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September 23, 2005

Via First-Class Mail

Commission Secretary
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 5453 (Sal Trovato)

Dear Madame Secretary:

This letter responds on behalf of Salvatore Trovato ("Respondent") to the Brief of the Office of General Counsel that the Federal Election Commission find Probable Cause to Believe ("PC Recommendation") that Respondent violated federal election laws by his role in an alleged excessive contribution. For the reasons described below, the Commission should determine that no further action should be taken and close this matter.

Discussion

The General Counsel's recommendation to find Probable Cause is flawed in two respects. First, it misapprehends the relationship among the text and legislative history of the Federal Election Campaign Act, the Supreme Court's decision in Buckley v.Valeo, and the Commission's precedent on transfers of funds between family members; and second, it fails to satisfy the standard of proof required to demonstrate that Mr. Trovato's gifts to his daughter and son-in-law were made with the intent that they be used in Mr. Giordano's campaign.

1. *Buckley v. Valeo* Acknowledged that Congress Intended a More Limited Application of 441a to Sharing of Funds Among Family Members

OGC cites Buckley v. Valeo, 424 U.S. 1 (1976) for the proposition that "[r]espondent, who happened to be Mr. Giordano's father-in-law, was subject to the same contribution limitations as other individuals " PC Recommendation at 3 As far as it goes, that proposition is not inaccurate; if family members *are* in fact making "contributions" they *are* subject to

FECA's dollar limits on those "contributions." Nevertheless, this citation omits a principal distinction involved in sharing of resources among family members that the Buckley Court acknowledged.

In upholding the contribution limits of FECA against the categorical argument that those limits cannot be applied to *any* transfers of resources among family members, the Court quoted this language from the Conference Report on FECA: "the immediate family member would not be permitted to grant access or control to the candidate in amounts up to [FECA limits], *if the immediate family member intends that such amounts are to be used in the campaign of the candidate.*" 424 U.S. at 51, n. 57 (quoting S. Conf. Rep. No. 93-1237, p. 58 (1974) (emphasis added)). By specifically qualifying the limitation of intra-family sharing of assets to situations where the provider of the funds affirmatively "*intends*" that the funds "are to be used in the campaign of the candidate," the Conference Report limits the application of 2 U.S.C. § 441a with respect to transfers of assets among family members, and raises the standard of proof required to show campaign intent. The OGC's PC Recommendation ignores this distinction, and thus applies the wrong legal standard to the gifts in question here.

2. OGC Fails to Satisfy Its Burden of Proof that the Gifts at Issue Were Made With Campaign Intent

The OGC recommendation also errs in evaluating the evidence of Mr. Trovato's intent, based on a selective reading of the administrative record. The Commission need not rely on the circumstantial evidence of Mr. Trovato's intent recited in the OGC recommendation, because there is direct evidence on this issue which the OGC unfortunately disregards.

First, there is direct contemporaneous evidence of the Respondent's intent in making these gifts in the instruments executed in transferring the CD's. These instruments show no indication that Mr. Trovato had any campaign intent in mind when he transferred the CDs to his daughter and son-in-law. There is also recent direct evidence of the Respondent's intent in the sworn statements filed by him and his daughter in response to the RTB brief, which overtly explain that the purpose of the gifts was "to assist [her] family." The PC recommendation contains no other direct evidence of the Respondent's intent, and offers no direct evidence to contradict the direct evidence offered by the Respondent. Accordingly, the Recommendation fails to prove the heightened standard of affirmative campaign intent reflected in FECA's legislative history and thus should be rejected.

Second, the recommendation analyzes these gifts under regulatory and advisory precedent of the Commission that ignores the qualifying Congressional intent cited above. It would exceed the Commission's authority under the Act to fine Mr. Trovato based on regulations and advisory opinions which exceed the scope of the statute, and since these precedents all exceed the intent of Congress, as evidenced in legislative history cited by the Court in Buckley, they cannot be said to bind the Commission here. OGC's legal approach ignores the direct evidence of intent provided by the Respondent, and bases its conclusions

entirely on circumstantial factors to which OGC assigns a presumption of campaign intent. This approach fails to meet the standard of proof intended by Congress in the Conference Report cited in Buckley, and referenced above. As a result, this interpretation of 441a exceeds the scope intended by Congress and is therefore contrary to law.

Finally, even if the Commission's faulty precedent were to be followed, OGC actually acknowledges that here there *is* a pattern of personal gifts from Mr. Trovato to his children which their families, including the Giordanos, customarily received prior to Mr. Giordano's candidacy. Respondent has established the frequency of these many gifts (which OGC has not disputed), and the amounts, while they cannot be established with certainty given the unavailability of the family's financial records from the time period in question, have been demonstrated by the Respondent to be at least comparable to the gifts at issue here. See Salvatore Trovato Subpoena Response dated March 30, 2005, and Dawn Giordano Subpoena Response dated March 28, 2005.

Conclusion

In short, and as repeatedly and consistently stated to OGC, Salvatore Trovato "never intended to make an excessive contribution to the Giordano for U.S. Senate Committee." RTB Response at 2, Statement of Salvatore Trovato ¶ 2 and Statement of Dawn Giordano ¶ 2. Since OGC has no direct evidence to offer to refute that, the Commission should find that Mr. Trovato made no transfer of assets "for the purpose of influencing" Mr. Giordano's candidacy, therefore made no "contribution" regulable under the Act, and thus committed no violation.

Even if the Commission does find a violation here, it should follow the intent of Congress and of the Supreme Court, and acknowledge that the lack of the danger of corruption posed by intra-family sharing of resources should sharply reduce, if not eliminate, the degree of culpability OGC seeks to attach to the Respondent. By seeking a civil penalty that far exceeds those imposed against respondents who laundered corporate resources into federal elections (see, e.g., Westar Energy, Inc., MUR 5573, and Rainbow/PUSH Coalition, Inc., MUR 5183), OGC here is sending the wrong message.

We suggest that those enforcement priorities are misplaced, and urge the Commission to take no further action on this matter against the Respondent and close the file.

Sincerely,

Kirk L. Jowers
Joseph M. Birkenstock
Counsel to Respondents

cc:
Ten copies to Commission Secretary
Three copies to Office of the General Counsel