



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

VIA FAX (202-467-6910) and FIRST CLASS MAIL

MAY 29 2012

James A. Kahl, Esq.
Womble Carlyle Sandridge & Rice, PLLC
1200 Nineteenth Street, NW, #500
Washington, DC 20036

RE: MUR 6500
W. Clark Durant;
The American Way – Durant 2012
and Walter Czarnecki, in his official
capacity as treasurer

Dear Mr. Kahl:

By letter dated September 29, 2011, the Federal Election Commission ("Commission") notified your clients, W. Clark Durant and The American Way – Durant 2012 and Walter Czarnecki, in his official capacity as treasurer, of a complaint alleging that your clients violated certain aspects of the Federal Election Campaign Act of 1971, as amended ("the Act") and Commission regulations. A copy of the complaint was provided at that time. By letter dated October 12, 2011, the Commission notified your clients of supplemental information provided by the complainant.

After reviewing the complaint, supplements, and your responses, the Commission, on May 22, 2012, found no reason to believe that The American Way – Durant 2012 and Walter Czarnecki, in his official capacity as treasurer, and W. Clark Durant violated 2 U.S.C. § 441b(a) or 11 C.F.R. §§ 114.2(f)(1) 11 C.F.R. § 114.4(c)(6)(i) and 300.61. Accordingly, on May 22, 2012, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

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James A. Kahl, Esq.
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If you have any questions, please contact Kimberly D. Hart, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Shonkwiler", with a stylized, flowing script.

Mark D. Shonkwiler
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

MUR 6500

RESPONDENTS:

The American Way – Durant 2012 and Walter P. Czarnecki, in his official capacity as treasurer

W. Clark Durant

I. INTRODUCTION

This matter was generated by a complaint filed by the Bill Beddoes. *See*

2 U.S.C. § 437(g)(a)(1). The matter involves allegations that two non-profit corporations, New Common School Foundation (“NCSF”) and Cornerstone Schools Association (“CSA”), an educational institution, made prohibited in-kind contributions to The American Way – Durant 2012 and Walter P. Czarnecki, in his official capacity as treasurer (“Committee”), the principal campaign committee for U.S. Senate candidate W. Clark Durant. Durant is the current President and a Board of Director member of NCSF, and currently serves as the “Founding Chair” and a Board of Director member of CSA.

The complaints (original, amended, and second amended) allege that the Committee violated 2 U.S.C. § 441b(a) by receiving prohibited in-kind corporate contributions as a result of: 1) NCSF’s payment for legal advice regarding any possible conflict of interest arising from Durant being a candidate while continuing to be an NCSF officer;¹ 2) a CSA television advertisement promoting the school across the state; 3) an email sent by CSA’s President and CEO, Ernestine Sanders, to its “partners” and “friends” inviting them to attend a regularly

¹ Complainant also alleges that the NCSF Board, of which Durant is a member, violated 11 C.F.R. § 114.2(f)(1) by facilitating the making of a prohibited corporate in-kind contribution; and that Durant, as a NCSF Board member, violated 11 C.F.R. § 300.61 by unlawfully directing the use of non-federal funds to benefit his federal candidacy.

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1 scheduled meeting, during which Durant announced his candidacy; 4) the Committee's use of
2 CSA's facility for announcing Durant's candidacy; and 5) the Committee's use of video
3 materials from CSA's YouTube page in one of its campaign mailers.

4 Respondents were notified of the complaint and amendments and deny the allegations.
5 Respondents, however, did not address the allegation regarding the CSA television
6 advertisement included in the original complaint but not included in the subsequently filed
7 amended and second amended complaints.

8 For the reasons discussed below, the Commission finds no reason to believe the
9 Respondent violated the Act.

10 **II. FACTUAL BACKGROUND**

11 NCSF is a Michigan non-profit corporation whose stated primary purpose is to "explore
12 educational methodologies that enhance performance throughout the public educational system."
13 Durant is the current President and serves on its Board of Directors. CSA is a Michigan non-
14 profit corporation that operates as a group of charter and independent schools in Detroit. Durant
15 currently serves as its "Founding Chair" and a Board of Director member. On August 8, 2011,
16 Durant filed his Statement of Candidacy with the Commission. The American Way – Durant
17 2012 is Durant's principal campaign committee and its treasurer is Walter P. Czarniecki.

18 The complaint alleges that NCSF paid for and Durant accepted legal services for the
19 benefit of Durant's campaign. See Original Complaint at 1. This allegation is based on an
20 August 22, 2011 newspaper article in which Durant was quoted as stating that the NCSF would
21 consult with its legal counsel to ensure that there was no conflict between Durant's continued
22 presidency of NCSF and his Senate candidacy. See *Id.* at 5, Ex. C. In their respective responses
23 to the complaints, both NCSF and Clark Durant's campaign deny such an arrangement. NCSF

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1 clarified that it asked its own counsel to research whether the organization could continue to
2 compensate Durant once he announced his candidacy. *See* NCSF and CSA Joint Response
3 (“Joint Response”) at 3. The Durant campaign stated that Durant personally retained and paid
4 for the legal services of a law firm different from the one retained by NCSF to advise him on his
5 legal obligations as a candidate. *See* Committee Response at 2. Complainant asks the
6 Commission to “investigate NCSF’s apparent prohibited in-kind contributions to Durant and the
7 Committee...[and] Durant’s role in directing the non-federal corporate funds of NCSF for legal
8 services for the clear benefit of his federal campaign.” Second Amended Complaint at 6.

9 On September 9, 2011, CSA’s President and CEO, Ernestine Sanders, sent an email
10 (“Sanders email”) to its “partners and friends” inviting them to attend a regularly scheduled
11 quarterly “Partner Morning” meeting on September 23, 2011, during which Durant formally
12 announced his candidacy.² *See* Complaints. Complainant contends that, given Durant’s current
13 position at CSA, there must have been coordination on the email resulting in the receipt of a
14 prohibited in-kind corporate contribution in violation of 2 U.S.C. § 441b(a). *Id.* Respondents
15 deny that the communication was coordinated with Durant or the Committee. Committee
16 Response at 3.

17 Complainant alleges further that CSA funded and aired an advertisement on a cable
18 television system serving Mackinac Island, Michigan, which is far outside of the Southeastern
19 Michigan area where CSA operates, on September 10, 2011. Without explaining the basis for its
20 conclusion or providing any details about the context, such as whether Durant is featured or even

² An individual meets the definition of a “partner” when he/she donates at least \$2,500 per year to help underwrite a child’s education for one year and is teamed with a student with whom they meet during the “Partner Mornings,” which are conducted four times per year. An individual who meets the definition of a “friend” is someone who contributes to CSA but not at the partner level.

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1 mentioned, Complainant alleges the ad was intended to build goodwill for Durant's campaign.
2 Original Complaint at 2. The advertisement is not available for Commission review. The
3 subsequently filed amended and second amended complaints do not include this particular
4 allegation, and the Committee Response does not address this allegation. See Amended
5 Complaint; Second Amended Complaint.

6 On September 23, 2011, Durant appeared and announced his campaign for U.S. Senate
7 at CSA's regularly scheduled quarterly "Partner Morning" meeting. Complainant alleges that
8 Durant's appearance at the "Partner Morning" meeting was essentially a campaign event for
9 which neither Durant nor his Committee paid the usual and normal cost for the use of CSA's
10 facility as required by 11 C.F.R. § 114.4(c)(7)(i). Complainant contends that Durant's use of
11 CSA's facility, at no cost to the Committee, constitutes the receipt of a prohibited in-kind
12 corporate contribution. However, the Committee stated that it paid \$800 for use of the facility
13 and that this was the usual and normal cost. Committee Response at 2.

14 On September 26, 2011, the Committee distributed a four page campaign mailer that
15 stated that Durant "formally announced his candidacy for United States Senate from the
16 Cornerstone Schools on Friday September 23." The mailer included a photograph of
17 "Cornerstone kindergartners recit[ing] the U.S. Constitution." Second Amended Complaint at 3-
18 4, Ex. E. Underneath the photograph is a link to the Committee's YouTube page that, when
19 accessed, directed the viewer to a video clip from 2008 of what appears to be the same
20 kindergartners reciting the U.S. Constitution.³ *Id.* Complainant alleges that the Committee's use
21 of CSA's YouTube video in its campaign mailer constitutes a prohibited in-kind corporate
22 contribution because the video was funded with CSA's corporate resources, and the Committee

³ This video is not available on the link provided on the mailer, <http://www.youtube.com/clarkdurant>. However, the video can be found at <http://www.youtube.com/watch?v=zzOwTym0Xi8>.

1 used the video without paying a fair market value. *Id.* The Complainant also asserts the use is a
2 potential violation of copyright laws. *Id.* Respondents deny that the Committee's use of
3 publicly available video footage resulted in an in-kind contribution. Committee Response at 2.

4 **III. LEGAL ANALYSIS**

5 The Act prohibits corporations from making contributions in connection with a federal
6 election.⁴ 2 U.S.C. § 441b(a). It also prohibits any candidate from knowingly accepting or
7 receiving any contribution from a corporation, or any officer or any director of a corporation
8 from consenting to any contribution by a corporation to a federal candidate. *Id.* Federal
9 candidates and officeholders, including agents acting on their behalf and entities that are directly
10 established, maintained, financed or controlled by one or more federal candidates or
11 officeholders, may not solicit, direct, receive, transfer, spend or disburse non-federal funds.
12 2 U.S.C. § 441i(e); 11 C.F.R. § 300.61.

13 Commission regulations provide that any incorporated nonprofit educational institution
14 exempt from federal taxation under 26 U.S.C. § 501(c)(3), such as a school, college, or
15 university, may make its facilities available to any federal candidate or candidate's
16 representatives in the ordinary course of business and at the usual and normal charge. 11 C.F.R.
17 § 114.4(c)(7)(i).

18 **A. NCSF's Retention of Counsel**

19 The available information indicates that the funds expended by NCSF to retain counsel
20 were for the purpose of ensuring its own compliance with the Act and Internal Revenue Service
21 laws given its Section 501(c)(3) status. The Committee Response asserts that Durant and NCSF

⁴ Contributions include any direct or indirect payment, distribution, loan, advance, deposit or gift of money, or any services, or anything of value to any candidate or campaign committee in connection with a federal election. 2 U.S.C. § 441b(b)(2). In-kind contributions must be reported pursuant to 2 U.S.C. § 434(b). The corporate ban on contributions to federal candidates also includes in-kind contributions. 11 C.F.R. § 114.2(c).

1 retained separate legal counsel to advise them on their differing legal obligations arising out of
2 his candidacy. Committee Response at 2. NCSF's use of funds for the purpose of legal advice
3 pertaining to Durant's candidacy and his continued affiliation with NCSF appears to have been
4 for the benefit of NCSF's own interests, and does not constitute the making or receiving of a
5 prohibited in-kind corporate contribution.

6 There is no available information indicating that NCSF paid for legal advice to benefit
7 Durant or his Committee. Similarly, there is no available information to support the allegation
8 that Durant, as a federal candidate, unlawfully directed the use of non-federal NCSF funds to
9 benefit his candidacy.

10 Accordingly, the Commission: 1) finds no reason to believe that The American Way –
11 Durant 2012 and Walter P. Czarnecki, in his official capacity as treasurer, received a prohibited
12 in-kind corporate contribution, in the form of legal services, in violation of 2 U.S.C. § 441b(a);
13 2) finds no reason to believe that W. Clark Durant, as a NCSF Board member, facilitated the
14 making of a prohibited in-kind corporate contribution to the Committee in the form of legal
15 services in violation of 11 C.F.R. § 114.2(f)(1); and 3) finds no reason to believe that W. Clark
16 Durant, as a federal candidate and NCSF Board Member, unlawfully directed the use of non-
17 federal funds to provide legal advice in support of Durant or his candidacy in violation of
18 11 C.F.R. § 300.61.

19 **B. CSA's "Partner Morning" Meeting Email**

20 The Sanders email advertising the announcement of Durant's candidacy was sent only to
21 those individuals who fell within the category of a "partner" or "friend" that would normally be
22 invited and attend CSA's regularly scheduled quarterly "Partner Morning" meeting. Further, it
23 appears that Sanders alone was responsible for preparing the email without any coordination

1 with Durant or the Committee. *See* Committee Response at 3. There is no available information
2 to support a conclusion that the Sanders email involved any coordination between the parties as
3 defined by 11 C.F.R. § 109.21.

4 Accordingly, the Commission finds no reason to believe that The American Way –
5 Durant 2012 and Walter P. Czarnecki, in his official capacity as treasurer, violated 2 U.S.C.
6 § 441b(a) by coordinating the Sanders email sent by Cornerstone Schools Association in a
7 manner that would result in the receipt of a prohibited in-kind corporate contribution.

8 **C. CSA's Television Advertisement**

9 As stated previously, Complainant did not provide any detailed information regarding the
10 CSA advertisement and the Committee Response does not address this issue, presumably
11 because it was not included in the amended complaints. Notwithstanding the Complainant's
12 allegations, there is no available information to support the assertion that the CSA television
13 advertisement constituted a contribution under the Act. Although Complainant asserts that the
14 advertisement was aired in order to promote Durant's candidacy, there is no allegation that the
15 advertisement featured Durant, expressly advocated for his election, was coordinated with the
16 Committee or constituted an electioneering communication. *See* 11 C.F.R. §§ 100.22, 100.29,
17 and 109.21. In the absence of any information that would suggest CSA or the Committee
18 violated the Act with respect to the television advertisement, the Commission finds no reason to
19 believe that The American Way – Durant 2012 and Walter P. Czarnecki, in his official capacity
20 as treasurer, violated 2 U.S.C. § 441b(a) by receiving a prohibited in-kind corporate contribution.

21 **D. Use of CSA's Corporate Facility for Candidacy Announcement**

22 The available information supports the Committee's contention that CSA, as a non-profit
23 educational institution, was permitted to make its facilities available to Durant in the ordinary

1 course of business at the usual and normal cost and that it, in fact, paid the usual and normal cost,
2 totaling \$800, for the use of CSA's facilities in conjunction with Durant's appearance at the
3 "Partner Morning" meeting. Committee Response at 3; *see also* 11 C.F.R. § 114.4(c)(7)(i).
4 Therefore, the Commission finds no reason to believe that The American Way – Durant 2012
5 and Walter P. Czarnecki, in his official capacity as treasurer, received a prohibited in-kind
6 corporate contribution in violation of 2 U.S.C. § 441b(a).

7 **E. Use of CSA's YouTube Video**

8 The Commission reviewed the Committee's campaign mailer which contains the
9 information as alleged in the complaint. Complaint at Ex. E. Although the Committee does not
10 make specific reference to the campaign mailer in its response, but rather refers to the videos
11 being placed on the Committee's website, the Commission concludes that the response appears
12 to be sufficient to cover the campaign mailer and YouTube video at issue. Committee Response
13 at 2. The CSA video is from 2008, well before Durant was a candidate. CSA states that the
14 Committee made the decision to post the publicly available video on its own website without
15 consultation with CSA. Joint Response at 5.

16 The Commission concludes that the Committee's use of the publicly available
17 information from CSA's YouTube page does not constitute an in-kind corporate contribution
18 from CSA to the Committee.⁵ Accordingly, the Commission finds no reason to believe that The
19 American Way – Durant 2012 and Walter P. Czarnecki, in his official capacity as treasurer,
20 received a prohibited in-kind corporate contribution in violation of 2 U.S.C. § 441b(a) with the

⁵ For purposes of this Report, the Commission does not reach any conclusion with respect to the copyright allegations since this issue does not fall within its jurisdiction. The Commission need not address coordination and the safe harbor for publicly available information where the mailer at issue was paid for by the Committee. *See* Committee Response at 2; *see also* Explanation and Justification for *Coordinated Communications and Independent Expenditures*, 71 Fed. Reg. 33,190 (June 6, 2006); 11 C.F.R. § 109.21(d)(2).

MUR 6500 (Durant)
Factual and Legal Analysis
for Durant and the Committee

- 1 use of Cornerstone Schools Association's publicly available YouTube video in its campaign**
- 2 mailer.**