



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)	
)	
1099 L.C. d/b/a/ Venice Nissan)	MUR 6054
and)	
Donald M. Caldwell)	

**STATEMENT OF REASONS
VICE CHAIR CAROLINE C. HUNTER**

The complaint in this matter alleged, *inter alia*, that 1099 L.C., d/b/a Venice Nissan (“VN”) and assistant general manager Donald Caldwell reimbursed the contributions of five employees, totaling \$5,000, to Vern Buchanan for Congress (“VBFC”) during Representative Buchanan’s 2006 congressional campaign. On June 23, 2009, I voted with the Commission to find reason to believe (“RTB”) that a violation of 2 U.S.C. § 441f had occurred in this matter.¹ The Office of General Counsel (“OGC”) subsequently investigated the specific allegations relating to VN² for almost a year, and obtained more than 900 pages of documents and seven depositions.

After this extensive investigation, there was no dispute that, on or about September 16, 2005, Mr. Caldwell provided \$1,000 in cash to each of the five employees at issue, and that each of the five employees made \$1,000 contributions to Vern Buchanan for Congress shortly thereafter. As OGC summarized the case, “The only issue in dispute is whether Caldwell’s five \$1,000 payments to his subordinates were legitimate bonuses or whether they were VN contributions to VBFC in the names of others in violation of 2 U.S.C. § 441f.”³

OGC urged the Commission to rely on the documentary evidence to find probable cause against respondents.⁴ However, OGC at other times acknowledged that such evidence was inconclusive and contradictory, and thus urged the Commission to consider the circumstantial

¹ MUR 6054, Certification dated June 23, 2009.

² Although OGC at times alluded to evidence obtained against respondents in MUR 6054 other than Venice Nissan and Mr. Caldwell, such evidence was not before the Commission with respect to OGC’s recommendation to find probable cause against VN and Caldwell in General Counsel’s Report #4. Accordingly, I did not consider this extraneous evidence in my vote against OGC’s recommendation. See 2 U.S.C. § 437g(a)(3) (setting forth the basis for a probable cause vote by the Commission).

³ MUR 6054, General Counsel’s Report #4 at 3-4.

⁴ See, e.g., General Counsel’s Report #4 at 5-8.

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evidence. At the end of the day, the Commission was left with one affiant with compromised credibility and suspect motives alleging his contribution had been reimbursed, and whose claims were never subjected to a rigorous examination or deposition. Another affiant who corroborated the allegation was deemed so unreliable that OGC disregarded him almost from the very beginning. The other four alleged conduits all denied in sworn testimony that their contributions had been reimbursed. While the circumstances of the contributions may seem suspicious, the documentary evidence failed to point conclusively in either direction.

On the basis of this conflicting evidence, the Commission voted 4-1⁵ on June 29, 2010 to find probable cause that VN and Mr. Caldwell had violated 2 U.S.C. § 441f on a non-knowing and willful basis.⁶ For the reasons set forth below, I dissented.

I. BACKGROUND

Venue Nissan is a car dealership in which Representative Vernon J. Buchanan is the majority owner.⁷ In 2008, Citizens for Responsibility and Ethics in Washington ("CREW"); along with Carlo A. Bell, VN's former finance director; and David J. Padilla, a former VN finance manager, alleged that VN assistant general manager Donald Caldwell gave each of the following five individuals \$1,000 in cash, drawn from VN's company funds, in exchange for their \$1,000 contributions to Rep. Buchanan's 2006 congressional campaign: (1) Mr. Bell; (2) Jack Prater, formerly VN's Dodge sales manager; (3) Jason Martin, VN's Nissan sales manager; (4) Marvin White, VN's used car sales manager; and (5) William Mullins, VN's new cars sales manager.⁸

In its response, VN countered that the complaint relied entirely on the affidavits of Messrs. Bell and Padilla, and that Mr. Padilla's allegation that he was asked to make a contribution to VBFC was belied by his public statement to the contrary.⁹ Additionally, VN submitted affidavits from each of the other alleged conduits specifically asserting that their donations were made of their own free will and were not pressured, coerced, forced, or reimbursed by anyone.¹⁰

⁵ Commissioner McGahn recused.

⁶ MUR 6054, Certification dated June 30, 2010. (Chairman Petersen, Vice-Chair Bauerly, and Commissioners Walther and Weintraub voted affirmatively; Commissioner Hunter dissented.) By a vote of 3-2, the Commission did not find probable cause that respondents had violated 2 U.S.C. § 441f on a knowing and willful basis. *See id.* (Vice-Chair Bauerly and Commissioners Walther and Weintraub voted affirmatively; Chairman Petersen and Commissioner Hunter dissented. The Commission's vote was on OGC's recommendations set forth in General Counsel's Report #4, which was submitted to the Commission on June 9, 2010. However, OGC had already submitted its General Counsel's Brief recommending probable cause on April 15, 2010, to which VN replied with its Respondent's Brief on May 5, 2010. The statute does not provide for an additional OGC brief to rebut the respondent's brief. *See* 2 U.S.C. § 437g(a)(3) (providing only for a general counsel's brief and a respondent's brief prior to a finding of probable cause.

⁷ MUR 6054, VN Response at 1.

⁸ MUR 6054, Complaint at 3-4. The affidavits of Messrs. Bell and Padilla, both residents of Florida, were both executed before the same notary a week apart in Washington, DC. *Id.* Exhibits. A and D.

⁹ MUR 6054, VN Response at 2 and Exhibit E.

¹⁰ *Id.* Exhibits A-D.

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The Commission found RTB against VN on June 23, 2009, pursuant to an OGC recommendation that included various other respondents related to Rep. Buchanan.¹¹ However, after an exhaustive investigation, the evidence remained as conflicting as it was at the outset.

II. ANALYSIS

A) Probable Cause Means More Likely Than Not

The threshold question in this matter is what standard of evidence must be met in order for the Commission to find “probable cause.” Neither the Act nor Commission regulations define this standard. While the term is ubiquitous in criminal law, it is debatable whether the Commission may properly apply interpretations of this standard from the criminal sphere, given that the Act permits the Commission to do nothing more than to seek a civil conciliation agreement with respondents pursuant to a probable cause finding.¹² If conciliation fails, the Commission may institute a civil action in federal district court.¹³ Thus, it stands to reason that, for the purposes of section 437g, “probable cause” means that the evidence should, at a minimum, meet the “preponderance” standard in a civil case. In this matter, the evidence OGC presented did not demonstrate that it was more likely than not that the alleged reimbursements had occurred.

B) The Testimonial Evidence Did Not Demonstrate Probable Cause

As mentioned above, the testimonial evidence in this matter was less than convincing. The allegations rested on the affidavits of Messrs. Bell and Padilla. However, Mr. Bell is not a disinterested party. In fact, Bell is separately suing Buchanan over allegations related to VN’s business practices that are wholly unrelated to the alleged campaign finance violations in this matter, and has sought \$43 million in his court action.¹⁴ During the course of discovery in that court action, Mr. Bell’s credibility was also impeached when he admitted to lying about his education on his employment applications and resume.¹⁵ Although Mr. Padilla’s credibility issues were not similarly documented, we were informed that his credibility was also compromised. This is evidenced by the lack of any citation to Padilla whatsoever (other than to identify him as a complainant) in either OGC’s brief or general counsel’s report¹⁶ recommending probable cause.¹⁷

Weighing against these two accusers (who were never deposed), the other four managers all denied that their contributions were reimbursed, not only in their sworn affidavits, but also in their sworn depositions, in which they were subjected to rigorous questioning by agency attorneys. Mr. Caldwell was also deposed under oath and denied the allegations. Mr. Shelby

¹¹ See MUR 6054, Certification dated June 23, 2009.

¹² 2 U.S.C. § 437g(a)(5)(A). The Act also provides that the Commission may refer knowing and willful violations of chapters 95 or 96 of title 26, which are inapplicable here, to the Department of Justice. 2 U.S.C. § 437g(a)(5)(C).

¹³ 2 U.S.C. § 437g(a)(6)(A).

¹⁴ MUR 6054, Respondent’s Brief at 9 (citing *Bell v. Buchanan et al.*, No. 2008-CA-012207-NC (Fla. Cir. Ct. filed July 31, 2008) and *Suits target Buchanan’s businesses*, SARASOTA HERALD-TRIBUNE, Aug. 24, 2008).

¹⁵ *Id.*, Exhibit B at 156-57.

¹⁶ See note 6, *supra*.

¹⁷ See MUR 6054, General Counsel’s Brief and General Counsel’s Report #4.

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Curtsinger, VN's operating partner, and Ms. Chistina Hires, VN's office manager and accounting office supervisor, were also deposed, and their sworn testimony similarly cast doubt on the allegations.

Specifically, Mr. Caldwell testified that, during a managers' meeting on September 14, 2005, he had informed each of the five managers at issue that they had earned "fast-start bonuses" of \$1,000 for having met certain performance targets.¹⁸ At the time, Caldwell also mentioned that he was contributing to Buchanan's congressional campaign and, since the managers were making good money, he suggested that they contribute as well.¹⁹ With the exception of Bell's affidavit, each of the four other managers in their depositions corroborated Caldwell's testimony. Mr. White testified that Caldwell asked if they would be willing to donate their bonuses, but that "if we didn't feel comfortable with donating or couldn't afford it, don't donate it."²⁰ Similarly, Mr. Martin stated that Caldwell "said we are all going to get these bonuses . . . but he mentioned that . . . he thought it would be a good idea if we wanted to donate to [Buchanan's] campaign."²¹ Likewise, Mr. Mullins, who was not initially in the meeting because he was making a sale, testified that he later went in, was informed that the others were all contributing to Buchanan's campaign, asked them how much they were contributing, and then wrote a \$1,000 check himself.²² Although Mr. Prater did not recall the discussion with Mr. Caldwell with the same degree of specificity, he also testified that his contribution to Buchanan's campaign "had nothing to do with money that I was receiving from anywhere. That was my decision to donate"²³

From a campaign finance lawyer's perspective, the timing of Mr. Caldwell's solicitation of contributions and his distribution of bonuses may not have been the best course of action. However, it is unlikely that the average person in Mr. Caldwell's situation is thinking about campaign finance law while conducting his daily activities.²⁴ Although Caldwell's actions may look suspicious when viewed in isolation, suspicion alone is insufficient to establish a finding of probable cause that he violated the law.²⁵ Moreover, when viewed in context, the events at issue take on a different light. For example, while many workers are accustomed to receiving a regular paycheck or electronic deposit, bonuses are a primary source of income in the car industry and

¹⁸ MUR 6054, Caldwell Dep. at 0052-54, 0072-73. While Mr. Bell asserts that he had "never received a cash bonus" from VN, Mr. Curtsinger disputes this. Curtsinger averred that Bell was eligible for the "fast-start bonus and any other bonuses deemed appropriate by his supervisors," and in fact "received cash bonuses on several occasions." MUR 6054, Bell Affidavit; cf. MUR 6054, Curtsinger Supp. Affidavit (attached as Exhibit G in Respondent's Brief).

¹⁹ *Id.* at 0072-73.

²⁰ MUR 6054, White Dep. at 0057.

²¹ MUR 6054, Martin Dep. at 0037.

²² MUR 6054, Mullins Dep. at 27-28.

²³ MUR 6054, Prater Dep. at 0038-39.

²⁴ As the Supreme Court has noted, the First Amendment does not permit laws that force citizens to retain a campaign finance attorney before engaging in political activities. *Citizens United v. FEC*, 130 S. Ct. 876, 889 (2010).

²⁵ Whether making solicitations in the workplace and using office stationery to forward contributions violate the Commission's corporate facilitation regulations, whether Mr. Caldwell's solicitation was directed beyond VN's restricted class, and whether corporate facilitation continues to be a viable violation after *Citizens United*, are matters beyond the scope of this statement; corporate facilitation was not alleged in the complaint or in OGC's recommendations.

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are often paid in cash. As Mr. Caldwell testified, “[C]ash is what’s referred to as king” in the industry.²⁶ According to Ms. Hires, “[m]ost bonuses are paid in cash,” and check requests for cash were quite frequent when business was good, and business was good in 2005.²⁷ Mr. Mullins recalled receiving cash bonuses prior to the September bonus at issue,²⁸ while Mr. Martin testified that he received bonuses “pretty regularly” in 2005, and that a \$1,000 cash bonus is “not unusual at all” in the car business.²⁹ In fact, “1,000 is kind of probably an average number,” Mr. Martin stated.³⁰ Similarly, Mr. Prater testified that he received bonuses “quite frequently” in 2005 prior to the bonus at issue here, and that he had been “getting bonuses lots of different ways every month,” including in cash.³¹

Viewed in this light, the fact that these individuals used their bonuses, which was how they were paid, to make contributions was wholly unremarkable. After all, most individuals use money derived from their employment to make their political contributions, and in fact the Act and Commission regulations emphasize identifying an individual’s employer when accepting lawful contributions.³² The fact that these individuals made their contributions soon after receiving their bonuses also is unremarkable. If one were to make a political contribution, it would be natural to do so when one has increased cash flow. As Mr. Martin testified, “Well, it just worked out that, you know, I got paid an extra \$1,000 bonus that, you know, was available . . .”³³

The fact that all of these individuals would be motivated to make their contributions on their own volition also is unremarkable. As Mr. Mullins explained, “It’s the only boss I ever had run [for office] . . . Well, I liked him and wanted to see – everybody wants to see their boss do well.”³⁴ Similarly, Mr. Martin stated, “[H]e’s in the car business, that’s kind of what I’ve hitohed my wagon to for my career. Maybe it wouldn’t be a bad iden to have somebody like that in Congress . . . I like his platform. I mean, I’ve always been a Republican, he’s Republican . . . He’s all for small business. And, you know, I liked the things he had to say and I thought I’d show him some support.”³⁵ Likewise, Mr. Prater testified, “I’m a Republican and I certainly wanted to give to Vern’s campaign.”³⁶ Moreover, Mr. Martin was Mr. Caldwell’s nephew,³⁷ and it is not uncommon for someone to give to a particular campaign in response to a solicitation from a relative, or from a co-worker for that matter.³⁸

²⁶ MUR 6054, Caldwell Dep. at 0086.

²⁷ MUR 6054, Hires Dep. at 0025 and 0040.

²⁸ MUR 6054, Mullins Dep. at 0033.

²⁹ MUR 6054, Martin Dep. at 0060.

³⁰ *Id.* at 0060-61.

³¹ MUR 6054, Prater Dep. at 0029-30, 0051.

³² *See, e.g.*, 2 U.S.C. § 431(13); 11 C.F.R. § 100.12.

³³ MUR 6054, Martin Dep. at 39.

³⁴ MUR 6054, Mullins Dep. at 20.

³⁵ MUR 6054, Martin Dep. at 37.

³⁶ MUR 6054, Prater Dep. at 0036.

³⁷ MUR 6054, Caldwell Dep. at 0072.

³⁸ OGC notes that several of Mr. Caldwell’s other relatives also made contributions to VBFC, and that all of these contributions were forwarded together in a single VN envelope. MUR 6054, General Counsel’s Report #4 at 2. However, OGC never inquired, investigated, or deposed those other individuals regarding the circumstances of their contributions. Seeing as how those other contributions were not raised in the complaint, the significance of this fact

C) The Documentary Evidence Did Not Demonstrate Probable Cause

The most significant pieces of documentary evidence in this matter are the September 16, 2005 check request for \$5,000 used to obtain the cash to pay the five bonuses, as well as the payroll records for the individuals involved. However, just like the testimonial evidence, the documents are inconclusive, and require reference to the depositions for explication.

VN's accounting record for the September 16 check request includes an entry in the description field reading "50S 20S 10S," likely indicating the denomination of the bills requested, as well as "TW" and "PER TH" in the remarks field.³⁹ Of all the other accounting records that VN produced for check requests for so-called "fast-start bonuses" paid between 2003 and 2007, there were always notations about "spiffs" (which is an industry term for bonuses)⁴⁰ in the description field.⁴¹ VN's explanation for this discrepancy is that someone other than Ms. Hires handled the check request and failed to follow her usual practice of including a notation that it was for bonus payments.⁴² This is borne out by the "TW" remark in the accounting record, by Theresa Weghorst's endorsement on the back of the check made payable to cash,⁴³ and by Ms. Hires' testimony that Ms. Weghorst entered this particular check request into the accounting records.⁴⁴ Indeed, Ms. Weghorst's initials do not appear on any of the other check request records.⁴⁵

Moreover, VN's document production was responsive to OGC's October 8, 2009 request, in which OGC specifically asked about the September 16, 2005 check request and documentation for all "fast-start bonuses that were paid before and after [that date]."⁴⁶ OGC did not ask for all check requests made payable to cash, and in fact VN interpreted the request narrowly and would not have produced the September 16, 2005 request at all had OGC not asked specifically for it.⁴⁷ Thus, it is possible that VN failed to include specific bonus-related notations in other check requests for cash that were used nonetheless to pay bonuses, and which records were not produced. The Commission need not have speculated about this, however, in order to have voted against finding probable cause. Even assuming the September 16 check request was the only request for bonus cash without a corresponding notation, it is still the only piece of documentary evidence pointing towards wrongdoing. Weighed against the other documentary evidence, the check request alone is insufficient to find probable cause.

is unclear. Nonetheless, it further supports the unremarkable fact that individuals often make political contributions in response to solicitations from relatives.

³⁹ MUR 6054, VN Oct. 15, 2009 Submission at DC 406.

⁴⁰ MUR 6054, Caldwell Dep. at 0022.

⁴¹ MUR 6054, VN Oct. 15, 2009 Submission at DC 360-418.

⁴² MUR 6054, Respondents' Brief at 14-15.

⁴³ MUR 6054, VN Oct. 15, 2009 Submission at DC 405-6 and Hires Dep. at 0019.

⁴⁴ MUR 6054, Hires Dep. at 0072-73 (Mr. Sovonick: "[F]or this particular entry, who input that data?" Ms. Hires: "Teresa Weghorst.")

⁴⁵ MUR 6054, VN Oct. 15, 2009 Submission at DC 360-418.

⁴⁶ MUR 6054, Letter from Jack Gould, Attorney, Federal Election Commission, to Christopher DeLacy, Partner, Holland & Knight (Oct. 8, 2009).

⁴⁷ MUR 6054, Respondents' Brief at 10.

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The other documentary evidence in this matter was VN's payroll records for the five managers for the entirety of 2005. OGC contended that, if the September 16 payments were legitimate cash bonuses, they should have been reflected in the payroll records, but were not.⁴⁸ To the contrary, there are only two bonus-related entries in all of these records: a notation in Mr. Prater's records that a \$1,000 receipt was for a "M/E SALES BO,"⁴⁹ and an identical notation in Mr. White's records for a receipt in the same amount.⁵⁰ As discussed above, the four managers all testified that they received multiple bonuses in 2005, and thus these two isolated bonus notations in two of their payroll records were the exception rather than the norm. As Mr. Curtsinger testified regarding these two payroll entries, "I'd never seen it done this way, though... I don't recall ever seeing one done that way."⁵¹ Similarly, Ms. Hires testified that bonus entries were not always used in the payroll system, and that documents supporting bonuses that should have been provided to the payroll department would often get lost on Mr. Caldwell's desk.⁵² Thus, just as the circumstances of the contributions at issue are unremarkable when viewed in context, it is equally unremarkable that the bonuses at issue were not recorded as such in VN's payroll records.

III. CONCLUSION

It is a common adage in life that things aren't always as they first appear. Events taken in isolation may seem suspicious at first blush, but when viewed in context, they take on a different light. Such was the case in this matter. Five managers at a car dealership each received \$1,000 in cash from the dealer, none of which was recorded in accounting or payroll records as salary or bonuses. Soon thereafter, they each gave a \$1,000 campaign contribution to a congressional candidate. At first blush, it is reasonable to suspect that the dealer funneled the \$5,000 through the managers to the campaign. Upon closer inspection, however, we learn that: (1) the candidate was the majority owner of the dealer;⁵³ (2) four of the five managers, along with their supervisor, contend that the amounts they received were ordinary cash bonuses that they often received; (3) the one manager who alleged the contrary has ulterior motives, and both he and the other accuser have credibility problems; and (4) bonus payments to the five managers were, in fact, almost never recorded in their payroll records. While these facts do not conclusively establish that a violation did not occur here, they also do not establish probable cause that a violation did occur. For these reasons, I dissented.

⁴⁸ MUR 6054, General Counsel's Report #4 at 7.

⁴⁹ MUR 6054, Prater Dep. at JP 043. There is a corresponding aggregate notation for this payment at JP 053.

⁵⁰ MUR 6054, White Dep. at MW 076.

⁵¹ MUR 6054, Curtsinger Dep. at 0038-39; *see also id.* at 0044. "'Was it a bonus? Yes. Was it always put in that line? Never was, other than that one time, it looks like, on Jack Prater. And... it looks like it was done one time for Marvin White during a different month, which was November.'"

⁵² MUR 6054, Hires Dep. at 0032, 0044, and 0051.

⁵³ While this fact may suggest that the candidate himself orchestrated a scheme to funnel his corporate funds into his campaign, it also cuts the other way. First of all, as several of the men stated, they felt motivated to contribute to their boss. Secondly, Rep. Buchanan could have made unlimited contributions to his own campaign. 11 C.F.R. § 11U.10. If the allegation were true that the five \$1,000 contributions here were actually funds from Buchanan's dealer, of which he was the majority owner, it begs the question why Buchanan would have done indirectly what he could have done directly. While it was suggested that one motivation for such an elaborate scheme was to demonstrate that Buchanan had a broad base of support, this supposition is belied by the fact that each of these managers reported Buchanan's dealership as their employer, as reflected on the Commission's disclosure reports. *See* MUR 6054, Complaint at Exhibit C.

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CAROLINE C. HUNTER
Vice Chair

Dec. 19, 2011
Date

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