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October 3, 2007

Thomasenia P. Duncan
General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: MUR 5646 - Response of Burton Cohen & Cohen for New Hampshire

Dear Ms. Duncan:

We are counsel to Burton Cohen and his principal campaign committee, Cohen for New Hampshire ("the Committee"). We write to oppose the Office of General Counsel's recommendation of a finding of probable cause to believe that Mr. Cohen knowingly and willfully violated 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d), and that the Committee violated 2 U.S.C. §§ 432(c), 432(h), and 439a(b) and knowingly and willfully violated 2 U.S.C. §§ 441i(e)(1)(A) and 434(b) and 11 C.F.R. § 110.3(d).

Respondents request an oral hearing before the Federal Election Commission, to address the issue of the appropriateness of levying fines against a political committee based on the behavior of a rogue employee, acting alone, who has admitted to stealing funds from the committee and falsifying reports to cover his crime.

A. Background

As the background of the General Counsel's brief itself demonstrates, Mr. Cohen and the Committee were the victims of a pattern of fraud and deception perpetrated by the then-campaign manager, Jesse Burchfield.

Burt Cohen was a fourteen-year veteran of the New Hampshire State Senate. He filed as a candidate for the United States Senate from the state of New Hampshire on January 16, 2003, and Cohen for New Hampshire filed a Statement of Organization on January 27, 2003. His campaign ended on June 10, 2004, when he was forced to withdraw from the election due to "a campaign situation beyond his control." B. Wang, *Cohen Not Saying Why He Quit*, ASSOCIATED

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PRESS, June 11, 2004. That "campaign situation" was the abrupt departure and disappearance of Burchfield from the campaign, along with the discovery by Cohen and campaign staff that the campaign had roughly $300,000 less cash-on-hand than Burchfield had previously informed both them and the Commission. (Cohen Dep. 164, Dec. 8, 2006).

Burchfield's abrupt departure was on June 7, 2004. Immediately after Burchfield's disappearance, he left a message on Cohen's cellular voice mail, which we presented to the Office of General Counsel during the course of its investigation. On the message, Burchfield admits culpability for the Committee's violations. "I am so, so sorry," he says. He told Cohen *that he would "take the blame for all of this. It's all my fault; I'll take whatever comes my way."* (*See* GC Br., Cohen for N.H. 4 n.4).

Three days later, on June 10th, Cohen withdrew from the race; at the same time, he hired counsel as well as an accounting firm to conduct a forensic audit. (*Id.* 4). The Committee notified the Commission of Burchfield's malfeasance in letters to the Reports Analysis Division on June 23 and again on July 15, 2004. The Committee filed partial amendments on December 2004. After a year of investigation to reconstruct the records, the Committee filed a comprehensive set of amendments on July 1, 2005.

As the General Counsel's briefs detail, the investigation revealed that Burchfield engaged in a pattern of fraud and deception during his tenure as campaign manager. He was solely responsible for a pattern of willful reporting errors, resulting in a failure to disclose $187,720 in disbursements, over-reporting receipts in 2003, failing to itemize contributions in 2004, and "fabricating or inflating" almost $50,000 in itemized contributions. (GC Br., Cohen for N.H. 12). Burchfield also admitted to using the Committee's bankcard to pay for $4,681.13 in personal transactions, including multiple payments to online pornography sites; he also withdrew roughly $9,500 in ATM withdrawals. (*Id.* 10; Burchfield Aff. Ex. 2).

The result of Burchfield's miscellany of theft and fraud against the Committee forced Mr. Cohen to withdraw immediately as a candidate; the Committee has spent the past three years, and many thousands of dollars, in an attempt to assess the damage and set the record straight. The Committee has so far spent a total of $33,719.60 to the audit firm of Evans & Katz to conduct an extensive forensic audit and file the amended reports. As of the last quarterly filing, the Committee reported $82.03 cash on hand, and over a quarter of a million dollars in debts and obligations.

On November 14, 2005, Burchfield pleaded guilty to a felony count of making false statements to the Commission. He was sentenced to one year of probation with six months of home confinement. (Burchfield Aff. ¶ 23).

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B. Legal Argument

Burt Cohen and his principal campaign committee were victimized; of that there is no doubt. Jesse Burchfield controlled every aspect of the campaign for the sole purpose of embezzling funds from the campaign, and covering his tracks. When the truth unfolded, not only was Mr. Cohen unable to continue his political campaign, but he and the Committee have since paid many thousands of dollars to correct the public record, and enormous debts remain.

Outrageously, the Office of General Counsel would like to make Respondents responsible for this malfeasance. Not only do they blame Respondents for not discovering and correcting Burchfield's fraud sooner; In doing so, they credulously base their entire case on an affidavit submitted by Burchfield, who is now a convicted felon, and who has every reason to lie to defend his actions.

The facts do not support the Office of General Counsel's recommendations. We ask that the Commission find that no probable cause exists to support a finding of violations by the Committee of 2 U.S.C. §§ 432(c), 432(h), 434(b), or 439a(b). We have recognized that both the Committee and Mr. Cohen have inadvertently violated 2 U.S.C. 441i(e)(1)(A); we ask that the Commission find that no probable cause exists that Respondents knowingly and willfully violated 2 U.S.C. 441i(e)(1)(A).

1. Section 441i(e)(1)(A): The Prohibition Against the Use of Non-Federal Funds to Pay for Federal Campaign Activity

Respondents have consistently acknowledged that in January and February 2003, Mr. Cohen's state senate campaign, Friends of Burt Cohen, issued checks to a variety of sources for federal electoral purposes. In the amended quarterly report filed with the Commission two years ago, the Committee reported $20,266.71 in in-kind contributions from the state senate campaign. The state senate campaign contained almost exclusively individual contributions; therefore, it could legally contribute $1,000 in a calendar year to the Committee, resulting in $19,266.71 in excessive contributions.

However, the facts do not support a knowing and willful finding against Mr. Cohen. The General Counsel's briefs allege that Mr. Cohen had a scheme to use the state funds for his federal

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election; they base this allegation solely on the testimony of the convicted felon Burchfield. This allegation is false.

Mr. Cohen stated in his sworn deposition that during the state senate campaign in 2002, Burchfield, then the state senate campaign manager – not Mr. Cohen – suggested that the campaign raise excess funds for use in a future election. (Cohen dep. 39, 42). Mr. Cohen was strongly considering running for governor, and the state funds would have been perfectly appropriate for that use. (*Id.* 14, 39). Once it was decided that he would run for the United States Senate, it was Burchfield who insisted that the use of the state funds would still be legal to use, after repeated questioning by Cohen. (*Id.* 195). Burchfield said "Trust me." (*Id.* 41). Cohen testified, under oath: "The first time I found out it was inappropriate to do that was the fall of 2004." (*Id.* 162). The facts support this statement; after all, the state senate campaign reported these expenditures on its 2003 report to the New Hampshire Secretary of State, a nonsensical act if Mr. Cohen knew the expenditures to be illegal.

As the General Counsel notes, a "knowing and willful" finding requires evidence that "actions [were] taken with full knowledge of all of the facts and a recognition that the action is prohibited by law." 122 Cong. Rec. H2778 (daily ed. May 3, 1976). There must be "proof that the defendant acted deliberately and with knowledge" that the action is lawful. *United States v. Hopkins*, 916 F.2d 207, 214 (5th Cir. 1990). Mr. Cohen plainly did not meet that standard.

The only evidence to the contrary is Burchfield's affidavit. Burchfield is not only a felon; his crime was one of moral turpitude, committed against Mr. Cohen and the Committee. His affidavit cannot be believed over the sworn testimony of Mr. Cohen – the subject of cross-examination by the Office of General Counsel – and consistent with the inclusion of these expenses on the state senate reports. The facts cannot support a finding that Mr. Cohen's violation of § 441i(e)(1)(A) was knowing and willful.

The Commission also argues that the Committee's violation of § 441i(e)(1)(A) was knowing and willful, based on the fact that Burchfield has admitted a knowing and willful violation, and the Committee should be held responsible for Burchfield's knowledge through *respondeat superior*. A finding of knowing and willful against the Committee would be a miscarriage of justice. Here, the Office of General Counsel has an admission from a rogue employee that he knowingly and willfully violated the law; instead of prosecuting that employee for these actions, they have decided instead to further penalize his employer while taking no action against the actual culprit. When, as here, the source of the knowing and willful violation is limited to one employee who actively misled the Committee, the Commission should find a knowing and willful violation only by that employee.

Finally, while Respondents admit to using state senate funds in January and February 2003 for federal purposes, Respondents object to the General Counsel's new claims that salary and

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housing payments made to Burchfield and his landlord in November and December 2002, and the salary payment to Burchfield on January 2, 2003, were for federal purposes. Again, the only evidence presented that these 2002 expenses were for federal purposes is the unbelievable testimony of Burchfield. Both Mr. Cohen's testimony, and the surrounding facts, indicate that the campaign was not operational until January 2003, and that no funds were spent to advance the federal campaign before that time.

Mr. Cohen's statement of candidacy was filed on January 16, 2003; his committee's statement of organization was filed on January 27. The Committee reported no contributions received until January, and there is no evidence to suggest that contributions were received before that time. Moreover, the campaign office was not opened until January. (Cohen dep. 50). The payments for Burchfield's salary, and for his housing expenses, in November and December (including his last paycheck for December, which was dated on January 2) was a reflection of his work on the state senate campaign in November, and the agreed-upon bonus he received for the state senate victory: his full salary in December while on vacation. (*Id.* 17-18). And indeed, Burchfield did take the month of December off; he did no work during that time for any campaign. (*Id.* 50).

Thus, while Respondents acknowledge a violation of § 441i(e)(1)(A), we do not believe that the facts support a finding of a violation regarding any expenses relating to November or December 2002.

2. Sections 432(c) & 434(b): Filing Inaccurate Disclosure Reports & Failing to Maintain Appropriate Records

Burchfield was solely responsible for all aspects of the Committee's financial operations. As he had insisted, he "controlled the checkbook, the bank statements, the use of the Committee's ATM and debit card." (GC Br., Burton Cohen, RTB Factual & Legal Analysis 6). He was the only person with access to the Committee's incoming mail, and he was the only person making deposits into the bank account. (*Id.*). He was the only person who prepared the Committee's reports, and the evidence indicates that he even signed reports filed with the Commission by forging the name of the Committee's treasurer. (*Id.* 4-5).

The General Counsel's brief admits Burchfield's "broad authority" over the recordkeeping and reporting. (OGC Br., Cohen for N.H. 14). And yet instead of prosecuting Burchfield for these acts, they instead target the Committee, by arguing that through *respondeat superior*, the Committee is liable for Burchfield's actions "because almost all of the intentional misreporting committed by Burchfield was undertaken for the Committee's benefit." (*Id.* 15).

It is true that Burchfield defended his actions as for the benefit of the Committee, due to his "concern[] that the campaign would fold unless it appeared that we were raising a certain level of funds." (Burchfield Aff. ¶ 20). But that is nothing more than the after-the-fact defense of a

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convicted felon. In fact, Burchfield's single-handed control over the recordkeeping and reporting, and the fraudulent reports he filed with the Commission, were nothing more than an attempt to cover up his embezzlement of Committee funds. Were that not the case, and were his actions truly to benefit the Committee, he would surely not have acted without a discussion with Mr. Cohen about his plan – and there is no dispute that Burchfield was acting alone and in secret when he carried out his plan to falsify the Committee's reports to the Commission

Under principles of agency law, an employer is liable for the actions of its employees only when the employee acts within the scope of employment. When an employee's actions occur "within an independent course of conduct not intended by the employee to serve any purpose of the employer," the actions are not within the scope of employment – and the employer is not liable. RESTATEMENT (THIRD) OF AGENCY § 7.07(2) (2006). Here, where Burchfield embezzled funds from the Committee for his own personal gain, the misconduct clearly did not serve any purpose of the employer. Because the "sole intention" of Burchfield's actions was to further "the employee's own purposes, and not any purpose of the employer, it is neither fair nor true-to-life to characterize the employee's action as that of a representative of the employer." *Id.* at cmt.b.

Because Burchfield's recordkeeping and reporting violations "were to his own advantage and to the disadvantage and detriment of his employer" and the misconduct was "the result of a single employee's criminal intent," then "the inference of responsibility placed on [the employer] is not justified." *Badwan v. United States*, 541 F.2d 1388, 1391 (10th Cir. 1976). The General Counsel is not attempting to penalize the Committee for Burchfield's outright theft against it; nor should the Committee be penalized for the actions Burchfield took to cover up his theft. A finding by the Commission that the Committee itself has committed violations would be contradictory with settled agency law.

Finally, holding the Committee liable would be inconsistent with the Commission's new statement of policy. *See* Statement of Policy; Safe Harbor for Misreporting Due to Embezzlement, 72 Fed. Reg. 16,695 (Apr. 5, 2007). As the statement was not issued until recently, the Committee did not have the benefit of the Commission's recommendations regarding internal controls. However, the Committee did take the steps required once it discovered the misreporting. *See id.* Specifically, the Committee notified the Federal Bureau of Investigation and the Commission; it also immediately hired a forensic accounting firm, at great expense, to reconstruct the records and amend the reports to correct any errors. Were the Commission to hold the Committee responsible for the actions taken by a rogue employee in covering up his theft, in circumstances in which the Committee has taken every measure to correct the recordkeeping and reporting violations, it would add insult to the injury already suffered by the Committee. More importantly, to do so would remove any incentive for campaign committees in similar circumstances to spend their own time and money to reconstruct the public record.

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The Committee, though deeply in debt, has spent over thirty-three thousand dollars on accounting services alone; these funds came almost exclusively from Mr. Cohen personally. It has done so after being taken advantage of by an employee who pled guilty to the reporting crimes alleged here, and who committed those crimes to cover up his embezzlement of Committee funds. Neither agency law, nor fairness, supports further monetary penalties against the Committee for these violations.

3. Section 439a(b): Personal Use

The General Counsel's brief does not attempt to argue that the Committee should be liable for Burchfield's personal use of Committee funds; nor could it, under the principles of *respondeat superior* described above. Instead, the brief alleges that probable cause exists that the Committee violated § 439a(b) is based solely on this statement: "two campaign staffers each received clothing allowances of $200 by Committee checks signed by Cohen." (OGC Br., Cohen for N.H. 11). There is no support for this bare allegation. The brief does not name the campaign staffers, nor does it submit the checks at issue or indicate on what it relies to make this claim.

Due to the Committee's extensive forensic accounting project, we were able to determine that the Committee wrote just two checks in the amount of $200. Copies of those checks are attached. (*See* Exhibit A). There is no evidence that they were meant for a clothing allowance. Nor does Burchfield's affidavit address this issue. The Committee is aware of no evidence – none – that would indicate that any of its funds were used for clothing.

The General Counsel apparently has no evidence to support this accusation. It should be summarily dismissed.

4. Section 432(h): Disbursements in Excess of $100 in Cash

The General Counsel's brief notes that Burchfield admits to a series of unauthorized cash withdrawals using the Committee's bank card; it states, "Twenty-nine of the ATM withdrawals identified by the Committee's auditors were in amounts over $100." (OGC Br., Cohen for N.H. 11). The brief then argues that the Committee has violated the requirement that disbursements in excess of $100 be made by check. *See* 2 U.S.C. § 432(h). But there is no credible evidence that *any* of these funds were used for Committee disbursements, and certainly no evidence that any expense greater than $100 was paid in cash. Indeed, the Committee continues to believe that all of these withdrawals were for the personal use of Burchfield. This allegation consists only of bare assertions, unsupported in the record, that do not in any case indicate that § 432(h) was violated.

Burchfield does state, in his affidavit, that he "used the cash obtained through ATM withdrawals for both personal and campaign expenses." (Burchfield Aff. ¶ 26). That statement, from a felon

who admits to theft from the Committee, is not to be trusted. However, even if it were true, it is not evidence of a violation of § 432(h). It is not a violation of § 432(h) to withdraw more than $100 from an ATM; it is only a violation of that statute if the General Counsel were able to show that at least one disbursement over $100 was paid for using those funds. But in fact, the brief is able to point to no specific disbursements whatsoever that were paid in cash.

The brief also states, "Burchfield estimated that 60% of the $9,500 in disbursements ($5,700) was used for his personal expenses and 40% for campaign expenses." (OGC Br., Cohen for N.H. 10). This statement is not found in Burchfield's affidavit, nor is it supported by any other evidence; if Burchfield indeed stated that figure at some point, it was apparently not under penalty of perjury. But even if true, that statement does not indicate a violation of § 432(h), as those disbursements could certainly all have been $100 or less over the course of a campaign of this size.

The brief also claims that two campaign employees were paid cash to pay for "miscellaneous campaign-related expenses such as lunch and repairs to a video camera." (*Id.* 10-11). Again, no support for this statement is given; and again, even if true it does not prove a violation of § 432(h), for those are expenses that almost certainly were under the $100 threshold for cash disbursements.

In sum, a violation of § 432(h) is only evident upon the showing of some evidence that even one disbursement of more than $100 was paid for in cash. The General Counsel's brief does not even contain that accusation, much less evidence to support it. All of the accusations and evidence center on the source of the cash, not on its use for disbursements. This allegation should also be summarily dismissed.

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C. Conclusion

For the reasons stated above, Respondents Burton Cohen and Cohen for New Hampshire ask that the Commission find that no probable cause exists to support a finding of violations by the Committee of 2 U.S.C. §§ 432(c), 432(h), 434(b), or 439a(b), and that no probable cause exists that Respondents knowingly and willfully violated 2 U.S.C. 441i(e)(1)(A).

Very truly yours,

Marc E. Elias
Ezra W. Reese
PERKINS COIE LLP

Counsel to Burton Cohen
Cohen for New Hampshire

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EXHIBIT A

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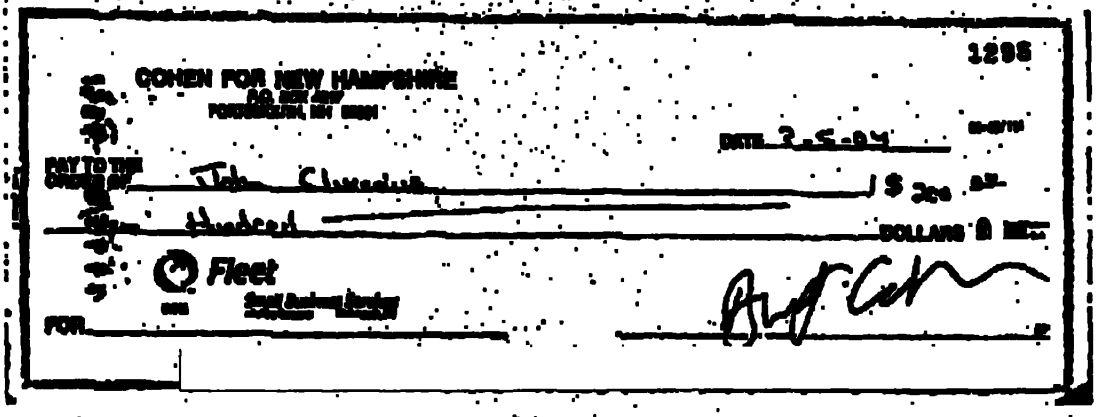

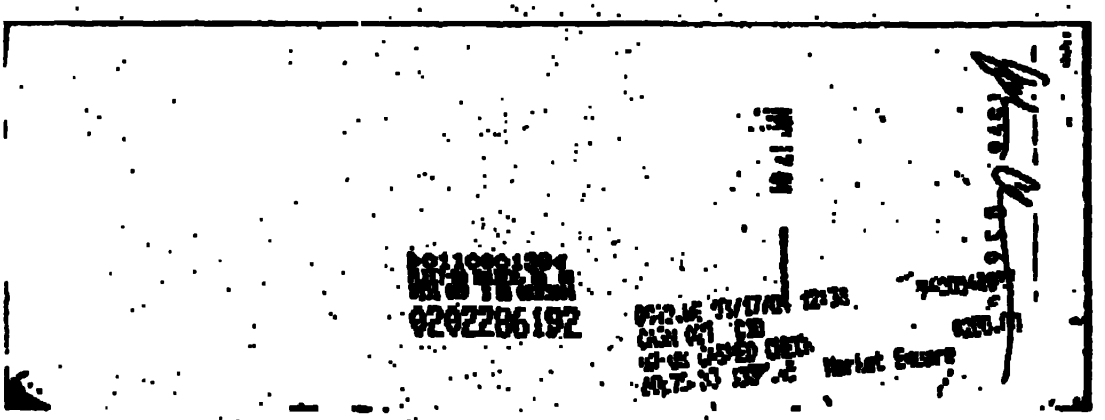

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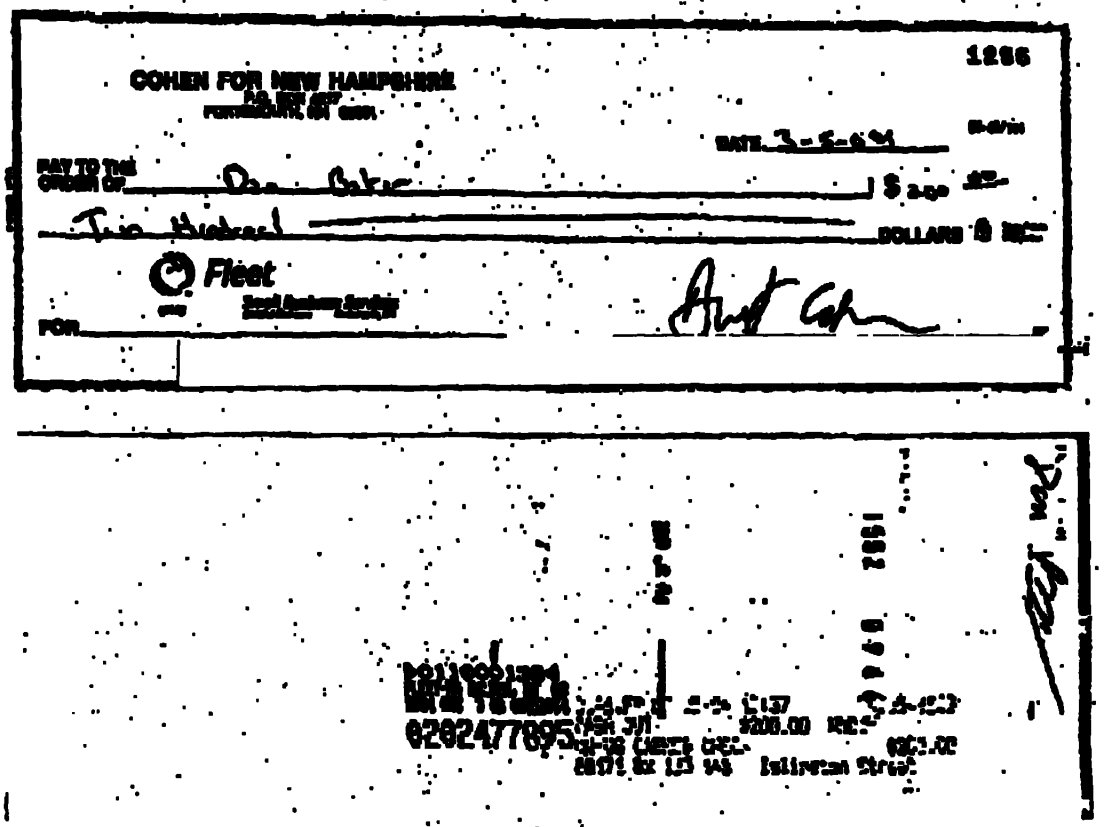

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