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COMMISSION

Re: *Response of Center To Protect Patient Rights, Inc. / American Encore and Sean Noble in MUR 6816*

Dear Mr. Jordan,

This response is submitted by the undersigned counsel on behalf of the Center To Protect Patient Rights, Inc., American Encore, and Sean Noble in the above-referenced matter. For the reasons set forth below, the Commission should quickly dismiss this frivolous complaint.

In its complaint, Citizens for Responsibility and Ethics in Washington ("CREW") contends that three organizations (American Future Fund ("AFF"), Americans for Job Security ("AJS"), and the 60 Plus Association ("60 Plus")) distributed certain independent expenditures and/or electioneering communications, but failed to identify the Center to Protect Patient Rights ("CPPR") as a contributor or donor on reports filed with the Commission regarding those independent expenditures and/or electioneering communications. According to CREW, this alleged omission "denied the public important information about who paid for the advertisements broadcast by AFF, AJS, and 60 Plus." Complaint at ¶ 2. While CREW alleges a criminal conspiracy, *see* Complaint at ¶¶ 65-67, the Complaint concerns only a minor reporting matter.

Not even CREW would *normally* devote its time and resources to such matters, except that, as CREW notes, "News reports closely link CPPR with Charles and David Koch." Complaint at ¶ 27. This complaint is just another part of the Democratic Party's anti-Koch political campaign. Nevertheless, CREW's claims are incorrect, and neither CPPR nor Mr. Noble "carmarked" any funds, as CREW alleges. Mr. Noble did not "unlawfully conspire" with anyone to violate any laws, or enter into any agreements "to intentionally violate" any laws.

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I. Factual Background

CPPR was founded in 2009 and organized pursuant to Section 501(c)(4) of the Internal Revenue Code. CPPR changed its name to American Encore in February 2014. See Noble Affidavit at ¶ 2. The organization existed as CPPR during the period relevant for this matter, and we refer to it as CPPR in this Response. During 2010, CPPR distributed \$44,291,946 in grants to other organizations as part of its efforts “to build a coalition of like minded organizations and individuals, which worked to educate the public about healthcare reform and advocate in favor of patients rights.” Center to Protect Patient Rights, Inc., Form 990 (2010), Part III, 4a. CPPR also engaged “in helping to plan, create, design and execute an issue advocacy/legislative awareness campaign in conjunction with its broad based healthcare coalition.”¹ *Id.*

AFF, AJS, and 60 Plus are all independent, non-profit organizations. AFF and 60 Plus operate under Section 501(c)(4) of the Internal Revenue Code, and AJS operates under Section 501(c)(6). None was or is established, financed, maintained, or controlled by any federal candidate, officeholder, or party committee. These three organizations are entirely free to “coordinate” with one another under the Act and Commission regulations, and if any efforts were “coordinated” by and between these organizations, that is legally irrelevant here.²

Mr. Noble’s consulting firm, Noble Associates, LLC,³ was retained by CPPR to provide management consulting services in 2009 and 2010, and as part of this agreement, Mr. Noble served as Executive Director of CPPR during the period relevant to this matter. See Noble Affidavit at ¶ 4. Thus, CPPR was a client of Noble Associates.

As partially recounted in the *National Review* article referenced in CREW’s Complaint, CPPR was originally conceived and founded in 2009 to oppose the federal government healthcare proposal known colloquially as “Obamacare.” See Eliana Johnson, *Inside the Koch-Funded Ads Giving Dems Fits*, National Review Online (March 31, 2014), <http://www.nationalreview.com/article/374580/inside-koch-funded-ads-giving-dems-fits-eliana-johnson>. The organization’s early efforts involved substantial legislative advocacy and

¹ This effort included approximately \$10,300,000 for “communications and surveys.” Center to Protect Patient Rights, Inc., Form 990 (2010), Part IX.

² The *National Review* article referenced in CREW’s complaint reports “the activity of the groups was extraordinarily well-orchestrated, with no two groups airing ads in the same congressional district.” Eliana Johnson, *Inside the Koch-Funded Ads Giving Dems Fits*, National Review Online (March 31, 2014), <http://www.nationalreview.com/article/374580/inside-koch-funded-ads-giving-dems-fits-eliana-johnson>. As noted, there is no legal prohibition or restriction against such collaboration.

³ The *National Review* article identifies Mr. Noble’s consulting firm as DC London. DC London was established in December 2010. The consulting firm involved in the activities described in the *National Review* article was Noble Associates.

grassroots lobbying efforts to oppose the "Obamacare" legislation. These initial efforts took place between Spring 2009 to Spring 2010, when the Affordable Care Act was signed into law.⁴ According to the *National Review* article, "CPPR's strategy changed when the House passed the Affordable Care Act and President Obama signed it into law in March 2010. Noble and his team set their sights on returning the House to the GOP." The implication that CPPR seamlessly transitioned to the 2010 U.S. House effort is incorrect. "Noble and his team," as explained below, did change *their* focus, but CPPR was not part of this new effort. CREW's allegation that "in 2010 CPPR engaged in extensive political campaign activities in opposition to Democrats running for the House" is incorrect. See Complaint at ¶ 29.

In 2010, Noble Associates served as a subcontractor to AFF, AJS and 60 Plus,⁵ participated in various working groups that included representatives from each of these three organizations, as well as the organizations' pollsters, media vendors, and media buyers, and helped to produce advertisements and determine advertisement placement strategy for AFF, AJS, and 60 Plus. In connection with these efforts, Noble Associates did *not* represent CPPR, or act as agents of CPPR. Noble Associates' representation of CPPR did *not* extend to these working group, and CPPR was *not* a party to the 2010 U.S. House efforts of AFF, AJS, and 60 Plus. See Noble Affidavit at ¶ 5.

This 2010 U.S. House effort was conducted entirely apart from CPPR's grant activities. During 2010, CPPR made numerous grants to AFF, AJS, and 60 Plus, among many others. In 2010, CPPR distributed \$44,291,946 in grants to 22 organizations as part of its efforts "to build a coalition of like minded organizations and individuals, which worked to educate the public about healthcare reform and advocate in favor of patients rights." Center to Protect Patient Rights, Inc., Form 990 (2010), Part III, 4a, and Schedule I. These grants included \$11,685,000 to AFF, \$4,828,000 to AJS, and \$8,990,000 to 60 Plus. See *id.* at Schedule I. These funds were not distributed to the three organizations as lump sums. Instead, grants were made throughout the year, as funds were available to CPPR, based on CPPR's own support, funding, and cash-flow. See Noble Affidavit at ¶ 6.

None of this grant money was earmarked for any particular project, purpose, or advertisement, including, but not limited to, the advertisements referenced in CREW's Complaint. Rather, all CPPR grants were made as unrestricted, general support grants to the recipient organization, and this purpose was made express in writing. See Noble Affidavit at ¶ 6-9. For example, every grant made in 2010 by CPPR to AFF, AJS, or 60 Plus was accompanied with a transmittal letter that read:

⁴ See *supra* footnote 1.

⁵ Noble Associates subcontracted with the media consultants of AFF, AJS, and 60 Plus.

The Center to Protect Patient Rights, Inc. is pleased to make a general support grant in the amount of \$[amount] to support [American Future Fund/Americans for Job Security/the 60 Plus Association]. Our federal tax ID number is [xx-xxxxxxx]. The Center to Protect Patient Rights is a 501(c)(4) organization.

See Attachments A, B, and C, and Noble Affidavit at ¶ 8.

CPPR's grants were made in a manner consistent with well-established principles of federal tax law. Although federal tax law is not directly relevant to the Commission's enforcement mission, in this case, it provides important context for understanding the assumptions that accompanied the provision and receipt of CPPR's grant funds. Generally speaking, under the Internal Revenue Code, when a transfer of funds is made to a Section 501(c) organization to provide "general" or "unrestricted" support to that organization, that transfer of funds is treated as a no-strings-attached donation to the recipient organization, and the recipient organization gains full control over how those funds are used.⁶ In other words, CPPR's grants were made under existing Internal Revenue Code standards and principles, and under those standards and principles, AFF, AJS, and 60 Plus were legally entitled to use the granted funds at their own discretion.

The terms "general purpose support," "operating support," and "core support" "are used interchangeably to refer to the same thing: grants in support of a nonprofit organization's mission rather than specific projects or programs. . . . The nonprofit can spend it on an array of expenses, including program costs, salaries, administration, office expenses, technology, personnel training, fund raising and marketing" Grantmakers for Effective Organizations, *GEO Action Guide: General Operating Support* (2007 ed.) at 6, <http://www.nch.gov/files/divisions/fedstate/generaloperatingsupportactionguide.pdf>.⁷

⁶ See, e.g., Sheila Warren and Rosemary E. Fei, *Lobbying Clauses In Grant Agreements With Organizational Grantees*, Taxation of Exempts (March/April 2006), <http://www.adlercolvin.com/pdf/TOE - Article - Lobbying Grant Agreements.pdf> ("Private foundations that wish to support an entire organization may make unrestricted or general support grants to public charities. Under Reg. 53.4945-2(a)(6)(i), even if the public charity has lobbying activities, those activities are not attributable to the private foundation's general support grant, and cannot cause the funder to have made a taxable expenditure. To protect the funder, general support grant agreements should state that the grant is 'not earmarked for lobbying' With such a provision, the foundation has made clear that its grant, in keeping with its unrestricted nature, is not directed at the grantee's lobbying activities, yet the public charity retains the flexibility to use the grant funds for any purpose, including lobbying. Even if the public charity does ultimately use the money for lobbying, the private foundation will not incur a taxable expenditure, because the public charity will have made an independent decision in its sole discretion to use the funds for lobbying activities.").

⁷ This report also recognizes that general operating support grants are especially common among conservative non-profit organizations: "Proof that general operating support enhances capacity can be seen in the success of conservative grantmakers in building a powerful network of policy, training and

CPPR's grants were not the sole source of support for AFF, AJS and 60 Plus. In 2010, all three organizations raised or received substantial funding from other sources, and in no instance can it be concluded that AFF, AJS, or 60 Plus must necessarily have spent CPPR's grant funds on the U.S. House spending referenced in the Complaint.

2010	CPPR Grant, Total	House spending ⁸	Gross Receipts	Total Expenses
AFF	11,685,000	8,499,278	23,304,826	21,352,090
AJS	4,828,000	5,007,447	12,411,684	12,417,809
60 Plus	8,990,000	6,678,813	18,858,700	18,315,535

As demonstrated in the chart above, each organization had more than ample funds from other sources to pay for the activities that are the subject of this Complaint. As three Commissioners explained in a similar matter, "besides [one individual donor], 'several donors have contributed a few hundred thousand dollars' and 'one other benefactor has given a million dollars or more.' Thus, the funds donated by these others persons would be more than sufficient to cover the roughly \$126,000 cost of the [specific] advertisement, and there is no suggestion that these other individuals made their donations for the purpose of furthering the electioneering communication." Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn in MUR 6002 at 6. Additionally, each organization spent considerable funds on activities other than television advertising, meaning this is not a case where "a group is using all of its donations for electioneering communications (and associated overhead)." Statement of Reasons of Vice Chair Cynthia L. Bauerly and Commissioner Ellen L. Weintraub in MUR 6002 at 5.

In short, CREW's factual allegations are almost entirely incorrect. CPPR did *not*:

- (i) engage in political/campaign strategy activities in connection with the 2010 U.S. House advertising of AFF, AJS, or 60 Plus, as alleged by CREW;
- (ii) conduct research for the purpose of creating or producing advertisements in connection with the 2010 U.S. House advertising of AFF, AJS, or 60 Plus, as alleged by CREW;
- (iii) create or produce any political/campaign advertisements in connection with the 2010 U.S. House advertising of AFF, AJS, or 60 Plus, as alleged by CREW;
- (iv) control the political/campaign advertising spending of AFF, AJS, or 60 Plus, as alleged by CREW;

advocacy institutions to advance their cause. A key strategy in this effort has been to provide significant amounts of unrestricted general operating support to a relatively small group of grantees." Grantmakers for Effective Organizations, *GEO Action Guide: General Operating Support* (2007 ed.) at 10, <http://www.neh.gov/files/divisions/fedstate/generaloperatingsupportactionguide.pdf>.

⁸ House spending figures are presented as alleged by CREW in its Complaint.

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(v) determine when or where any political/campaign advertising distributed by AFF, AJS, or 60 Plus should be distributed, as alleged by CREW; or

(vi) earmark any funds to AFF, AJS, or 60 Plus for the purpose of furthering specific independent expenditures or electioneering communications, or for the purpose of furthering independent expenditures or electioneering communications in general.

II. Relevant Law

The Complaint contains a considerable amount of irrelevant material. The *only* question presented for the Commission is whether CPPR “earmarked” grants to AFF, AJS, or 60 Plus in a manner that would require AFF, AJS, or 60 Plus to report CPPR as a “a person who made a contribution ... for the purpose of furthering an independent expenditure” pursuant to 2 U.S.C. § 434(c)(2)(C), as interpreted by the Commission at 11 C.F.R. 109.10(e)(1)(vi), or a “contributor” pursuant to 2 U.S.C. § 434(f)(2), as interpreted by the Commission at 11 C.F.R. § 104.20(c)(9). **Importantly, even if we assume solely for the sake of argument that such “earmarking” occurred, CPPR still would not have violated any provision of the Act or FEC regulations because CPPR was never the responsible reporting entity.**

Commission regulations provide that an independent expenditure report must include “[t]he identification of each person who made a contribution in excess of \$200 to the person filing such report, *which contribution was made for the purpose of furthering the reported independent expenditure.*” 11 C.F.R. § 109.10(e)(1)(vi) (emphasis added).⁹

With respect to electioneering communications, the precise scope and application of the donor disclosure requirement is disputed by the Commissioners. Commission regulations require the reporting of “the name and address of each person who made a donation aggregating \$1,000 or more to the corporation or labor organization, aggregating since the first day of the preceding calendar year, *which was made for the purpose of furthering electioneering communications.*” 11 C.F.R. § 104.20(c)(9) (emphasis added). Three Commissioners have interpreted this provision in a manner that is consistent with the corresponding independent expenditure provision. *See* Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn in MUR 6002 (“we interpret 11 C.F.R. § 104.20(c)(9) as requiring a corporation or labor union to disclose the persons who make donations that meet or exceed the \$1,000 threshold only if such donations are made for the

⁹ CREW complains about the Commission’s interpretation of Act, but Section 109.10(e)(1)(vi) and other Commission guidance speaks for itself and remains the law. Despite CREW’s invitation, the Commission cannot change the meaning of this long-standing regulation without undertaking a formal rulemaking.

purpose of furthering the electioneering communication that is the subject of the report”).¹⁰ Two Commissioners disagreed with this reading, and would instead hold that “[n]either the statute nor the regulation requires that specific donations be explicitly tied to specific communications.” Statement of Reasons of Vice Chair Cynthia L. Bauerly and Commissioner Ellen L. Weintraub in MUR 6002.

The differences between the Commissioners regarding the proper scope and application of the electioneering communication reporting provision is not critical in this matter – CPPR did not contribute or donate funds to AFF, AJS, or 60 Plus for the purpose of funding or furthering *specific* electioneering communications, or for the purpose of funding or furthering electioneering communications *in general*. In the present matter, with respect to each of its grants, CPPR made its donative purpose expressly clear in writing – all grants were made for the purpose of providing “general support” to the recipient organization.

Thus, 11 C.F.R. § 109.10(e)(1)(vi) sets forth the standard for donor disclosure with respect to independent expenditure reports, and 11 C.F.R. § 104.20(c)(9) sets forth the standard for donor disclosure with respect to electioneering communications reports, and with respect to electioneering communications, the Commissioners have interpreted the regulatory provision in two different ways. However, the Commission has never explained *how* it determines if a contribution or donation was made with the relevant “purpose of furthering” an independent expenditure or electioneering communication. In other words, what serves as evidence that the donor had the requisite purpose, and how is that donor’s “purpose” demonstrated?¹¹ This

¹⁰ See also *McConnell v. FEC*, 540 U.S. 93, 196 n.81 (2003) (“The disclosure requirements that BCRA § 201 added to FECA § 304 are actually somewhat less intrusive than the comparable requirements that have long applied to persons making independent expenditures. For example, the previous version of § 304 required groups making independent expenditures to identify donors who contributed more than \$200. 2 U.S.C. § 434(c)(2)(C) (2000 ed.). The comparable requirement in the amendments applies only to donors of \$1,000 or more. 2 U.S.C. §§ 434(f)(2)(E), (F) (Supp. 2003).”).

¹¹ While it is generally presumed that both 11 C.F.R. §§ 109.10(e)(1)(vi) and 104.20(c)(9) require something akin to an “earmarking” of funds, the Act does not use the term “earmarking” at 2 U.S.C. § 434(c)(2)(C), which requires a person to report “the identification of each person who made a contribution in excess of \$200 to the person filing such statement which was made for the purpose of furthering an independent expenditure,” or at 2 U.S.C. § 434(f)(2)(F). In the 2007 electioneering communications rulemaking, which resulted in the current 11 C.F.R. § 104.20(c)(9), the Commission referred to the “disclosure of funds received only from those persons who donated *specifically* for the purpose of furthering ECs.” *Explanation and Justification for Final Rules on Electioneering Communications*, 72 Fed. Reg. 72,899, 72,911 (Dec. 26, 2007) (emphasis added). In an entirely separate provision, the Act refers to “contributions which are in any way *earmarked or otherwise directed* through an intermediary or conduit.” 2 U.S.C. § 441a(a)(8) (emphasis added). For purposes of Section 441a(a)(8), Commission regulations define “earmarked” to mean “a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate’s authorized committee.” 11 C.F.R. § 110.6(b)(1); see also Advisory Opinion

question is not necessarily determinative in the present matter because CPPR made expressly clear in writing that all of its grants were for the recipients' "general support," but it would perhaps be helpful if the Commission explained how the "for the purpose of furthering" standard is met or satisfied for purposes of 11 C.F.R. §§ 109.10(e)(1)(vi) and 104.20(c)(9).

III. Review of CREW's Complaint

A. Mr. Noble's *National Review* Interview

CREW's Complaint relies almost exclusively on a March 31, 2014, article in *National Review*. CREW is correct that Mr. Noble is "quoted throughout" the *National Review* article. But, as CREW itself recognizes, *see* Complaint at ¶ 28, most of the material from that article upon which CREW relies is material "where Mr. Noble is not quoted directly."

Mr. Noble's direct quotations in the *National Review* article are set forth below:

- "Randy Kendrick said, 'Who do I have to give money to? What organizations are doing this?'"
- Noble referred to an "impassioned speech" given by Ms. Kendric, and said, "People were moved to tears by how invested she was in this."
- "What Frank [Luntz] did, is he took political guys like me and like Larry [McCarthy] and had to kind of shake us into understanding that we needed to treat this differently than we would a political campaign, and that we had to do this not by beating someone over the head but by persuading."
- "We knew we had to make that summer absolute hell."
- "We packed these town halls with people who were just screaming about this thing."
- "We expected we could turn out 250 people there. Over 1,000 showed up."
- "We made a deliberate recommendation that you gotta focus on the House. That's where this bill passed. Pelosi broke so many arms of Democrats that had no business voting for that bill. Obamacare clearly was the watershed moment that provided the juice to deliver the majority back to the Republicans in the House."
- "We did not spend another dime in that race from August until Election Day."

2006-30 fn. 2. Early advisory opinions provide an example of an earmarking, noting that contributors may "expressly earmark the contribution" by including a "notation on a check." *See, e.g.,* Advisory Opinion 1975-60, 1975-64, and 1975-82. While the two concepts (contributing or donating "for the purpose of furthering" and "earmarking") could be treated as analogous concepts, the Act itself uses different language to describe the two actions, and it is normally presumed that different language within the same statute carries different meaning.

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- “When we tied them to Pelosi, swing voters were more likely to vote against them 65 percent of the time. She was absolutely toxic for her conference with swing voters.”
- “There was some interesting stretching of the field that no one thought was possible.”
- “What we warned people was going to happen is now happening, so it’s a natural extension of the debate. Now we’re saying, ‘We told you so,’ without saying ‘We told you so.’”
- “It’s kind of like this great story. We don’t know how it’s going to end, but Democrats are going to lose twice over it.”

Not one sentence directly attributed to Mr. Noble supports any of the allegations made in the Complaint. Specifically, no language directly attributed to Mr. Noble in any way supports CREW’s central allegation that “CPPR made contributions to AFF, AJS, and 60 Plus earmarked to pay for air time to broadcast specific television advertisements in House races in 2010.” See Complaint at ¶ 2.¹² In light of the fact that Mr. Noble’s own words quite clearly fail to suggest any violation, CREW contends “even where Mr. Noble is not quoted directly, he was almost certainly the source of the information about CPPR’s activities.” This is pure speculation on CREW’s part.

Much of the remainder of the material from the *National Review* article upon which CREW relies is either taken out of context, misrepresented, misunderstood, or simply incorrect. One such error is a misunderstanding of Mr. Noble’s use of the word “we.” As used by Mr. Noble in his interview with the author of the *National Review* article, the term “we” referred generally to the individuals and organizations with whom Mr. Noble was working at the time – and “we” did not consistently refer to the same individuals and organizations. See Noble Affidavit at ¶ 11. While Mr. Noble was simply attempting to be informative and conversational with an interviewer, CREW has made a federal case out of a lack of precision.

For example, when describing efforts undertaken during the 2009 Congressional recess to generate opposition to the “Obamacare” legislation, Mr. Noble used the term “we” to refer generally to his consulting firm (Noble Associates), CPPR, and Americans For Prosperity and its representatives.¹³ In one instance, Mr. Noble used “we” to refer to his consulting firm (Noble

¹² CREW’s Complaint contains similarly unsupported conclusions at Paragraph 29 (“making contributions to other organizations, including AFF, AJS, and 60 Plus, earmarked for broadcasting the ads”), Paragraph 32 (“CPPR earmarked contributions to other groups to pay for broadcasting them.”), Paragraph 33 (“Mr. Noble’s statements in the news report confirm CPPR’s control of the spending.”), and Paragraph 35 (“Mr. Noble further asserted he and CPPR decided when to broadcast certain ads.”).

¹³ Specifically, Mr. Noble was referring to his consulting firm (Noble Associates), CPPR, Americans For Prosperity, and its representatives in the following statements included in the *National Review* article:

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Associates) and Americans For Prosperity when describing an advertisement that Americans For Prosperity aired in 2010.¹⁴ When describing efforts undertaken during 2010 in connection with the U.S. House advertising program, Mr. Noble used the term “we” to refer to the working group(s) referenced above, or to certain members of the working groups.¹⁵ (As noted above, those working groups did not include CPPR.) Finally, in two statements included near the end of the *National Review* article, Mr. Noble used the term “we” in a very general sense that was intended to refer to himself and other like-minded consultants and strategists.¹⁶ See Noble Affidavit at ¶ 11.

B. Misattribution of Activity to CPPR

The interviewer’s and author’s consistent (mis)attribution of activity to CPPR reflects this misunderstanding of Mr. Noble’s use of the term “we.” As explained above, the activity generally attributed in the *National Review* article to CPPR, or “Noble and CPPR,” as well as in CREW’s complaint, did not actually involve CPPR and was instead undertaken by the working group(s) detailed on page 3 of this Response. Specifically:

- CPPR did *not* “engage[] in extensive political campaign activities in opposition to Democrats running for the House.” See Complaint at ¶ 29.

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- “We knew we had to make that summer absolute hell.”
 - “We packed these town halls with people who were just screaming about this thing.”
 - “We expected we could turn out 250 people there. Over 1,000 showed up.”

¹⁴ Specifically, Mr. Noble was referring to his consulting firm, Noble Associates, and Americans For Prosperity when he said, “we didn’t spend another dime in that race from August until Election Day.”

¹⁵ Specifically, Mr. Noble was referring to individuals who participated in the working groups referenced above in the following statements included in the *National Review* article:

- “What Frank did is he took political guys like me and like Larry and had to kind of shake us into understanding that we needed to treat this differently than we would a political campaign, that we had to do this not by beating someone over the head but by persuading.”
- “We made a deliberate recommendation that you gotta focus on the House.”
- “When we tied them to Pelosi, swing voters were more likely to vote against them 65 percent of the time.”

¹⁶ Specifically, Mr. Noble was referring very generally to himself and other similarly-minded strategy consultants and strategists in the following statements included in the *National Review* article:

- “What we warned people was going to happen is now happening.”
- “Now we’re saying ‘We told you so’ without saying ‘We told you so.’”
- “We don’t know now how it’s going to end, but Democrats are going to lose twice to it.”

- “Mr. Noble and CPPR” did *not* “produce[] dozens of ads that targeted hundreds of Democratic congressmen in the 2010 midterm elections.”¹⁷ See Complaint at ¶ 30.
- “Mr. Noble and CPPR” did *not* “carefully select[] the political races in which the ads would be broadcast.” See Complaint at ¶ 31.
- “Mr. Noble and CPPR” did *not* “rel[y] on a spreadsheet listing vulnerable Democratic House members.” See Complaint at ¶ 31.
- Mr. Noble and CPPR did *not* decide which races to broadcast advertisements. See Complaint at ¶ 34.

As explained above, these activities were undertaken by Noble Associates, in conjunction with the working groups referenced above, and without involvement from CPPR.

CREW contends that “Mr. Noble further asserted that he and CPPR decided when to broadcast certain ads.” Complaint at ¶ 35. This is not correct with respect to the 2010 U.S. House advertisements aired by the named respondents, AFF, AJS, and 60 Plus. CREW’s supporting evidence for this claim is Mr. Noble’s comment that “we did not spend another dime in that race from August until Election Day.” As the *National Review* article makes clear, Mr. Noble was referring to advertising sponsored by Americans for Prosperity. Americans for Prosperity is not named as a respondent in this matter, and the advertisement aired by Americans for Prosperity in Colorado’s 4th Congressional District was neither an independent expenditure nor an electioneering communication. Americans for Prosperity had a consulting agreement with Noble Associates at the time this advertisement was aired. Mr. Noble was referring to his firm’s arrangement with Americans for Prosperity. See Noble Affidavit at ¶ 11.

With respect to the Colorado advertising of Americans for Prosperity, CREW claims that “Mr. Noble’s comments demonstrate his and CPPR’s control over the timing of spending on political advertisements.” Complaint at ¶ 35. The paragraph in the *National Review* article detailing this particular advertisement makes absolutely no mention of CPPR; it refers only to “Noble and company.” The circumstances of this advertisement do not reveal or “demonstrate” anything about the advertising of AFF, AJS, or 60 Plus.

Next, CREW claims that “[t]he news report identifies several advertisements ‘CPPR and the constellation of groups to which it disbursed millions of dollars’ broadcast against Democratic candidates using earmarked contributions.” Complaint at ¶ 36. The referenced news report says no such thing. Rather, the news report incorrectly states: “Between June and November, CPPR and the constellation of groups to which it disbursed millions of dollars in funds sought to tie Democrats not to President Obama, who inspires warm feelings among most

¹⁷ The reference to “hundreds of Democratic congressmen” in the *National Review* article is certainly a mistake.

Americans, but to House speaker Nancy Pelosi.” The reference to “CCPR and the constellation of groups” is inaccurate. As explained above, CPPR was not a party to the 2010 U.S. House advertising program undertaken by AFF, AJS, and 60 Plus. AFF, AJS, and 60 Plus may have utilized a common strategy of linking Democratic candidates to Nancy Pelosi. To the extent they did, that strategy emerged from the working group described above, and of which CPPR was not a part. (This strategy was certainly not unique to AFF, AJS, and 60 Plus.)

The *National Review* article also asserts that “Noble coordinated the disbursement of over \$50 million to several other groups that paid to put the ads on the air: Americans for Prosperity, the 60 Plus Association, Americans for Job Security, Americans for Limited Government, and the American Future Fund.” These are not Mr. Noble’s words, and the implication that the grants were made to fund the referenced ads is incorrect. Mr. Noble oversaw the disbursement of grants from CPPR to other organizations, see Noble Affidavit at ¶ 6, and some of those recipients did pay to distribute certain advertisements in 2010 that constituted independent expenditures or electioneering communications. The funds distributed by CPPR were designated for the general support of the organization, and were not “earmarked” for any particular purpose. See Noble Affidavit at ¶ 7; see also Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter and Donald F. McGahn in MUR 6002 at 7 (“there is no specific evidence to contradict the assertion of Freedom’s Watch that all funds contributed during 2008 were for general purposes (the general purpose of Freedom’s Watch was to engage in activities furthering its core issue agenda)”).

CPPR did not earmark funds for the purpose of furthering the specific advertisements referenced in CREW’s Complaint at Paragraph 36, namely: (1) a 60 Plus advertisement referencing Alan Grayson and Suzanne Kosmas; (2) a 60 Plus advertisement referencing James Oberstar; (3) an AFF advertisement referencing Stephanie Herseth-Sandlin; and (4) an AJS advertisement referencing Robert Etheridge. See Noble Affidavit at ¶¶ 7 – 9. In addition:

- There is no evidence in either the *National Review* article or CREW’s Complaint that CPPR earmarked funding for any of the 60 Plus advertisements referenced in the Complaint at Paragraphs 36, 42, or 43.
- There is no evidence in either the *National Review* article or CREW’s Complaint that CPPR earmarked funding for any of the AFF advertisements referenced in the Complaint at Paragraphs 38-39.
- There is no evidence in either the *National Review* article or CREW’s Complaint that CPPR earmarked funding for any of the AJS advertisements referenced in the Complaint at Paragraphs 40-41.

Of this dearth of actual evidence, CREW claims: “It is not clear precisely which other advertisements were paid for by contributions CPPR gave to other organizations.” Complaint at ¶ 37. We agree there is no evidence linking CPPR’s grants to the advertisements at issue in

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this matter, and also note that CREW misstates the legal inquiry. It makes no difference whatsoever if “advertisements were paid for by contributions CPPR gave to other organizations.” The relevant legal inquiry is whether the donor, CPPR, made a contribution “for the purpose of furthering the reported independent expenditure” or “for the purpose of furthering electioneering communications.”¹⁸

CREW similarly misstates the law at Paragraph 51 of its Complaint, where it alleges that CPPR “contributed money to AFF ‘that paid to put the ads on the air.’” Again, this statement fails to reflect the law’s emphasis on CPPR’s purpose for contributing. (CREW uses the same incorrect language with respect to AJS and 60 Plus. See Complaint at ¶¶ 56-57 and 61-62.)

C. Overall Finances of AFF, AJS, and 60 Plus

CREW presents a remarkably simplistic and incomplete picture of AFF’s, AJS’s, and 60 Plus’s finances. Publicly-available financial documents show that AFF, AJS, and 60 Plus all had gross receipts far in excess of the total grant funding received from CPPR, and each spent far in excess of the amount CREW claims was devoted to House spending.¹⁹ As CPPR’s 2010 Form 990, Schedule I indicates, its grants to these three organizations were for “general support.” See also Noble Affidavit at ¶¶ 7 – 10 and Attachments A, B, and C. In other words, CPPR provided funding to each of these three groups for general organizational support, *i.e.*, unspecified, non-earmarked funding.

Per the terms of the CPPR grant transmittal letters, the funds *could have been* spent on advertising, at the recipient organizations’ discretion. CPPR did not earmark its grants in any way. The transmittal letters distributed by CPPR along with its grants provide the single best (and only) evidence of the purpose for which the grants were made: to support the general mission and organization of each grantee. These letters are affirmative proof that the grants were *not made for the purpose of furthering any independent expenditures or electioneering communications*. The grantees were free to spend the funds as they saw fit. In this clear absence of any earmarking, supplemented here by the additional fact that each of the three organizations had ample funding from other sources to pay for the advertisements at issue, the Commission cannot reasonably conclude that CPPR made any grant for the purpose of furthering any advertisements, or that the grant recipients even spent CPPR’s funds on the advertisements at issue in this matter.

¹⁸ See Statement of Vice Chair Cynthia L. Bauerly and Commissioner Ellen L. Weintraub in MUR 6002 at 4 (“The only relevant inquiry is: did the donor make a donation for the purpose of furthering electioneering communications”).

¹⁹ The figures provided for gross receipts and total expenses are taken from each organization’s 2010 Form 990 filing, all of which are available through Guidestar.

D. FEC Reports

With respect to the FEC reports filed by AFF, AJS, and 60 Plus, CREW asserts that “none of these reports identified any person who made a contribution to [AFF, AJS, or 60 Plus] for the purpose of furthering these independent expenditures [or electioneering communications].” See Complaint at ¶¶ 38 – 43. Neither Mr. Noble nor CPPR can speak to whether AFF, AJS, or 60 Plus received contributions from *other* sources that were made for the purpose of furthering the independent expenditures and electioneering communications identified in the Complaint. However, CPPR did *not* make contributions to any of these three organizations “for the purpose of further these independent expenditures” or “for the purpose of furthering these electioneering communications.” CREW’s central contention – that CPPR should have been identified on these three organization’s independent expenditure and/or electioneering communications reports – is incorrect.

IV. Conclusion

For the reasons set forth above, the Commission should find no reason to believe that any violation of the Act or Commission regulations occurred and quickly dismiss this matter.

Sincerely,



Jason Torchinsky

Michael Bayes

Counsel to the Center to Protect Patients
Rights, American Encore, and Sean Noble

Attachments

AFFIDAVIT OF SEAN NOBLE

PERSONALLY came and appeared before me, the undersigned Notary, the within named SEAN NOBLE, and makes this his Statement and General Affidavit upon oath and affirmation of belief and personal knowledge that the following matters, facts and things set forth are true and correct to the best of his knowledge:

1. I am Sean Noble. I currently reside in Phoenix, Arizona.

2. The Center To Protect Patient Rights, Inc., was founded in 2009, and changed its name to American Encore in February 2014.

3. I am the owner and sole member of Noble Associates, LLC.

4. The Center To Protect Patient Rights, Inc., retained Noble Associates as consultants to provide organizational management services in 2009 and 2010. In connection with those consulting agreements, I served as Executive Director of the Center To Protect Patient Rights:

5. In 2010, Noble Associates served as a subcontractor to American Future Fund, Americans for Job Security and the 60 Plus Association. Noble Associates participated in various working groups that included representatives from each of these three organizations, as well as pollsters, media vendors, and media buyers for each of these three organizations, and also helped to produce advertisements and determine advertisement placement strategy for American Future Fund, Americans for Job Security and the 60 Plus Association. In connection with these efforts, Noble Associates did not represent the Center To Protect Patient Rights, or act as agents of the Center To Protect Patient Rights. Noble Associates' representation of the Center To Protect Patient Rights did not extend to these working group, and the Center To Protect Patient Rights was not a party to the 2010 U.S. House efforts of American Future Fund, Americans for Job Security and the 60 Plus Association.

6. In my capacity as Executive Director of CPRR, I distributed grants from the Center To Protect Patient Rights to other organizations. These grants were distributed as funding became

available to the Center To Protect Patient Rights, based on the Center To Protect Patient Rights' own support, funding, and cash-flow.

7. Grants distributed by the Center To Protect Patient Rights to other organizations were never earmarked for use for any particular purpose, nor did the Center To Protect Patient Rights prohibit those funds from being used for particular purposes. Rather, grants were provided to other organizations in the form of general organizational support, and grant recipients were free to use the funds at their own discretion.

8. Grants made in 2010 by the Center To Protect Patient Rights to American Future Fund, Americans for Job Security, and the 60 Plus Association were accompanied with transmittal letters that read:

The Center to Protect Patient Rights, Inc. is pleased to make a general support grant in the amount of \$[amount] to support [American Future Fund/Americans for Job Security/the 60 Plus Association]. Our federal tax ID number is [xx-xxxxxxx]. The Center to Protect Patient Rights is a 501(c)(4) organization.

9. I never instructed any individual representing American Future Fund, Americans For Job Security, or The 60 Plus Association that any grant provided by CPPR in 2010 should or must be used in connection with any particular project, advertisement, or advertisements.

10. Neither CPPR nor any individual acting as an agent of CPPR, to the best of my knowledge, earmarked any grant to pay for, or further, the specific advertisements referenced in CREW's Complaint at Paragraph 36, namely: (i) a 60 Plus advertisement referencing Alan Grayson and Suzanne Kosmas; (ii) a 60 Plus advertisement referencing James Oberstar; (iii) an AFF advertisement referencing Stephanie Herseth-Sandlin; and (iv) an AJS advertisement referencing Robert Etheridge.

11. Based upon my recollection of my interview with Ms. Johnson of National Review, and upon reading Ms. Johnson's article, *Inside the Koch-Funded Ads Giving Dems Fits*, I used the term "we" to refer generally to the individuals and organizations with whom I was working at the time. In my interview with Ms. Johnson, I did not use the term "we" to refer consistently to the same individuals and organizations. In Ms. Johnson's article, the only instances in which my use of the term "we" included the Center To Protect Patient Rights are in my references to

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advertising and other efforts undertaken by Americans For Prosperity in 2009. My other uses of the term "we," including in my references to the 2010 U.S. House efforts of American Future Fund, Americans for Job Security, and the 60 Plus Association, are not references to the Center To Protect Patients Rights, and were not intended to be understood as references to the Center To Protect Patients Rights.

DATED this the 19th day of June, 2014

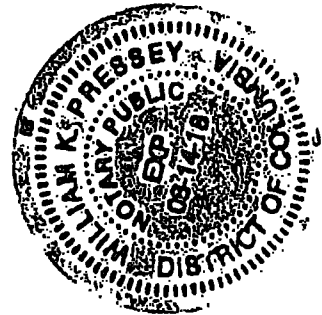
Sean Noble
Signature of Affiant, Sean Noble

SWORN to subscribed before me, this 19th day of June, 2014

William K. Pressey
NOTARY PUBLIC

My Commission Expires:

August 14, 2018



PATIENTS' RIGHTS

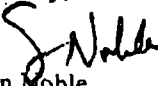
February 22, 2010

American Future Fund
Mr. Nick Ryan
4225 Fleur Drive #142
Des Moines, IA 50321

Dear Mr. Nick Ryan,

The Center to Protect Patient Rights, Inc. is pleased to make a general support grant in the amount of \$150,000 to support American Future Fund. Our federal tax ID number is 26-4683543. The Center to Protect Patient Rights is a 501(c)(4) organization.

Sincerely,


Sean Noble
Executive Director

PATIENTS' RIGHTS

August 24, 2010

Americans for Job Security
Mr. Steve DeMaura
107 South West Street, PMB 551
Alexandria, VA 22314

Dear Mr. Steve DeMaura,

The Center to Protect Patient Rights, Inc. is pleased to make a general support grant in the amount of \$1,000,000 to support Americans for Job Security. Our federal tax ID number is 26-4683543. The Center to Protect Patient Rights is a 501(c)(4) organization.

Sincerely,



Sean Noble
Executive Director

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PATIENTS' RIGHTS

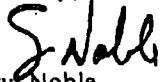
January 21, 2010

60 Plus Association
Mr. Jim Martin
515 King Street, Suite 315
Alexandria, VA 22314

Dear Mr. Jim Martin,

The Center to Protect Patient Rights, Inc. is pleased to make a general support grant in the amount of \$400,000 to support the 60 Plus Association. Our federal tax ID number is 26-4683543. The Center to Protect Patient Rights is a 501(c)(4) organization.

Sincerely,


Sean Noble
Executive Director