



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
 Sean Eldridge, *et al.*) MUR 6792
)
)

**STATEMENT OF REASONS OF
VICE CHAIRMAN MATTHEW S. PETERSEN
AND COMMISSIONER CAROLINE C. HUNTER**

The complaint in this matter alleged that the Hudson Valley Economic Development Corporation (“Hudson Valley”) made, and the Sean Eldridge campaign accepted, a prohibited corporate contribution by giving the Eldridge’s campaign free video footage. The Commission found reason to believe a violation of the Federal Election Campaign Act of 1971, as amended (the “Act”) occurred and initiated an investigation. While the investigation confirmed that Hudson Valley had given some footage to Eldridge’s media vendor, the investigation also established that this footage had little, if any, value. Hudson Valley had received the footage earlier for free from a volunteer filmmaker as a byproduct of another project and only a small portion of it was useable.

Rather than the significant in-kind contribution alleged at the reason-to-believe stage, this small clip of free and previously used footage likely could not command much of a purchase price, if any. Hudson Valley reasonably ascribed no monetary value to it, previously made an edited version of it available to the public and other businesses for free, and said it would have given the footage to anyone who asked without charge. For these reasons and those stated below, we voted against any further action and instead voted to close the file.

Background

Hudson Valley is a non-profit corporation that helps businesses relocate to the Hudson Valley area of New York.¹ In or around May 2013, Jeremy Ellenbogen produced a promotional film on a volunteer pro bono basis for Hudson Valley.² As he had done with other projects, Mr.

¹ Factual & Legal Analysis at 3.

² Gottlieb Aff. ¶ 3, May 6, 2016; Ellenbogen Aff. ¶¶ 2-3, Dec. 20, 2017.

Ellenbogen produced and provided this film to Hudson Valley free of charge and accepted no payment for the footage, his services, or the final promotional film.³

What appeared to be altered portions of the film later appeared in an Eldridge campaign video. The complaint alleged that Hudson Valley must have given that video and more to the Eldridge Campaign, which would be a prohibited in-kind contribution. The complaint also alleged that Hudson Valley coordinated its earlier advertising with Eldridge for the purpose of promoting his candidacy in violation of § 30118 and 11 C.F.R. § 109.21.

On March 15, 2016, the Commission found reason to believe that the respondents violated section 30118(a) and opened an investigation.⁴ The investigation established that, in addition to Hudson Valley, Mr. Ellenbogen gave video footage from this project to Central Hudson Gas & Electric Corp. and SUNY New Paltz — also without charge.⁵ If asked, he would have provided it for free to anyone else.⁶ Mr. Ellenbogen later estimated that, if he had charged someone for the Hudson Valley promotional film, he would have charged between \$7,000 and \$10,000⁷ to shoot all the video and edit it together into the finished film.⁸

Because Hudson Valley received Mr. Ellenbogen's film and associated video footage for free and is not in the business of producing or selling video, Hudson Valley ascribed no value to it.⁹ Accordingly, at the time, Hudson Valley also made the film available for free by broadcasting it live at a public media-covered event, offering to provide it for free to various entities, and posting it to YouTube.¹⁰ If anyone else had asked for this or the underlying raw video footage, Hudson Valley would have given it to them free of charge.¹¹

In August 2013, Sean Eldridge for Congress (the Eldridge Committee) hired SKDKnickerbocker (SKDK) to produce an announcement video. This promotional video was two minutes and forty-eight seconds and included original content as well as footage from

³ *Id.* ¶¶ 4-5.

⁴ The Office of General Counsel noted that, while it seemed clear Hudson Valley gave Eldridge campaign some footage, it was premature to judge how much or how much it might be worth. But, based on a \$67,450 expenditure for the campaign's announcement ad, OGC reasoned the in-kind contribution could be substantial. As for the allegation that respondents coordinated Hudson Valley's advertising, the Commission found no reason to believe a violation occurred and dismissed it outright.

⁵ Ellenbogen Aff ¶ 8.

⁶ *Id.*

⁷ Ellenbogen Aff ¶ 10.

⁸ *Id.*

⁹ Gottlieb Aff. ¶¶ 5-8.

¹⁰ *Id.* ¶ 6; Complaint at 1 n.3.

¹¹ Gottlieb Aff. ¶ 7.

various sources.¹² One source was Hudson Valley, which gave SKDK some of the free footage from Mr. Ellenbogen's project. The clip at issue consisted of raw unedited video of Mr. Laurence Gottlieb, Hudson Valley's President and Chief Executive Officer. In it, Mr. Gottlieb repeated a line in front of a green screen until he was able to recite it without mistakes.¹³ SKDK edited and finished the error-free clip (about seventeen seconds) from this footage and incorporated it into the nearly three-minute promotional video for the Eldridge Campaign.

SKDK charged the Eldridge campaign \$67,450 for its promotional video. Of that amount, \$45,000 was for a one-day video shoot with professional videographers. The remaining \$17,450 was for editing and finishing services necessary to produce the campaign video, including editing and incorporating the free Hudson Valley footage. Unlike Mr. Ellenbogen, who estimated that he might charge a paying customer as little as \$7,000 for *all* filming and editing services, SKDK estimated that its professional videographers would cost a minimum of \$10,000 to reproduce the raw video clip from Hudson Valley alone.¹⁴

A couple of other facts should be noted. Sean Eldridge had various business ties to Hudson Valley, not least of which is sitting on its Board of Directors. He also invested in small businesses in the area, potentially including businesses that Hudson Valley helps relocate.¹⁵

In its Second General Counsel's Report, OGC cited SKDK's estimate to value the amount of Hudson Valley's prohibited corporate in-kind contribution at \$10,000 and recommended further enforcement proceedings. We voted against this recommendation.

Analysis

The Act prohibits corporations from making contributions, including in-kind contributions, to candidates.¹⁶ One form of in-kind contribution is the provision of goods or services without charge or at a charge that is less than the usual and normal charge.¹⁷ Commission regulations provide that the "usual and normal charge" means the item's market price at the time of the contribution.¹⁸

¹² Cunningham Aff. ¶¶ 2-6.

¹³ Second General Counsel's Report at 2.

¹⁴ *Id.* at 4 ("[T]he cost to produce similar interview footage . . . would be \$10,000 for a shoot at the *lowest* production value.") (emphasis added).

¹⁵ *Id.* at 4.

¹⁶ 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b)(1).

¹⁷ 11 C.F.R. § 100.52(d)(1).

¹⁸ 11 C.F.R. § 100.52(d)(2) ("[U]sual and normal charge for goods means the price of those goods in the market from which they ordinarily would have been purchased at the time of the contribution; and usual and normal charge for any services . . . means the hourly or piecework charge for the services at a commercially reasonable rate prevailing at the time the services were rendered").

The Free Raw Footage Had Little If Any Value And Dismissal Was Appropriate.

The unedited footage Hudson Valley gave SKDK, the Eldridge Campaign’s vendor, likely had no market value. Commission regulations state that the value of an in-kind contribution is “the price of *those* goods [that is, the donated goods themselves] in the market from which they ordinarily would have been purchased at the time of the contribution.”¹⁹

The surplus footage Hudson Valley gave the Eldridge campaign was an unedited byproduct of a minor clip in a nearly three-minute free promotional film. The Commission’s investigation did not establish that the market would support any price for this surplus footage from Mr. Ellenbogen’s cutting room floor. Hudson Valley and others already had received it free of charge. Further, Hudson Valley ascribed no value to the clip and provided it for free to business partners and —with regard to the portion used in the finished promotional film— to the public long before giving it to SKDK.

Even if the clip had some value, it was not close to the \$10,000 figure adopted by OGC. OGC’s defends this figure because SKDK would charge \$10,000 to reproduce the free clip, and therefore, this is how much Hudson Valley’s footage “saved the Eldridge campaign.”²⁰ But that is not the correct test for determining the value of an in-kind contribution.²¹ As discussed above, under Commission regulations, what matters is what the market would support for the clip as it existed — *not* the cost of a professional cover version.

In his affidavit, Mr. Ellenbogen stated that he took no funds from Hudson Valley and that if he were to produce his video for a paying customer, he would charge \$7,000-\$10,000 for the finished product. As for the small unedited clip at issue, it could have commanded only a fraction of Ellenbogen’s estimate. Indeed, had Sean Eldridge paid Hudson Valley — a company in which he invested and helped govern — \$10,000 for a worthless clip of otherwise publicly available free footage, he may have risked a finding that he converted campaign funds to personal use.²²

The investigation also made clear that Hudson Valley’s intent was innocent. Hudson Valley does not produce videos. According to its CEO, and as evident from the way it received and gave the film to businesses and the public for free, Hudson Valley ascribed no monetary

¹⁹ 11 C.F.R. § 100.52(d)(2) (emphasis added).

²⁰ Second General Counsel’s Report at 4, 10.

²¹ To be sure, this benefit-received rubric was suggested by respondents as a way to value corporate in-kind contributions. See letter from Marc E. Elias to Jeff S. Jordan (May 6, 2016) at 3-4. However, the MURs that respondents cite are distinguishable. Those matters dismissed allegations involving solicitations or ads with corporate logos or letterhead. Among other things, those matters cite the fact that the respondents received little if any benefit from the use of corporate logos or letterhead. It is unclear whether the use of those intangible assets constitute reportable in-kind contributions. But, at most, the language about their minimal benefit to campaigns seems to be shorthand for what might be the “usual and normal” value for using logos or letterhead in those circumstances. Whatever the merits of a benefit-derived test in evaluating incidental use of corporate logos, however, the correct measure for valuing an in-kind contribution of goods is set forth in 11 C.F.R. §100.52(d).

²² See 52 U.S.C. § 30114(b).

value to the footage at issue. In a sworn affidavit, that CEO affirmed that Hudson Valley would have given the footage free to anyone else who asked for it. The common practice of political committees using free publicly available video in ads supports the inference that those publicly available videos no longer have independent monetary value. The evidence here demonstrates that Hudson Valley's video and footage similarly had no monetary worth and Hudson Valley reasonably assigned no value to the unedited clip at issue.

Thus, the amount of a violation, if any, is low and the respondents acted without bad faith. Under such circumstances, dismissal is appropriate so the Commission can focus resources on more significant matters.

Conclusion

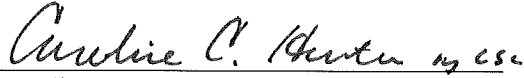
At the initial stage of this proceeding, the Commission found reason to believe Hudson Valley gave a significant in-kind contribution to the Eldridge Committee. We initiated an investigation to find how much video Hudson Valley gave the Eldridge Committee and how much it was worth. The investigation proved Hudson Valley gave a campaign vendor much less than we anticipated. The footage at issue was short, raw, and unfinished. It had little, if any, market value. Given these facts, the importance of assigning limited Commission resources where they can be better spent, and the reasons set forth above, we voted to dismiss this matter.

Statement of Reasons of Vice Chairman Petersen and Commissioner Hunter
MUR 6792 (Eldridge)



Mathew S. Petersen
Vice Chairman

8/30/2019
Date



Caroline C. Hunter
Commissioner

8/30/2019
Date