at that time

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9 At all times, we each believed that the above-described contributions were donations from each individual within legal limits

Under penalty of perjury and any other penalties possibly applicable under law, I swear that the foregoing statements are true to the best of my knowledge, belief, and recollection, and after due investigation of all my records

  
Dennis W Gay

10-20-04  
Dated

Sworn and subscribed to  
Before me this 20 day of  
October, 2004

Teresa G. Nielsen  
Notary Public

My Commission expires 6/11/07



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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of WinterHawk Enterprises L.L.C., )  
WinterFox L.L.C., Dennis W. Gay, G. Evan Bybee, et. al. )

MUR No. 5333

Affidavit of David T. Posey

1. My name is David T. Posey, and I make the following statements to the best of my knowledge and belief.
2. I am a Certified Public Accountant with the accounting firm of Pinnock, Robbins, Posey, & Richins P.C., located in Salt Lake City. I have been a CPA for 25 years.
3. My firm and I have been doing accounting work for the Bybee and Gay families for 11 years. Among other things, we prepare the tax returns for WinterHawk Enterprises L.L.C. ("WinterHawk") and WinterFox L.L.C. ("WinterFox").
4. In 1993, Dennis W. Gay, and his five children established WinterHawk. Each family member is a "member" under Utah law in WinterHawk and owns an (almost) equal share of the enterprise: 16.666% or 16.667%. The ownership shares have remained unchanged since 1993. The individual members of WinterHawk are as follows: Dennis W. Gay, Gina Jo Gay, Kimberly N. Humphreys, Bodee Gay, Haley Gay, and Bryant Gay. Dennis W. Gay serves as Managing Partner of WinterHawk.
- 5.
6. In the check register that WinterHawk provided to us, WinterHawk treated the political contributions made to John Swallow for Congress as draws, respectively, to the four and five contributing members of WinterHawk listed on the contribution checks.
7. On the tax return, the accountants mistakenly allocated the political contributions solely as a draw to the capital of Dennis W. Gay.

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8. WinterHawk maintains individual capital accounts for each member, each member receiving their allocable share of partnership earnings or loss as the case may be, and individual members have drawn against their capital accounts for personal items in the past.

9. In 1993, G. Evan Bybee, his wife, and seven of his children established WinterFox. Each family member is a "member" under Utah law in WinterFox and owns an equal share of the enterprise: 11.1111 %. The ownership shares have remained unchanged since 1993. The individual members of WinterFox are as follows: G. Evan Bybee, Tamra Bybee, Targe S. Bybee, Kara Davis, Shalane E. Kerr, Nical J. Bybee, Lant M. Bybee, Brenn D. Bybee, and Keve E. Bybee. G. Evan Bybee serves as Managing Partner of WinterFox.

10. WinterFox files with the IRS as a partnership and has done so since 1993. Attached at Tab B is a copy of WinterFox's 2002 federal tax return. Form TC-65 Schedules G & L, attached to the federal tax returns, shows the owners and their ownership shares for 2002.

11. In the check register that WinterFox provided to us, the check stub of one of the checks, # 195 lists five members of the partnership as contributors to the Swallow Campaign. I no longer have the check register for the other check, # 227. It is likely it was listed in the memo on the check stub the same way, with various members of the partnership listed.


12. On the tax return, the accountants mistakenly allocated the political contributions solely as draws to the capital of G. Evan Bybee and Tamra Bybee.

13. WinterFox maintains individual capital accounts for each member, each member receiving their allocable share of partnership earnings or loss as the case may be, and individual members have drawn against their capital accounts for personal items in the past.

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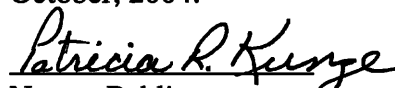
14. Following usual tax return filing procedures, the accountants will reclassify the draws on the capital accounts of WinterFox and WinterHawk in order to take into account the members indicated on the checks and check register.

Under penalty of perjury and any other penalties possibly applicable under law, I swear that the foregoing statements are true to the best of my knowledge, belief, and recollection, and after due investigation of all my records.

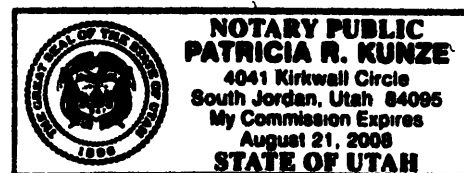
  
David T. Posey CPA

10/20/04  
Dated

Sworn and subscribed to  
Before me this 2<sup>nd</sup> day of  
October, 2004.

  
Notary Public

My Commission expires: 8/21/08



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