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Re: Response of James C. Thomas, III in MUR 6920

Dear Mr. Shonkwiler and Ms. Fuoto:

I write on behalf James C. Thomas, III in response to your letter of April 20, 2017 in the above-referenced matter. This letter provides Mr. Thomas' position regarding the legal standard governing the Complaint's allegations that the Respondents (1) made, received or facilitated a contribution in the name of another, and/or (2) violated the reporting requirements of the Federal Election Campaign Act of 1971 (the "Act").

I. Contributions in the Name of Another

The Act provides that "[n]o person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person." 52 U.S.C. § 30122. The Commission's implementing regulation supplements the statutory prohibition with a proscription of the aiding and abetting of conduit schemes, specifying that it is a violation for an individual to "[k]nowingly help or assist any person in making a contribution in the name of another." 11 C.F.R. § 110.4(b)(1)(iii).

The Complaint alleges that an entity that was unknown at the time (but, based on information obtained after the Complaint was filed, was apparently Government Integrity, LLC) made a contribution to Now or Never PAC through a conduit, namely, the American Conservative Union ("ACU"). *See* Compl. ¶¶ 22, 25, 27. Mr. Thomas is not alleged to have been the source of the funds, their ultimate recipient, or the conduit through which they passed; any claim with respect to Mr. Thomas must necessarily be predicated upon the aiding and abetting provision of Section 110.4.

For liability to attach to Mr. Thomas on this issue, it must be established that (1) there existed a conduit arrangement between and among Government Integrity, ACU, and Now or Never PAC; and (2) that Mr. Thomas "knowingly" participated in and assisted the arrangement. Each facet of the claim incorporates a distinct state of mind element, as discussed below.

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A. Conduit Arrangements Require a Shared Purpose by the Participants

A prohibited "contribution in the name of another" necessarily entails a conscious purpose by the source of the funds to circumvent the Act's contribution limits or reporting requirements. Although no explicit intent criterion is articulated on the face of the statute, it inheres in the concept of a "contribution," which is defined as "anything of value made by any person *for the purpose* of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A)(i) (emphasis added). This "purpose-laden definition of 'contribution' set forth in FECA's very own definitional section," *Van Hollen*, 811 F.3d at 493, dictates that the mere existence of a monetary transfer and objective indicia of its apparent use do not necessarily engender a "contribution;" the defining attribute is the subjective intent of the person furnishing the funds.

For this reason, the Commission has interpolated a rigorous "purpose" requirement into the prohibition on contributions in the name of another. In a recent series of enforcement actions involving independent expenditure committees' disclosures of contributions received from closely held corporations or limited liability companies, the General Counsel's Office's explained that a violation pivots on whether the original donor "sought to elude the reporting requirements of the Act by using . . . a mere pass through intermediary for the funds." MUR 6930 (In re Michel), First General Counsel's Report at 2;[1] *see also* MUR 6485 (In re W Spann), First General Counsel's Report), Supplement (revising report to clarify that "the analysis requires examination of whether a source transmitted property to another *with the purpose* that it be used to make or reimburse a contribution" (emphasis added)).

Thus, the transfer of funds, in similar amounts and in short succession, from Person A to Person B to Person C is necessary but not sufficient to delineate a contribution in the name of another. As the Commission has repeatedly recognized in this and similar contexts, speculative suppositions about what an individual objectively should have known cannot supplant proof of actual intent, and a subjective conscious purpose cannot be extruded solely from the face of the transaction. *See, e.g.*, MUR 6930 (In re Michel), First General Counsel's Report at 9 (recommending dismissal where evidence did not show donor had "the intent to make a political contribution" through another and "did not seek to circumvent the Act's disclosure requirements"); MUR 6661 (In re Robert E. Murray), Statement of Reasons of Commissioners Petersen, Hunter and Goodman), at 18 (concluding that employer's alleged statement to employee that "bonuses would more than make up for" employees' contributions did not supply reason to believe employer intended to reimburse employees for contributions); *cf.* Electioneering Communications, 72 FR 72899-01, 72911 (Dec. 26, 2007) (interpreting statute requiring disclosure of "all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement" for an electioneering communication to apply only to "those persons who made a donation . . . specifically for the purpose of furthering ECs," as evidenced by, for example, express designations accompanying the funds); MUR 6002 (In re Freedom Watch), Statement of Reasons of Commissioners Petersen, Hunter and McGahn), at 6-7 (newspaper reports that donor participated in development of organization's advertisement did not support reason to believe that donor had "the purpose of furthering" the electioneering communication at issue, particularly where organization had other significant sources of financial support and organization's history of accurate campaign finance reports indicated "the group was not trying to hide the identities of its donors"); MUR 6217 (In re CHIP PAC), Factual & Legal Analysis, at 3-4 (noting that

[1] At least three Commissioners agree that the General Counsel's report in MUR 6930 encapsulates "the dispositive legal analysis" for claims of this type. *See* MUR 6485, 6487 & 6488, 6711, and 6930, Supplemental Statement of Reasons of Commissioners Petersen, Hunter and Goodman, at 2.

"funds are considered earmarked only when there is clear documented evidence of acts by donors that resulted in their funds being used by the recipient committees for expenditures on behalf of a particular campaign").

A necessary corollary is that the state of mind of an alleged conduit cannot be imputed to an alleged true donor. *See* MUR 6661 *supra*, at 18 (employee's belief that employer would reimburse political contributions through compensation bonuses did not supply reason to believe that employer subjectively intended to, or actually did, provide such reimbursements). In this vein, the ACU's apparent unilateral representation to the Internal Revenue Service that its contribution to Now or Never PAC consisted of monies it received from others, rather than its own funds, *see* Compl. Ex. C, is not a proxy for the subjective intent of Government Integrity LLC at the time it transmitted funds to the ACU.[2]

In short, a *sine qua non* of an improper contribution in the name of another is proof that the source of the contribution acted with the subjective purpose of utilizing a conduit in order to conceal its identity. The complaint and supporting documents do not evidence any conscious design by Government Integrity LLC to evade the Act's reporting requirements, or that Now or Never PAC shared this purpose at the time it received a donation from the ACU.

B. Liability for "Knowingly" Assisting a Contribution in the Name of Another Requires Proof of Actual Knowledge of the Conduit Arrangement

Even if it could be demonstrated that Government Integrity LLC was the actual source of ACU's donation to Now or Never PAC, no liability attaches to Mr. Thomas under 52 U.S.C. § 30122. As noted above, it is not alleged that Mr. Thomas personally was either the true source of the funds, the conduit through which they were transmitted, or their ultimate recipient. Accordingly, the only regulatory predicate for any claim against Mr. Thomas is the Commission's regulation providing that a person may not "[k]nowingly help or assist any person in making a contribution in the name of another."

Crucially, in this context "knowingly" connotes significantly more than mere general awareness of one's physical acts. Rather, the aiding and abetting prohibition "applies to those who initiate or instigate or have some significant participation in a plan or scheme to make a contribution in the name of another." Affiliated Committees, Transfers, Prohibited Contributions, Annual Contribution Limitations and Earmarked Contributions, 54 Fed. Reg. 34098-01, 34105 (Aug. 17, 1989).[3] This conception of the "knowingly" element in Section 110l.4(b)(1)(iii) is consonant with – and indeed compelled by – foundational precepts of aiding and abetting liability. It is a settled (and intuitively obvious) maxim that "[t]he state of mind required for conviction as an aider and abettor is the same state of mind as required for the principal

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[2] It should be noted that the ACU's amended Form 990 for 2012 is internally inconsistent on this point. Specifically, it reports the transaction with Now or Never PAC on Part I-C, Line 5 of Schedule C as a transfer of funds it received from others, but also represents on Line 2 that the donation consisted of the ACU's own funds. The IRS' official instructions confirm that amounts reported on Line 2 reflect funds disbursed by the organization in its own discretion, not earmarked donations, *see* 2012 Instructions for Schedule C (Form 990 or 990-EZ) at 4, *available at* https://www.irs.gov/pub/irs-prior/i990sc--2012.pdf

[3] The Commission's guidance apparently derived directly from a judicial construction of aiding and abetting liability in the context of contributions made in the name of another. *See id.* (citing *FEC v. Rodriguez*, No. 86-687 Civ-T-10(B) (M.D. Fla. May 5, 1987)).

offense." *United States v. Valencia*, 907 F.2d 671, 680 (7th Cir. 1990); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 104 (D.D.C. 2003) (to be civilly liable for aiding and abetting, "the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance" (citing *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983)); *see also Rosemond v. United States*, 134 S. Ct. 1240, 1248 (2014) ("To aid and abet a crime, a defendant must not just 'in some sort associate himself with the venture,' but also 'participate in it as in something that he wishes to bring about' and 'seek by his action to make it succeed.'"). Since a conscious purpose to evade the Act's contribution limits or reporting mandates is a constitutive element of a contribution in the name of another, it follows that an individual "knowingly" helps or assists the scheme only if he subjectively shares—or at least is fully cognizant of—the illegal objective. Further, an individual cannot retroactively assume aider and abettor status on the basis of knowledge he acquired *after* the operative acts were completed; rather, liability is contingent upon his actual knowledge of all elements of the underlying offense *at the time it was undertaken. See Rosemond*, 134 S. Ct. at 1251 (defendant "needed advance knowledge of a firearm's presence" to have aided and abetted the firearms offense).

In sum, Mr. Thomas cannot be liable for knowingly helping or assisting the making of a contribution in the name of another in the absence of proof that (1) Government Integrity, LLC and Now or Never PAC subjectively intended to utilize the ACU as a straw donor in order to circumvent the Act's reporting requirements; and (2) Mr. Thomas had actual knowledge of Government Integrity, LLC's and/or Now or Never PAC's illicit purpose *when he took action to further the contribution.* Evidence that Mr. Thomas executed certain ministerial functions—such as preparing campaign finance reports or authorizing wire transfers—does not even remotely approximate the nature and quantum of proof necessary to sustain aiding and abetting liability.[4]

II. Violations of the Act's Reporting Requirements

The Complaint's allegation that Now or Never PAC failed to accurately and timely disclose Government Integrity, LLC as the true source of the funds transmitted by the ACU presupposes that the entities acted with the intent to make a contribution in the name of another. *See* Compl. ¶¶ 20, 25. For the reasons discussed above, there is insufficient evidence to infer any such subjective purpose; it follows that any alleged violations of the Act's reporting requirements are similarly unsustainable.

Even if it were established, however, that Government Integrity, LLC was the true source of the the ACU's contribution, this fact would not engender any liability on the part of Mr. Thomas personally. In general, the Commission will proceed against a treasurer personally "only when available information (or

[4] Any contention that Mr. Thomas' actions were "knowing and willful" would require proof of an additional element, namely, that Mr. Thomas "acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful." *Bryan v. United States*, 524 U.S. 184, 193 (1998); *see also United States v. Danielczyk*, 788 F. Supp. 2d 472, 491 (E.D. Va.), *rev'd in part on other grounds*, 683 F.3d 611 (4th Cir. 2012) (holding that "the Government must prove that Defendants intended to violate the law" to establish knowing and willful violation of prohibition against contributions in the name of another); *United States v. Whittemore*, 944 F. Supp. 2d 1003, 1006 (D. Nev. 2013), *aff'd*, 776 F.3d 1074 (9th Cir. 2015) (same). For the reasons discussed above, no evidence could plausibly support such a finding as to Mr. Thomas in this case.

inferences fairly derived therefrom) indicates that the treasurer had knowledge that his or her conduct violated a duty imposed by law, or where the treasurer recklessly failed to fulfill his or her duties under the act and regulations, or intentionally deprived himself or herself of facts giving rise to the violations." Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, Notice 2004-20, 70 Fed. Reg. 3-01 (Jan. 3, 2005). Mere negligence or carelessness in the preparation of campaign finance reports does not beget personal liability. *See id.*

There is no evidence that Mr. Thomas was in any way derelict in performing his duties as the treasurer of Now or Never PAC, let alone that he recklessly or intentionally abdicated his legal responsibilities. Commission regulations required Mr. Thomas to "examin[e] all contributions received for evidence of illegality and for ascertaining whether contributions received" exceeded contribution limits or originated from an illicit source. *See* 11 C.F.R. § 103.3(b). The contribution of $1.71 million made by the ACU to Now or Never PAC on October 31, 2012 bore no indicia of illegality. As an independent expenditure only committee, Now or Never PAC is constitutionally entitled to accept unlimited contributions from non-foreign corporations, including the ACU. *See generally SpeechNow.org v. Fed. Election Comm'n,* 599 F.3d 686 (D.C. Cir. 2010). Nothing in the Act or the Commission's regulations required Mr. Thomas to elicit information from the ACU concerning the reasons for, and circumstances attendant to, its decision to contribute to Now or Never PAC. Similarly, there is no basis in the law for positing that Mr. Thomas' duty of care as Now or Never PAC's treasurer encompassed an obligation to draw upon information and records he may have acquired in his engagements with third party clients (including Government Integrity, LLC).

Even if it were somehow incumbent upon Mr. Thomas to affirmatively investigate whether there existed a nexus between Government Integrity, LLC's donation to the ACU and the latter's subsequent transfer to Now or Never PAC, his failure to do so does not here establish an intentional or reckless disregard of a legal duty. Now or Never PAC's 2012 Post-General Election report, which disclosed the ACU's contribution, was prepared and filed more than a month after the transaction occurred at the height of a frenetic election season, at which point Mr. Thomas inevitably would have been inundated with other demands and his attention divided between numerous clients. In such a context, any failure by Mr. Thomas to more diligently inquire into the provenance of the ACU's contribution—assuming he was legally obligated to do so at all—would have been the product of simple negligence, not any malign intent.

* * *

In sum, there is no evidence (1) that Government Integrity, LLC or Now or Never PAC subjectively intended to use the ACU as a conduit in order to evade the Act's reporting requirements, or (2) that Mr. Thomas had actual knowledge of any such purpose by the parties at the time of the transaction, or (3) that Mr. Thomas intentionally or recklessly violated his legal duties as Now or Never PAC's treasurer in preparing and filing its 2012 Post General Election report. Accordingly, any action by the Commission against Mr. Thomas in his personal capacity is unwarranted.

Respectfully,

Kory Langhofer