FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

CERTIFIED MAIL
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SEP 24 2003

John P. Contini, Esq.
John P. Contini & Associates, P.A.
888 East Las Olas Boulevard
Fort Lauderdale, FL 33301

MUR 5357
Gary Esporrin

Dear Mr. Contini:

On March 25, 2003, the Federal Election Commission notified your client, Gary Esporrin, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your client at that time.

Upon further review of the allegations contained in the complaint, the Commission, on September 12, 2003, found that there is reason to believe your client, Gary Esporrin, violated 2 U.S.C. §§ 441b and 441f, provisions of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is enclosed for your information. In order to expedite the resolution of this matter, the Commission has also decided to offer to enter into negotiations directed towards reaching a conciliation agreement in settlement of this matter prior to a finding of probable cause to believe.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of your receipt of this letter. Statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

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This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

If you have any questions, please contact April Sands or Renee Salzmann, the attorneys assigned to this matter, at (202) 694-1650.

Sincerely,

Ellen L. Weintraub

Ellen L. Weintraub
Chair

Enclosures
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Gary Esporrin MUR: 5357

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission by Centex Corporation. *See* 2 U.S.C. § 437g(a)(1).

II. FACTUAL AND LEGAL ANALYSIS

A. The Law

Corporations are prohibited from making contributions or expenditures from their general treasury funds in connection with any election of any candidate for federal office. 2 U.S.C. § 441b(a). Section 441b(a) also makes it unlawful for any candidate, political committee, or other person knowingly to accept or receive a contribution prohibited by section 441b(a). In addition, section 441b(a) prohibits any officer or director of any corporation from consenting to any contribution or expenditure by the corporation.

The Act provides that no person shall make a contribution in the name of another person or knowingly permit his or her name to be used to effect such a contribution and that no person shall knowingly accept a contribution made by one person in the name of another person. 2 U.S.C. § 441f. Commission regulations also prohibit persons from knowingly assisting in making contributions in the name of another. *See* 11 C.F.R. § 110.4(b)(1)(iii).

The Act addresses violations of law that are knowing and willful. *See* 2 U.S.C. §§ 437g(a)(5)(B) and 437g(d). The knowing and willful standard requires knowledge that one is violating the law. *Federal Election Commission v. John A. Dramesi for*

Congress Committee, 640 F. Supp. 985, 987 (D. N.J. 1986). A knowing and willful violation may be established "by proof that the defendant acted deliberately and with knowledge that the representation was false." *United States v. Hopkins*, 916 F.2d 207, 214 (5th Cir. 1990). An inference of a knowing and willful act may be drawn "from the defendant's elaborate scheme for disguising" his or her actions. *Id.* at 214-15.

Where a principal grants an agent express or implied authority, the principal generally is responsible for the agent's acts within the scope of his authority.[1] *See Weeks v. United States*, 245 U.S. 618, 623 (1918). Even if an agent does not enjoy express or implied authority, however, a principal may be liable for the agent's actions on the basis of apparent authority. A principal may be held liable based on apparent authority even if the agent's acts are unauthorized, or even illegal, when the principal placed the agent in the position to commit the acts. *See Richards v. General Motors Corp.*, 991 F.2d 1227, 1232 (6th Cir. 1993).

B. <u>Factual Summary</u>

Centex Corporation ("Centex") notified the Commission that Centex-Rooney Construction Co., Inc. ("Rooney"), which is a separate, incorporated division of a Centex subsidiary, Centex Construction Group, Inc. ("CCG"), as well as other persons, appear to have violated the Federal Election Campaign Act. The Centex complaint and the responses to it reveal that: (1) Rooney employees were encouraged by Bob Moss, then-CEO of Rooney (and later CEO of CCG), to make political contributions as a means of relationship-building with public officials; (2) these employees, who included top officers

[1] The conduct of an agent is within the scope of his authority if: (a) it is the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the master. Restatement (Second) of Agency § 228(1).

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of Rooney and, in some cases, their spouses, were asked to inform either Mr. Moss or Gary Esporrin, then-CFO of Rooney (and later CFO of CCG), of their contributions and to send copies of their contribution checks to either Mr. Moss or Mr. Esporrin; (3) although Mr. Moss may have solicited contributions to some specific officials, it appears that employees were able to submit copies of checks for self-initiated contributions; and (4) the political contributions were then reimbursed to each employee, grossed up to offset any tax liability, through a special "discretionary management bonus."

Rooney is a construction company with commercial building projects primarily in the state of Florida. Bob Moss joined Rooney (operating under a different name at that time) in 1986 as Chairman, President, and CEO. In early 2000, Mr. Moss was promoted to the position of Chairman and CEO of CCG while retaining his title of Chairman at Rooney. Gary Esporrin, the CFO of Rooney, was promoted in January 2000 by Mr. Moss to co-CFO of CCG while retaining his position as CFO of Rooney.

In approximately 1997, Brice Hill, then-Chairman, CEO and President of CCG, decided to discontinue CCG and Rooney's practice of making non-federal corporate political contributions. Employees of Rooney were still encouraged to make political contributions as a means of relationship-building, but were asked to do so out of personal funds. On March 4, 1998, Moss met with Brice Hill and Ken Bailey, then Executive Vice President and COO of CCG, to discuss Rooney's political contribution policy. Moss "suggested that individuals' political activities and contributions could be recognized just as their community involvement and other relationship building activities were already recognized in the discretionary bonus process." Brice Hill reviewed numbers provided by Rooney's CFO Gary Esporrin which indicated who had been

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politically active with respect to making personal political contributions and "approved the plan whereby [Centex-] Rooney would consider political contributions at year-end discretionary bonus time."

Thereafter, Rooney employees were encouraged to inform either Mr. Moss or Mr. Esporrin of their contributions and to send copies of contribution checks to Mr. Moss or Mr. Esporrin. Mr. Esporrin calculated amounts that would reimburse each employee for his contributions and grossed up the amounts to offset any tax liability. These amounts were listed in a bonus spreadsheet under a separate column designated "discretionary management bonuses" and were added to the bonus amounts the employee otherwise would have received from any incentive plan. Mr. Moss ultimately approved these discretionary management bonuses. In addition, CCG's CEO Brice Hill, CCG's CFO Chris Genry and CCG's Vice President of Finance Mark Layman, who knew of the composition of the discretionary management bonus column, approved the individual bonus amounts. These reimbursements initially were made from a CCG corporate account, which was then reimbursed with Rooney corporate funds.

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According to Centex in its Complaint, eleven different Rooney employees and, in some instances, their spouses made a total of $55,875 in federal contributions that were reimbursed out of corporate funds between 1998 and 2002.[2]

In November 2002, as part of a larger review of Mr. Moss' management of CCG, Gary Esporrin e-mailed Larry Hirsch, CEO of Centex, a list of perceived problems at CCG, which included the "questionable campaign contributions" being tracked at the direction of Bob Moss. In January 2003, Larry Hirsch directed the General Counsel of

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[2] Some of Mr. Moss' and Mr. Esporrin's contributions were made after they became CEO and CFO of Rooney's parent, CCG.

Centex to undertake an investigation of information that suggested that Rooney employees were being reimbursed with corporate funds for individual political contributions. As a result of that investigation, Centex came forward to the Commission regarding the potentially illegal activities of CCG and Rooney.

Gary Esporrin was the CFO of Rooney and later the co-CFO of CCG. Following their internal investigation, Centex removed Mr. Esporrin from the CFO positions. In November 2002, Mr. Esporrin reported himself and his superior, Bob Moss, to Larry Hirsch, CEO of Centex. According to Mr. Esporrin, Hirsch asked Esporrin to perform a "cost-benefit analysis" of keeping Mr. Moss employed with Rooney. As part of that evaluation, Mr. Esporrin reported to Mr. Hirsch that Bob Moss was engaging in activities involving "questionable political contributions" which eventually led to Centex's self-reporting to the Commission.

Mr. Esporrin states that although the activities involving the "discretionary management bonuses" never felt quite right to him, he "saw correspondence and notes by and between" Centex parent corporation superior officers and their lawyers which led him to believe that the discretionary management bonuses were legal and had been approved by the Centex Audit Review Committee. In fact, Mr. Esporrin states that the campaign contribution reimbursement program was factored into the approved corporate budget, after review by the budget committee and the Audit Review Committee.

Mr. Esporrin characterizes himself as the whistle-blower who brought Mr. Moss' alleged wrongdoing to their employer's notice, but was also an officer of the company who consented to the use of corporate funds for making political contributions. In addition, Mr. Esporrin also made $2,000 in federal contributions during this time period that were reimbursed using CCG and Rooney funds in his discretionary management bonus and also assisted in the reimbursement of other employees. Therefore, there is reason to believe that Gary Esporrin violated 2 U.S.C. §§ 441b and 441f.

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