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February 8, 2005

Beth Mizuno, Esq.
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 5635: Edward Adams
Response Brief to RTB Findings

Dear Ms. Mizuno:

Enclosed please find the response brief to the Commission's Reason to Believe ("RTB") Findings in MUR 5635 in the above-referenced matter. In addition please, find a copy of Mr. Adams's designation of our firm as counsel and copies of various supporting documents. Originals of all documents will be provided as soon as we receive them from Mr. Adams.

If you have any questions, please contact me at your convenience.

Very truly yours,

Paul E. Sullivan
Sullivan & Associates, PLLC

cc: Scott E. Thomas, Chairman
Michael E. Toner, Vice Chairman
David M. Mason, Commissioner
Danny L. McDonald, Commissioner
Bradley A. Smith, Commissioner
Ellen L. Weintraub, Commissioner

BEFORE THE FEDERAL ELECTION COMMISSION

Edward J. Adams, Jr.	)	MUR 5635 Response to RTB Findings

Pursuant to 2 U.S.C. § 437g(a)(1), Edward J. Adams, Jr., in his individual capacity ("Adams" or "Respondent"), files this response to the Reason To Believe Finding ("RTB Finding") by the Commission in the above-referenced matter.

I. FINDINGS AND SUMMARY OF ARGUMENT

Edward Adams served as Chief Financial Officer ("CFO") of American Target Advertising, Inc. ("ATA"), a for-profit direct-mail marketing firm, from April 2000 until his departure at the end of October 2004. While employed at ATA, he was frequently asked to provide advance payments for postage to ATA's vendors, so that ATA's nonprofit clients could conduct a mass mailing and later repay him, with interest, out of the funds they raised from the mailing.

In connection with its audit of the Conservative Leadership Political Action Committee ("CLPAC"), one of ATA's clients, the Federal Election Commission ("FEC" or "Commission") found reasons to believe ("RTB") claiming that Adams had possibly violated 2 U.S.C. § 441a(a)(1)(C) between August and December of 2000, when he made a series of payments for CLPAC mailings to various mail vendors and the U.S. Post Office, which aggregately exceeded the $5,000 annual PAC contribution limit.

The RTB Finding further claimed that these loans made by Adams were not exempted from the definition of "contribution" by the safe harbor that 11 C.F.R. § 116.3 provides for credit extended by a commercial vendor in the ordinary course of business.

We believe that the RTB Finding's contention is without merit because it is based upon fundamental misunderstandings of Adams's relationship with ATA and the nature of the direct marketing business, and an unjustifiably narrow interpretation of § 116.3.

As will be evidenced below, ATA fully and unconditionally guaranteed the repayment of the loans made by Adams. Under the regulations the FEC has promulgated at 11 C.F.R. ("Regulations"), this alone is sufficient to relieve Adams of personal liability for making a contribution. Moreover, Adams made each of the loans for the CLPAC mailings in his capacity as an agent of, on behalf of, and for the benefit of ATA. Because Adams was indisputably acting as an agent of ATA in making the postage loans, agency principles establish that Adams, as an agent, is exempt from any alleged personal liability that may attach to the loans he made for the CLPAC mailings. ATA, as principal and guarantor, bore the full legal responsibility for the loans. Therefore, the RTB Finding was improperly made against Adams in his personal capacity.

In addition, all the loans Adams made for the CLPAC mailings:

(1) Were extended according to established procedures and past practice of ATA,

(2) Resulted in prompt payment in full,

(3) Conformed to the usual and normal practice in the direct mail industry, and

(4) Were on terms substantially similar to those used for ATA's nonpolitical clients of comparable size and obligation.

Therefore, the loans precisely met the requirements of the "ordinary course of business" exemption set forth in § 116.3, and should not be considered contributions by Adams or ATA.

Finally, because Adams was acting as ATA's agent in making the loans, these

loans are aptly analogized to the postage loans issued by the direct mail firm in Advisory Opinion ("AO") 1979-36, which the Commission held were protected by the forerunner of § 116.3. Adams "stood in the shoes" of ATA, and therefore since ATA could permissibly have made the loans itself (as did the company that requested AO 1979-36), the loans Adams made on ATA's behalf should be similarly protected. Because Adams was not a third party lender, the facts of MURs 3027 and 5173, upon which the Commission relies in this case, are distinguishable.

II. STATEMENT OF FACTS

A. Background Information

ATA, a for-profit business entity incorporated in the Commonwealth of Virginia, is a mass-marketing company that since 1965 has helped nonprofit organizations, both nonpolitical and political, to raise funds through targeted direct mail programs.[1]

Adams began employment as the CFO of ATA on April 28, 2000.[2] Adams's duties for ATA in 2000 were initially restricted to designing and implementing an accounting system, and he reported to both the Chairman of ATA, Richard Viguerie, and the President and General Counsel, Mark Fitzgibbons.[3] Adams was employed by ATA until October 31, 2004.[4]

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1 *See* "American Target Advertising," *available at* http://www.sourcewatch.org/wiki.phtml?title=American_Target_Advertising (last visited Feb. 2, 2005).

2 Affidavit of Edward J. Adams, Jr. ("Affidavit"), ¶ 1, attached as Exhibit "A."

3 *Id.* ¶ 2.

4 *Id* ¶ 19.

At ATA, Fitzgibbons and Viguerie controlled all disbursements of ATA and client escrowed funds. Adams did not participate in, nor did he have authority to make decisions regarding mailings or the disbursement of client funds for any client.[5]

It was Adams's understanding that, prior to his commencing work at ATA, ATA used a long-established standard operating procedure by which it borrowed funds from various lenders for the postage required for each of its clients' mailings.[6] The nature of the direct marketing business is such that each mailing requires the payment of large up-front costs for postage and materials such as paper and envelopes, which are then usually recovered through the funds received in response to the mailings.[7] Because ATA, like most direct marketing companies, did not have large capital reserves, it relied heavily on financing through short-term loans from persons with whom it had established relationships, predominantly its "mail shop" vendors and its own employees.[8] The cash flow from these loans enabled ATA to attract clients who otherwise could not afford the initial outlay for a mass mailing, and ATA usually was able to make a profit once the response to the mass mailing was received.[9]

ATA's standard process for obtaining financing was as follows:

- ATA would request postage from a lender for a specific mailing and client.

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[5] *Id* ¶ 3.

[6] *Id* ¶ 5.

[7] *Id* ¶ 8.

[8] *Id*

[9] *Id.*

- ATA would provide an escrow agreement stipulating that the lender would receive the first money back on the mailing and that ATA was ultimately responsible for repaying this loan.[10]
- The lender would write a check to either the mail shop or the U.S Post Office.
- The lender would be paid back in funds raised from the respective mailing that were deposited into the client's escrow bank account.[11]

B. Adams Made the Loans for the Benefit of ATA.

In June or July 2000, ATA employee Nate Snelson, whose primary work at ATA was to arrange for lenders to advance money for specific mailings and clients, asked Adams if he would like to be a lender or if he knew of any possible lenders.[12] Adams consulted Fitzgibbons, as ATA President and General Counsel, about the offer, and Fitzgibbons explained the above-referenced standard financing process to him.[13]

In subsequent meetings, Viguerie and Fitzgibbons further encouraged Adams to make these loans and to seek out others capable of making loans, explaining to Adams how important it was to the business to have ready sources of financing for ATA's

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[10] Examples of escrow agreements between Adams and ATA for the CLPAC loans, are attached as Exhibits "C," "E," "G," "I," "K," "M," and "O." The guarantee clause, by which ATA promised to repay the vendor (*i e* , Adams) for any shortfall, is found in § 3(d) of the escrow agreements. Also attached, at "Exhibit P," is a contemporaneous escrow agreement for a different client, which was not a political committee, which shows that the terms of the agreement for ATA's PAC and non-PAC clients were identical. The names of the client, the vendor, and the particular mailing job, recited in the first paragraph, were the only terms of the agreement that changed.

[11] Affidavit ¶ 5.

[12] *Id.* ¶ 6.

[13] *Id.*

clients, most of which were non-FEC-regulated 501(c)(3) and (c)(4) clients. In most cases, neither the nonpolitical nonprofit clients nor the political clients of ATA had enough cash to pay the full cost of a mailing up front, so it was very important to ATA to have a supply of lenders available to pay for clients' mailing costs in advance.[14] If a client could not pay for the mailing in cash and no lender was available to advance the costs of postage or materials, the client would have to be turned away, and ATA's business would suffer. ATA did not distinguish between political and nonpolitical clients because prepayment would be made for both on comparable terms and for the same reasons, as evidenced by the use of the same escrow agreement for both types of client.[15]

Because Adams had limited knowledge of FEC filings and regulations, he asked Fitzgibbons how the loans would be recorded on reports submitted to the FEC. As CFO, he needed to know how to set up the accounting system and processes so as to facilitate the gathering of appropriate data for the FEC reports. Fitzgibbons specifically informed him that loans would be handled like any other loan to ATA clients. Fitzgibbons also stated to Adams numerous times that ATA's contracts and activities of its vendors and lenders with respect to FEC-regulated clients were being conducted under "an approved method by the FEC,"[16] and therefore Adams was assured the loans to CLPAC were in compliance with the Act.

Adams, as an employee of ATA, relied upon this advice from ATA and had no knowledge or reason to believe that the loans he made may have been considered by the

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[14] *Id.* ¶ 8.

[15] *See* Escrow Agreement exhibits referenced in *supra* note 10.

[16] *Id.* ¶ 17.

FEC to be in violation of the Act.[17] Pursuant to the advice offered by Fitzgibbons, Adams followed the same procedures with regard to CLPAC as he followed for all other clients. For example, interest was fixed at 2% per month on the loans Adams made for all ATA clients for whom he lent money, and the rate was not changed for CLPAC.[18]

After considering these issues, and because he wanted to be a "team player" by helping ATA's business as much as possible, Adams agreed to become a lender and to seek out other lenders, beginning in the summer of 2000.[19] A substantial majority of the postage loans he made while working for ATA—approximately 75 to 80%—were for mailings benefiting ATA's nonpolitical, nonprofit clients, rather than FECA-regulated political committees.[20]

All of the loans Adams provided for postage on behalf of ATA clients were guaranteed by ATA according to the terms of ATA's standard escrow agreement.[21] Thus ATA, not Adams, bore the complete risk of default if any of the loans were not repaid by the client. This supports the argument that Adams was acting as an agent for ATA: Adams merely provided the liquidity, but ATA assumed all liability.

CLPAC retained ATA to conduct its direct mail solicitations beginning in July, 2000. At Snelson's request, Adams made loans for various CLPAC mailings between August and December, 2000. Adams did not initiate any of the loan transactions himself or in consultation with CLPAC, but was told by an ATA employee when funds were

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[17] *Id.*

[18] *Id.* ¶ 13.

[19] *Id* ¶ 7.

[20] *Id.* ¶ 9.

[21] *Id* ¶¶ 5(b), 10; *See* Escrow Agreement exhibits referenced in *supra* note 10.

needed and in what amounts via a standard loan request memo, usually on ATA letterhead,[22] and he made the loans in response to those requests.[23]

Most of the mailings for which Adams lent money returned their startup costs, with interest, within 25 to 45 days after Adams lent the initial funds for postal expenses. The loans he made for the CLPAC mailings were no exception; all were repaid in a timely fashion, and the last one was timely paid in full by the end of January, 2001.[24] Thus, ATA never had to institute collection proceedings against CLPAC, nor did Adams have to invoke the provision of the escrow agreement calling for ATA, as guarantor, to repay him for any underpayment by the client.

As time went by at ATA, Adams's role as lender and intermediary with other lenders was encouraged and rewarded by Viguerie. He was praised for his work on behalf of the company, and in the spring of 2001 he received a raise in pay.[25]

Because his lending activity enabled ATA to retain more clients, it was a significant factor enhancing his value as an ATA employee. The loans proved so

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[22] Some representative memos requesting a check to be made to a vendor for a CLPAC mailing, along with copies of the checks Adams drew in response to them, are attached as Exhibits "B," "D," F," "H," "J," "L," and "N."

[23] Affidavit ¶ 12.

[24] *Id.* ¶ 14. As the attached records indicate, there was not usually a precise one-to-one ratio of disbursements made by Adams with payments received by Adams. As money from a direct mailing came in, a client would sometimes repay Adams for the loans on multiple invoices at once, and or might make partial payments for a single invoice on multiple checks. The invoice numbers for which payment was being tendered were always marked on the Memo line. However, as the RTB acknowledges, CLPAC had paid all its debts to Adams as of January 31, 2001.

[25] *Id* ¶ 15.

valuable to ATA, in fact, that by 2004, making these loans was Adams's sole responsibility at the company.[26]

III. ARGUMENTS

A. Every loan Adams made was fully guaranteed by ATA, and therefore the Regulations mandate that Adams cannot be held liable for making a "contribution" under the Act.

Because the escrow agreements always provided that ATA guaranteed the loans Adams made, the Regulations themselves dictate that ATA, not Adams, should be considered to be the entity making the loans and therefore liable for any ramifications resulting from the loans. At the time Adams made the loans, the Regulations defining "contribution" explained that liability for making a loan or guarantee would be attributed in the following manner:

> Each endorser or guarantor shall be deemed to have contributed that portion of the total amount of the loan *for which he . . . agreed to be liable* in a written agreement. . . . In the event that such agreement does not stipulate the portion of the loan for which each endorser or guarantor is liable, the loan shall be considered a loan by each endorser or guarantor in the same proportion to the unpaid balance that each endorser or guarantor bears to the total number of endorsers or guarantors.[27]

All the postage loans that Adams made, including those for the CLPAC mailings, were fully guaranteed by ATA pursuant to section 3(d) of the escrow agreements. ATA bore *100%* of the risk of default; Adams himself did not agree to be liable for *any* portion of a potential nonpayment. In essence, by issuing the checks to the vendors, Adams was simply making the loans for cash flow purposes for the benefit of ATA. Had there been

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[26] *Id* § 16. In early 2001, Adams also started a new corporation, Braintree, to facilitate the bringing in of additional lenders for ATA's benefit. This corporation was not involved in making any of the postage loans for CLPAC at issue in this MUR, as CLPAC received its last loan from Adams in December 2000.

[27] Former 11 C.F.R. § 100.7(a)(1)(i)(C) (2000)(emphasis added).

any unpaid balance that CLPAC was unable to satisfy, only ATA and not Adams would have been responsible for assuming the debt, and ATA had the contractual obligation to repay any unpaid balance to Adams.

The Regulations thus dictate that because ATA fully guaranteed the loans Adams made, only ATA, as the guarantor, is the one to whom the loan and alleged contribution should be attributed. The RTB Finding fails to discuss or even note this point. Adams cannot be held personally liable for a loan for which he bore no liability in the event of default. To hold him responsible for it when ATA clearly bears responsibility as guarantor would lead to the nonsensical conclusion that a single "contribution" was made by two separate entities. How could CLPAC be expected to have attributed the contribution in its reports to the FEC, if such were the case?

Therefore, the loans Adams made to CLPAC's vendors cannot possibly be deemed to be contributions from Adams, based strictly upon the Regulations' definition of "contribution." If a contribution occurred in these loans, only ATA is liable for making it—and, as noted below, the FEC Regulations (§ 116.3), advisory opinions (AO 1979-36), and enforcement cases (MURs 3027 and 5173) recognize that ATA was and continued to be permitted to make the postage loans at issue in this matter.

B. Adams made loans for the CLPAC mailings in his capacity as an agent of ATA, and therefore no personal liability can attach to Adams for the loans he made.

1. An agency relationship existed between Adams and ATA, and the loans Adams made for the CLPAC mailings were within the scope of that agency relationship.

In addition to the argument from the regulatory text above, traditional rules of agency also absolve Adams of personal liability for being deemed to have made any contribution to CLPAC. When Adams made the loans for client mailings, including the

CLPAC mailings, he was invariably acting as an agent of ATA. "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."[28] An agency relationship "may be inferred by the conduct of the parties and from the surrounding circumstances."[29] In this case, the conduct of the parties and the surrounding circumstances leave no doubt whatsoever that Adams was acting as an agent of ATA by making these loans.

a) Agency is inherent in the employment relationship between ATA and Adams.

First, ATA manifested its consent that Adams should act on its behalf and subject to its control. Its hiring of Adams as Chief Financial Officer in 2000 is significant evidence of this fact. In the position of CFO of ATA, Adams had not only a duty to serve the company as an employee, but *fiduciary* duties of care, loyalty, and obedience to act in the best interests of ATA. Even though the specific practice of lending money for clients' postage was not part of Adams's initial job description, it quickly became his primary responsibility at ATA, and ultimately was his *only* responsibility at ATA. That Adams received a salary as compensation for making these loans is probative evidence that he made the loans in the scope of his employment and as an agent acting on behalf of ATA, *not* in his individual capacity or as an "independent contractor."

b) Adams was expressly authorized by ATA to make the loans.

In addition to the agency arising from the nature of the employment relationship,

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[28] RESTATEMENT (SECOND) OF AGENCY § 1 (1958).

[29] *Bishop v. Med Facilities of Am. XLVII(47), LP*, 65 Va. Cir. 187 (2004)(citing *Accordia of Virginia Ins Agency, Inc. v. Genito Glenn, L.P.*, 263 Va. 377, 384, (2002)).

ATA *expressly* authorized Adams to act on its behalf by verbally manifesting its intention that Adams should act on its behalf and subject to its control. The many conversations in which Viguerie, Fitzgibbons, and Snelson invited and encouraged Adams to make the loans, explaining how important it was to ATA's business that such financing be available, in addition to their rewarding of Adams with a pay raise, provide ample evidence of this manifestation of consent.

Another key piece of evidence that Adams made the loans as an agent of ATA is that Adams was subject to ATA's right to control the manner in which he made the loans. "[I]n most jurisdictions, the determinative test in establishing an agency is a finding that the principal has the right to control the agent's manner or method of achieving desired results."[30] Among the indicia utilized to evaluate whether such a right to control exists are "such facts as the matter of having the right to discharge, the manner and direction of the work of the parties, and the right to terminate [the] relationship."[31]

In the present case, it is abundantly clear that ATA had the right to control Adams's manner and method of achieving desired results when it called on him to make the postage loans for CLPAC and other clients. Although Adams could choose to accept or reject any particular offer from ATA to make a loan, that ability to choose to go forward is not, as a matter of law, determinative of whether an agency relationship exists. Rather, the "manner or method" of control is what matters—and here, Adams did not

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[30] *Patrick v. Miss New Mexico-USA Universe Pageant*, 490 F. Supp. 833, 839 (W.D. Tex. 1980); *cf. Chemtool, Inc. v. Lubrication Techs.*, 148 F.3d 742 (7th Cir. 1998)("The test of agency is whether the alleged principal has the right to control the manner and method in which work is carried out by the alleged agent and whether the alleged agent can affect the legal relationships of the principal.").

[31] *Jones v Atteberry*, 77 Ill. App. 3d 463, 468 (1979); *Lewis v Mt. Greenwood Bank*, 91 Ill. App. 3d 481, 487 (1980). "These indicia of status are not conclusive, but merely aid in determining each case on its own particular facts." *Gunterberg v. B & M Transp Co* , 27 Ill. App. 3d 732, 738 (1975).

have any control over, or even involvement in, negotiations for the loans' terms with CLPAC, any other client, or the mail house vendors. He was not permitted to approve mail house vendors or clients or solicit them for new business. Rather, every loan he made was controlled by ATA pursuant to a specific request from ATA, in a memo usually typed on ATA letterhead, to make postage loans for clients in amounts predetermined by ATA, and the terms of which were governed by an unchanging escrow agreement between ATA and Adams.

But for the specific requests by ATA staff, Adams would never have made *any* of the postage loans; his fiduciary employment relationship would have precluded him from soliciting an ATA client such as CLPAC, to serve as a postage lender, without the authorization of ATA. The fact that Adams made the loans *only* when they were requested by ATA, and *always* for the amounts dictated by ATA, shows ATA's unmistakable power of control over the manner in which Adams made the loans. This leaves no room but to conclude that Adams was acting in his capacity as an agent of ATA.

In addition, the indicia that courts use to distinguish an employee-agent from an independent contractor also support a finding of an agency relationship here. It is undisputed that, at the time he made the loans for the CLPAC mailings, Adams was an employee of ATA who received a regular salary from ATA, was capable of being discharged by ATA, and in making the loans was subject to the direction of ATA. As noted above, his fiduciary duty to ATA *compelled* him to act only with ATA authorization in making the postage loans.

c) Objections to the existence of agency based on certain circumstances are invalid.

Moreover, the fact that Adams drew the checks for the postage loans from a personal checking account is no evidence against the fact that he was acting as an agent of ATA in making the loans. ATA expressly authorized him to write the checks,[32] specifying in memos to Adams the amount of each loan, the purpose of the loan, and the name of the payee.[33] And when ATA specifically requested for Adams to write the checks and he agreed to do so, he was not only authorized but *obligated* to carry out those instructions. "A person who makes a contract with another to perform services as an agent for him is subject to a duty to act in accordance with his promise."[34] By writing the checks at ATA's explicit direction, Adams was undeniably acting in accordance with his duties as ATA's agent.

Likewise, the fact that Adams profited personally from making the loans by receiving interest on them is no reason not to find that agency existed here. It is true that, *in the absence of agreement*, there is a default inference that all activities conducted by the agent must be for the benefit of the principal, rather than himself,[35] and that all profits the agent receives in transactions for the principal's benefit must be given to the

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[32] "An agent has 'actual authority' to act on a principal's behalf when the principal's words or actions (i.e., the principal's 'manifestation' of intent) would lead a reasonable person in the agent's position to believe that he or she was so authorized." *Kinesoft Dev. Corp. v. Softbank Holdings, Inc.*, 139 F. Supp. 2d 869, 899 (N.D. Ill. 2001).

[33] *See, e g.*, the check request memos referenced in *supra* note 22.

[34] RESTATEMENT (SECOND) OF AGENCY § 377 (1956). It is also well established in the case law that individuals may write personal checks in their capacity as agents when, as here, to do so accomplishes the goals of the principal. *See, e g , Cassidento v United* States, (D. Conn. 1990); Cross *v White*, 112 S.W. 2d 502 (Tex. App. 1937)(*aff'd,* 134 Tex. 91 (1939)(cattle merchant held to be an agent entitled to indemnity for personal checks written in scope of contractual relationship); *Williams v. Commercial Trust Co.*, 276 Mass. 508 (1931)("straw man" who used personal checks to purchase land for a trust company an agent entitled to indemnity). In these cases, even though the agents were only agents by contract and not employees of the principal, the courts found the personal checks they wrote were a part of their agency relationship, and the principals were obligated to repay them for writing those checks.

[35] RESTATEMENT (SECOND) OF AGENCY § 39 (1958).

principal.[36] However, the comments to the Restatement (Second) of Agency say explicitly that the agent and principal may agree for the agent to receive some personal gain from the activities he conducts on the principal's behalf.[37] It is only *undisclosed* and *unauthorized* profits that violate the agent's duty to the principal.[38]

Here, ATA explicitly offered the potential for receiving interest payments as an incentive for Adams to make the loans. To encourage Adams to make the loans for the benefit of ATA, it authorized him to be paid interest on those loans. Adams therefore received the interest from the clients with ATA's full knowledge and agreement. The corresponding benefit to ATA was that the loan enabled the mailing to be sent and created a profit-making activity for ATA. Thus, Adams did not breach any duty to ATA by receiving interest, and the fact that he received interest does not in any way negate the existence of the agency relationship.

Finally, we note that Adams consented to act on behalf of and subject to the control of ATA in making the postage loans for mailings by CLPAC and other ATA clients, which by the end of his employment with ATA had become his sole activity as an employee. Thus, all the requirements for the existence of an agency relationship between ATA and Adams—that the parties mutually consented that Adams would work on behalf and under the control of ATA—have been met.

All future references to Adams in this Response Brief will be made with the implicit understanding that it is made in the context of his position as an agent of ATA.

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[36] *Id* § 388.

[37] "By agreement, the principal can authorize the agent to act for the latter's benefit." *Id* § 39, cmt. a.

[38] *Id* § 388, cmt. a.

2. *Because Adams made the loans for the CLPAC mailings while acting as an agent of ATA, any finding, including RTB, can only be made against him as an agent of ATA, not in his personal capacity.*

When an agent acts within the scope of the agency relationship, at the direction and for the benefit of the principal, and his actions as an agent result in some form of liability, he is not personally responsible for the liability that results. "Unless otherwise agreed, a person making or purporting to make a contract with another as agent for a disclosed principal does not become a party to the contract."[39] Rather, the principal at whose direction he acted bears the primary liability.[40]

Neither the escrow agreement nor any other written or oral agreement waived or restricted the obvious agency relationship established between ATA and Adams, as would be required had the parties to the Escrow Agreements not intended to create an agency relationship between ATA and Adams. Because Adams acted as ATA's agent in making the loans, only ATA, *not* Adams, is liable.[41] In light of the evidence of agency now before the Commission, the Commission is obligated to void its previous RTB Finding against Adams in his personal capacity and absolve him of any charges that would result in personal liability, and alternatively issue a new RTB Finding against him only in his capacity as an agent of ATA, should the Commission desire to further investigate this matter as to the loans made by Adams. However, in light of the agency

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[39] RESTATEMENT (SECOND) OF AGENCY § 320 (1958).

[40] "[A] principal is subject to liability upon a transaction conducted by his agent, whom he has authorized or apparently authorized to conduct it in the way in which it is conducted, as if he had personally entered into the transaction." *Id.* § 140.

[41] "An agent who has incurred a liability or sustained a loss in properly executing the instructions of his principal has a right to look to the latter to exonerate him from such liability or reimburse him for the loss. The person to whom the agent has incurred a liability in the proper execution of his agency can reach the right of the agent to be exonerated by his principal in satisfaction of his claim against the agent." *Central Trust Co. v. Rudnick*, 310 Mass. 239, 240-41 (1941)(citations omitted). *See also Cross* and *Williams*, *supra* note 34.

relationship and arguments pertaining to § 116.3 below, such further investigation or findings against Adams are not justified.

C. The loans made by Adams on behalf of CLPAC were made in ATA's ordinary course of business, and are therefore exempted from the definition of "contribution" by 11 C.F.R. § 116.3.

The provisions of 11 C.F.R. § 116.3 apply to exempt the loans Adams made to mail vendors of CLPAC from the FECA definition of "contribution," and thus render untenable the Commission's contention that Adams made excessive contributions through these transactions.

1. ATA was a commercial vendor that extended credit to a political committee.

Commercial vendors are defined in the Regulations as, "any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease or provision of those goods or services."[42] ATA meets the definition of "commercial vendor" because its usual and normal business is to provide nonprofit organizations, including political committees such as CLPAC, with the services of creating and implementing a direct mail campaign, which includes providing postage and printing services.

"Extension of credit" is defined in the Regulations as "[a]ny agreement between the creditor and political committee that full payment is not due until after the creditor provides goods or services to the political committee."[43] Here, Adams, in his capacity as an agent of ATA, extended credit to various vendors of CLPAC, because he contractually agreed to pay for the costs of postage before CLPAC would be obligated to repay him.

[42] 11 C.F.R. § 116.1(c) (2000).

[43] *Id* § 116.1(e)(1).

Since Adams was an agent of ATA, if ATA would have been able to make the loans at issue from ATA treasury funds under § 116.3, then Adams "stood in the shoes" of ATA and as a matter of law was authorized as its agent under § 116.3 to make the loans without a contribution resulting.

2. *No contribution resulted when ATA, through Adams, extended credit to CLPAC vendors in its ordinary course of business.*

Under the Regulations, incorporated commercial vendors such as ATA may extend credit to a political committee in the ordinary course of business without a contribution resulting.[44] The term "ordinary course of business" has a three-part definition in § 116.3(c), which provides:

> (c) *Ordinary course of business.* In determining whether credit was extended in the ordinary course of business, the Commission will consider—
>
> (1) Whether the commercial vendor followed its established procedures and its past practice in approving the extension of credit;
>
> (2) Whether the commercial vendor received prompt payment in full if it previously extended credit to the same candidate or political committee; and
>
> (3) Whether the extension of credit conformed to the usual and normal practice in the commercial vendor's trade or industry.

We will deal briefly with each part of this test, being mindful that Adams's only dealings with CLPAC were to write checks to the U.S. Postmaster or other vendors for the CLPAC mailings, then receive payment back from CLPAC after a period of weeks.

(a) Adams's extension of credit followed ATA's established procedures and past practices.

The first part of the ordinary course of business test asks whether the commercial vendor followed its own established procedures and past practice in approving the

[44] *Id.* § 116.3(b).

extension of credit.[45] Here, ATA had established a long history of extending credit to its customers through intermediaries such as Adams. It used a highly standardized escrow agreement form, which did not vary based on the client's political or nonpolitical nature, to establish the terms of each loan, and to send memos to lenders requesting a loan for a particular mailing was its regular and usual procedure for financing such loans.

The process of obtaining financing from a lender was a well-established practice at ATA even before Adams's arrival. As a matter of standard procedure, once Viguerie and Fitzgibbons determined to conduct mailings for a client, such as CLPAC, based upon what they considered to be a commercially reasonable agreement, they would seek sources of financing to provide for standard business cash flow needs to include printing and postage. For each mailing at issue in the MUR, Snelson or another intermediary contacted Adams to see if he would be willing to make a postage loan of a predetermined amount. These requests usually appeared on ATA letterhead.[46] Adams, in turn, prepared invoices on his own letterhead to bill the client for the loans requested plus two percent (2%) monthly interest.

For all the loans he made to CLPAC vendors, Adams was required by ATA to carefully follow the standard procedures that ATA had established. Adams complied with these procedures, using the exact same escrow agreement containing the same repayment terms used for all other loans to ATA clients, most of which were not political committees. Therefore, the first prong of the ordinary course of business test, considering whether procedures and past practices have been followed, is satisfied.

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[45] *Id.* § 116.3(c)(1).

[46] *See* check request memos referenced at *supra* note 22.

(b) After the first few loans, Adams's extension of credit was founded on CLPAC's history of prompt repayment.

The second prong of the ordinary course of business test asks whether the commercial vendor received prompt payment in full if it previously extended credit to the same candidate or committee. This provision is invoked only when there is a history of extending credit to a particular client.

Because Adams made a series of loans on CLPAC's behalf over a period totaling five (5) months at the end of 2000, the second prong of the ordinary course of business test is properly applied to his later loans to CLPAC vendors, using the prompt repayment he received for his initial loans for the CLPAC mailings as the standard against which subsequent loans would be assessed to determine compliance with this second prong of the Regulations' standard.

When this element of the test is applied, it is abundantly clear that Adams satisfies it, too. CLPAC always paid the loans back to Adams within 25 to 45 days after he disbursed them—well within the business standard for "a reasonable time," taking into account that donations in response to direct mailings take weeks to be received, caged, deposited, and vendors paid. As stated previously, every loan Adams made for a CLPAC mailing had been paid in full, with the full interest required in the agreement, by January, 2001. Thus, the loans Adams made were fully consistent with the second prong of the ordinary course of business test.

(c) ATA extended credit to CLPAC in conformance with the usual and normal practice of the direct mail industry.

The third prong of the ordinary course of business test asks whether the extension of credit by Adams conformed to the usual and normal practice in the trade or industry. It is perhaps this area in which the RTB Finding's analysis appears the most confused.

Balking at the large operating losses incurred by ATA—though not by Adams—in connection with the CLPAC mailings, the Commission appears to consider those losses as prima facie evidence against conformity with normal industry practice. Yet in the intensity of its focus on whether the large operating losses sustained by ATA in connection with its work for CLPAC were according to industry standards, the Commission becomes sidetracked by that issue, which is not relevant to the point that ATA's simple practice of borrowing from its own employees to pay up-front postage costs was well within established industry standards. Concerning the loans made by Adams, it is that narrow issue that is to be measured against the third prong of the above-stated regulatory test—*not* the operating losses by ATA.

In its 40-year history as a pioneer in the direct marketing business, ATA has for decades engaged in the practice of using key employees to help with cash flow. In fact, given its early and continued success in the direct mailing realm, and the many companies since its beginning that have attempted to emulate its business model, ATA can legitimately claim to have *set* the industry standard. As Adams has testified, by the time he arrived at ATA, it was a well-established practice for ATA to receive loans from its employees and others.[47] Because of ATA's significant role in defining the industry standards for the direct mail industry, Adams's compliance with ATA's long-established in-house standards also conform to the usual and normal practice of the direct mail industry.

Therefore, the Commission should determine that, at least as regards the loans Adams made, ATA was extending the credit to CLPAC in the ordinary course of

[47] Affidavit § 8.

business under § 116.3.

D. As applied to the loans made by Adams, the MURs cited by the RTB Finding are distinguishable from the present case.

The authorities for justifying Finding 3 of the RTB Finding rely heavily on two previous MURs in concluding that payments made by Adams were excessive contributions: MURs 3027 and 5173. MUR 3027 is distinguishable because Adams, acting as an agent of ATA in making the loans, was not a true "third party lender." MUR 5173 is distinguishable for that reason and because the facts of the case are so markedly different, with the lender significantly reducing the debtor committee's obligations on commercially unreasonable terms—quite unlike Adams, who was paid in full by the committee for every loan he made on its behalf.

1. Because Adams was acting as an agent of ATA, the facts of MUR 3027 are distinguishable from the present case.

In MUR 3027, the Commission found that postage loans made by a corporate third party lender[48] for the benefit of a federal committee were in violation of the Act's ban on corporate contributions when the credit was not extended in the ordinary course of business.[49] However, with respect to the loans made by Adams as an agent of ATA, the situation in MUR 3027 is markedly distinguishable from the facts in the present case.

At the time it decided MUR 3027, the FEC had previously ruled, in Advisory Opinion ("AO") 1979-36, that a direct marketing firm *was* permitted to pay the up-front costs of postage and other materials for its political committee clients without a contribution resulting, when it did so in the ordinary course of business and on

[48] Other than a bank: *see* 11 C.F.R. § 100.7(b)(11) (2000), now at 11 C.F.R. § 100.82 (2004).

[49] 2 U.S.C. § 441b(a) (2000).

commercially reasonable terms.[50] Direct Marketing Finance & Escrow, Inc. ("DMFE"), a postage lender and the primary respondent in MUR 3027, contended that AO 1979-36 protected its lending activities because the loans were made in the ordinary course of business for the direct marketing industry.

However, in MUR 3027, the FEC distinguished AO 1979-36 based upon DMFE's status as a third party lender, saying, "Although in that Advisory Opinion the Commission said the direct mail firm could advance the start-up costs of the mailing, the issue of a third party lender was not addressed."[51] The Commission found that DMFE had indeed made impermissible corporate contributions by lending on the committee's behalf, but ultimately declined to take further action against DMFE on that basis because "certain mitigation [was] warranted."[52]

Because Adams was acting as an agent of ATA when he made the loans to CLPAC vendors, the facts of MUR 3027 are distinguishable from the present case. Adams was not a "third party lender" as DMFE was, but rather was acting within the scope of his employment with ATA. The Commission held in AO 1979-36, and reaffirmed in MUR 3027, that postage loans are *specifically permitted* and are not deemed to be contributions when made in the ordinary course of business of a direct mail firm by the firm itself.

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[50] This opinion relied largely on former 11 C.F.R. § 114.10(a), the predecessor to the current section 116.3, which provided that "a corporation may extend credit to a political committee only if that credit is extended in the ordinary course of the corporation's business and the terms are substantially similar to extensions of credit to nonpolitical debtors which are of similar risk and size of obligation." AO 1979-36.

[51] MUR 3027: Gen. Couns. Rpt., 3 (1991).

[52] *Id.* at 5. Among the major factors tending to mitigate DMFE's liability were the fact that the loans it made were guaranteed by a different direct mailing entity (as is the case with ATA), and its lack of awareness that one of the entities for which it made loans was a political committee.

Adams was a full-time employee of ATA when he made the loans, all the loans were fully guaranteed by ATA, and Adams issued every loan at the direction and for the benefit of ATA. As detailed in our arguments above, under the plain meaning of the Regulations defining a contribution and the long-established rules of agency law, it is ATA and not Adams who bore the full legal responsibility for making those loans. Therefore, the loans Adams made should be attributed to him in his capacity as an agent of ATA, not as a third party independent "subcontractor" as the RTB Finding characterizes him. The Commission should also recognize that, based upon the lack of a true third party lender situation, the loans made by Adams for ATA are analogous to the postage loans in AO 1979-36 and not to the loans prohibited in MUR 3027.

2. *Because Adams was acting as an agent of ATA and lent on commercially reasonable terms, the facts of MUR 5173 are distinguishable from the present case.*

For the above and additional reasons, MUR 5173 is also inapplicable to the facts surrounding the loans made by Adams. MUR 5173 again dealt with DMFE. The Commission held in MUR 5173 that DMFE had made impermissible corporate contributions as a third party lender to a political committee, and moreover had reduced the interest rate and extended the repayment period multiple times for the benefit of the debtor committee, giving it far more favorable treatment than it had been entitled to receive under the terms of the original loan agreement.

As explained above, in this case Adams was acting in his capacity as an agent of ATA, and not as a third party lender such as DMFE. Thus, the "third party lender" issue is moot, and the holding of AO 1979-36 that permits direct mail companies to advance the costs of postage for their political clients may be properly applied as a safe harbor for the loans Adams made.

Moreover, the additional prejudicial factors that the FEC found against DMFE in MUR 5173 are also nowhere to be found in the case against Adams. By the time it engaged in the activities under review in MUR 5173, DMFE had been put on explicit notice by the Commission in MUR 3027 that it was not supposed to act as a third party postage lender for any more political committees.

Unlike DMFE, Adams did not have any prior warning that his lending of postage funds could incur liability as a "contribution" under the Act. Adams had consulted ATA legal counsel, Mr. Fitzgibbons, to ensure that the lending was proper, and had in good faith acted on Fitzgibbons's assurance that all was being done under a method approved by the FEC.

Additionally, unlike DMFE, Adams always received timely payment in full from CLPAC for his postage loans. DMFE had continually renegotiated the loans for the benefit of the political committee debtor, changing the terms of its financing agreement to go from 6.75% monthly (81% annual) interest, to 54% annual interest over four years, to 42% annual interest over five years with no compound interest, and finally to 10% over ten years. Adams, in stark contrast, charged a fixed monthly rate of 2% interest, never renegotiated it, and received all his payments in full and on time.

Therefore, in light of Adams's role as an agent of ATA, and given the facts that he relied in good faith on assurances that his activities were legal and that he never even attempted to reduce CLPAC's debt without receiving full payment, the Commission should find that the facts of MURs 3027 and 5173 are materially distinguishable from the facts relating to the loans made by Adams.

IV. CONCLUSION

In view of the facts clearly demonstrating that Adams was acting solely as an agent of ATA, the Commission is obligated to remove Adams from the scope of its investigation in his individual capacity, and attribute the loans Adams made for the CLPAC mailings to ATA alone. Moreover, since these loans were extensions of credit by a commercial vendor within the ordinary course of business, the Commission should find that the safe harbor provisions of 11 C.F.R. § 116.3 preclude those loans from being considered "contributions" under the Act, and therefore that they were not excessive contributions in violation of the $5,000 annual PAC contribution limit found in 2 U.S.C. § 441a(a)(1)(C).

For these reasons, the Commission should close the file on Respondent Adams, in this matter.

Respectfully submitted,

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