



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

VIA ELECTRONIC AND FIRST CLASS MAIL

JUN 26 2015

Michael E. Toner, Esq.
Brandis L. Zehr, Esq.
Wiley Rein LLP
1776 K Street, N.W.
Washington, D.C. 20006

RE: MUR 6816
The 60 Plus Association

Dear Mr. Toner and Ms. Zehr:

On May 14, 2014, the Federal Election Commission notified your client, the 60 Plus Association ("60 Plus") of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to 60 Plus at that time.

Upon further review of the allegations contained in the complaint and information supplied by you, the Commission, on June 23, 2015, found that there is reason to believe 60 Plus violated 52 U.S.C. § 30104(c)(2)(C) and (f)(2) (formerly 2 U.S.C. § 434(c)(2)(C) and (f)(2)) and 11 C.F.R. §§ 109.10(e)(1)(vi) and 104.20(c)(9). The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

Please note that you have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. *See* 18 U.S.C. § 1519.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. *See* 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter.

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Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 52 U.S.C. §§ 30109(a)(4)(B) and 30109(a)(12)(A) (formerly 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A)) unless you notify the Commission in writing that you wish the matter to be made public.

If you have any questions, please contact Jin Lee, the attorney assigned to this matter, at (202) 694-1650.

On behalf of the Commission,



Ann M. Ravel
Chair

Enclosure
Factual and Legal Analysis

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1 FEDERAL ELECTION COMMISSION
2 FACTUAL AND LEGAL ANALYSIS
3

4 RESPONDENT: The 60 Plus Association

MUR 6816

5 I. INTRODUCTION

6 This matter involves allegations that the 60 Plus Association ("60 Plus") knowingly and
7 willfully violated the Federal Election Campaign Act of 1971, as amended (the "Act") when it
8 failed to disclose the Center to Protect Patient Rights ("CPPR") as a contributor on its
9 independent expenditure reports and as a donor on its electioneering communication reports filed
10 with the Commission in 2010 and January 2011.

11 60 Plus denies the allegations. While 60 Plus admits that it received funds from CPPR, it
12 denies that the funds were earmarked for particular advertisements.¹ Rather, it argues that CPPR
13 awarded unrestricted, general support grants to 60 Plus.² Further, because 60 Plus also received
14 substantial funds from other sources, 60 Plus contends that it could have used such funds, not
15 funds from CPPR, to pay for the advertisements in question.³

16 Nevertheless, as explained below, the factual record in this matter indicates that Sean
17 Noble, acting as a subcontractor to 60 Plus, participated in selecting the targets and contents of
18 its advertisements in 2010, and at the same time, acting as Executive Director of CPPR, provided
19 CPPR funds to 60 Plus. The fact that Noble decided whether 60 Plus received CPPR funds and
20 advised 60 Plus as to which advertisements it should broadcast suggests that CPPR donated
21 funds for the purpose of furthering specific advertisements. Accordingly, the Commission finds
22 reason to believe that 60 Plus violated 52 U.S.C. § 30104(c)(2)(C) and (f)(2) (formerly 2 U.S.C.

¹ See Response of 60 Plus ("60 Plus") at 4.

² *Id.*

³ *Id.* at 5.

1 § 434(c)(2)(C) and (f)(2)) and 11 C.F.R. §§ 109.10(e)(1)(vi) and 104.20(c)(9) by failing to
2 disclose CPPR as a contributor on the independent expenditure disclosure reports and as a donor
3 on the electioneering communication disclosure reports it filed with the Commission in 2010 and
4 January 2011.

5 II. FACTUAL BACKGROUND

6 A. CPPR and Sean Noble

7 CPPR is a non-profit corporation organized under section 501(c)(4) of the Internal
8 Revenue Code ("IRC").⁴ According to the available information, Sean Noble is the owner and
9 sole member of Noble Associates, a consulting firm retained by CPPR to provide management
10 consulting services in 2009 and 2010. As part of the agreement, Noble served as the Executive
11 Director of CPPR.

12 CPPR disbursed over \$44 million to various organizations in 2010. Of the \$44 million,
13 CPPR gave \$8,990,000 to 60 Plus. The available information indicates that CPPR did not
14 distribute the funds in one lump sum to 60 Plus but sent them throughout the year.

15 B. 60 Plus

16 60 Plus is a section 501(c)(4) social welfare organization, founded in 1992, that
17 "advocates for free enterprise, less government, and lower tax solutions to public policy issues
18 affecting senior citizens."⁵ Amy Noone Frederick has been the President of 60 Plus since
19 January 2010.⁶

⁴ According to its 2010 Form 990 filed with the Internal Revenue Service, CPPR describes its mission as "building a coalition of like-minded organizations and individuals, and educating the public on issues, related to health care with an emphasis on patients rights. Engaging in issue advocacy and activities to influence legislation related to health care." Compl., Ex. D.

⁵ 60 Plus Resp. at 1.

⁶ *Id.*

1 60 Plus states that it has “a longstanding policy of not soliciting or accepting donations
2 that are earmarked, designated, or encumbered for any particular program or activity, including
3 electioneering communications and independent expenditures.”⁷ In accordance with this policy,
4 60 Plus claims that it neither solicited nor accepted funds specifically or generally earmarked or
5 designated by a donor to pay for electioneering communications or independent expenditures in
6 2010.⁸

7 60 Plus admits receiving \$8,990,000 from CPPR in 2010 but asserts that the funds were
8 “unrestricted, general support” grants.⁹ 60 Plus spent \$7,096,131 on both independent
9 expenditures (\$6,698,293) and electioneering communications (\$397,838) targeting House races
10 in 2010.

11 **C. 60 Plus’s Advertising Campaign Targeting 2010 House Races**

12 The Complaint’s allegations regarding the funds provided by CPPR rely almost entirely
13 upon a *National Review* article published on March 31, 2014.¹⁰ Noble himself appears to have
14 been the primary source for the article.¹¹

15 According to the article, beginning in March 2010, CPPR and Noble decided to focus on
16 the struggle for control of the House of Representatives and sought to produce dozens of
17 advertisements targeting hundreds of congressional candidates in the 2010 midterm elections.¹²

⁷ *Id.* at 4 (citing Aff. of Amy Noone Frederick ¶ 11 (June 30, 2014) (“Frederick Aff.”))

⁸ *Id.*

⁹ *Id.*

¹⁰ See Compl. ¶ 28 (citing Eliana Johnson, *Inside the Koch-Funded Ads Giving Dems Fits*, NAT’L REV. (Mar. 31, 2014) [hereinafter Johnson, *Inside the Ad*] (attached as Exhibit C. of Complaint).

¹¹ *Id.*

¹² Johnson, *Inside the Ads*, *supra*, at 5.

1 The article indicates that Noble and his team prepared an Excel spreadsheet identifying over 100
2 House members prioritized by likelihood of defeat and allotted their resources accordingly.¹³

3 The article states that Noble oversaw the disbursement of over \$50 million to groups,
4 including 60 Plus, that paid to put advertisements on the air.¹⁴ The article describes several
5 advertisements, which were produced by Noble and aired by one of the recipient organizations.
6 For example, based on polling research, Noble determined that aligning Democratic candidates
7 with Nancy Pelosi would be an effective way to persuade voters to vote Republican.¹⁵
8 Thereafter, 60 Plus aired advertisements linking Democratic members of Congress to Nancy
9 Pelosi.¹⁶

10 60 Plus does not deny that it disseminated the advertisements in question during the 2010
11 mid-term elections as described in the *National Review* article. It also admits to using the same
12 media consultants, McCarthy, Marcus, Hennings Ltd. (“MMH”), which produced the
13 advertisements, and Mentzer Media Services (“MMS”), which placed the advertisements,
14 although it claims it also used other vendors.¹⁷

15 60 Plus denies, however, that it solicited or used any earmarked funds from CPPR to pay
16 for those advertisements. 60 Plus states that while it hired MMH and MMS to manage its
17 television advertising, it retained sole discretion over the content, timing, and placement of the
18 advertising.¹⁸ 60 Plus’s Amy Noone Frederick states that she and her staff were actively

¹³ *Id.*

¹⁴ *Id.* at 3.

¹⁵ Johnson, *Inside the Ads, supra*, at 5.

¹⁶ *Id.* at 6. For example, 60 Plus apparently aired advertisements in Florida stating, “Alan Grayson and Suzanne Kosmas are putting Nancy Pelosi’s liberal agenda ahead of seniors.” *Id.* In addition, it spent \$100,000 to air an advertisement in Minnesota’s eighth congressional district aligning incumbent Jim Oberstar with Pelosi. *Id.*

¹⁷ 60 Plus Resp. at 2.

¹⁸ *Id.* at 2-3.

1 involved in the development of its advertising, reviewing scripts and making substantive edits;
2 they also reviewed and gave final approval before each advertisement was publicly
3 disseminated.¹⁹ Frederick also claims that “[a]t some point in 2010,” she became aware that
4 Noble was working with one of 60 Plus’s media vendors but did not know who employed Noble,
5 his level of involvement, or who paid him.²⁰

6 **III. LEGAL ANALYSIS**

7 **A. Reporting of Independent Expenditures and Electioneering Communications**
8 **Under the Act**

9
10 Both independent expenditures²¹ and electioneering communications²² are subject to
11 disclosure under Federal law. The Act requires persons, other than political committees, to
12 report independent expenditures that exceed \$250 during a calendar year.²³ Such a report must
13 include, among other information, “the identification of each person who made a contribution in
14 excess of \$200 to the person filing such statement which was made for the purpose of furthering
15 an independent expenditure.”²⁴ The Commission’s implementing regulation provides that an
16 independent expenditure report must include “[t]he identification of each person who made a

¹⁹ Frederick Aff. ¶¶ 6-8.

²⁰ *Id.* ¶ 9.

²¹ An independent expenditure is an expenditure that expressly advocates the election or defeat of a clearly identified federal candidate and “that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate’s authorized political committee, or their agents, or a political party committee or its agents.” 52 U.S.C. § 30101(17) (formerly 2 U.S.C. § 431(17)).

²² “Electioneering communications” are defined as broadcast, cable or satellite communications that refer to a clearly identified candidate for federal office, are publicly distributed within sixty days before a general election or thirty days before a primary election, and are targeted to the relevant electorate. *See* 52 U.S.C. § 30104(f)(3)(A)(i) (formerly 2 U.S.C. § 434(f)(3)(A)(i)). A communication is “targeted to the relevant electorate” if it can be received by 50,000 or more persons in the district or state in which the candidate is running. *Id.* § 30104(f)(3)(C) (formerly 2 U.S.C. § 434(f)(3)(C)).

²³ *Id.* § 30104 (formerly 2 U.S.C. § 434(c)(1)); 11 C.F.R. § 109.10(b).

²⁴ *See* 52 U.S.C. § 30104(c)(2)(C) (formerly 2 U.S.C. § 434(c)(2)(C)) (emphasis added).

1 contribution in excess of \$200 to the person filing such report which contribution was made for
2 the purpose of furthering *the reported* independent expenditure.”²⁵

3 The Act also provides that a person that has made electioneering communications
4 aggregating in excess of \$10,000 in a calendar year must file a disclosure statement.²⁶ Such a
5 report must include, among other information, “the names and addresses of all contributors who
6 contributed an aggregate amount of \$1,000 or more to the person making the disbursement”
7 during a specified time period.²⁷ Commission regulations in effect at the time of the conduct in
8 question provided that when an electioneering communication has been financed by a
9 corporation or a labor organization, pursuant to 11 C.F.R. § 114.15, these statements must
10 disclose the names and addresses of all those who donated an aggregate amount of \$1,000 or
11 more within a specified time period “for the purpose of furthering electioneering
12 communications.”²⁸

13 **B. There is Reason to Believe that CPPR Made Contributions for the Purpose of**
14 **Furthering the Communications at Issue**
15

16 The available information indicates that under the regulations in effect at the time of the
17 relevant conduct, 60 Plus may have been required to disclose CPPR as a contributor on
18 independent expenditure disclosure reports and as a donor on electioneering communication
19 disclosure reports 60 Plus filed with the Commission in 2010 and January 2011. The available

²⁵ 11 C.F.R. § 109.10(e)(1)(vi) (emphasis added).

²⁶ See 52 U.S.C. § 30104(f)(1) (formerly 2 U.S.C. § 434(f)(1)).

²⁷ See *id.* § 30104(f)(2) (formerly 2 U.S.C. § 434(f)(2)).

²⁸ 11 C.F.R. § 104.20(c)(9). Though this regulation is the subject of ongoing litigation, it remained in effect at all times relevant to the conduct at issue in this matter. *Van Hollen v. FEC*, No. 11-0766 (ABJ), 2014 WL 6657240 (D.D.C. Nov. 25, 2014) (vacating the regulation), *remanded from Ctr. for Individual Freedom v. FEC*, 694 F.3d 108, 112 (D.C. Cir. 2012), *vacating Van Hollen v. FEC*, 851 F. Supp. 2d 69 (D.D.C. 2012) (striking down the regulation), *appeal docketed*, Nos. 15-5016, 15-5017 (D.C. Cir. Jan. 22, 2015); see Center for Individual Freedom Notice of Appeal, *Van Hollen v. FEC*, No. 11-0766 (ABJ) (D.D.C.) (Docket No. 101, Jan. 9, 2015); Hispanic Leadership Fund Notice of Appeal, *Van Hollen v. FEC*, No. 11-0766 (ABJ) (D.D.C.) (Docket No. 103, Jan. 12, 2015).

1 information indicates that CPPR, through its Executive Director and agent Sean Noble, gave
2 funds to 60 Plus for the purpose of furthering communications in 2010 based on Noble's
3 undisputed role in 60 Plus's advertising campaign. Specifically, the Commission is in
4 possession of information indicating that Noble's solely owned consulting firm, Noble
5 Associates, helped to produce advertisements and determine advertisement placement strategy
6 for 60 Plus. There is also information that Noble Associates participated in working groups that
7 included representatives from 60 Plus, as well as pollsters, media vendors, and media buyers.
8 For example, the strategy to link Democrats to Nancy Pelosi, as reported in the *National Review*
9 article, appears to have emerged from those working groups. It was against this backdrop that
10 CPPR, through Noble, provided millions of dollars to 60 Plus. Therefore, the multiple roles that
11 Noble played in these organizations, along with his various involvements surrounding these
12 transactions, indicate that Noble may have known when he dispersed CPPR funds that those
13 funds were to be used in connection with the relevant advertisements.

14 The argument that there was no violation because Noble was acting in his capacity as a
15 member of Noble Associates is unpersuasive. Here, Noble Associates provided management
16 consultant services to CPPR apparently while also helping 60 Plus produce specific
17 advertisements. Moreover, an officer's knowledge, however gained, may be imputed to the
18 corporation.²⁹ So, here, the information Noble learned while working for 60 Plus may be
19 imputed to CPPR and could have informed CPPR's giving to 60 Plus. And, although 60 Plus
20 claims that it received sufficient funds from other sources to pay for its ad campaigns, the fact

²⁹ Specifically, in Maryland, where CPPR is registered as a corporation, if an individual is an officer for two corporations, the "officer's knowledge of the affairs of one corporation will be imputed to the other when such knowledge is present in his mind and memory at the time he engages in a transaction on behalf of such other corporation, or when such knowledge comes to him while acting as an agent for such other corporation in his official capacity, or while acting as an agent of such corporation, and within the scope of his authority." *Mercy Med. Ctr., Inc. v. United Healthcare of the Mid-Atlantic, Inc.*, 815 A.2d 886, 904 (Md. Ct. Spec. App. 2003) (citation omitted).

1 remains that CPPR alone provided sufficient funds to pay for all of its advertisements relating to
2 the 2010 House races.

3 The present record supports a reason to believe finding. For example, there is
4 information confirming that Noble was the source for the article and that certain key facts as
5 reported by the article are true. Further, while Noble was providing funds to the recipient
6 organizations in 2010, he was also actively working on their ad campaigns as a subcontractor. In
7 addition, representatives of 60 Plus participated in working groups with Noble Associates and
8 the media firms to work on the 2010 House advertising campaign. Such evidence supports an
9 inference that CPPR, through its officer and agent, Sean Noble, had knowledge of the particular
10 ads that the recipient organizations planned to run, and relevant information about the
11 organizations' advertising campaigns may have been shared between Noble Associates and 60
12 Plus.

13 Thus, there is information indicating that 60 Plus should have disclosed CPPR as a
14 contributor on the independent expenditure disclosure reports and as a donor on the
15 electioneering communication disclosure reports filed with the Commission in 2010 and January
16 2011. For these reasons, the Commission finds reason to believe 60 Plus violated 52 U.S.C.
17 § 30104(c)(2)(C) and (f)(2) (formerly 2 U.S.C. § 434(c)(2)(C) and (f)(2)) and 11 C.F.R.
18 §§ 109.10(e)(1)(vi) and 104.20(c)(9).