BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of:	)	
	)	
Mr. Lawrence Capelli	)	**Matter Under Review 5628**
	)	
Respondent	)	
	)	

RESPONSE OF MR. LAWRENCE CAPELLI
TO THE COMMISSION'S REASON TO BELIEVE FINDING

I. INTRODUCTION

On behalf of Mr. Lawrence Capelli, we hereby respond to the Commission's finding of reason to believe in the above captioned matter under review. For the reasons set forth herein, the Commission should find no reason to believe Mr. Capelli violated the Federal Election Campaign Act ("Act") and dismiss him from this matter under review.

In short, the Commission's claims against Mr. Capelli appear to be time barred by the five-year federal statute of limitations and, thus, the Commission is without authority to seek a civil penalty from Mr. Capelli. However, even if the claims are not time barred, the Commission has improperly alleged knowing and willful violations.

With regard to Mr. Capelli's culpability, the Commission alleges only that Mr. Capelli admitted to having "accepted" reimbursements from AMEC for contributions to federal campaigns. From this, the Commission makes the factual and legal leap to finding that Mr. Capelli "knowing and willfully" violated the Act. In support of this finding, the Commission cites a federal case involving a different statute which held that one may draw the inference of a knowing and willful act from the defendant's "elaborate scheme for disguising" his or her

actions. Putting aside for the moment that the case is inapplicable, the Commission does not even meet this standard. At no point does the Commission provide any evidence that Mr. Capelli was the driving force in any "scheme," elaborate or otherwise, to disguise any actions.[1] There is simply no predicate for a finding of knowing and willful conduct by Mr. Capelli. Moreover, the Commission's knowing and willful finding against Mr. Capelli runs counter to FEC precedent. In prior cases, the Commission has either made non-knowing and willful findings against alleged "conduit" contributors or simply issued letters of admonishment and taken no further action. The Commission has presented no facts warranting the application of a different standard in this matter.

II. THE COMMISSION'S CLAIMS ARE TIME-BARRED BY THE FEDERAL STATUTE OF LIMITATIONS

As the Commission is well aware, the Federal Election Campaign Act does not contain an internal statute of limitations for civil claims, and, thus, the five-year statute of limitations found in 28 U.S.C. § 2462 applies to any enforcement action in which the Commission pursues a civil penalty. *See Federal Election Commission v. Williams*, 104 F.3d 237, 239-40 (9th Cir. 1996), *cert. denied*, 522 U.S. 1015 (1997); *Federal Election Commission v. Christian Coalition*, 965 F. Supp. 66, 69 (D.D.C. 1997); *Federal Election Commission v. National Right to Work Committee, Inc.*, 916 F. Supp. 10, 13 (D.D.C. 1996); *Federal Election Commission v. National Republican Senatorial Committee*, 877 F. Supp. 15, 17 (D.D.C. 1995).

For violations of the Federal Election Campaign Act, the five-year statute of limitations begins to run when the events at issue first occur or when the alleged violation is committed, not when the circumstances are first reported to the Commission. *See Christian Coalition*, 965 F.

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[1] Nor does the allegation that a public accounting firm advised the company to reimburse political contributions using a bonus system instead of expense reports alter the equation as to Mr. Capelli.

Supp. at 70; *National Right to Work Committee*, 916 F. Supp. at 13; *National Republican Senatorial Committee*, 877 F. Supp. at 19-20.[2]

The Commission states that Mr. Capelli made $3,000 in political contributions for the period from January 1995 to October 15, 1998, "some of which were reimbursed from AMEC," and that Mr. Capelli accepted $4,000 in reimbursements from AMEC for political contributions for the period from October 15, 1998 to December 1999.[3] *See* Factual and Legal Analysis at 2, Lines 21 – 22, and at 3, Lines 1 -2.

Because the last alleged violation occurred prior to 2000, any attempt by the Commission to enforce a claim against Mr. Capelli is time barred by the five-year statute of limitations. For this reason alone, the Commission should dismiss Mr. Capelli from this matter.

III. THE COMMISSION IMPROPERLY ALLEGES KNOWING AND WILLFUL VIOLATIONS OF THE FEDERAL ELECTION CAMPAIGN ACT

Even if the Commission's claims are not time barred, the Commission improperly alleged knowing and willful violations of the Act. More specifically, the facts presented in the Factual and Legal Analysis demonstrate that a knowing and willful finding against Mr. Capelli is unjustified by the facts and not supported by Commission precedent or applicable case law.

According to the Factual and Legal Analysis, Mr. Capelli allegedly confirmed to his employer merely "receiving" certain reimbursements from AMEC for contributions to federal campaigns, after having been instructed as to which candidates to make the contributions. *See*

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[2] Administrative procedures such as the initiation of an investigation or a reason to believe determination do not toll the statute of limitations. *See National Right to Work Committee*, 916 F. Supp. at 14; *National Republican Senatorial Committee*, 877 F. Supp. at 20.

[3] The Commission should not interpret our response as conceding that Mr. Capelli was reimbursed $4,000 for political contributions as apparently alleged in AMEC's submission to the FEC.

Factual and Legal Analysis at 2, Lines 6-10 and 18. It further appears from the Commission's findings that any reimbursement efforts, if any, were ultimately quite disorganized.

Based on this record, however, the Commission inexplicably makes the conclusory statement that "[t]he actions of Lawrence Capelli, who directed or actively participated in AMEC's disguised corporate reimbursement scheme, appear to constitute knowing and willful conduct under the Act." Factual and Legal Analysis at 3, Lines 3 – 4. The Commission provides no factual basis for this sweeping allegation regarding an individual who was, at most, a mere conduit.

The Act enables the Commission to impose enhanced civil penalties upon parties who allegedly commit knowing and willful violations of *federal election laws*. *See* 2 U.S.C. § 437g(a)(5)(B); 11 C.F.R. § 111.24(a)(2). However, according to a controlling decision by the District of Columbia Circuit, an individual commits a knowing and willful violation of a federal election law when his behavior is "equivalent to a knowing, conscious, and deliberate flaunting of the Act." *A.F.L.-C.I.O. v. Federal Election Commission*, 628 F.2d 97, 101 (D.C. Cir. 1980) (internal citation omitted).[4] In other words, an individual must have *specific knowledge* that his actions violated the Act to have acted "knowingly and willfully." The Commission does not allege that Mr. Capelli was aware of the provisions of the Act prohibiting reimbursement, or even that he was aware he was violating any law in particular.

The Second and Fifth Circuit cases cited in the Commission's Factual and Legal Analysis are inapplicable because they involve federal criminal charges of fraud and false statements pursuant to 18 U.S.C. § 1001, a statute that is not at issue in this matter. *See United States v.*

[4] The Factual and Legal Analysis cites this controlling decision, but inexplicably relegates it to a footnote.

Whab, 355 F.3d 155, 157-58 (2d Cir. 2004); *United States v. Hopkins*, 916 F.2d 207, 214 (5th Cir. 1990). The Supreme Court has noted that the meaning of the term "willfully" often depends upon the context of the statute. *See Bryan v. United States*, 524 U.S. 184, 191 (1998).

Further, even if these cases were somehow applicable (and they are not), a prosecutor must still present sufficient evidence that an individual "acted with the purpose to do something the law forbids, and with an awareness of the generally unlawful nature of his actions," even if the intent element does not require proof that the individual *specifically knew* the conduct was criminal. *See Whab*, 355 F.3d at 160, 161. In this matter, as explained above, the Commission does not allege that Mr. Capelli was aware of the law; the Commission merely notes that Mr. Capelli "accepted" reimbursements and nothing more. The Commission cannot elide the matter by claiming the existence of an "'elaborate scheme for disguising' . . . corporate political contributions" as this general statement does not provide any predicate for a finding that Mr. Capelli authored or was a driving force in any alleged scheme. In fact, as the Commission specifically concedes, he was not. Accordingly, the Commission's reason to believe finding that Mr. Capelli knowingly and willfully violated the Act is without foundation.

The FEC's effort to extend a knowing and willful finding to Mr. Capelli appears, moreover, unprecedented. In prior FEC "conduit" cases, the Commission has held that individuals acting at the direction of other persons had either committed non-knowing and willful violations or, in some cases, took no action against such persons, other than sending letters of admonishment. For instance, in MUR 5187, the Commission took no further action against numerous "conduits" who "appear to have been minor players in the [reimbursement] scheme perpetrated" by others. General Counsel's Report #3, MUR 5187 at 7, Line 5. In that case, the contribution reimbursement scheme used friends and family members as conduits for reimbursed

contributions. The report did not opine on whether the conduits were aware that their actions were illegal, but nevertheless recommended that the Commission take no further action against the family and friends "[b]ecause of the relatively limited nature of their involvement" as well as the fact that the relevant company, Mattel, had self-disclosed, as has AMEC in this instance. *Id* at 7, Lines 5 – 6.

Likewise, in FEC Matter Under Review 4931, a senior officer of Audiovox Corporation directed a political contribution reimbursement scheme involving dozens of corporate officers and employees. To effect the reimbursement scheme, some employees submitted falsified expense reports while others were paid out of petty cash. In settlement of the case, some officers and employees admitted to non-knowing and willful violations of 2 U.S.C. § 441f, while the Commission took no further action against numerous other employees, including some senior employees who were aware of the illegality of the scheme and had made reimbursed contributions. *See generally* MUR 4931, General Counsel's Report #7.

In this matter, the Commission does not allege that Mr. Capelli exercised any independent judgment with regard to the allegedly reimbursed contributions, or even that he had any idea that any reimbursements were illegal. Mr. Capelli is, thus, similarly situated to the "minor players" in MUR 5187 and the employees in MUR 4931 in that he was allegedly merely acting on instructions. The Commission should take this into consideration with regard to its disposition of this matter.

IV. CONCLUSION

For the foregoing reasons, we respectfully request that the Commission find no reason to believe Mr. Capelli violated the Act and dismiss Mr. Capelli from this matter under review.

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Respectfully submitted,

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