

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

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FIRST GENERAL COUNSEL'S REPORT

1 Pre-MUR: 526
2 Date Activated: October 26, 2011
3
4 Expiration of Statute
5 of Limitations
6 Earliest: April 15, 2012
7 Latest: July 15, 2015
8
9 SOURCE: *Sua Sponte* Submission by Geoff Davis for
10 Congress and Kevin Broghamer, in his official
11 capacity as treasurer
12
13 RESPONDENTS: Geoff Davis for Congress and Kevin Broghamer,
14 in his official capacity as treasurer
15 Joe Green
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17 RELEVANT STATUTES
18 AND REGULATIONS: 2 U.S.C. § 432(c)
19 2 U.S.C. § 434(b)
20 2 U.S.C. § 439a(b)
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22 INTERNAL REPORTS CHECKED: Disclosure Reports
23
24 FEDERAL AGENCIES CHECKED: None
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26 I. INTRODUCTION

27 Geoff Davis for Congress and Kevin Broghamer, in his official capacity as treasurer
28 ("the Committee"), the principal campaign committee of U.S. Representative Geoff Davis,
29 filed a *sua sponte* submission ("Submission") with the Commission on August 5, 2011. The
30 Submission disclosed that its former treasurer, Joe Green, made unauthorized payments of
31 Committee funds to himself totaling \$7,343.03, and failed to report them. The Submission

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1 also acknowledged that the Committee's disclosure reports covering the period between
2 January 1, 2007 and June 30, 2010 contained reporting errors totaling \$50,741. The errors
3 were caused by the Committee's failure to report its former treasurer's unauthorized payments
4 to himself, the failure to report direct mailing postage refunds and returned contribution
5 checks, the overreporting of bank fees, and computation errors. These errors, according to the
6 Submission, led to the Committee's underreporting of cash-on-hand, receipts, and
7 disbursements over this time period. Additionally, the Committee's disclosure included four
8 contribution checks that the Committee had never deposited into its bank account.

9 Joe Green responded to the notification of the alleged personal use and associated
10 misreporting violations, describing personal difficulties during the period of the alleged
11 unauthorized payments to himself, but not denying that he misappropriated Committee
12 funds. Green, who had already refunded \$5,900 to the Committee, attached a check to the
13 Committee for \$1,443.03 to his response; the check was immediately returned to him by the
14 Commission's Budget Office.

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We also recommend that the

23 Commission open a MUR as to Joe Green, find reason to believe that Joe Green knowingly

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1 and willfully violated 2 U.S.C. §§ 432(c), 434(b), and 439a(b), and enter into pre-probable
2 cause conciliation with him.

3 **II. FACTUAL AND LEGAL ANALYSIS**

4 **A. Factual Background**

5 The Committee first informed OGC of unauthorized payments to its treasurer in a
6 telephone conversation on July 27, 2010, in which it stated that it had terminated Green as
7 treasurer, and that Green tried to repay the money.² In a telephone update on October 28,
8 2010, the Committee told OGC that it had hired a local Kentucky accountant who had
9 conducted a limited review of the Committee's records and disclosure reports, but that it was
10 hiring another accountant to conduct a more thorough audit. On April 11, 2011 and May 4,
11 2011, the Committee's counsel contacted OGC regarding arranging a meeting with OGC and
12 the Reports Analysis Division ("RAD") to discuss this matter. The Committee's counsel
13 subsequently met with OGC and RAD staff on June 1, 2011, and summarized the results of
14 the audit.

15 In its written Submission dated August 5, 2011, the Committee states that in July
16 2010, Kevin Broghamer, then compliance officer for the Committee, reviewed the
17 Committee's June 2010 bank statement and noticed an unauthorized payment to Joe Green,
18 then treasurer of the Committee. After further investigation, Broghamer noticed other
19 unauthorized payments to Green. The Committee states that it hired a law firm, terminated
20 Joe Green as treasurer, and notified a local law enforcement official in Kentucky of the
21 unauthorized payments. Additionally, after using a local accountant in Kentucky to conduct

² According to the Committee's disclosure reports, Joe Green served as treasurer of the Committee from January 2003 to July 2010, when he was terminated by the Committee. On July 27, 2010, the Committee filed a Statement of Organization listing Kevin Broghamer as the treasurer. Geoff Davis was first elected to Congress in November 2004, and announced on December 15, 2011 that he was not seeking reelection in 2012.

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1 initial audit work, the Committee states that it hired Michael Erler, a certified public
2 accountant, to audit the Committee's books and records. On February 27, 2011, Erler
3 reported his audit findings to the Committee and thereafter, the Committee conducted
4 additional due diligence to follow up on the audit findings.

5 The audit covered the period between January 1, 2007 and June 30, 2010, and
6 revealed that as of June 30, 2010, the Committee had understated its cash balance by
7 \$55,575; the actual cash balance was \$865,673, but the Committee's disclosure reports
8 showed cash-on-hand of \$810,098. The audit also determined that a cash-on-hand surplus of
9 \$43,910 existed prior to January 1, 2007, and the remaining \$11,665 of the surplus in cash-
10 on-hand occurred between January 1, 2007 and June 30, 2010.³

11 The audit also identified unauthorized Committee checks to Green on September
12 30, 2009 for \$659; February 24, 2010 for \$284.03; April 15, 2010 for \$4,800; and June 17,
13 2010 for \$1,100, totaling \$6,843.03 that had not been reported to the Commission. Joe
14 Green also received an additional unauthorized payment of \$500 in 2009; the Committee's
15 records show a payment from the Committee to Green for \$2,000, but the 2009 July
16 Quarterly Report disclosed a payment to Green for \$1,500 on April 1, 2009 for computer
17 software expense. It appears that the audit determined the disbursement for \$1,500 was a
18 legitimate disbursement to Green, and the remaining \$500 of the Committee's \$2,000
19 payment was unauthorized because the total alleged unauthorized payments to Green are

³ According to additional information that the Committee submitted by letter dated December 21, 2011, it chose the time period between January 1, 2007 and June 30, 2010 for the audit because "it represented the three years preceding the date of the most recent FEC reporting period" and "FEC regulations specify that committees must keep the records of receipts and disbursements for three years from the date of the report to which they relate. See 11 C.F.R. § 102.9(c) and 104.14(b)." In regard to the cash-on-hand surplus as of December 31, 2006, the Committee stated that "there is no evidence that it is attributable to any misconduct" and "we understood RAD's agreement to have the Committee file a Form 99 disclosure as an acknowledgment that there was no need to conduct further auditing to analyze the cash on hand discrepancy that existed on December 31, 2006."

1 listed as \$7,343.03 (\$6,843.03 + \$500). According to the Submission, Joe Green refunded
2 \$5,900 of the unauthorized payments to the Committee, and the Committee's disclosure
3 reports indicate this refund occurred on August 5, 2010.⁴

4 In addition, the Submission described errors and omissions in the Committee's
5 reporting of receipts and disbursements for the period between January 1, 2007 and June 30,
6 2010 identified in the audit. See Submission, Exhibit 1. In addition to the unauthorized and
7 unreported payments to Green, the Committee failed to report direct mailing postage
8 refunds, returned contribution checks, credit card contributions and fees, and overreported
9 bank fees, which resulted in the misstatement of financial activity totaling \$50,741 during
10 the period between January 2007 and June 2010. In its Submission, the Committee also
11 reported four contribution checks that were not deposited into its bank account. The
12 Submission noted that in consultation with RAD, the Committee had previously adjusted its
13 reported cash on hand to conform to the amount of funds actually in its bank account, and
14 were in the process of filing a Form 99 detailing the reporting errors identified during the
15 audit.

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⁴ According to the Committee's 2010 October Quarterly Report, Green wrote a check for 5,900 to the Committee on July 27, 2010, and the Committee noted that this receipt was for "return of unauthorized disbursement." The disclosure report also notes that the bank returned the check to the Committee on August 2, 2010, and that the Committee received another check from Joe Green on August 5, 2010 for \$5,935.

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3 Accordingly, on November 25, 2011, we sent the Committee a letter requesting it
4 to provide additional information, including a description of its internal controls prior to its
5 discovery of the unauthorized payments, the policies and procedures it had implemented
6 since the discovery to prevent such payments occurring in the future and to ensure accurate
7 reporting to the Commission, the documentation from its internal audit, and the chronology
8 of events between the discovery of the unauthorized payments and the Submission. The
9 Committee responded by letter dated December 21, 2011 ("Response").

10 In its Response, the Committee states that during Green's tenure as treasurer,
11 "Representative Davis and Mr. Green had signature authority over the Committee's Heritage
12 Bank checking account, and all checks had to have one of their signatures." Response at 5.
13 Representative Davis and Green were also authorized to initiate wire transfers. *Id.* The
14 Committee states that Jeremy Hughes, Davis' campaign manager and Kevin Broghamer,
15 a Committee consultant and compliance officer, handled disbursement functions, such as
16 receiving invoices, printing checks, archiving check copies and seeking approval for
17 payment from Armstrong Robinson, the Chief of Staff. *Id.* Hughes and Broghamer also
18 handled contribution receipts including depositing contributions into the bank and entering
19 data about the contributions. The Committee indicates that Green was "responsible for bank
20 reconciliations, before and after Mr. Broghamer was hired, though it is not clear from current
21 records whether he performed reconciliations," and Hughes and Broghamer were responsible
22 for opening mail, but "bank statements were placed in Mr. Green's mailbox unopened." *Id.*
23 at 6. After he was hired, Broghamer "would occasionally open the bank statements and send

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1 a scanned copy to Mr. Green." *Id.* Before Broghamer was hired, Green prepared the
2 Committee's disclosure reports, and thereafter, Green reviewed initial drafts prepared by
3 Broghamer, and Representative Davis and Robinson reviewed the final drafts.

4 The Committee stated in its Response that it has implemented new policies related to
5 handling receipts and disbursements. The Committee states that it "reconciles its bank
6 statements monthly and reviews them for unauthorized transactions," and the reconciliations
7 are prepared by a deputy assistant treasurer and confirmed by an assistant treasurer who is
8 also a certified public accountant. *See Response* at 6. The Committee also states that three
9 individuals have signature authority on the checks, and any "checks in excess of \$1,000 and
10 all wires must now be signed by two individuals." *Id.* Kristy Broghamer, a Finance
11 assistant for the Committee, is responsible for handling contributions, but she does not have
12 banking authority or primary responsibility for the Committee's accounting. The Committee
13 also provided the documentation from its independent audit.

14 The Committee also described its efforts to correct its disclosure reports for the
15 period covering January 1, 2007 through June 30, 2010. On October 21, 2010, after
16 consulting with RAD, the Committee had adjusted its cash-on-hand balance by \$55,575 in
17 its 2010 Pre-General Report. After further consultation with RAD, the Committee filed a
18 Form 99 on August 15, 2011, identifying all adjustments it needed to make in its disclosure
19 reports filed during the period between January 1, 2007 and June 30, 2010. At the request of
20 RAD, the Committee also filed an additional Form 99 on September 3, 2011 stating that
21 "part of the adjustment to cash on hand made by the Committee on October 21, 2010 was the
22 result of discrepancies that occurred prior to December 31, 2006." The Committee provided
23 no additional explanation of factors that may have caused the \$43,910 cash-on-hand

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1 discrepancy as of December 31, 2006 other than it "presumably represents accumulated
2 reporting errors occurring prior to January 1, 2007." Response at 4.

3 OGC notified Joe Green of the allegations in the Committee's Submission. In
4 response, Green stated that during his last two years as treasurer of the Committee, he was
5 "less than diligent in discharging his duties" due to demanding responsibilities in his
6 professional employment. Green also stated that while working for the campaign, he "never
7 intentionally misappropriated funds" from the campaign, but was a "sloppy bookkeeper" in
8 the final months of his tenure.

9 Further, Green states that he
10 had problems in handling the Committee's accounting records. Green claims not to
11 "remember the details" of his unauthorized payments to himself from campaign funds.
12 With his response to the notification, Green attached a check made out to the Committee
13 for the remaining \$1,443.03 of the \$7,343.03 in alleged unauthorized withdrawals; the
14 Commission's Budget Office returned that check to him.

15 **B. Legal Analysis**
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Pre-MUR 526
First General Counsel's Report
Page 11

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2. Joe Green

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A contribution or donation described in 2 U.S.C. § 439(a) shall not be converted to personal use. 2 U.S.C. § 439a(b)(1). A contribution or donation shall be considered to be converted to personal use if the contribution or amount is used to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of federal office. 2 U.S.C. § 439a(b)(2). The Act and Commission regulations set forth some examples of personal use, such as mortgage payments, tuition payments, noncampaign-related automobile expenses, and health club dues. *See* 2 U.S.C. § 439a(b)(2)(A)–(I); *see also* 11 C.F.R. § 113.1(g).

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Joe Green allegedly made five unauthorized payments to himself in 2009 and 2010 from Committee funds totaling \$7,343.03, which were apparently for personal use, and failed to report the payments on the Committee's disclosure reports. The first unauthorized

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1 payment was for \$500, as evidenced by Committee check number 2655, which was made
2 out to Green for \$2,000, but was reported on the Committee's disclosure report as a
3 disbursement for \$1,500. See Submission, Exhibit 1, page 3. According to the Committee's
4 2009 July Quarterly Report, the disbursement of \$1,500 was made on April 1, 2009. The
5 remaining four unauthorized payments totaling \$6,843.03, as evidenced by Committee check
6 number 10500 on September 30, 2009 and Committee check numbers 10497, 10498, 10499
7 on February 24, 2010, April 15, 2010 and June 17, 2010, respectively, were made out to
8 Green and not reported on the Committee's disclosure reports. See Submission, Exhibit 1,
9 page 3. Thus, it appears that Green made unauthorized payments to himself, using
10 Committee checks, on five different occasions over a period of 15 months, and failed to
11 report them on the Committee's disclosure reports. While we do not know the specific
12 purposes for which Green spent the alleged unauthorized disbursements, he has not denied
13 converting \$7,343.03 in campaign funds for personal use in violation of 2 U.S.C.
14 § 439a(b)(1). Moreover, his repayment of most of the funds to the Committee, while
15 commendable, may also constitute an admission that he unlawfully misappropriated those
16 funds.

17 According to the Commission's *Statement of Policy Regarding Treasurers Subject to*
18 *Enforcement Proceedings*, a former treasurer may be named as a respondent in his personal
19 capacity when it appears that he, while serving as treasurer, may have violated obligations
20 imposed by the Act or regulations, and where the violations were knowing and willful.
21 70 Fed. Reg. 3 (January 3, 2005). See MUR 6179 (Christopher Ward), MUR 5610 (Earl
22 Allen Haywood), MUR 5721 (Lockheed Martin), MUR 5971 (Jennifer Adams). Under the
23 Act, a treasurer is required to accurately keep an account of and report disbursements. See

1 2 U.S.C. §§ 432(c)(5), 434(b)(4) and (6). Committee treasurers are also personally
2 responsible for the timely and complete filing of reports and statements required by the Act
3 and for the accuracy of any information or statement contained in it. 11 C.F.R. § 104.14(d).
4 It appears that Joe Green violated these provisions in the course of his misappropriation of
5 the Committee funds.

6 The Act addresses violations that are knowing and willful. See 2 U.S.C.
7 § 437g(a)(5)(B). The knowing and willful standard requires knowledge that one is violating
8 the law. The phrase "knowing and willful" indicates that "acts were committed with full
9 knowledge of all of the relevant facts and a recognition that the action is prohibited by law...
10 ." 122 Cong. Rec. H3778 (daily ed. May 3, 1976); see also *AFL-CIO v. FEC*, 628 F.2d 97,
11 98, 101-02 (D.C. Cir.), *cert. denied*, 449 U.S. 982 (1980) (noting that a "willful" violation
12 includes "such reckless disregard of the consequences as to be equivalent to a knowing,
13 conscious, and deliberate flaunting of the Act," but concluding on the facts before it that this
14 standard was not met) (*cited in National Right to Work Comm. v. FEC*, 716 F.2d 1401, 1403
15 (D.C. Cir. 1983)). An inference of knowing and willful conduct may be drawn "from the
16 defendant's elaborate scheme for disguising" his or her actions. *United States v. Hopkins*,
17 916 F.2d 207, 214-15 (5th Cir. 1990). The evidence need not show that the defendant "had
18 specific knowledge of the regulations" or "conclusively demonstrate" a defendant's "state of
19 mind," if there are "facts and circumstances from which the jury reasonably could infer [the
20 defendant] knew her conduct was unauthorized and illegal." *Id.* at 213 (*quoting United*
21 *States v. Bordelon*, 871 F.2d 491, 494 (5th Cir.), *cert. denied*, 439 U.S. 838 (1989)).

22 Although he states he "never intentionally misappropriated funds" from the
23 Committee, Green's apparent efforts to disguise the disbursements to himself by failing to

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1 include them in the Committee's disclosure reports strongly indicates that he knew that his
2 conduct was illegal. Accordingly, we recommend that the Commission open a MUR as to
3 Joe Green, find reason to believe that Joe Green knowingly and willfully violated 2 U.S.C.
4 §§ 432(c), 434(b), and 439a(b), and enter into pre-probable cause conciliation with him.

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IV. RECOMMENDATIONS

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2. Open a MUR as to Joe Green;
3. Find reason to believe that Joe Green knowingly and willfully violated 2 U.S.C. § 432(c), 2 U.S.C. § 434(b) and 2 U.S.C. § 439a(b);
4. Enter into conciliation with Joe Green, prior to a finding of probable cause to believe;
- 5.
6. Approve the attached Factual and Legal Analysis with Joe Green; and
7. Approve the appropriate letters.

Christopher Hughey
Deputy General Counsel

Kathleen Guith / by SLT
Kathleen Guith
Acting Associate General Counsel for
Enforcement

Susan L. Lebeaux
Susan L. Lebeaux
Assistant General Counsel

Feb. 23, 2012
Date

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Delbert K. Rigsby

Delbert K. Rigsby
Attorney

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