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FIRST GENERAL COUNSEL'S REPORT

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MUR: 6322
DATE COMPLAINT FILED: July 7, 2010
DATE OF NOTIFICATION: July 12, 2010
LAST RESPONSE RECEIVED: September 3,
2010
DATE ACTIVATED: September 21, 2010

EXPIRATION OF SOL: June 8, 2015 – June 9,
2015

COMPLAINANT:

Floyd D. Ferrell

RESPONDENTS:

Tommy Sowers
Tommy Sowers for Congress and John P. Heisserer,
in his official capacity as treasurer
Square, Inc.

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 431(8)(A)(i)
2 U.S.C. § 439a
2 U.S.C. § 441b(a)
2 U.S.C. § 441b(b)(2)
11 C.F.R. § 100.52(a)
11 C.F.R. § 100.52(b)
11 C.F.R. § 113.1
11 C.F.R. § 113.2
11 C.F.R. § 114.2(f)

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

This matter concerns allegations that Square, Inc. ("Square"), Tommy Sowers, and
Tommy Sowers for Congress and John P. Heisserer, in his official capacity as treasurer ("the
Committee"), violated the Federal Election Campaign Act of 1971, as amended ("the Act").
Specifically, the complaint alleges that Square facilitated the making of contributions, which the

1 Committee knowingly received, when Square allowed the use of its name in advertisements for a
2 fundraiser to benefit the Committee, and provided Square credit card reading devices to the
3 Committee, in violation of 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.2(f). Further, the complaint
4 alleges that Square made, and the Committee accepted, prohibited corporate contributions in
5 violation of 2 U.S.C. § 441b(a), when Square furnished the Committee with its card readers.
6 Finally, the complaint alleges that the respondents converted campaign contributions to personal
7 use, in violation of 2 U.S.C. § 439a(b).

8 As described below, we recommend that the Commission dismiss the allegations that
9 Square violated 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.2(f) by facilitating prohibited corporate
10 contributions to the Committee, and that the Committee violated 2 U.S.C. § 441b(a) and
11 11 C.F.R. § 114.2(f) by knowingly accepting such contributions. We also recommend that the
12 Commission dismiss the allegations that Square and the Committee violated 2 U.S.C. § 441b(a)
13 in connection with the provision of Square card reader devices to Tommy Sowers for Congress.
14 Further, we recommend that the Commission find no reason to believe that Tommy Sowers for
15 Congress and John P. Heisserer, in his official capacity as treasurer, violated 2 U.S.C. § 439a(b)
16 by converting campaign funds to personal use. Finally, we recommend that the Commission find
17 no reason to believe that Tommy Sowers violated the Act, and close the file.

18 **II. FACTUAL BACKGROUND**

19 Tommy Sowers was a Democratic candidate for Congress from Missouri's 8th District.¹
20 On June 8, 2010, the Sowers campaign committee hosted a fundraiser in Washington, D.C.
21 Several notable Democratic politicians attended the event, along with Jack Dorsey, the CEO of
22 Square. Square is a software company founded in February 2009 by Jack Dorsey. *See*

¹ Mr. Sowers lost the general election.

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1 <https://squareup.com/about>. The company manufactures small, cube-shaped credit card readers
2 that plug into the headphone ports in cell phones. *Id.* The devices allow merchants to accept
3 payment for goods or services instantly over a cell phone network. *See* <https://squareup.com/->
4 about.²

5 The Committee's announcement publicizing the June 8 fundraiser contains the date, time,
6 and location of the fundraiser, and lists Jack Dorsey as attending the event and as the founder of
7 Twitter. *See* Complaint at Ex. 2, 3; *see also* <http://www.sowersforcongress.com/page/s/-square>.
8 Further, in the bottom right-hand corner of the announcement, there is a picture of the Square
9 payment processing device with Square's name, along with the statement: "We're also launching
10 Square in DC! The new application by the founder of Twitter that allows credit card transactions
11 from your mobile phone." *See* Complaint at Ex. 2. Additionally, the invitation states that
12 attendees should "RSVP now & pay at the door w/ SQUARE." *Id.* Near the bottom, the
13 invitation gives attendees the ability to choose a cell phone operating system (Android or iPhone)
14 if the attendee would like a Square card reading device. *Id.*

15 The complaint also includes a news article that features promotional material, allegedly
16 distributed by the Committee, which contains a photo of the candidate, the campaign logo, and
17 the statement "The Tommy Sowers campaign is using Square and launching it in DC. What
18 better way to unveil the future of grassroots fundraising than through a fundraiser for a true
19 grassroots candidate. Square is the new application by the founder of Twitter that allows credit
20 card transactions from your mobile phone. Tuesday, June 8 5:30 - 7:30 PM @ Local 16 1602
21 U St. NW. RSVP & for more details: www.sowersforcongress.com/square2." *See* Complaint at
22 2; Complaint Ex. 3. Additionally, Jack Dorsey wrote about the fundraiser on his Twitter

² For a visual demonstration of the Square device, *see* <http://goo.gl/TgTp>.

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1 account. See <http://goo.gl/AlkHu> (posted June 8, 2010, 4:53 PM) (last visited December 7, 2010)

2 ("At #sqdc with @crazybob for @Sowers and @Square. Come by and say hi! Local 16.").

3 Square provided its mobile credit services to the Committee during the 2010 election
4 cycle. See Response at 2. To use the Square service, the merchant must first download Square's
5 free application to a cell phone or iPad. See <https://squareup.com/get-started>. The merchant then
6 attaches Square's credit card reader to a cell phone, and the buyer swipes a credit card through
7 the reader. After swiping the card, the buyer signs the transaction receipt on the phone using his
8 or her finger. See <https://squareup.com/about>. Square distributes the readers for free and does
9 not charge a monthly fee or require a merchant account. See <https://squareup.com/features>.
10 Instead, the merchant pays Square a percentage of each transaction amount. *Id.* Merchants are
11 not required to have the card reader to use Square's payment processing service because the
12 merchant can manually run the credit card information through Square's cell phone application,
13 but Square charges more for non-swiped transactions. *Id.* Although Square distributes the
14 device for free, at the time of the fundraiser, Square admittedly confronted a "big hardware
15 shortage" and struggled to meet the demand for its readers. See Letter from Jack Dorsey, *The*
16 *Home Stretch*, SQUARE, INC. (June 18, 2010), <http://goo.gl/eNkZM>. *Id.*

17 In a joint response, respondents maintain that the Committee paid for all of the
18 fundraiser's expenses. See Response at 2. Respondents also assert that Square's only
19 involvement was as a commercial vendor to the Committee, and that Square did not "approve or
20 comment on" any Committee promotional material. *Id.* Further, even though Jack Dorsey was
21 listed as attending the event, the response insists that he was involved in the event as a personal
22 supporter, and he appeared in his personal capacity. *Id.*

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1 The response also asserts that the Committee referenced Square's name with respect to
2 Square's status as a commercial vendor to the Committee and to draw attention to an innovative
3 technology that the Committee uses for fundraising operations, and not to encourage
4 contributions. See Response at 2-3. According to the Committee, using Square's name in an
5 advertisement is akin to the Committee revealing that it accepts contributions via MasterCard,
6 Visa, or ActBlue, because Square is merely a "conduit" for contributions. *Id.* Finally, the
7 response argues that even if the use of Square was a violation of the Act, it was a *de minimis*
8 violation because the event raised only \$5,574 in contributions. See Response at 4. Respondents
9 also state the Committee paid Square the full market value for use of its services. *Id.* at 3. The
10 Committee reported contributions totaling \$2,950 on June 8, 2010, the day of the fundraiser, and
11 \$10,000 on June 9, 2010, the day after the fundraiser. It is possible that the Committee received
12 contributions from sources other than the June 8 fundraiser on those days.

13 **III. DISCUSSION**

14 **A. Corporate Activity**

15 The complaint alleges that: (1) the references to Square and the Square payment
16 processing device in the Committee's fundraiser announcement; (2) a speech made by Dorsey at
17 the fundraiser in which Dorsey allegedly endorsed Tommy Sowers and the Committee's use of
18 Square; (3) and the provision of Square card readers to the Committee to distribute at the
19 fundraiser, constitute impermissible uses of corporate resources to engage in fundraising
20 activities. The Complaint also alleges that Square gave, and the Committee accepted, prohibited
21 contributions when Square furnished the Committee with the card reader devices.

22 Under the Act and Commission regulations, corporations are prohibited from making a
23 contribution to a candidate's committee in connection with a Federal election, and candidates are

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1 prohibited from accepting or receiving corporate contributions. *See* 2 U.S.C. § 441b(a);
2 11 C.F.R. § 114.2(b)(1). A "contribution" includes "any gift, subscription, loan, advance, or
3 deposit of money or anything of value made by any person for the purpose of influencing any
4 election for Federal office." 2 U.S.C. § 431(8)(A)(i) and 11 C.F.R. § 100.52(a); *see also*
5 2 U.S.C. § 441b(b)(2) and 11 C.F.R. § 114.2(b)(1). "Anything of value" includes all in-kind
6 contributions, including the provision of goods or services without charge or at a charge that is
7 less than the usual and normal charge. *See* 11 C.F.R. § 100.52(d)(1).

8 Further, neither a corporation nor its agents may use the corporation's resources to
9 facilitate the making of contributions to a candidate's committee (other than the corporation's
10 separate segregated fund). *See* 11 C.F.R. § 114.2(f)(1); 11 C.F.R. § 114.2(f)(4)(ii).³
11 Commission regulations state that a commercial vendor does not facilitate contributions if the
12 corporation provides goods or services to political committees in the ordinary course of business
13 and at the usual and normal charge. *See* 11 C.F.R. § 114.2(f)(1). A "commercial vendor" is any
14 person "providing goods or services to a candidate or political committee whose usual and
15 normal business involves the sale, rental, lease or provision of those goods or services."
16 11 C.F.R. § 116.1(c).

17 Corporate names, trademarks, and service marks can be valuable corporate resources, and
18 corporations may invest substantial resources in developing their value and defending them. *See*
19 MUR 6110 (Obama Victory Fund) Senate Realty Corporation Factual and Legal Analysis at 9.
20 A trademark is a limited property right in a "particular word, phrase or symbol." *Id.* Trade
21 names are also protected when they acquire a "secondary meaning" in that they "symbolize a

³ We note that Part 114 of the Commission's regulations may be addressed in the Commission's upcoming rulemaking to implement changes in the law arising from the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. ____ (2010).

1 particular business.” *Id.* A corporation’s name and trademark, therefore, are things of value
2 owned by the corporation. *Id.* Because the Act prohibits corporations from contributing
3 anything of value to committees or using their resources to facilitate contributions to committees,
4 a corporation’s donation of its name to a committee constitutes an impermissible corporate
5 contribution. *Id.*

6 The Commission has recognized that corporate names and trademarks are things of value.
7 See MUR 5578 (Wetterling for Congress) First General Counsel’s Report; MUR 6110 (Obama
8 Victory Fund) Senate Realty Factual and Legal Analysis. Further, in Advisory Opinion 2607-10
9 (Reyes), the Commission advised that a Committee holding a fundraising golf tournament could
10 not recognize its contributors by posting signs including the name, trademark, or service mark of
11 their employers, because the corporation would be using its resources to facilitate contributions.
12 AO 2007-10 at 2-3; see also MUR 6110 (Obama Victory Fund) Senate Realty Factual and Legal
13 Analysis (citing AO-2007-10). The AO requestor stated that the inclusion of the name of the
14 contributor’s corporate employer was intended to encourage contributions. *Id.* at 2. The
15 Commission concluded that corporate names, trademarks, and service marks are “corporate
16 resources,” and because neither a corporation nor its agents may use the corporation’s resources
17 to facilitate the making of contributions to a federal political committee, the proposed activity
18 would violate the Act. *Id.* at 2-3.

19 Here, the available information indicates that the fundraiser announcement featured a
20 picture and description of the Square card reader, and it notified viewers that the fundraiser was
21 serving as the “launch” of Square in Washington, D.C. The announcement also promised
22 contributors their own Square device, even though the Square reader was difficult to obtain at the
23 time of the fundraiser. Further, Square’s role at the event appears to have been more than a mere

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1 portal for contributions, like MasterCard or Visa, given that the devices were distributed to the
2 fundraiser attendees to keep and use apart from contributing to the Committee, the event appears
3 to have been a "launch" event for Square, and Dorsey's Twitter post can be read to suggest he
4 was appearing both as an individual and as a corporate representative. Although the use of
5 Square's corporate name in the Committee's solicitations was a thing of value, *see* MUR 6110
6 (Obama Victory Fund) Senate Realty Factual and Legal Analysis at 9, the fundraising event was
7 relatively modest in size, as it apparently raised only \$5,574. Also, Square offers the devices
8 free to the public, so it would be difficult to assess the value of the devices. Under these
9 circumstances, further use of the Commission's resources for an investigation is not warranted.
10 Accordingly, we recommend that the Commission exercise its prosecutorial discretion and
11 dismiss the allegations that Square, Inc. and Tommy Sowers for Congress and John P. Heisserer,
12 in his official capacity as treasurer, violated 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.2(f) with
13 respect to corporately-facilitated contributions, and violated 2 U.S.C. § 441b(a) in connection
14 with the provision and acceptance of Square card reader devices to Tommy Sowers for Congress.
15 *See Heckler v. Chaney* 470 U.S. 821, 831 (1985).

16 B. Personal Use

17 Finally, the complaint alleges that if the Committee paid for the costs of the fundraiser,
18 then it is "certain that at least part of the funds were put to personal use." *See* Complaint at 4.
19 According to the complaint, the fundraiser benefited Square, which ultimately benefits Jack
20 Dorsey and the other owners and investors of Square, and therefore is an impermissible use of
21 Committee contributions because the costs of this "launch party" would exist irrespective of the
22 candidate's campaign. *Id.* In response, the Committee states that it paid for all expenses related
23 to the fundraiser, and the costs of the fundraiser do not constitute personal use because neither

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Tommy Sowers nor any member of his family own stock in or are in any way financially connected to Square. *See* Response at 2, fn 2.

Campaign contributions accepted by a candidate may not be converted to personal use by any person. 2 U.S.C. § 439a(b)(1); 11 C.F.R. § 113.2(e); *see also* 2 U.S.C. § 439a(a). "Personal use" is defined as "any use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate's campaign or duties as a Federal officeholder." *See* 11 C.F.R. § 113.1(g); *see also* 2 U.S.C. § 439a(b)(2); 2 U.S.C. § 431(11) (defining "person" under the Act); Explanation and Justification, *Expenditures; Reports by Political Committees; Personal Use of Campaign Funds*, 60 *Fed. Reg.* 7862 (February 9, 1995) ("If campaign funds are used for a financial obligation that is caused by campaign activity or the activities of an officeholder, that use is not personal use.") Commission regulations list a number of purposes that would constitute personal use *per se*. 11 C.F.R. § 113.1(g)(1)(i). Where a specific use is not listed as personal use, the Commission makes a determination, on a case-by-case basis, whether an expense would fall within the definition for personal use. 11 C.F.R. § 113.1(g)(1)(ii). The Commission has long recognized that if a candidate "can reasonably show that the expenses at issue resulted from campaign or officeholder activities, the Commission will not consider the use to be personal use." *See* 60 *Fed. Reg.* at 7867. In previous matters, funds were considered converted by individuals to personal use when they were used to pay for personal expenses, such as Broadway show and football tickets, haircuts, credit card bills, and personal trainer payments. *See, e.g.*, MUR 5962 (Istook for Congress) Conciliation Agreement; MUR 5895 (Meeks for Congress) Conciliation Agreement.

1 Here, there is no information indicating that campaign funds were put to personal use.
2 The complaint argues that because the fundraiser was also styled as a launch for Square, the
3 Committee used campaign contributions to pay for launch expenses that would have existed
4 irrespective of the campaign. However, the Commission gives candidates wide discretion over
5 the use of campaign funds. *See 60 Fed. Reg. at 7867.* The Committee hosted a fundraiser for
6 Tommy Sowers' campaign, and has reasonably shown that the expenses for this fundraiser
7 would not have existed irrespective of the campaign. Therefore, because no campaign
8 contributions appear to have been converted to personal use, we recommend that the
9 Commission find no reason to believe that Tommy Sowers for Congress and John P. Heisserer,
10 in his official capacity as treasurer, violated 2 U.S.C. § 439a(b). We also recommend that the
11 Commission find no reason to believe that Tommy Sowers violated the Act. Finally, we
12 recommend that the Commission close the file in this matter.

13 **IV. RECOMMENDATIONS**

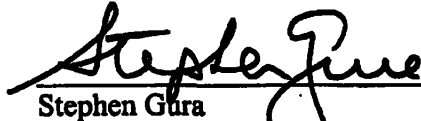
- 14 1. Dismiss the allegations that Tommy Sowers for Congress and John P. Heisserer,
15 in his official capacity as treasurer, violated 2 U.S.C. § 441b(a) and 11 C.F.R.
16 § 114.2(f) in connection with the acceptance of corporately-facilitated
17 contributions.
- 18 2. Dismiss the allegations that Square, Inc. violated 2 U.S.C. § 441b(a) and
19 11 C.F.R. § 114.2(f) by facilitating the making of contributions.
- 20 3. Dismiss the allegations that Tommy Sowers for Congress and John P. Heisserer,
21 in his official capacity as treasurer, violated 2 U.S.C. § 441b(a) in connection with
22 the acceptance of the Square card reader devices.
- 23 4. Dismiss the allegations that Square, Inc. violated 2 U.S.C. § 441b(a) in
24 connection with the provision of Square card reader devices to Tommy Sowers
25 for Congress.
- 26 5. Find no reason to believe that Tommy Sowers for Congress and John P.
27 Heisserer, in his official capacity as treasurer, violated 2 U.S.C. § 439a(b).
- 28 6. Find no reason to believe that Tommy Sowers violated the Act.

7. Approve the attached Factual and Legal Analyses.

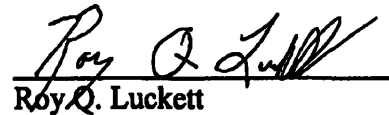
8. Approve the appropriate letters.

9. Close the file.


Christopher Hughey
Acting General Counsel


Stephen Gura

Deputy Associate General Counsel


Roy Q. Luckett

Acting Assistant General Counsel


Joshua B. Smith
Attorney

12/20/10
Date

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