

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

2012 NOV 19 PM 5: 08

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

SENSITIVE
RECEIVED
FEDERAL ELECTION
COMMISSION

2012 NOV 19 PM 5: 10

FIRST GENERAL COUNSEL'S REPORT

CELA

MUR: 6542

DATE COMPLAINT FILED: March 19, 2012

DATE OF NOTIFICATION: March 30, 2012

LAST RESPONSE RECEIVED: June 26, 2012

DATE ACTIVATED: August 21, 2012

EXPIRATION OF SOL: August 21, 2016 –
May 26, 2017

COMPLAINANT:

Morgan Anderssen-Williams

RESPONDENTS:

Markwayne Mullin
Mullin for Congress and Debbie Dooley, in her
official capacity as treasurer
Mullin Plumbing, Inc.
Superior Wood Floors, Inc.
Branchcomb, Inc.
Reco Electric Co.
Mother Nature's, Inc.

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 431(8)
2 U.S.C. § 441a
2 U.S.C. § 441b
11 C.F.R. § 100.52
11 C.F.R. § 103.3
11 C.F.R. § 110.1
11 C.F.R. § 110.2
11 C.F.R. § 114.2
11 C.F.R. § 114.9

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The Complaint alleges that Mullin for Congress and Debbie Dooley in her official capacity as treasurer ("Committee") violated the Federal Election Campaign Act of 1971, as

13044331538

1 amended, ("the Act") by accepting impermissible contributions. After reviewing the Complaint,
2 responses, and publicly available information, we recommend that the Commission dismiss or
3 find no reason to believe as to each allegation raised in the Complaint. Additionally, we
4 recommend that the Commission issue letters of caution, as described below.

5 II. FACTUAL BACKGROUND

6 Markwayne Mullin was a candidate in the 2012 primary, primary runoff, and general
7 elections for the U.S. House of Representatives from the Second Congressional District of
8 Oklahoma. The Committee is Mullin's principal campaign committee. Mullin is the president,
9 CEO, and sole shareholder of Mullin Plumbing, Inc., an Oklahoma corporation. Mullin Resp. at
10 2 (May 16, 2012).¹

11 The Complaint alleges that the Committee made an "excessive number" of redesignations
12 and reattributions of contributions and accepted impermissible direct contributions including:
13 (1) contributions in excess of the \$2,500 per election limit, including unidentified contributions
14 of \$10,000 or more; (2) unidentified contributions from "businesses" that were "redesignated" as
15 contributions from individuals; and (3) direct corporate contributions from Superior Wood
16 Floors, Inc., Mother Nature's Inc., Reco Electric Co., and Branchcomb, Inc. Compl. (Mar. 19,
17 2012). The Complaint also alleges that Mullin Plumbing made and the Committee accepted
18 in-kind corporate contributions when the Committee used Mullin Plumbing resources.
19 According to the Complaint, the Committee used Mullin Plumbing "storefront images, logo-
20 bearing Mullin plumbing vehicles, and business employees" in the Committee's print and video
21 advertising. *Id.*

¹ Counsel for Markwayne Mullin and the Committee submitted a joint response on behalf of these respondents. Mullin Plumbing did not submit a response. This "Mullin Response" and the responses of Superior Wood Floors, Inc., Mother Nature's Inc., Reco Electric Co., and Branchcomb, Inc. are discussed in more detail below as they pertain to each allegation.

III. ANALYSIS

A. Alleged Excessive Contributions and Direct Corporate Contributions

Under the Act and Commission regulations, contributions to a candidate's committee are subject to source and amount limitations. *See, e.g.*, 2 U.S.C. §§ 441a, 441b(a); 11 C.F.R. §§ 110.1(a), (b)(1), 114.2(b)(1). Corporations are prohibited from making contributions in connection with a federal election, and candidates are prohibited from knowingly accepting or receiving corporate contributions. *See* 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(b)(1). The contribution limit in 2011-2012 is \$2,500 per election to a candidate's committee. *See* 2 U.S.C. § 441a(a)(1); <http://www.fec.gov/pages/brochures/contriblimits.shtml>. Candidates and committees are prohibited from knowingly accepting prohibited contributions in violation of this limit. 2 U.S.C. § 441a(f).

Committee treasurers are responsible for examining all contributions received for evidence of illegality and for ascertaining whether contributions received, when aggregated with other contributions from the same contributor, exceed the contribution limitations. 11 C.F.R. § 103.3(b). Contributions that present genuine questions as to whether they were made by a prohibited source, such as a corporation, may be either deposited or returned to the contributor within ten days. 11 C.F.R. § 103.3(b)(1). If the contribution is deposited, the treasurer must make his or her best efforts to determine the legality of the contribution. *Id.* If the contribution cannot be determined to be legal, the treasurer must refund the contribution within 30 days of receipt. *Id.* Likewise, contributions that exceed the contribution limits may be either deposited or returned to the contributor. 11 C.F.R. § 103.3(b)(3). If the contribution is deposited, the treasurer may request redesignation or reattribution of the contribution by the contributor in accordance with section 110.1 of the Commission's regulations. *Id.* If a redesignation or

13044331540

1 reattribution is not obtained, the treasurer must refund the contribution within 60 days of receipt.

2 *Id.*

3 **1. Alleged Improper Redesignations and Reattributions**

4 The Complaint does not specify which redesignated or reattributed contributions violated
5 the Act. The Mullin Response observes that Mullin participated in three elections to which
6 contributions could be designated (primary, runoff, and general). Mullin Resp. at 5. It also
7 explains that the Committee received permissible contributions from a number of LLCs and sole
8 proprietorship accounts and joint contributions from spouses that were both redesignated and
9 reattributed.² *Id.* at 2.

10 Our review of the Committee's disclosure reports shows that, with the exception of two
11 contributions, the Committee properly and timely redesignated, reattributed, or refunded all
12 contributions. Those two are contributions from Rockin Z Ranch LLC and Darryl A. Christner
13 Family LLC.³

14 Rockin Z Ranch LLC made a \$10,000 contribution on September 8, 2011. On the same
15 date, the Committee designated \$7,500 of the amount (\$2,500 each for the primary, run-off, and
16 general elections), but did not refund the remaining \$2,500 contribution that was excessive until
17 May 10, 2012. Similarly, Darryl A. Christner Family LLC made a \$10,000 contribution on
18 September 26, 2011 and the Committee designated \$7,500 of the amount (for the primary, run-

² In some circumstances, a contribution from an LLC is treated as a contribution from a partnership. *See* 11 C.F.R. § 110.1(g)(2). In those cases, the contribution must be attributed to both the partnership and each partner. *See* 11 C.F.R. § 110.1(e). In other circumstances, a contribution from an LLC must be attributed to the single member of the LLC. *See* 11 C.F.R. § 110.1(g)(4).

³ The Committee reported these as contributions from partnerships. *See* 11 C.F.R. § 110.1(g). We have no reason to believe these were impermissible contributions from LLCs electing treatment as corporations. *See* 11 C.F.R. § 110.1(g)(3).

13044331541

1 off, and general elections) but did not refund the remaining \$2,500 that was excessive until May
2 21, 2012.

3 Thus, it appears the Committee failed to timely refund two excessive contributions in
4 violation of 2 U.S.C. § 441a(f). In light of the *de minimis* amount of those violations, we
5 recommend that the Commission exercise its prosecutorial discretion and dismiss the allegations
6 that Mullin for Congress violated 2 U.S.C. § 441a(f) by accepting excessive contributions. *See*
7 *Hecldler v. Chaney* 470 U.S. 821, 831 (1985). We also recommend that the Commission issue a
8 letter of caution to the Committee for the apparent violation of 2 U.S.C. § 441a(f).

9 **2. Alleged Direct Corporate Contributions**

10 The Complaint also alleges that the Committee received contributions from four
11 corporations: Reco Electric Co., Mother Nature's, Inc., Superior Wood Floors, Inc., and
12 Branchcomb, Inc.

13 The Committee admits, and its disclosure reports show, that the Committee received
14 contributions from two of these: Mother Nature's, Inc. and Superior Wood Floors, Inc. The
15 Committee asserts, and its reports reflect, however, that these impermissible corporate
16 contributions were both timely refunded.⁴ *See* Mullin Resp. at 5-7. The Committee's 2011 July
17 Quarterly Report shows a receipt of \$1,000 from Superior Wood Floors, Inc. on June 27, 2011
18 and a refund in the same amount on June 30, 2011, well within the time period for permissible

⁴ Mother Nature's and Superior Wood Floors both replied, acknowledging having made the contributions. Mother Nature's seems to indicate that its check was returned and it made a new check to Mullin. Superior Wood Floors does not reference a refund. *See* Mother Nature's, Inc. Resp. (June 26, 2012); Superior Woods, Inc. Resp. (May 23, 2012).

1 refund. The Committee's 2011 October Quarterly Report shows a receipt of \$1,000 from Mother
2 Nature's, Inc. on July 15, 2011 and a refund in the same amount on the same day.⁵

3 Committee disclosure reports do not reflect contributions from Branchcomb, Inc. or Reco
4 Electric Co. Instead, the Committee reports receiving contributions from two similarly-named
5 entities: Reco Enterprises and Branchcomb Asphalt.

6 The Committee's 2011 July Quarterly Report shows a receipt of \$2,500 from Reco
7 Enterprises on June 29, 2011 and a refund in the same amount on June 30, 2011, well within the
8 permissible time period for refund.⁶ Counsel for Reco Enterprises and Reco Electric Co.
9 submitted copies of checks and deposit slips to corroborate the Committee's report. See Reco
10 Resp. at 1; Mullin Resp. at 5-7.

11 Gerald Branchcomb, president of Branchcomb, Inc., denied making a contribution to the
12 Committee. See Branchcomb Resp. at 1 (May 18, 2012). The Committee notes, and its reports
13 show, that the Committee received a \$500 contribution from a different entity, Branchcomb
14 Asphalt. The Committee asserts that Branchcomb Asphalt is an unincorporated sole
15 proprietorship authorized to make contributions – and we have no evidence to the contrary.⁷
16 Mullin Resp. at 6.

⁵ Sheila Ahrend of Mother Nature's, Inc. subsequently made a \$1,000 contribution to the Committee on August 23, 2011. See 2011 October Quarterly Report; Mother Nature's Resp. There is no allegation and we are aware of no evidence suggesting that the funds used to make this contribution were reimbursed from corporate sources.

⁶ Jerry Reed, owner of Reco Enterprises and Reco Electric Co., subsequently made a \$2,500 contribution to the Committee on July 1, 2011. See 2011 October Quarterly Report; Reco Resp. at 1 (June 18, 2012). There is no allegation and we are aware of no evidence suggesting that the funds used to make this contribution were reimbursed from corporate sources.

⁷ Though Branchcomb, Inc. and Branchcomb Asphalt share the same address, they appear to be separate entities. Gerald Branchcomb is president of Branchcomb Inc., a company that manufactures plastic products and industrial machinery. Cody Branchcomb is owner and president of Branchcomb Asphalt, which provides residential and commercial asphalt services. See <http://tulsaokasphalt.com/index.html>.

13044331543

Accordingly, we recommend that the Commission find no reason to believe that Superior Wood Floors, Inc., Branchcomb, Inc., Mother Nature's Inc. and Reco Electric Co. violated 2 U.S.C. § 441b by making prohibited corporate contributions to Mullin for Congress or that Mullin for Congress violated 2 U.S.C. § 441b by knowingly accepting prohibited corporate contributions.

B. Alleged Corporate In-Kind Contributions from Mullin Plumbing, Inc.

It is undisputed that the Committee used in its campaign ads images of and footage of the Mullin Plumbing name, employees, and facilities. A copy of a Committee brochure, submitted with the Complaint, includes several photos of bright red Mullin Plumbing trucks. Similarly, several of the Committee's television ads, uploaded on YouTube, feature Mullin interacting with uniformed Mullin Plumbing employees while standing in front of Mullin Plumbing buildings and Mullin Plumbing trucks.⁸

As discussed above, corporations are prohibited from making contributions in connection with a Federal election, and candidates and committees are prohibited from accepting such contributions. 2 U.S.C. § 441b; 11 C.F.R. § 114.2(b), (d). Further, an officer or director of any corporation is prohibited from consenting to any such contribution. 2 U.S.C. § 441b; 11 C.F.R. § 114.2(e). A "contribution" includes "anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i); 11 C.F.R. § 100.52(a). "Anything of value" includes all in-kind contributions, including the provision of goods or services without charge or at a charge that is less than the usual and normal charge. See 11 C.F.R. § 100.52(d)(1).

⁸ See, e.g., "Rancher. Father. Job Creator," available at <http://www.youtube.com/watch?v=Bidwm7fXEnY&feature=plcp>, "In His Own Words," available at http://www.youtube.com/watch?v=PJ_oGMfJYYE&feature=plcp.

1 1. The Mullin Plumbing Name and Logo

2 A corporation's name, trade name, trademarks, and service marks are things of value
3 owned by the corporation. See Advisory Op. 2007-10 (Reyes); MUR 6110 (Obama Victory
4 Fund) (citing *New Kids on the Block v. News America Pub., Inc.*, 971 F.2d 302, 306 (9th Cir.
5 1992) and *Madrigal Audio Labs., Inc. v. Cello, Ltd.*, 799 F.2d 814, 822 (2d Cir. 1986); MUR
6 6322 (Tommy Sowers) (finding that use of corporate name in committee's solicitations was a
7 thing of value but dismissing due to small amount raised). Because the Anticorruption Commission
8 regulations prohibit corporations from contributing anything of value to committees, a
9 corporation's donation of its name to a committee constitutes an impermissible corporate
10 contribution. See 2 U.S.C. § 441b(a).

11 The Mullin Response does not address the apparent contribution by Mullin and Mullin
12 Plumbing of the corporation's name and logo to the Committee.⁹ But the amounts at issue
13 appear to be likely *de minimis*. As such, we believe that an investigation to determine the exact
14 value of the corporate name and logo to Mullin Plumbing and to the Committee would not be a
15 prudent use of the Commission's resources.¹⁰ See, e.g., MURs 6287, 6288, and 6297
16 (Liberatore for Congress) (dismissing matter where candidate used his own company's letterhead
17 with the company's logo for a letter advocating his election, based on the likely insubstantial
18 value of the letterhead and the apparent *de minimis* benefit provided to the campaign); see also
19 MUR 6331 (Comm. to Elect Shirley Gibson) (dismissing matter with a cautionary letter where
20 committee flyer announcing a fundraiser contained several corporate logos and the event costs,
21 attendance at the event, and the amounts raised were *de minimis*).

⁹ As discussed below, the Committee reports that Mullin reimbursed Mullin Plumbing for vehicles and salary; this payment does not appear to include an amount related to the value of the corporate name or logo.

¹⁰ The Mullin Plumbing logo does not appear to include a trademark or service mark.

13044331545

2. Mullin Plumbing Employees and Facilities

The Mullin Response claims that the use of Mullin Plumbing facilities, vehicles, and employees in the Committee's ads does not violate the Act because the activity qualifies as permissible volunteer activity under 11 C.F.R. § 114.9(a). The Response also notes that Mullin personally reimbursed Mullin Plumbing for the use of its facilities. The Committee reported this as a \$1,425 reimbursement of an in-kind contribution from Mullin to the Committee for "vehicle rental and salary," on March 31, 2012. *See* Mullin Resp. at 4; 2012 April Quarterly Report.

The safe harbor at 11 C.F.R. § 114.9(a) allows a corporation's stockholders and employees to make "occasional, isolated, or incidental" use of the corporate facilities for individual volunteer activity in connection with a federal election, so long as that use does not increase the overhead or operating costs of the corporation. A stockholder or employee whose use exceeds one hour per week or four hours per month, regardless of whether the activity is undertaken during or after normal working hours, must reimburse the corporation within a commercially reasonable time for the normal and usual rental charge for the use of such facilities. 11 C.F.R. § 114.9(a)(2), (3). Moreover, any person who uses a corporation's facilities "to produce materials in connection with a Federal election" must reimburse the corporation within a commercially reasonable time for the normal and usual rental charge for the use of the facilities. 11 C.F.R. § 114.9(c). Failure to make the reimbursement would result in a contribution from the corporation to the committee. *See, e.g.,* Advisory Op. 1980-51 (First Farmers and Merchants National Bank).

The Mullin Response asserts that Mullin Plumbing employees who appeared in the Committee's ads were volunteers. It additionally asserts that employees spent less than four

13044331546

1 hours in total filming the ads and that Mullin Plumbing's overhead costs were not increased as a
2 result of this activity. See Mullin Resp. at 2-4.

3 The statement of Mullin Response that the use of facilities was for only four hours and at
4 a cost of only \$1,425 is not corroborated by affidavit or other documentation. In addition, the
5 record evidence does not demonstrate whether the volunteer activity meets all the requirements
6 for the volunteer safe harbor at 11 C.F.R. § 114.9(a). For instance, the response asserts that
7 Mullin Plumbing vehicles were used for "less than four hours total" on the ads, but does not note
8 whether this use exceeds "one hour per week or four hours per month" as specified in the
9 regulation. Moreover, it is unclear at this time whether Mullin's reimbursement, which occurred
10 six months after the publication date of the brochure and more than two months after the
11 television ads aired, was for the usual and normal charge and within a commercially reasonable
12 period of time.

13 Without an investigation, we are unable to determine whether Mullin Plumbing made
14 impermissible contributions to the Committee. But the apparent *de minimis* amount at issue does
15 not warrant expending the Commission's limited resources to investigate these issues. See, e.g.,
16 MUR 5497 (Wortman for Congress) (taking no action in matter where Commission did not know
17 whether a \$300 reimbursement for a Committee's use of a company's phones and facsimile was
18 in a "commercially reasonable time" and "in the amount of the normal and usual rental charge"
19 as required under 11 C.F.R. § 114.9(d)).

20 3. Conclusion

21 Accordingly, we recommend that the Commission exercise its prosecutorial discretion
22 and dismiss the allegations that Mullin Plumbing, Markwayne Mullin, and the Committee
23 violated 2 U.S.C. § 441b(a) in connection with the use of the Mullin Plumbing name, facilities,

13044331547

vehicles, and employees in the Committee's ads. *See Heckler v. Chaney* 470 U.S. 821, 831 (1985). We also recommend that the Commission caution these respondents concerning their apparent violation of 2 U.S.C. § 441b(a).

IV. RECOMMENDATIONS

1. Dismiss the allegations that Mullin for Congress and Debbie Dooley, in her official capacity as treasurer, violated 2 U.S.C. § 441b(a) in connection with the acceptance of corporate in-kind contributions from Mullin Plumbing, Inc. and issue a letter of caution.
2. Dismiss the allegations that Markwayne Mullin and Mullin Plumbing, Inc. violated 2 U.S.C. § 441b(a) in connection with the making of corporate in-kind contributions to Mullin for Congress and issue a letter of caution.
3. Dismiss the allegations that Mullin for Congress and Debbie Dooley in her official capacity as treasurer, violated 2 U.S.C. § 441a(f) in connection with the receipt of excessive contributions and issue a letter of caution.
4. Find no reason to believe that Mullin for Congress and Debbie Dooley, in her official capacity as treasurer, violated 2 U.S.C. § 441b by receiving prohibited corporate contributions from Superior Wood Floors, Inc., Branchcomb, Inc., Reco Electric Co., and Mother Nature's, Inc.
5. Find no reason to believe that Superior Wood Floors, Inc., Branchcomb, Inc., Reco Electric Co., and Mother Nature's, Inc. violated 2 U.S.C. § 441b by making prohibited corporate contributions to Mullin for Congress.
6. Approve the attached Factual and Legal Analyses.
7. Approve the appropriate letters.

13044331548

8. Close the file.

Date

11/19/12

Anthony Herman
General Counsel

Daniel A. Patalas
Associate General Counsel

Peter G. Blumberg
Assistant General Counsel

Dominique Dillenseger
Attorney

13044331549