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December 8, 2020

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VIA EMAIL
Kimberly Hart
Assistant General Counsel
Federal Election Commission
1050 First Street, NE
Washington, DC 20463

RE: Matter Under Review 7102

Dear Ms. Hart:

We write on behalf of our clients, Keefe, Keefe, & Unsell, P.C. and Thomas Q. Keefe, Jr., ("Respondents") in response to the November 23, 2020, letter from the Office of General Counsel ("OGC") informing Respondents that OGC is recommending that the Commission find probable cause to believe Respondents violated the Federal Election Campaign Act (the "Act").

Respondents request a hearing pursuant to 72 Fed. Reg 64919 (Nov. 19, 3007) and 74 Fed. Reg. 55443 (Oct. 28, 2009). Respondents expect to address the following important issues raised in the attached response to OGC's Brief, namely: (1) in order to avoid compounding violations of Commission procedure and due process that are rife in this proceeding, this MUR should be dismissed and (2) it would be improper to place the burden on Mr. Keefe, Jr. to establish that he did not consent to reimburse contributions and draw unsupported inferences against him when OGC has conducted no investigation of its own.

Please let us know if you need additional information.

Respectfully submitted,

Lawrence H. Norton

Enclosure

cc: Stephen Gura, Deputy Associate General Counsel for Enforcement (via email)
Mark Shonkwiler, Assistant General Counsel (via email)

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Keefe, Keefe & Unsell, P.C.	)	MUR 7102
Thomas Q. Keefe Jr.	)	
	)	

RESPONSE TO GENERAL COUNSEL'S BRIEF

This brief is submitted on behalf of Keefe, Keefe & Unsell, P.C. ("Firm") and Thomas Q. Keefe, Jr. (collectively "Respondents") in response to the General Counsel's Brief in MUR 7102.

In a case that languished for three years before the Commission took any action on it and that OGC has done no work of its own to investigate, OGC now seeks to have the Commission make probable cause findings that could have significant personal and professional implications for Respondents and enshrine in settlement documents a false narrative of noncooperation that could be used to justify a higher penalty. This desperate effort to jam through a resolution in the face of an expiring statute of limitations – *while a proper request for pre-probable cause conciliation is still pending before the Commission* – attempts to paper over serious procedural irregularities and violations of due process, as well as OGC's missed opportunities to resolve this matter.

The major theme of the General Counsel's Brief – that Respondents have failed to cooperate in this matter – is grossly inaccurate. Indeed, Respondents have voluntarily provided OGC with the only actual *evidence* contained in OGC's Brief - a sworn statement from the Firm's office manager that she signed Firm checks to reimburse employee contributions without knowing that such reimbursements were prohibited or concealing their purpose. For purposes of settlement, Respondents also made a detailed proffer as to additional affidavits Respondents would submit confirming that they had no role in authorizing or consenting to the reimbursements and clarifying that the Firm reimbursed contributions to a second campaign.

Through these submissions, Respondents provided OGC with ample basis for recommending that the Commission settle this matter. Nevertheless, every effort to satisfy OGC prompted new and shifting demands, including requests that Respondents provide information clearly not encompassed by the Complaint or Commission's Factual & Legal Analysis ("F&LA"). When it became clear that efforts to satisfy OGC would be futile, Respondents submitted a written request that the Commission authorize pre-probable cause conciliation, pursuant to procedures described in the Commission's Regulations, correspondence from the Chair enclosing the F&LA, the Commission's Guidebook for Complainants and Respondents, and OGC's Enforcement Manual. Though OGC has represented that this request never was discussed or voted upon in Executive Session, OGC invited Respondents a year later to participate in a self-described "alternative" to pre-probable cause conciliation that OGC had no authority to offer. Indeed, OGC proposed through this extra-procedural process to "take off the table" knowing and willful findings that OGC has improperly and unsuccessfully pursued and had no authority to use as a settlement lever.

Finally, facing the prospect of coming up empty-handed, OGC decided to bypass Respondents' pending request, dispense with any formal investigation, and move ahead to recommend probable cause findings. Strikingly, the proposed findings mirror the terms on which Respondents offered to settle just a couple of weeks after receiving notice of the Commission's reason-to-believe findings, but for OGC's proposed findings concerning Thomas Keefe, Jr., which are based not on evidence, but rather on inferences drawn out of thin air.

Under these circumstances, it would subvert basic principles of due process and fairness to brand the Firm and its owner and partner, Thomas Keefe, Jr., as violators of the Federal Election Campaign Act (the "Act"). To avoid compounding the violations of Commission procedure and due process that are rife in this proceeding, this matter should be dismissed.

I. HISTORY OF THIS PROCEEDING

The Commission took no action on the Complaint in this matter for *three years*. Finally, in June 2019, the Commission found reason-to-believe that the Firm and/or its partners reimbursed employee contributions to the unsuccessful congressional campaign of Charles John ("C.J.") Baricevic. The F&LA explained the Commission's reason for conducting an investigation:

> At this point, the Commission lacks information as to whether the funds used to make the alleged contributions in the name of another came from the firm or its name partners. During the investigation, [the] Commission intends to determine the source of the contributions and make appropriate further findings.[1]

Shortly after receiving notice of the Commission's reason-to-believe findings, Respondents advised OGC that they wished to settle the matter. In support, Respondents submitted a sworn statement from Debra M. Eastridge, the manager of Respondents' small law office since 2000, who was responsible for the Firm's finances. Ms. Eastridge's affidavit states that she reimbursed employee contributions to the Baricevic campaign because she knew of no reason why she could not do so, and that neither she nor anyone else attempted to conceal the purpose of the reimbursements by mischaracterizing them as salary, bonus, or other type of compensation.

Despite addressing the open issue identified by the Commission in the F&LA, OGC concluded that this was insufficient to settle the matter. In addition to the Eastridge affidavit, OGC insisted that each individual respondent would have to submit a sworn affidavit describing their "personal experience with political fundraising" (which OGC indicated in meetings should cover a 10-year period, including any solicitations they received or donor cards they signed); "their awareness as to the prohibition as to contributions in the name of another," and "clarify[ing] whether or not the contributions to the Baricevic Committee were the only instance in which [Respondents] reimbursed federal contributions, or whether they had reimbursed *other federal contributions*,"[2] including but not limited to contributions by Firm employees to Hillary Clinton's 2016 presidential campaign, which the F&LA mentions, but on which the Commission

[1] Factual & Legal Analysis, MUR 7102 at 10 (June 25, 2019).
[2] Email from M. Shonkwiler, FEC Office of General Counsel, to L. Norton (August 2, 2019) (emphasis added).

made no reason-to-believe finding. In an early meeting, OGC also advised that additional sworn statements should address whether Respondents had ever reimbursed, or authorized reimbursement of, any *non-federal* contributions.

Rather than continue handing over affidavits to OGC only to find out they were getting nowhere, Respondents decided instead to make a detailed proffer as to affidavits the individual respondents were prepared to submit if OGC agreed that such affidavits would provide a basis to settle the matter. Accordingly, for settlement purposes, Respondents' counsel proffered that an affidavit from Thomas Keefe, Jr., would say the following: (1) Between mid-February and early March 2016, he asked if certain Firm employees would each contribute $2,700 to the Baricevic and Clinton campaigns; (2) he believed that these employees would be interested in making, and had the wherewithal to make, contributions to these two candidates, further noting that the Firm's administrative employees are well-compensated, with two of them paid well above $100,000 a year; (3) he was aware at the time that the Firm was not permitted to reimburse contributions; and (4) Ms. Eastridge, who had been with the Firm since 1992 and had been entrusted with all aspects of Firm finances, reimbursed contributions by Firm employees to the Baricevic and Clinton campaigns without Mr. Keefe's direction or approval, and without his knowledge that she had done so. In addition, we proffered that affidavits from Respondents Thomas Keefe, III and Samantha Unsell, both salaried employees of the Firm, would say that they each contributed to the two campaigns from their personal funds and did not receive reimbursement from anyone, and that they did not authorize, direct, or approve reimbursement of contributions made by any Firm employee.[3]

Without taking even a moment to consider the proffer, OGC reeled off a list of additional affidavits, testimony, and documents that Respondents would have to provide to give OGC "full context" and that would be necessary before OGC would consider recommending conciliation. For example, OGC advised that Respondents would have to address through sworn statements "when everyone found out about the reimbursements" and "what they did" in response, because according to OGC, Respondents' after-the-fact knowledge would constitute "consent" to the reimbursements. On top of that, even if Respondents submitted the proffered affidavits, they would also need to produce every email, note, and record relating to the reimbursements.[4]

By this point – with each submission or proffer eliciting new demands – it was clear that further attempts to discuss a potential settlement with OGC would be fruitless. On August 23, 2019, in the hope of negotiating with OGC based on an opening settlement document approved by the Commission, Respondents sent a letter to OGC recapping their proffer and requesting that the Commission authorize pre-probable cause conciliation. Respondents further asked that OGC forward their letter to the Commission.[5]

OGC replied three weeks later, stating that since the time of Respondents' letter, Commissioner Matthew S. Petersen had resigned, leaving the Commission without a quorum "such that it could approve a conciliation agreement." The letter asked Respondents' counsel "whether your clients continue to request pre-probable cause conciliation in light of these

[3] Phone call between L. Norton and M. Shonkwiler (Aug. 20, 2019).
[4] *Id*.
[5] Letter from L. Norton to M. Shonkwiler (Aug. 23, 2019).

circumstances and if so, whether your clients would be willing to toll the statute of limitations until after the Commission has enough members to act on your request." "In any case," the letter went on, "your clients have not yet provided sufficient factual information in response to the allegations in the Complaint" and listed additional information and documents that "would *help complete the factual picture* and *might* provide a sufficient basis upon which conciliation could be appropriate."[6]

On September 24, 2019, Respondents replied, objecting to OGC's fishing expedition into contributions made by law firm employees to *any* federal candidate at *any* time, OGC's request for detailed affidavits concerning unspecified actions by the Firm's partners once they became aware that contributions had been reimbursed, and OGC's insistence on multiple additional affidavits, as well as documents, to establish that the reimbursements were not knowing and willful. Respondents reiterated that the sworn affidavit and proffer provided ample basis to conciliate concerning the only contributions cited in the Commission's findings – that is, the Baricevic and Clinton contributions – because they established that (1) the Firm's office manager reimbursed employee those contributions not at the direction or approval of anyone in the Firm, but rather because she was unaware of any reason why the Firm might not be able to do so, and (2) no one in the firm made any attempt to conceal the purpose of the reimbursements by mischaracterizing them as salary, bonus, or other type of compensation.[7]

Almost a year later, on or about September 3, 2020, OGC contacted Respondents, advising that Respondents' request for pre-probable cause conciliation had been circulated to Commissioners' offices for a "tally vote" when the Commission still had a quorum, but that there were neither four votes to approve the request nor four votes to reject it.[8] OGC told us that the Commissioners who opposed the request did so because of Respondents' unwillingness to make the reimbursed Clinton contributions part of the settlement. This characterization of Respondents' settlement request was, of course, inaccurate, as Respondents' August 23, 2019 letter to OGC – *which memorialized the details of their proffer for purposes of settlement and which Respondents asked be shared with the Commission* – acknowledged that Ms. Eastridge had also reimbursed contributions to the Clinton campaign.[9]

Perhaps finally recognizing its missed opportunities, OGC then suggested that Respondents negotiate a complete conciliation agreement, including payment of a civil penalty, which OGC would submit for Commission approval once the Commission regained a quorum.[10] In a follow-up call on September 22, 2020, OGC characterized this as an "alternative" to pre-probable cause conciliation, a "creative" workaround to the requirement that only the Commission may authorize such conciliation based on a draft settlement document that the Commission has approved.[11] As a condition for entering into this extra-procedural process, OGC

[6] Letter from C. Edwards, FEC Office of General Counsel, to L. Norton (Sept. 12, 2019). The letter did not reveal to Respondents that OGC had circulated Respondents' request for consideration while there was still a quorum but that no action by the Commission was taken. Nor did the letter respond to Respondents' contention in their August 23 letter that OGC's demand for evidence to establish whether the violations were knowing and willful lacked any basis and was contrary to Commission procedure.
[7] Letter from L. Norton to C. Edwards (Sept. 24, 2019).
[8] Phone call between L. Norton and M. Shonkwiler (Sept. 3, 2020).
[9] Letter from L. Norton to M. Shonkwiler (Aug. 23, 2019).
[10] Phone call between L. Norton and M. Shonkwiler (Sept. 3, 2020).
[11] Phone call between L. Norton and M. Shonkwiler (Sept 22, 2020).

said that Respondents would have to toll the statute of limitations until 30 days after a quorum was restored.[12] OGC promised they would agree in such negotiations to forgo knowing and willful findings, leveraging a threat that, as explained below, was never properly part of the case.

Respondents rejected OGC's offer to negotiate a conciliation agreement without Commission authorization of pre-probable cause conciliation and told OGC that they viewed the proposal as beyond the scope of OGC's authority.[13] Respondents also declined to toll the statute of limitations based on circumstances that were not of Respondents' making.[14]

Two months later, OGC served Respondents with a General Counsel's Brief, stating that OGC was prepared to recommend that the Commission make probable cause to believe findings against the Firm and its sole owner and equity partner, Thomas Keefe, Jr. The only evidence cited in OGC's Brief is the affidavit voluntarily submitted by the Firm's office manager.

II. THE COMMISSION SHOULD DISMISS THIS MATTER TO AVOID COMPOUNDING THIS PROCEEDING'S PROCEDURAL IRREGULARITIES AND FAILURES OF DUE PROCESS

A. OGC Failed to Follow Commission Procedures in Regard to Respondents' Request for Pre-Probable Cause Conciliation

Commission regulations provide that a respondent may request "by letter to the General Counsel a desire to enter into negotiations directed towards reaching . . . a conciliation agreement" before the Commission makes a finding of probable cause to believe.[15]

This procedural right is also spelled out in the letter Respondents received from the Commission's Chair – *and that every similarly situated respondent receives* – notifying them of the Commission's reason-to-believe findings and enclosing the F&LA which sets forth the basis for an investigation. This letter states:

> If you are interested in pursuing pre-probable cause conciliation, you should make such a request by letter to the Office of the General Counsel. *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 that the Commission decline to pursue pre-probable cause conciliation. The Office of General Counsel may recommend that the Commission not pursue pre-probable cause conciliation in order to complete its investigation of the matter.[16]

The Respondents' right to request pre-probable cause conciliation is also delineated in the Commission's Guidebook for Complainants and Respondents on the FEC Enforcement Process,

[12] Phone call between L. Norton and M. Shonkwiler (Sept. 3, 2020).
[13] Phone call between L. Norton and M. Shonkwiler (Sept. 22, 2020).
[14] *Id.*
[15] 11 C.F.R. § 111.18(d).
[16] Letter from Chair Ellen Weintraub, MUR 7102 (July 3, 2019).

which is also referenced in the Chair's letter. It states that "respondents can request pre-probable cause conciliation at any time, even in matters in which the Commission has authorized an investigation." Such a request should be made "in writing to OGC," which upon receipt "will make recommendations to the Commission."[17]

Finally, OGC's Enforcement Manual specifies that when a respondent requests pre-probable cause conciliation, OGC should circulate a General Counsel's Report informing the Commission of the request and making a recommendation, adding that "[t]he Commission then decides what action is appropriate."[18]

There is no question that OGC considered itself obligated to follow this procedure. In our September 22, 2020 conversation, OGC acknowledged that more than a year earlier it had circulated "on tally" a recommendation concerning Respondents' request (presumably recommending the Commission reject it), but there were not four Commissioners who supported the request or four who were prepared to reject it. OGC told us that the Commissioners who did not support pre-probable cause conciliation felt that way because of Respondents' purported unwillingness to include the Clinton contributions in the settlement – a baffling assertion given Respondents' proffer to submit sworn statements acknowledging exactly that.[19] After the tally circulation failed, Commissioner Caroline C. Hunter resigned, and no vote was taken.[20]

The Commission still has not voted on Respondents' pending request for conciliation, as is customary for matters that do not pass on a tally circulation. Faced with Respondents' still-pending request but determined to jam through a resolution before the possibility of an expiring statute of limitations, OGC has decided it is no longer expedient for the Commission to consider Respondents' request and, without conducting any investigation, has plowed ahead to request that the Commission make probable cause findings.

B. OGC May Not Disregard Respondents' Right to Have the Commission Vote on its Pending Request for Pre-Probable Cause Conciliation Because It Is No Longer Convenient

It is a basic tenet of administrative law that an agency must follow its own rules and regulations. "Simply stated, rules are rules, and fidelity to the rules which have been properly promulgated, consistent with applicable statutory requirements, is required of those to whom

[17] FEC, GUIDEBOOK FOR COMPLAINANTS AND RESPONDENTS ON THE FEC ENFORCEMENT PROCESS at 17 (May 2012), https://www.fec.gov/resources/cms-content/documents/respondent_guide.pdf.
[18] FEC OFFICE OF GENERAL COUNSEL, OGC ENFORCEMENT MANUAL at 78 (June 2013), https://www.fec.gov/resources/updates/agendas/2013/mtgdoc_13-21.pdf.
[19] If OGC did not forward Respondents' letter requesting pre-probable cause conciliation to the Commission, we do not understand why. The letter expressly asked OGC to share it with the Commission and OGC never told us they would not or questioned our request. Moreover, the proffer, which is memorialized in the letter, was made for settlement purposes. The entire point of Respondents' request was to provide a basis for the Commission to authorize OGC to engage in settlement discussions. Whatever the explanation, OGC's assertion that Respondents "refuse to address" the Clinton contributions and "instead have sought to have the Firm enter in pre-probable cause conciliation with regard to only the Baricevic contributions identified in the Complaint" is untrue. And OGC certainly knows that. General Counsel's Brief at 4, 7, and 13, MUR 7102 (Nov. 24, 2020).
[20] Phone call between L. Norton and M. Shonkwiler (Sept. 3, 2020).

Congress has entrusted the regulatory missions of modern life."[21] In recognition of that principle, an agency must follow "even gratuitous procedural rules that limit otherwise discretionary actions," if deviation from its procedural rules would cause an affected individual "substantial prejudice."[22] Such considerations are especially important for the Commission, which has a "[u]nique [role] among federal administrative agencies" with the "sole purpose" of regulating "core constitutionally protected activity."[23] Unlike other federal agencies, such as the Federal Trade Commission (FTC) and Securities and Exchange Commission (SEC), that "oversee fair dealings in commerce," the conduct the "FEC oversees, in contrast, relates to the behavior of individuals and groups only insofar as they act, speak and associate for political purposes."[24] Hence, "more than other agencies whose primary task may be limited to administering a particular statute, every action the FEC takes implicates fundamental rights."[25] This is precisely why Congress and the Commission have prescribed carefully calibrated procedures to protect the First Amendment interests inherent in Commission investigations.

OGC feigns puzzlement at Respondents' position that OGC's end-run around the pending request for pre-probable cause conciliation "somehow contravenes the Enforcement Manual" and in support cites boilerplate language in the Enforcement Manual that it is non-binding and creates no procedural rights.[26] The Enforcement Manual, however, has long guided OGC's exercise of its duties, and Commissioners have expressed broad agreement on most topics in the Enforcement Manual.[27] It defies longstanding practice and the expectations of experienced counsel, Commissioners – and we daresay most of OGC's own lawyers – to suggest that OGC could so completely disregard a core and unambiguous provision of its own governance manual.

Moreover, a respondent's right to submit a written request for pre-probable cause conciliation has been codified in Commission regulations since 1980. We are unaware of any instance in forty years when the Commission has declined to consider such a request. In fact, this right is deemed so fundamental to the enforcement process that the Commission Chair, on behalf of the Commission, specifically cited it in a letter advising Respondents of the Commission's reason-to-believe findings and enclosing the F&LA. Surely Respondents are entitled to rely on the Chair's representations.

Finally, it is absurd to accuse Respondents of acting unreasonably because they have refused to toll the statute of limitations until the Commission has regained a quorum to act on their request for pre-probable cause conciliation. If there is insufficient time to provide Respondents with their procedural rights, it is not a circumstance of Respondents' making. Respondents were not responsible for the lack of action on this matter for three years, nor are

[21] *Reuters Ltd. v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986).
[22] *Steenholdt v. FAA*, 314 F.3d 633, 639 (D.C. Cir. 2003).
[23] *AFL-CIO v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003).
[24] *FEC v. Machinists' Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981) (emphasis removed).
[25] *Van Hollen v. FEC*, 811 F.3d 486, 499 (D.C. Cir. 2016).
[26] General Counsel's Brief at 14 n.56, MUR 7102 (Nov. 24, 2020).
[27] *See* Memorandum from Vice Chairman Donald F. McGahn to Commission, Background Information Regarding Proposed Enforcement Manual, https://www.fec.gov/resources/about-fec/commissioners/mcgahn/ statements/13-21-k.pdf (July 25, 2013) ("[T]here is a tremendous amount of agreement among Commissioners as to most of the manual[.]"). In addition, as Chair Weintraub noted, "the public can assume that there's general agreement [among Commissioners] on the topics that are considered therein." *See* Open Meeting June 27, 2013, Discussion of the OGC Enforcement Manual, https://www.fec.gov/resources/audio/2013/ 2013062704.mp3.

they responsible for OGC's failure to do any investigation. Likewise, Respondents did not prevent the Commission from voting on Respondents' request for pre-probable cause conciliation, which circulated when there was still a quorum. Nor did Respondents interfere with OGC's ability to request authority to issue compulsory process if OGC believed that Respondents' affidavit and proffer were an insufficient basis for conciliation. And of course, Respondents did nothing to cause the lack of a quorum for certain periods during the past year. It should not fall on Respondents to choose between exercising their procedural rights and giving the Commission more than the ample five-year period that the law allows to resolve this matter.

A respondent's right to request pre-probable cause conciliation is no mere procedural convenience or technical matter. Probable cause findings by the Commission can have serious personal and professional implications, not the least of which is damage to Respondents' reputations. OGC was not entitled to disregard Respondents' pending request and vault ahead to recommend probable cause findings.

C. OGC's Brief Fundamentally Mischaracterizes this Proceeding, which has been Rife with Procedural Irregularities and Violations of Due Process

In addition to OGC's attempt to short-circuit Respondents' pending request for pre-probable cause conciliation, this proceeding has been plagued by other significant procedural irregularities and disregard for due process.

First, OGC's Brief argues that Respondents have failed to cooperate with OGC "in order to complete the record,"[28] notwithstanding that OGC has done absolutely no work of its own to investigate this matter. No requests for depositions, no subpoenas for documents, and apparently, no witness interviews or other informal investigation. At the same time, OGC contends the record is apparently complete enough – indeed "clear and undisputed"[29] as to the Firm's violations – based on an affidavit from the Firm's office manager that Respondents voluntarily produced shortly after the Commission made its reason-to-believe findings. Contrary to OGC's characterization of the affidavit as a mere response to the Commission's findings and OGC's questions, the affidavit was explicitly provided to OGC for a reason: to attempt to settle the matter by providing exactly the information that the Commission's F&LA indicated the Commission sought to investigate – namely, the source of the contributions and whether the employee contributions were reimbursed by the Firm or its partners.

Second, it is untrue that Respondents "have sought to have the Firm enter into pre-probable cause conciliation with regard to only the Baricevic contributions identified in the Complaint" and "refused to comply" with OGC's requests for additional information, "including sworn affidavits from each partner regarding his or her specific role or involvement in arranging or consenting to reimbursement of federal contributions," including contributions to Hillary Clinton's 2016 presidential campaign.[30] Respondents' detailed proffer, made for purposes of settlement, addressed each partner's role and lack of involvement in authorizing, directing or consenting to the reimbursements, and acknowledged that employee contributions to the Clinton presidential campaign were reimbursed by the Firm in the same manner as the Baricevic

[28] General Counsel's Brief at 7, MUR 7102 (Nov. 24, 2020).
[29] *Id*. at 10.
[30] *Id*

contributions. In short, Respondents did everything but put a bow on a submission that should have allowed OGC to settle this matter at an early stage. What Respondents *have* refused to do is to continue handing over affidavits that only prompt OGC to make additional and far-flung demands.

Third, after doing no investigation of its own and with time running out, OGC decided that the lack of a quorum allowed the Office to be "creative" and offered an unauthorized "alternative" to pre-probable cause conciliation for which OGC had no authority.[31] This would turn the Commission's conciliation process on its head, with OGC setting the parameters and terms of an initial settlement document and the Commission weighing in only if and when an agreement had been fully negotiated.

Fourth, while it is true that Respondents have resisted certain demands for information, they did so because OGC lacked authority to seek the requested information in the first place. To settle this matter, OGC repeatedly insisted on information aimed at developing evidence that Respondents' conduct was knowing and willful, such as requests for sworn statements addressing each respondent's "awareness as to the prohibition as to contributions in the name of another" and "personal experience with political fundraising,"[32] which OGC clarified in an early meeting on this matter should cover a 10-year period and include donor cards and solicitations. These demands – which OGC claimed it was authorized to seek by the Commission's F&LA and that the Commission would not hesitate to demand through subpoena – were (a) baseless because there was no evidence in the Complaint or F&LA to support a finding that Respondents' conduct was knowing and willful, and (b) contrary to Commission practice and the OGC Enforcement Manual, which both require that if an investigation will seek evidence of knowing and willful conduct in a matter, the F&LA must say so, even in circumstances where making a knowing and willful finding at the reason-to-believe stage is premature.[33] Based on OGC's Brief – which makes no mention of knowing and willful conduct – and OGC's failure to conduct any investigation concerning whether the alleged violations were knowing and willful, it appears the aim of these improper requests was simply to gain leverage for conciliation. This was exactly what OGC was doing when it offered to "take knowing and willful off the table" if Respondents agreed to toll the statute of limitations and participate in an "alternative" to pre-probable cause conciliation.[34] There was no reason it should have been on the table in the first place.

These were hardly the only requests from OGC that were outside the bounds of the Complaint and the Commission's F&LA. In a September 12, 2019 letter, OGC stated that in order to put this case in a posture for settlement, Respondents had to produce "affidavits from each of the firm employees who made the federal contributions reimbursed by the firm," including employees who are not respondents in this matter, and "documents, *including communications*, that relate to the firm's reimbursement of *any federal political contributions.*"[35]

[31] Phone call between L. Norton and M. Shonkwiler (Sept. 22, 2020).
[32] Email from M. Shonkwiler to L. Norton (Aug. 2, 2019).
[33] *See, e.g.*, Factual & Legal Analysis at 12, MURs 7005 and 7056 (Adam H. Victor et al) (Nov. 14, 2016); *see also* OGC Enforcement Manual at 51, https://www.fec.gov/resources/updates/agendas/2013/mtgdoc_13-21.pdf ("By including this language in the F&LA, the respondent will be on notice that the Commission may make a knowing and willful finding at a later stage.")
[34] Phone call between L. Norton and M. Shonkwiler (Sept. 3, 2020).
[35] Letter from C. Edwards to L. Norton (Sept. 12, 2019) (emphasis added).

All of this, in OGC's view, would " help complete the factual picture for the Commission" and "*might* provide a sufficient basis upon which conciliation could be appropriate."[36]

Whatever it meant to "complete the picture" – a phrase that shifted in meaning with each request – it is hard to fathom why it was not enough for Respondents to provide OGC with the submitted affidavit from Ms. Eastridge, along with the proffered affidavits from the individual respondents which established that Ms. Eastridge reimbursed Firm employees' contributions to both the Baricevic and Clinton campaigns and reaffirmed that she did so on her own volition, not because anyone directed her to or was even aware of it. As we wrote to OGC on September 24, 2019: "How many more sworn affidavits are necessary to establish the same point?" Simply put, any further submissions from Respondents were never going to be enough for OGC, which is why Respondents exercised their right to request pre-probable cause conciliation and negotiate based on a Conciliation Agreement approved by the Commission.

By virtue of its regulation of conduct within the realm of First Amendment rights, the Commission is held to a higher standard than other federal agencies. Unlike other agencies, such as the FTC and SEC, the Commission has statutory authority "to conduct a confidential investigation *of the complaint*," not "roving statutory functions" or "broad duties to gather and compile information" about *any* potential violations.[37] The Act does not give OGC unfettered authority to investigate whether Respondents ever reimbursed a contribution to *any* federal (or other) candidate and insist that Respondents produce every related document and communication; or to pursue knowing and willful violations when the Commission made no reason-to-believe findings concerning such violations and did not notify Respondents in the F&LA that it intended to investigate them; or to rummage through each Respondents' fundraising activities over a 10-year period; or to investigate their post-reimbursement activities in search of evidence of wrongdoing. The sworn affidavit from Ms. Eastridge and proffer from Respondents provided ample basis for conciliating *this* matter.

Finally, OGC's Brief states: "Respondents did not cooperate with this or subsequent requests for additional information, and *instead* they sought pre-probable cause conciliation ('PPCC') on behalf of the Firm."[38] Based on the foregoing, it is no surprise that OGC characterizes Respondents' request for pre-probable cause conciliation as obstructionist, rather than an exercise of their procedural rights.

To avoid compounding the procedural irregularities and violations of due process that have plagued this case, the Matter Under Review should be dismissed.

III. The Inferences Made by OGC to Support Its Case That Thomas Keefe, Jr., Consented to the Contributions Are Pulled out of Thin Air

In asking the Commission to make probable cause findings against Mr. Keefe, Jr., OGC wants to have it both ways. For purposes of establishing liability against the Firm, OGC is happy to accept as true Ms. Eastridge's statements that Mr. Keefe, Jr. solicited employee contributions

[36] *Id*. (emphasis added).
[37] *MNPL*, 655 F.2d at 387 (emphasis added).
[38] General Counsel's Brief at 3, MUR 7102 (Nov. 24, 2020) (emphasis added).

and that Ms. Eastridge issued Firm checks to reimburse employees who made contributions.[39] Indeed, OGC argues that the facts establishing the Firm's violation, which were handed to them through Ms. Eastridge's affidavit, "are clear and undisputed."[40] But when it comes to Mr. Keefe, Jr., OGC argues that "it is not believable" that Ms. Eastridge would have reimbursed contributions by firm employees without direction from Thomas Keefe, Jr. because "Respondents provided no supporting evidence that Eastridge acted with this kind of independence and authority in comparable situations."[41]

This proposed inference is either naïve or disingenuous. There are countless small businesses where the owners hand control over the business's finances to a trusted manager – especially where, as here, the business's owner is focused on other aspects of the business's operations. It is hardly implausible that Keefe, Keefe & Unsell – a small Belleville, Illinois law firm with three partners and one associate, led by a partner who has been trying cases for over 40 years – would do the same.

Moreover, OGC's claim of disbelief is breathtaking in the context of a matter that has been pending for nearly five years and in which no investigation has been conducted. If OGC did not regard Ms. Eastridge's affidavit as credible, it had tools at its disposal to try to challenge it. Yet the Office did nothing. It never asked to interview or depose Ms. Eastridge (or any of Respondents or their employees), nor did it issue a single subpoena for books and records.

OGC also argues that Ms. Eastridge's affidavit is not credible because "[t]here is nothing in the record to tie the contributions to the Firm's practice."[42] Since when must a donor prove to the Commission that it had a demonstrable reason to support its favored candidates? And with other inferences OGC is comfortable making, one would think that OGC might be able to come up with a reason why a plaintiff's law firm might have supported a candidate for Congress who drew his most significant support from the plaintiffs' bar.[43]

OGC doubles down on the absence of evidence by arguing that its conclusion that Ms. Eastridge acted at Mr. Keefe's direction "is reinforced by the fact that Keefe Jr. has refused to provide an affidavit regarding his role in authorizing or consenting to the reimbursements, nor is there any indication that the Firm or Keefe Jr. took corrective actions that would have been expected if Keefe, Jr., had not consented to the reimbursements with corporate funds, such as requesting the return of the contributions or taking disciplinary action or counseling Eastridge for making purportedly unauthorized disbursements."[44] Setting aside the fact that Respondents *did* proffer an affidavit from Mr. Keefe, Jr. stating that he did not direct or approve the reimbursements,[45] OGC asks the Commission to conclude based on the absence of any evidence

[39] *Id.* at 4-7.
[40] *Id.* at 10.
[41] *Id.* at 11. Given that political contributions may not be reimbursed, it is unclear what "comparable situations" OGC has in mind.
[42] *Id.*
[43] *See Trial Bar Contributions Factor Big in Democratic Challenger to First Term Congressman Bost*, MADISON-ST. CLAIR REC. (May 23, 2016), https://madisonrecord.com/stories/510740861-trial-bar-contributions-factor-big-in-democratic-challenge-to-first-term-congressman-bost.
[44] General Counsel's Brief at 12, MUR 7102 (Nov. 24, 2020).
[45] Letter from L. Norton to M. Shonkwiler (Aug. 23, 2019).

in the record concerning corrective action that no such action was taken. Again, OGC had the ability to develop such evidence for the record. It did not.

In sum, OGC's Brief disregards the basic principle that the burdens of production and persuasion lie with OGC, not Respondents. Rather than conduct an investigation and present the Commission with evidence, OGC wants the Commission to make probable cause findings against Mr. Keefe, Jr., because OGC has doubts about Ms. Eastridge's sworn statement and because Mr. Keefe has not proved a negative – namely, that he did not direct Ms. Eastridge to reimburse the contributions. This effort at burden-shifting is plainly improper.[46]

OGC has not carried its burden – much less produced any evidence – to establish that Mr. Keefe, Jr. consented to reimburse contributions. There is no probable cause to believe that he violated the Act, and the case against him should be dismissed.

IV. Conclusion

For all the foregoing reasons, and to avoid compounding the violations of Commission procedure and due process in this matter, this matter should be dismissed. In addition, there is no basis whatsoever for finding that Thomas Keefe, Jr. violated the Act or seeking relief against him through conciliation.

Submitted December 8, 2020

Respectfully submitted,

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[46] *See* Statement of Reasons of Vice Chairman Petersen and Commissioner Caroline Hunter, MUR 6848 (Aug. 30, 2019) (declining to find probable cause because "weakness of the record at this late stage of the enforcement process" failed to meet the "Commission's evidentiary burden"); Statement of Reasons of Chairman Mason and Vice Chairman Sandstrom, MUR 4530 et al. (Huang) (Aug. 7, 2002) ("Because the Commission was presented with no probative evidence or other testimony in the General Counsel's Brief dated November 2, 2000 that John Huang knew about the family and corporate business practices which led to the foreign national contributions at issue, the Commission could not properly conclude, based solely on an adverse inference, that John Huang violated the law."); Statement of Reasons of Vice Chairman Mason and Commissioners Smith and Wold, MUR 4382 and 4401 (Republican National Committee) (June 11, 2001) ("Proving a negative would put a virtually impossible burden, with no starting point and no stopping point, on the [respondent]"); *see also United States v. Private Sanitation Industry Ass'n*, 899 F. Supp. 974, 982 (E.D.N.Y. 1994) ("[L]iability should not be imposed based solely upon the adverse inference. The government must produce 'independent corroborative evidence' of the matters to be inferred before liability will be imposed." (citations omitted)); *United States v. Bonanno Organized Crime Family*, 683 F. Supp. 1411, 1452 (E.D.N.Y. 1988).