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April 14, 2003

April Sands, Esq.
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: MUR 5357 – Centex Corporation Response

Dear Ms. Sands:

We represent Centex Corporation ("Centex"). The purpose of this letter is to respond to a letter from the Federal Election Commission (the "Commission") dated March 26, 2003, and received on March 31, 2003, notifying Centex that it may have violated the Federal Election Campaign Act of 1971, as amended (the "Act"). The Commission's letter was sent to Centex after Centex notified the Commission, in our letters dated February 27, 2003, and March 24, 2003, of potential violations of the Act that may have occurred at Centex-Rooney Construction Co., Inc. ("Rooney"), which is a subsidiary of a Centex subsidiary, Centex Construction Group, Inc. ("CCG").

I. Centex Has Not Violated the Act

The Commission is authorized to take action against "a person" that has violated the Act. *See generally* 2 U.S.C. § 437g. The term "person" is defined as including "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons . . . ." 2 U.S.C. § 431(11). As this definition recognizes, a corporation is a separate legal entity, and, as such, is subject to liability severally from its employees or agents. *See, e.g.*, *United States v. Sain*, 141 F.3d 463, 474 (3d Cir. 1998); 18 Am. Jur. 2d *Corporations* § 2136 (2002). Even if the Commission determines that the facts that Centex brought to the Commission's attention constitute violations of the Act by certain individuals employed by subsidiaries of Centex, we submit that it is clear as a matter of law that Centex itself is not a "person" that has violated the Act.

Centex, CCG and Rooney are separate and distinct corporate entities:

- Centex is a publicly held company incorporated in the state of Nevada and headquartered in Dallas, TX. It is a holding company with a number of

subsidiaries. These subsidiaries are involved in a variety of businesses including home building, home services, mortgages, title and insurance, investment real estate, construction products, and commercial construction. Centex had revenues totaling $7,748,430,000 in its fiscal year ending March 31, 2002, and net after tax profits of $382,226,000.

- CCG is one of Centex's wholly owned subsidiaries. CCG itself is a holding company, with six subsidiaries in the commercial construction business that operate in several regions of the country. It is incorporated in Nevada and has headquarters in Dallas and Plantation, FL.

- Rooney is one of the wholly owned subsidiaries of CCG and is incorporated in the state of Florida. It is a general contracting and commercial construction company based in Plantation, FL. Originally Frank J. Rooney Construction Co., Rooney became an indirect subsidiary of Centex in 1986, but has retained its separate corporate existence.

Centex, CCG, and Rooney are separately incorporated and hold themselves out as separate and distinct entities. They have separate boards of directors and officers,[1] and all observe the appropriate corporate requirements and procedures. For example, Centex, CCG, and Rooney each have separate accounting, separate property, and separate meetings of shareholders and directors. Rooney and CCG are each adequately capitalized to carry out their respective businesses. Rooney and CCG do not rely on Centex to provide them with business, and their day-to-day operations are not controlled by Centex. Centex, as noted above, has diversified activities and many subsidiaries. CCG and Rooney account for only a small part of Centex's consolidated revenues.[2] Thus, Centex, CCG and Rooney are distinct corporate entities – separate "persons" for purposes of the Act.

Even if the Commission determines that violations of the Act have occurred, Centex was not the person that committed them. All of the employees who made federal contributions that were reimbursed were employees of Rooney; none were employees of

[1] The companies share one common director and three common officers.

[2] CCG contributed less than 17% of Centex's overall consolidated revenues in fiscal year 2002 and approximately 4% of its operating earnings. Rooney contributed only 5% of the overall consolidated revenues and 2.5% of operating earnings.

Centex.[3] The funds used to reimburse them came from Rooney's incentive compensation plan, which was based on and funded out of Rooney's profits alone. The improper reimbursement activity was originated and directed by Bob Moss and facilitated by Gary Esporrin, who were employed by Rooney and CCG.[4] *No* employee, officer, or director of Centex had any knowledge that employees of Rooney were being reimbursed for political contributions on a dollar-for-dollar basis, or was involved in that activity in any way.[5] Indeed, when Centex management learned of the improper activities, they promptly ordered the activities to stop, initiated an investigation, and reported the activities to the Commission.

As a general rule, a corporation may be liable for the acts of its employees or agents if the employee or agent is acting within the scope of his or her authority and with the intent to benefit the company. *See, e.g., United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 660 (2d Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990); *see also United States v. Sun-Diamond Growers of Calif.*, 138 F.3d 961, 970-91 (D.C. Cir. 1998), *aff'd on a different issue*, 526 U.S. 398 (1999). Even if the activities described in Centex's letters to the Commission constituted violations of the Act, they were not committed by employees or agents of Centex, but by employees or agents of Rooney or

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[3] Three individuals were employees of both Rooney and CCG. Bob Moss, the CEO and Chairman of Rooney, became CEO of CCG in 2000 but retained his position as Chairman of Rooney. On February 13, 2003, Mr. Moss was terminated from his positions at Rooney and CCG.

Gary Esporrin, the CFO of Rooney, became co-CFO of CCG in 2000 while retaining his position as CFO of Rooney. Mr. Esporrin was relieved of his duties as CFO of Rooney and co-CFO of CCG in February 2003.

Bruce Moldow, the Executive Vice President and Chief Legal Officer of Rooney, became Executive Vice President and co-Chief Legal Officer of CCG in 2000 while retaining his positions at Rooney.

Mr. Moss originated and directed the reimbursement of political contributions at Rooney; Mr. Esporrin facilitated it significantly; Mr. Moldow was one of the employees who was reimbursed for contributions he made. None of Mr. Moss, Mr. Esporrin or Mr. Moldow was ever employed by Centex.

[4] *See* n. 3 *supra*.

[5] Centex management approved the total amount of Rooney's bonus pool, but individual bonuses paid from the pool did not need to be and were not approved by Centex management.

CCG. These employees had neither actual nor apparent authority to act on behalf of Centex. Thus, under basic principles of law, Centex is not liable for the acts of these individuals.

Nor may Centex be held liable for the acts of its subsidiaries. The Supreme Court of the United States has stated that "[i]t is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998). This long-standing principle has been applied in a wide range of matters. *E.g.*, *Bestfoods*, 524 U.S. at 61 (parent corporation's liability under Comprehensive Environmental Response, Compensation and Liability Act); *DeJohn v. The .TV Corp.*, No. 02C4497, 2003 WL 356181 (C.D. Ill. Jan. 16, 2003) (intellectual property claims); *In re Managed Care Litigation*, 185 F. Supp. 2d 1310 (S.D. Fla. 2002) (ERISA and RICO claims); *Poole v. Sofamor Danek Group, Inc.*, No. 94-40191, 1998 WL 1041328 (E.D. Mich. Dec. 9, 1998) (product liability claims).

Indeed, the Commission itself has recognized this principle. In an Advisory Opinion concerning the Act's prohibition on political contributions by federally chartered bank corporations, the Commission ruled that state-chartered banks could make contributions in state or local elections even if they were wholly owned subsidiaries of national banks. In doing so, the Commission stated that "[g]enerally, a subsidiary corporation is considered a distinct legal entity, an entity in its own right, apart from its parent." Op. Fed. Election Comm'n 1980-7 (1980), *available at* http://herndon3.sdrdc.com/ao/ao/800007.html. The Commission advised that only when circumstances would result in the two corporations being characterized as one entity would a state subsidiary and federal parent be subject to the same prohibition. *See id.*

This case does not fall within the narrow class in which the separate corporate existence of a parent and subsidiary should be disregarded. Liability may be found only if the corporate veil may be pierced to avoid misuse of the corporate form, *see Bestfoods*, 524 U.S. at 62, or if the parent has been involved in the commission of the transgressions. *See In re American Honda Motor Co., Inc. Dealerships Relations Litigation*, 958 F. Supp. 1045 (D. Md. 1997). For example, a parent corporation may be liable if the corporation's owner is using the corporate form for wrongful purposes such as a fraud on the owner's behalf. *Bestfoods*, 524 U.S. at 62. No such scheme is at issue here. Rooney is a legitimate subsidiary company engaged in one, relatively small, aspect of Centex's many business activities.

A second theory under which the corporate veil may be pierced is if the subsidiary serves as essentially the "alter ego" of the parent corporation. This theory applies "when there is such unity between the parent corporation and the subsidiary that the separateness of the two has ceased and holding only the subsidiary corporation liable would result in injustice." *Gardemal v. Westin Hotel Co.*, 186 F.3d 588, 592-593 (5th Cir. 1999). The unity between the two corporations is established by examining a range of factors to determine whether the parent controls the subsidiary to such an extent that it has no form other than as a business conduit for the parent. *Id.* at 593-594. Important factors include the business autonomy of the subsidiary and whether the subsidiary is undercapitalized. *See id.* at 594. Even close ties through stock ownership, shared officers, and financing arrangements are insufficient, since they simply reflect typical interactions between a corporate parent and its subsidiaries rather than complete dominion of the parent over the subsidiary. *See id.* at 593-594; *Bestfoods*, 524 U.S. at 61-62.

As noted above, CCG and Rooney are and remain distinct and separate corporations from their parent corporation, Centex. Both CCG and Rooney are adequately capitalized and independently managed; they operate their day-to-day business without significant input from Centex. As the Supreme Court noted, it is a "well established principle of corporate law that directors and officers holding positions with a parent and its subsidiary can and do change hats to represent two corporations despite their common ownership. . . . It cannot be enough to establish liability . . . . that dual officers and directors made policy decisions and supervised activities" at the subsidiary. *Bestfoods*, 524 U.S. at 69-70. This conclusion is even more appropriate in this case where there is only one common director on boards of eleven (Centex), five (CCG) and nine (Rooney), and three common officers out of nineteen (Centex), twenty-one (CCG) and twenty-nine (Rooney) respectively, and where these common officers and director played no role in the activities at issue.

Thus, to the extent that Centex is involved in the operations of CCG and Rooney, its actions are consistent with Centex's status as stockholder in Rooney. Appropriate parental involvement includes monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures. *Bestfoods,* 524 U.S. at 72. But such involvement alone does not establish liability. *Id.*

Finally, until January 2003, *no* employee, officer, director, or agent of Centex knew that employees' political contributions were being reimbursed on a dollar-for-dollar basis, or was involved in that activity in any way. The actions of Centex in responding to

the situation once it learned of it show quite the opposite from any involvement or complicity. After learning of Mr. Moss's contribution reimbursement program, Centex has moved quickly to stop, investigate, rectify, and report the improper activities. Accordingly, there is no "reason to believe that [Centex] has committed, or is about to commit, a violation of [the] Act," and hence no "action should be taken" against Centex on the basis of its complaint. 2 U.S.C. § 437g(a).

II. Centex has Cooperated Fully with the Commission

Moreover, under the circumstances of this case, "no action should be taken against" Centex in light of its self-reporting and cooperation. 2 U.S.C. § 437g(a)(1). We submit that Centex's actions in this matter were entirely exemplary. Immediately upon learning of the possibility that there had been improprieties, Centex management ordered a thorough internal investigation and retained outside counsel to conduct it. The company cooperated fully with the internal investigation and determined to report the possible violations to the Commission even before the internal investigation was complete. It has already cooperated with the Commission and will continue to do so. It has taken disciplinary action against the individuals involved, including terminating the originator of the improper activities and removing his principal associate from his responsibilities. It is updating and enhancing its compliance policies and procedures to guard against future improper actions, and employees will receive increased training in the application of the election laws to their activities.

We respectfully submit that – entirely apart from the fact that Centex did not violate the Act – the Commission should exercise its enforcement discretion not to pursue this matter against Centex. Centex has behaved precisely in the manner it should. It acted diligently to ferret out evidence of possible violations of the election laws. Although there was every reason to believe that those apparent violations might not have otherwise come to light, Centex decided to report them voluntarily to the Commission. This is behavior that should be encouraged, not deterred, by the Commission. A decision to proceed as if it were Centex itself that violated the law would inevitably cause other corporations facing a similar situation to hesitate before reporting themselves.

The importance of tailoring enforcement to encourage corporate self-reporting is widely recognized. For example, the Department of Justice, in its "Principles of Federal Prosecution of Business Organizations," states that a corporation's "timely and voluntary disclosure of wrongdoing and its willingness to cooperate with the government's investigation may be relevant factors" in determining whether the corporation should be

charged. Memorandum from Larry D. Thompson, to all U.S. Attorneys and Heads of Department Components, 7 (Dept. of Justice Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/business_organizations.pdf. Since the Commission does not have the resources itself to police all federal contributions, a primary goal of its enforcement policy should be to encourage corporations to police themselves. Centex has done just that. Accordingly, we submit that no action should be taken against Centex in this matter.

We look forward to working with the Commission on reaching a final conclusion to this matter. As always, we would be pleased to discuss any aspect of this letter or this matter with you or other Commission staff.

Sincerely,

Robert S. Litt
Martha L. Cochran