

BEFORE THE FEDERAL ELECTION COMMISSION

2016 FEB 12 AM 10: 11

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3 In the Matter of)
4)
5 American Future Fund)
6 Americans for Job Security)
7 The 60 Plus Association, Inc.)

MUR 6816

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9 **SECOND GENERAL COUNSEL'S REPORT**

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11 **I. ACTIONS RECOMMENDED**

12 (1) Enter into pre-probable cause conciliation with American Future Fund ("AFF"),
13 Americans for Job Security ("AJS") and The 60 Plus Association, Inc. ("60 Plus"); (2) approve
14 the three attached conciliation agreements; and (3) approve the appropriate letters.

15 **II. INTRODUCTION**

16 The Commission previously found reason to believe that AFF, AJS, and 60 Plus
17 (collectively "recipient organizations") violated 52 U.S.C. § 30104(c)(2)(C) and (f)(2) and 11
18 C.F.R. §§ 104.20(c)(9) and 109.10(c)(1)(vi) by failing to disclose that the Center to Protect
19 Patient Rights ("CPPR") provided them with funds for millions of dollars of independent
20 expenditures ("IEs") and electioneering communications ("ECs") made prior to the 2010 federal
21 elections.¹ The Commission made its findings based on the factual record indicating that Sean
22 Noble, as the Executive Director of CPPR, provided millions of dollars in grants to the recipient
23 organizations while also serving as a subcontractor to these same three organizations to help
24 produce and place their political advertisements. The Commission determined that CPPR's
25 knowledge of how the recipient organizations would use its funds, as imputed through Noble,
26 made it appear that CPPR provided funds for the purpose of furthering specific advertisements
27 produced by the recipient organizations, and the Commission authorized an investigation. After

¹ Certification, MUR 6816 (June 23, 2015).

1 we notified the three recipient organizations of the Commission's findings, they each informed
2 this Office that while disagreeing with some aspects of the Commission's legal conclusion
3 regarding their obligation to report CPPR as the source of the funds for their IEs and ECs, they
4 wished to resolve this matter through pre-probable cause conciliation.²

5 In light of respondents' requests to settle this matter expeditiously and their willingness
6 to enter into tolling agreements, we limited our investigation to questions designed to identify the
7 IEs and ECs for which CPPR should have been reported as the source of funds.³ Because we
8 have obtained the information needed to formulate conciliation agreements with AFF, AJS, and
9 60 Plus, we recommend that the Commission authorize pre-probable cause conciliation with
10 each organization and approve the three proposed conciliation agreements.

11 III. DISCUSSION

12 A. AFF

13 CPPR, acting through its Executive Director Sean Noble, provided AFF with a total of
14 \$11,685,000 in grants on various dates during 2010.⁴ In response to the Commission's reason to
15 believe findings, AFF acknowledges that that it spent a total of \$6,427,422 airing two series of
16 advertisements, reported as IE's, the first entitled "Tricked" or "Trick" and the second "Fork in
17 the Road," and variations of those advertisements. AFF admits that those advertisements match
18 the Complaint's description of an advertising campaign that Noble through his consulting firm,

² See Letter from Jason Torchinsky and Michael Bayes, Counsel for AFF (July 7, 2015); Letter from Michael E. Toner and Brandis Zehr, Counsel for 60 Plus (July 2, 2015); Letter from Michael E. Toner and Brandis Zehr, Counsel for AJS (July 2, 2015). All three respondents agreed to toll the applicable statute of limitations in order to facilitate pre-probable cause conciliation.

³ We asked respondents to provide information in the following three categories: (1) the total amount of funds that CPPR provided to them in 2010; (2) the identification of their IEs and ECs in 2010 that were funded by CPPR; and (3) the identification of their IEs and ECs in 2010 with which Sean Noble or Noble Associates provided assistance, services, or otherwise were involved with, and the dollar value of any such IEs or ECs. See Letter to Jason Torchinsky and Michael Bayes (July 8, 2015); Letters to Michael E. Toner and Brandis L. Zehr (July 8, 2015).

⁴ AFF Submission at 1 (Aug. 31, 2015).

1 Noble Associates, helped develop as AFF's subcontractor.⁵ AFF acknowledges that as described
2 in the *National Review* article attached to the Complaint, Noble created a spreadsheet of
3 Democratic candidates for nonprofit groups such as AFF to target in advertisements; that
4 spreadsheet listed each candidate in order of likelihood of defeat and increased the number of
5 candidates to 88 in June 2010 and to 106 in August 2010.⁶ AFF further affirms the *National*
6 *Review's* report that those candidates were each the subject of advertisements sponsored by
7 groups working with Sean Noble.⁷ AFF indicates that it disclosed the relevant expenditures for
8 those advertisements as payments made to Mentzer Media Services for advertisement placement
9 services and to McCarthy Marcus Hennings for advertisement production services.

10 AFF maintains, however, that it did not receive funds from CPPR that were designated
11 for any particular advertisement and argues that its founder, Nicholas Ryan, does not recall
12 having any discussions with Noble about AFF's "Trick" or "Fork in the Road" advertisements.⁸
13 While there may be a question as to what AFF and Noble may have communicated, the facts
14 described above, along with Noble's sworn affidavit,⁹ clearly establish that Noble was a
15 subcontractor for AFF and that Noble provided consulting services for producing and placing
16 AFF's advertisements at the same time that he controlled the flow of funds from CPPR to AFF in
17 his capacity as CPPR's Executive Director. In his dual roles, Noble knew how AFF would use

⁵ *Id.*, Attach. A.

⁶ *Id.* at 7 (quoting Eliana Johnson, *Inside the Koch-Funded Ads Giving Dems Fits*, NATIONAL REVIEW (Mar. 31, 2014) (Attachment C to Complaint).

⁷ *Id.*

⁸ *Id.* at 8. Notwithstanding these representations, AFF's counsel acknowledges that he only questioned Ryan in answering our questions and no other staff members at AFF and that he did not consult either of the media firms, Marcus McCarthy or Menzer Media Services E-mail from Michael Bayes to Jin Lee (Sept. 29, 2015); Mem. to File: MUR 6816 (Sept. 16, 2015).

⁹ CPPR Resp., Noble Aff. ¶ 5.

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1 funds that CPPR provided¹⁰ and provided funds for the purpose of furthering particular IE's.¹¹
2 Under these circumstances, AFF had an obligation to report CPPR as the source of the funds for
3 its IEs.¹²

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6 Accordingly, we recommend that the Commission authorize pre-
7 probable cause conciliation with AFF.

8 **B. 60 Plus**

9 CPPR, acting through its Executive Director Sean Noble, provided 60 Plus with a total of
10 \$8,990,000 in grants on various dates in 2010. 60 Plus does not contest that Noble, through
11 Noble Associates, served as a subcontractor hired to work on 60 Plus's advertising campaign
12 during the same time period.¹³ In its response to the Commission's findings, 60 Plus

¹⁰ Further, as a legal matter, the knowledge of Noble who was a subcontractor to AFF, 60 Plus, and AJS, may be imputed to those organizations given that the knowledge of a subagent is imputed to the principal. See *In re Color Tile, Inc.*, 475 F.3d 508, 513 (3d Cir. 2013) ("Where an agent receives notice, that notice is imputed to the principal This imputation applies to sub-agents as well: from sub-agent to agent, and then from agent to principal."); *Restatement (Third) of Agency* § 3.15(d) (2006) ("When a subagent works on a principal's account, notifications received by the subagent are effective as notifications to the principal to the same extent as if the principal had appointed the subagent directly. Likewise, notice of facts the subagent knows or has reason to know is imputed to the principal to the same extent as if the principal had appointed the subagent directly."); *Restatement (Second) of Agency* § 5 (1958) ("Thus, the courts now consistently hold that the principal is bound by the knowledge of the subagent as if he had been directly appointed, with only an occasional dictum to the contrary.") (citation omitted).

AFF's argument that the Commission allows individuals to "wear 'multiple hats' without their actions being imputed to multiple organizations relies on advisory opinions addressing the meaning of agency under the Act's soft money prohibitions at 52 U.S.C. § 30125(e) and whether an individual who is an agent of a federal candidate may also solicit funds for a non-federal entity in his role as an agent of that entity — a wholly separate question from the one raised in this matter regarding whether an agent's knowledge can be imputed to a principal.

¹¹ See 11 C.F.R. § 109.10(e)(1)(vi).

¹² *Id.*

¹³ 60 Plus Submission at 1-2. 60 Plus denies that it directly contracted with Noble to work on its advertising or participated in working groups, and states that it did not knowingly subcontract him or Noble Associates in 2010. *Id.* at 2. Counsel however acknowledges that due to budgetary constraints, he was not able to consult the media vendors or conduct an internal investigation to resolve all of the questions concerning 60 Plus as well as his other client, AJS, discussed *infra*. Mem. to File, MUR 6816 (Oct. 20, 2015) ("Oct. 20, 2015 Mem.").

1 acknowledges that it was generally aware that Noble was "involved with many outside groups'
2 advertising and advocacy efforts in 2010," including its own.¹⁴ Thus, given 60 Plus's admissions
3 combined with Noble's own sworn affidavit acknowledging his role in producing and placing 60
4 Plus's advertisements, the available information indicates that Noble had knowledge of the
5 advertisements that 60 Plus planned to air at the same time he was also providing grants to it.¹⁵
6 Under these circumstances, there is a reasonable basis for concluding that CPPR, acting through
7 Sean Noble, provided funds for the purpose of furthering IEs and ECs, and that 60 Plus had an
8 obligation to report CPPR as a donor or contributor in its IE and EC reports.¹⁶

9 Although 60 Plus maintains that it did not accept "earmarked" funds designated for
10 particular communications, it has requested that the Commission proceed to pre-probable cause
11 conciliation.

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¹⁴ 60 Plus Submission at 2; Oct. 20, 2015 Mem..

¹⁵ While 60 Plus claims it cannot conclusively confirm that Noble was its subcontractor, counsel for 60 Plus stated that he thought Noble would have the answer, *see* Oct. 20, 2015 Mem., and Noble has confirmed that he was a subcontractor hired to work on 60 Plus's advertisements in his sworn affidavit. Noble Aff. ¶5.

¹⁶ *See* 11 C.F.R. §§ 104.20(c)(9), 109.10(e)(1)(vi).

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3 Given the record in this matter, we recommend that the
4 Commission authorize pre-probable cause conciliation with 60 Plus.

5 C. AJS

6 CPPR, acting through its Executive Director Sean Noble, provided AJS with a total of
7 \$4,800,000 in grants on various dates during 2010. AJS does not dispute that Noble through
8 Noble Associates was also a subcontractor for its advertising campaign in 2010 and admits that it
9 was generally aware of Noble's involvement in other groups' advertising and advocacy efforts in
10 2010, including its own.¹⁸ Although AJS and its then-President, Stephen DeMaura, cannot recall
11 the specific role that Noble played with respect to AJS's advertisements, counsel for AJS
12 admitted that DeMaura could not rule out that Noble had some involvement with AJS's 2010
13 U.S. House IEs, totaling over \$4.4 million.¹⁹ While AJS asserts that Noble had no involvement
14 with AJS's ECs totaling \$99,672, AJS admits that it cannot dispute Noble's assertion that he was
15 involved in producing and/or placing AJS's IEs.²⁰ Thus, given AJS's admissions combined with
16 Noble's own sworn affidavit acknowledging his role in producing and placing its advertisements,
17 the available information indicates that Noble had knowledge of the advertisements that AJS
18 planned to air when he was also providing grants to it at the same time. Under these
19 circumstances, there is a reasonable basis for concluding that CPPR, acting through Sean Noble,

¹⁸ AJS Submission at 2 (Sept. 11, 2015) ("AJS Submission"); Oct. 20, 2015 Mem.

¹⁹ Oct. 20, 2015 Mem. (stating that DeMaura could not rule out that Noble played some role with the independent expenditures listed in the first three pages of Exhibit A of the AJS Submission).

²⁰ E-mail from Michael Toner (Oct. 8, 2015 06:39 PM); Oct. 20, 2015 Mem.

1 provided funds for the purpose of furthering IEs, and AJS therefore had an obligation to report
2 CPPR as the source of the funds for its IEs.²¹

3 While maintaining that it did not accept "earmarked" funds designated for particular
4 advertisements, AJS has offered to conciliate this matter in the interest of resolving this matter
5 expeditiously.

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Given the state of the record in
this matter, we recommend that the Commission authorize pre-probable cause conciliation with
AJS.

²¹ See 11 C.F.R. § 109.10(e)(1)(vi).

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V. RECOMMENDATIONS

1. Authorize conciliation with American Future Fund, The 60 Plus Association, Inc., and Americans for Job Security prior to a finding of probable cause to believe;
2. Approve the attached conciliation agreements; and
3. Approve the appropriate letters.

Date: 2/12/2016



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Kathleen Guith
Acting Associate General Counsel
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Mark Shonkwiler
Assistant General Counsel



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