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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)

Benishek for Congress and Trent)

J. Benishek, in his official capacity)

as Treasurer)

MUR 6421

Dan Benishek)

St. George Glass and)

Window Co., Inc.)

Steven P. Zurcher)

SECOND GENERAL COUNSEL'S REPORT

I. ACTIONS RECOMMENDED

We recommend that the Commission: (1) take no further action as to Benishek for Congress and Trent J. Benishek in his official capacity as treasurer (the "Committee") and Dan Benishek (collectively, the "Benishek Respondents"); (2) take no further action as to St. George Glass and Window Co., Inc. ("St. George Glass") and Steven P. Zurcher; (3) send letters of caution; and (4) close the file.

II. INTRODUCTION

The Complaint alleges that Benishek traveled on a non-commercial airplane owned by St. George Glass in connection with his 2010 campaign for the U.S. House of Representatives, in violation of the Federal Election Campaign Act of 1971, as amended, (the "Act"). On June 14, 2011, the Commission found reason to believe that Benishek violated 11 C.F.R. § 100.93(c)(2) by traveling on non-commercial aircraft in connection with an election for federal office; the Benishek Respondents violated 2 U.S.C. § 439a(c)(2) and 11 C.F.R. § 113.5(b) by accepting a prohibited in-kind contribution in the form of non-commercial aircraft travel; St. George Glass made and the Benishek Respondents knowingly accepted a prohibited in-kind corporate contribution in violation of 2 U.S.C. § 441b; and Steven Zurcher, the pilot and president and owner of St. George

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1 Glass, violated 2 U.S.C. § 441b by consenting to the corporate contribution. The
2 Commission authorized an investigation.

3 Based on the results of the investigation, we now recommend that the
4 Commission take no further action as to the respondents. We also recommend that the
5 Commission send letters of caution regarding the prohibition on non-commercial aircraft
6 flight by a House candidate. Finally, we recommend that the Commission close the file.

7 **A. Benishek's Flight on Non-Commercial Aircraft**

8 In response to the Commission's findings, the Benishek Respondents admitted
9 that Benishek took a non-commercial flight for campaign travel and requested pre-
10 probable cause conciliation. Letter from Charles R. Spies, Counsel for Benishek
11 Respondents, to Elena Paoli, Staff Attorney, FEC, July 7, 2011 ("July 7, 2011, Benishek
12 Letter").¹

13 The campaign-related flight took place on April 10, 2010, and involved
14 Benishek's air travel from Harbor Springs, Michigan to Sawyer International Airport
15 ("MQT") in Gwinn, Michigan, (the "Munising flight") and from MQT, by car, to the
16 Munising Home Show ("Home Show") in Munising, Michigan. Letter from Charles R.
17 Spies to Elena Paoli, July 21, 2011, ("July 21, 2011, Benishek Letter"); Joseph A. Shubat
18 Aff. ¶ 4.a (Attach. 1). While at the Home Show, Benishek engaged in campaign activity:
19 he greeted attendees and spoke to them about his positions on current issues. *Id.*

20 The Munising flight included two repositioning flights by Zurcher. Before
21 Benishek joined him in Harbor Springs, Zurcher had flown the airplane from Ford

¹ The Benishek Respondents had initially admitted that Benishek took two non-commercial flights for campaign travel but later took the position that the second identified flight was for personal travel. See July 7, 2011, Benishek Letter; July 21, 2011, Benishek Letter; Joseph A. Shubat Aff. ¶ 5.

1 Airport in Iron Mountain, Michigan to Harbor Springs, where he picked up Benishek.
2 See Zurcher Resp. (July 11, 2011) (attaching pilot log); *see also* Table 1, *infra*
3 (describing flight repositioning/deadhead legs, times, and distances). After Benishek
4 deplaned at MQT, Zurcher flew the plane back to Ford Airport. *See id.*

5 Table 1 details the times and distances of each of the legs that comprised the
6 Munising flight. The flight times are based on entries in Zurcher's pilot log, and the
7 distances between points were obtained from online charter flight services. *See*
8 www.ussskylink.com; [www.paramountbusinessjets.com/private-jet-charter/tools/time-](http://www.paramountbusinessjets.com/private-jet-charter/tools/time-distance.html)
9 [distance.html](http://www.paramountbusinessjets.com/private-jet-charter/tools/time-distance.html).

10 **Table 1: Munising Flight Information**

LEG	TIME	DISTANCE
Iron Mountain to Harbor Springs	1.2 hours	157 miles
Harbor Springs to MQT	1.4 hours	136 miles
MQT to Iron Mountain	0.4 hour	50 miles
TOTAL:	3.0 hours	343 miles

11
12 **B. Cost of Comparable Charter Flight**

13 As noted in the First General Counsel's Report, about six months after the
14 Munising flight, on October 21, 2010, the Committee paid Zurcher \$2,250 for "travel."
15 Our investigation has concluded that the amount the Committee paid Zurcher
16 substantially *exceeded* the cost of a comparable charter flight for the same time or
17 distance flown.

18 The Committee's over-payment for the value of the flight appears to have resulted
19 from a series of errors. According to counsel, the Committee paid \$2,250 to reimburse
20 Zurcher for two flights: the Munising flight and a second flight that the Committee
21 mistakenly believed constituted campaign travel. *See* July 21, 2011, Benishek Letter; *see*

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1 *also* Note 1, *supra*. The Committee obtained the cost estimate for those two flights from
2 Superior Aviation, Inc., a charter flight service provider in Iron Mountain, Michigan, and
3 the only such provider servicing the relevant airports. Letter from Charles R. Spies to
4 Elena Paoli, Aug. 15, 2011, at 2. Following our further inquiry, *see* Letter from Elena
5 Paoli to Charles R. Spies, Oct. 5, 2011, the Committee obtained additional information
6 from Superior and concluded that a flight comparable to the Harbor Springs to MQT
7 flight alone would have cost approximately \$1,500. Letter from Charles R. Spies to
8 Elena Paoli, Oct. 12, 2011. In an effort to obtain more detailed information about
9 Superior's price quote to the Committee, we requested and the Committee obtained a
10 written price quote from Superior providing an estimate of \$1,260 plus tax. *See* E-mail
11 from James E. Tyrell III, Counsel to Dan Benishek, to Elena Paoli (June 18, 2012, 3:36
12 pm) (attachment). That quote was not for a comparable flight, however, because it
13 addressed a flight departing from Saginaw, Michigan, not Harbor Springs. *See id.*

14 We contacted Superior to discuss the charter flight quote it provided the
15 Committee. Superior based its quote on the aircraft that Superior charts — a Cessna
16 441 Conquest II, a twin-engine turbo-prop model with a pressurized cabin and eight-
17 person seating, capable of 300 mph flight speeds — an aircraft far different and
18 expensive to operate — than Zurcher's single-engine, four-seat Cessna 172 Skyhawk
19 with a cruising speed of approximately 150 mph. *See*
20 <http://www.superioraviation.com/serv01.htm>. Accordingly, the charter price quotes the
21 Committee received from Superior did not involve a comparable airplane of comparable
22 size, and as noted, the second quote was not for a flight from the same origination point.

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1 We contacted 11 charter companies that use airplanes identical or nearly identical
2 to Zurcher's Cessna 172 Skyhawk.² These providers typically calculate rates either on a
3 cost per mile or a cost per hour basis. We determined that general per-mile rates range
4 from \$1.35 to \$2.50, while hourly rates range from \$119 to \$295. Many of these charter
5 providers confirmed that they would charge for repositioning or deadhead flights, and
6 several added that they would pass along any other fees charged to them by airports; one
7 company also included charges for time on the ground spent waiting. Most noted
8 additional variables that could affect a particular price quote, including weather, season,
9 pilot experience, and other negotiable issues. Thus, the appropriate price for Benishek's
10 trip from Harbor Springs to MQT includes the costs of the two repositioning flights.

11 Here, whether we use a per-hour or per-mile method to calculate the cost of the
12 Munising flight, the fair market value of the charter flight would be roughly the same,
13 and, in any case, far less than the \$2,250 that the Committee reimbursed Zurcher for the
14 travel. Applying the highest quoted per-mile rate, \$2.50, to the 343 miles flown for
15 campaign travel in Zurcher's aircraft yields an estimated \$857 cost for chartering a
16 comparable aircraft for a coreparable route. Similarly, using the most expensive hourly
17 rate for a charter flight on a comparable aircraft of \$295, and the three hours of total
18 flight time identified in Zurcher's pilot log, costs out at roughly \$885 for the Munising
19 flight.

² We conducted telephone surveys with Air Reldan, Inc. from Abita Springs, Louisiana; Pavco Flight Center located in Tacoma Narrows, Washington; Aberdeen Flying Service based in Aberdeen, South Dakota; Rite Bros. Aviation from Port Angeles, Washington; El Aero Services located in Elko, Nevada; Air New England from Waterville, Maine; Westwind Aviation from Friday Harbor, Washington; Chester Charter located in Chester, Connecticut; Baker Aircraft from Baker City, Oregon; Shawano Flying Service located in Shawano, Wisconsin; and Dallas Aero based in Poplar, Montana.

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C. Legal Analysis

1. Benishek Violated the Non-Commercial Flight Prohibition

The Honest Leadership and Open Government Act of 2007 ("HLOGA") amended the Act to prohibit House candidates from making expenditures for non-commercial aircraft travel. *See* 2 U.S.C. § 439a(c)(2). Commission regulations provide that House candidates are prohibited from non-commercial air travel if they are "campaign travelers," 11 C.F.R. § 100.93(c)(2), and from making expenditures for or receiving in-kind contributions in the form of non-commercial air travel. 11 C.F.R. § 113.5(b). A "campaign traveler" includes "any candidate traveling in connection with an election for Federal office." *Id.* § 100.93(a)(3)(i)(A).

The Act also prohibits corporations from making any contribution in connection with a federal election, and correspondingly prohibits candidates and committees from knowingly accepting such contributions. 2 U.S.C. § 441b.³ The Commission's regulations also prohibit officers from consenting to the making of contributions by corporations. *Id.*; 11 C.F.R. § 114.2(e).

The evidence shows that Benishek was a "campaign traveler" as defined by 11 C.F.R. § 100.93(a)(3)(i)(A), because he flew on a non-commercial, corporate-owned airplane to MQT to campaign at the Home Show in connection with his 2010 campaign for the House. July 21, 2011, Benishek Letter. Benishek and the Committee initially characterized the Munising flight as "entirely personal," Resp. at 2 (Nov. 23, 2010), but they subsequently acknowledged that Benishek's "meeting and greeting friends and attendees of the Home Show" may have been "arguably" campaign-related. July 21,

³ "Contribution" includes any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office. 2 U.S.C. § 431(8).

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1 2011, Benishek Letter. Zurcher, for his part, claims that the Munising flight was not a
2 "campaign flight" but a pilot training flight and that the time he spent with Benishek was
3 personal. *See* Zurcher Resp. (Nov. 10, 2010); Zurcher Resp. (July 11, 2011).

4 Benishek's own statements in a YouTube video and the Committee's posting of a
5 Facebook photo of the aircraft on the Harbor Springs airport runway undercut any
6 contention that the travel was personal and not in connection with his election. *See*
7 Factual and Legal Analysis (Benishek Respondents) (June 21, 2011). The Benishek
8 Respondents have not disavowed Benishek's statements in the YouTube video, in which
9 he states that he went "to Munising to do the home show. So we got to shake a lot of
10 people's hands and to see a lot of the constituents, and meet a lot of people and tell them
11 where I stand on the issues." *See* Benishek Letter, July 21, 2011.

12 For these reasons, Benishek was a "campaign traveler" and violated 11 C.F.R.
13 § 100.93(c)(2) by taking a non-commercial aircraft flight, and Benishek and the
14 Committee violated 2 U.S.C. § 439a(c)(2) and 11 C.F.R. § 113.5(b) by accepting a
15 prohibited in-kind contribution in the form of non-commercial aircraft travel. Further,
16 Benishek and the Committee knowingly accepted a prohibited in-kind corporate
17 contribution in violation of 2 U.S.C. § 441b. Finally, St. George Glass violated 2 U.S.C.
18 § 441b by making a prohibited in-kind corporate contribution in the form of non-
19 commercial aircraft travel, and Zurcher, as president, violated 2 U.S.C. § 441b by
20 consenting to the contribution.

21 2. The Low Dollar Amount Does Not Warrant Further Action

22 Neither the Act nor the Commission's regulations specifically provide a method
23 to calculate the value of a flight prohibited by HLOGA or establish a civil penalty

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1 formula. Another section of HLOGA relating to non-House candidates who *are* allowed
2 to use non-commercial aircraft, however, requires reimbursement of "fair market value
3 . . . based on the charter rate for a 'comparable plane of comparable size' to the one
4 actually flown." *See* 2 U.S.C. § 439a(c)(1)(B).

5 As the Committee's and Zurcher's violations of the Act constitute prohibited
6 activity, a 100% civil penalty formula is in line with the civil penalty formulas used in
7 many other prohibited contribution MURs. *See, e.g.*, MUR 5895 (Meeks for Congress)
8 (approving 100% of the amount in violation in prohibited personal use matter under
9 Section 439a(b)); *see also* MUR 5020 (MGM Mirage) (approving 100% of the amount in
10 violation in corporate facilitation matter under Section 441b); MUR 6129 (ARDA-ROC
11 PAC) (approving 100% of the amount in violation in foreign national contribution matter
12 under Section 441e); and MUR 5879 (Bank of America) (approving 100% of amount of
13 non-knowing and willful violations in contribution in the name of another matter under
14 Section 441f).

15 Due to the low dollar amount at issue, however, we do not believe that this matter
16 warrants the use of additional Commission resources. Under the 100% civil penalty
17 approach, we would apply the average of the mileage or flight time rates we obtained,
18 that is, approximately \$697 based on mileage or \$589 based on flight time, to the 343
19 miles or three hours respectively of the Munising flight. *See* Table 1, *supra*. Taking the
20 higher of those two figures, \$697, and applying the 100% penalty formula for both sets of
21 respondents, with a 25% pre-probable cause discount, yields a rounded, opening civil
22 penalty offer of \$500 ($\$697 \times .75 = \523). The Commission generally has not pursued

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1 enforcement in matters where the opening civil penalty is less than \$1,000.⁴ Further, the
2 Committee took action to remedy the part of the violation concerning receiving in-kind
3 contributions in the form of non-commercial air travel (though not the part of the
4 violation concerning the making of expenditures for the same). Indeed, the Committee
5 subsequently reimbursed Zurcher \$2,250 for the cost of travel, an amount much larger
6 than the highest comparable cost for a flight of similar duration or distance based on the
7 comparable rates we obtained. For these reasons, we conclude this matter does not
8 warrant the further expenditure of Commission resources.

9 Therefore, we recommend that the Commission take no further action other than
10 to send letters cautioning Benishek, the Committee, Zurcher, and St. George Glass,
11 pointing out that House candidates are prohibited from flying on non-commercial aircraft
12 while on campaign travel. We also recommend that the Commission close the file.


⁴ See, e.g., Pre-MUR 465 (Tuesday Group PAC); Pre-MUR 466 (DENT PAC); Pre-MUR 467 (JEB FUND); Pre-MUR 468 (COLDPAC); Pre-MUR 471/RR 08L-26 (PHILPAC); Pre-MUR 476/RR 08L-27 (SAXPAC); RR 08L-30 (LUISPAC) (Commission approved OGC recommendations to decline opening MURs as to embezzled committees based on the circumstances involved and the low civil penalty amounts, ranging from \$375-\$625). We note that the Commission could, alternately, apply a statutory penalty (\$7,500) for this violation. We do not recommend that approach here, however, because such a penalty seems disproportionately high considering the particular nature of these flights, the fact that Benishek was a first-time candidate, and the fact that the regulations implementing HLOGA were still relatively new at the time of this travel. See Explanation and Justification for Regulations on Campaign Travel, 74 Fed. Reg. 63,951 (Dec. 7, 2009) (effective Jan. 6, 2010).

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IV. RECOMMENDATIONS

1. Take no further action as to Benishek for Congress and Trent J. Benishek in his official capacity as Treasurer, Dan Benishek, St. George Glass and Window Co., Inc., and Steven P. Zurcher, and send letters of caution.
2. Approve the appropriate letters.
3. Close the file.

Anthony Herman
General Counsel



Daniel A. Petalas
Associate General Counsel for Enforcement



Elena Paoli
Attorney

11/30/12

Date

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