



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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RE: MURs 7165 & 7196

Dear Mr. Backer:

On November 2, 2016, and November 17, 2016, the Federal Election Commission (“Commission”) notified your client, Great America PAC and you in your official capacity as treasurer (“GAP”) of complaints alleging violations of the Federal Election Campaign Act of 1971, as amended (the “Act”). Copies of the complaints were forwarded to GAP at that time. Upon review of the allegations contained in the complaints and information supplied by GAP, the Commission, on February 25, 2021, found reason to believe that GAP and you in your official capacity as treasurer knowingly and willfully violated 52 U.S.C. § 30121(a)(2), a provision of the Act, and the Commission’s regulation at 11 C.F.R. § 110.20(g). The Factual and Legal Analysis, which formed a basis for the Commission’s finding, is enclosed for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission’s further consideration of this matter. Please submit such materials and answers to the enclosed questions to the Office of the General Counsel (“OGC”) within 15 days of receiving this notification. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation. *See* 52 U.S.C. § 30109(a)(4).

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

If GAP is interested in pursuing pre-probable cause conciliation, you should make such a request in writing to OGC. *See* 11 C.F.R. § 111.18(d). Upon receipt of the request, OGC will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. OGC may recommend that pre-probable cause conciliation not be entered into in order to complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been delivered to the respondents.

Requests for extensions of time are not routinely granted and may be conditioned on your clients entering into a tolling agreement with the Commission. Requests must be made in writing at least five days prior to the due date of the response and good cause must be

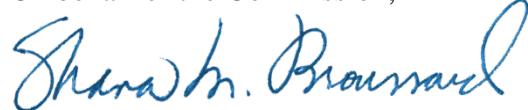
Dan Backer, Esq.  
 MURs 7165 & 7196 (Great America PAC)  
 Page 2

demonstrated. In addition, OGC ordinarily will not grant extensions beyond 20 days. Pre-probable cause conciliation, extensions of time, and other enforcement procedures and options are discussed more comprehensively in the Commission's "Guidebook for Complainants and Respondents on the FEC Enforcement Process," which is available on the Commission's website at [http://www.fec.gov/em/respondent\\_guide.pdf](http://www.fec.gov/em/respondent_guide.pdf).

Please be advised that, although the Commission cannot disclose information regarding an investigation to the public, it may share information on a confidential basis with other law enforcement agencies.<sup>1</sup>

This matter will remain confidential in accordance with 52 U.S.C. §§ 30109(a)(4)(B) and 30109(a)(12)(A) unless you notify the Commission in writing that your clients wish the matter to be made public. For your information, we have enclosed a brief description of the Commission's procedures for handling possible violations of the Act. If you have any questions, please contact Saurav Ghosh, the attorney assigned to this matter, at (202) 251-3381 or [sghosh@fec.gov](mailto:sghosh@fec.gov).

On behalf of the Commission,



Shana M. Broussard  
 Chair

Enclosures  
 Factual and Legal Analysis  
 Questions

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<sup>1</sup> The Commission has the statutory authority to refer knowing and willful violations of the Act to the Department of Justice for potential criminal prosecution, 52 U.S.C. § 30109(a)(5)(C), and to report information regarding violations of law not within its jurisdiction to appropriate law enforcement authorities. *Id.* § 30107(a)(9).

## FEDERAL ELECTION COMMISSION

## FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Great America PAC and Dan Backer  
in his official capacity as treasurer MURs: 7165 & 7196

## I. INTRODUCTION

7 These matters were generated by complaints filed with the Federal Election Commission  
8 (the “Commission”), which allege that Great America PAC and Dan Backer in his official  
9 capacity as treasurer (“GAP”) and Jesse Benton — a consultant for GAP during the relevant time  
10 — knowingly and willfully solicited a contribution from a foreign national in violation of the

11 Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations.

12 The complaints base their allegations on an October 24, 2016, article appearing on *The*  
13 *Telegraph UK*'s website, which describes two reporters posing as consultants for a fictitious

14 Chinese donor and discussing a series of transactions with Eric Beach — one of GAP's co-chairs  
15 during the relevant time — and Benton that would allow the donor to contribute \$2 million to  
16 GAP. Based on the available information, including a video published online with the *Telegraph*  
17 article, the Commission finds reason to believe that GAP knowingly and willfully violated  
18 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g) by soliciting a contribution from a foreign  
19 national.

## 20 II. FACTUAL BACKGROUND

21 GAP is an independent-expenditure-only political committee that supported Donald J.  
22 Trump during the 2016 presidential election.<sup>1</sup> Beach was one of GAP's co-chairs. Benton was a

<sup>1</sup> See GAP, Amend. Statement of Org. (Mar. 14, 2016).

MURs 7165 & 7196 (Great America PAC)

Factual and Legal Analysis

Page 2 of 16

1 strategist for GAP until May 2016, when he resigned and opened an independent political  
 2 consulting firm, Titan Strategies LLC (“Titan”).

3 According to the complaints, undercover journalists contacted Beach posing as  
 4 representatives of a Chinese national offering to contribute \$2 million to GAP.<sup>2</sup> Although the  
 5 *Telegraph* video does not contain explicit language stating that the representatives’ ostensible  
 6 principal is a foreign national, this is the only inference that can be reasonably drawn from the  
 7 conversations recorded in the video and respondents have not argued to the contrary. The  
 8 contact occurred “[i]n or around October 2016” and Beach reportedly stated that he needed  
 9 information about the donor and “rais[ed] concerns about his nationality,” and that he would  
 10 “need to know the origins” of contributions to GAP.<sup>3</sup> Beach then referred the reporters to  
 11 Benton,<sup>4</sup> who allegedly met with the reporters and offered to transmit the \$2 million contribution  
 12 to GAP through his company, Titan, and two 501(c)(4) organizations.<sup>5</sup> The reporters recorded  
 13 their discussions with Benton, and clips of those recordings are shown in the *Telegraph* video,  
 14 which include the following exchanges between Benton and the reporters:<sup>6</sup>

15 Jesse Benton: “I’ll actually probably send, I’ll send money from my company to  
 16 both.”

17 \*\*\*

18 Undercover reporter: “So I’m just thinking also about logistics, how this would  
 19 actually work. That is the 501(c)(4) that the money is going into — yeah?”

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<sup>2</sup> Compl. at 2-3, MUR 7165 (Oct. 27, 2016); Compl. at 2, MUR 7196 (Nov. 10, 2016); *Pro-Trump Fundraisers Agree to Accept Illicit Foreign Donation*, YOUTUBE, <https://www.youtube.com/watch?v=xQnOxM9iqOw> (posted Oct. 24, 2016) (“Telegraph Video”). The video is no longer available on the *Telegraph* website, but a copy is available on YouTube.

<sup>3</sup> Nicholas Confessore, *Consultant with Ties to Donald Trump Linked to Offer to Hide Source of Donations*, N.Y. TIMES (Oct. 24, 2016), <https://www.nytimes.com/2016/10/25/us/politics/consultant-with-ties-to-donald-trump-linked-to-offer-to-hide-source-of-donations.html> (“NYTimes Article”).

<sup>4</sup> NYTimes Article.

<sup>5</sup> MUR 7165 Compl. at 3-4; MUR 7196 Compl. at 3.

<sup>6</sup> Telegraph Video.

MURs 7165 & 7196 (Great America PAC)

Factual and Legal Analysis

Page 3 of 16

1 Jesse Benton: "Correct."

2 Undercover reporter: "Yeah. And that's through your company, yeah?"

3 Jesse Benton: "That's correct."

4 \*\*\*

5 Undercover reporter: "How much do you think you can pass on to the super PAC  
6 because I think that's what I am going to get asked."

7 Jesse Benton: "All of it."

8 Undercover reporter: "All of it?"

9 [Benton nods his head]

10 \*\*\*

11 Undercover reporter: "Can I report back that it's getting used for on-the-ground  
12 grassroots stuff or it's getting used for TV, or could be a mixture?"

13 Jesse Benton: "It's a mixture."

14 \*\*\*

15 Jesse Benton: "It will definitely allow us to spend two million more dollars on  
16 digital and television advertising for Mr. Trump."

17 Undercover reporter: "Right, and that'll be spent by the super PAC?"

18 Jesse Benton: "Yes it will be."

19 \*\*\*

20 Jesse Benton: "You shouldn't put any of this on paper."

21 \*\*\*

22 Undercover reporter: "It's not like he's asking for anything directly but he just  
23 wants to know that he won't just be treated as 'A N Other' — what do you  
24 think?"

25 Jesse Benton: "It'll do that, yeah."

26 \*\*\*

27 Jesse Benton: "And we can have that whispered into Mr. Trump's ear whenever  
28 your client feels it's appropriate."

29 **III. FACTUAL AND LEGAL ANALYSIS**

30 **A. The Act and Commission Regulations Prohibit Knowingly Soliciting Foreign  
31 National Contributions**

32 The Act and Commission regulations prohibit any "foreign national" from directly or  
33 indirectly making a contribution or donation of money or other thing of value, or an expenditure,  
34 independent expenditure, or disbursement, in connection with a federal, state, or local election.<sup>7</sup>

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<sup>7</sup> 52 U.S.C. § 30121(a)(1); 11 C.F.R. § 110.20(b), (c), (e), (f). Courts have consistently upheld the provisions of the Act prohibiting foreign national contributions on the ground that the government has a clear, compelling interest in limiting the influence of foreigners over the activities and processes that are integral to democratic self-government, which include making political contributions and express-advocacy expenditures.

MURs 7165 & 7196 (Great America PAC)

Factual and Legal Analysis

Page 4 of 16

1 The Act's definition of "foreign national" includes an individual who is not a citizen or national  
 2 of the United States and who is not lawfully admitted for permanent residence.<sup>8</sup> Moreover, the  
 3 Act prohibits any person from soliciting, accepting, or receiving any such contribution or  
 4 donation from a foreign national,<sup>9</sup> and Commission regulations further prohibit any person from  
 5 knowingly providing substantial assistance in soliciting, making, accepting, or receiving any  
 6 such contribution or donation.<sup>10</sup>

7 It is a matter of first impression whether the Act's prohibitions on the solicitation of  
 8 foreign nationals reach the solicitation of a foreign contributor who is fictitious. The  
 9 Commission has not addressed this question in any enforcement matters or advisory opinions,  
 10 and the courts are also silent.<sup>11</sup>

11 In the absence of any precedent squarely on point, the Commission interprets the Act and  
 12 forms a conclusion based on the plain meaning of section 30121(a)(2), the policy behind the  
 13 longstanding prohibition on foreign national involvement in elections, the Act's parallel  
 14 restriction on soliciting soft money, and the interpretation of related federal anti-corruption

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*See Bluman v. FEC*, 800 F. Supp. 2d 281, 288–89 (D.D.C. 2011), *aff'd* 132 S. Ct. 1087 (2012); *United States v. Singh*, 924 F.3d 1030, 1041–44 (9th Cir. 2019).

<sup>8</sup> 52 U.S.C. § 30121(b)(2).

<sup>9</sup> 52 U.S.C. § 30121(a)(2); *see* 11 C.F.R. § 110.20(g).

<sup>10</sup> 11 C.F.R. § 110.20(h). "Substantial assistance" is "active participation in the solicitation . . . of a foreign national contribution or donation with an intent to facilitate successful completion of the transaction." Contribution Limitations and Prohibitions, 67 Fed. Reg. 69,928, 69,945 (Nov. 19, 2002) ("E&J"). Therefore, in defining "substantial assistance," the Commission has explicitly added another intent-based standard on top of the "knowingly" requirement.

<sup>11</sup> In MUR 6687 (Obama for America), the Commission dismissed allegations that the Obama campaign solicited foreign nationals for contributions when it emailed a solicitation to "OsamaforObama2012@gmail.com" and allowed a "Bin Laden" solicitation page to be posted to its website, the latter of which resulted in a \$3 contribution. Factual & Legal Analysis at 3-4, 8, MUR 6687 (Obama for America). Both the email address and solicitation page were created by journalists conducting a sting operation. *Id.* The Commission dismissed the allegations "to conserve Commission resources," given the *de minimis* amount of money at stake. *Id.* at 8.

MURs 7165 & 7196 (Great America PAC)

Factual and Legal Analysis

Page 5 of 16

1 statutes. Accordingly, the Commission concludes that the Act and Commission regulations,  
 2 fairly construed, prohibit an individual from making a solicitation with the intent to violate the  
 3 prohibition on foreign national participation in the electoral process, as demonstrated by the  
 4 individual's awareness of facts that would lead a reasonable person to conclude that, or inquire  
 5 whether, the contributor is a foreign national.

6 The Act, as implemented by the Commission, effectively provides three elements to the  
 7 foreign national solicitation prohibition: (1) a solicitation; (2) for a contribution or donation in  
 8 connection with a federal election; (3) from a source that the person making the solicitation  
 9 knows or reasonably believes to be a foreign national.<sup>12</sup>

10 1. Plain Meaning of Section 30121

11 The precise text of the foreign national solicitation prohibition states that “[i]t shall be  
 12 unlawful for . . . a person to solicit . . . a contribution or donation . . . from a foreign national.”<sup>13</sup>  
 13 The Commission regulation implementing this provision, however, incorporates a *mens rea*  
 14 element by providing that “[n]o person shall *knowingly* solicit, accept, or receive from a foreign  
 15 national any contribution or donation.”<sup>14</sup>

16 In defining “knowingly,” the regulations state that the solicitor must have either “actual  
 17 knowledge” that the person being solicited is a foreign national, “[b]e aware of facts that would  
 18 lead a reasonable person to conclude that there is a substantial probability that the source of the  
 19 funds” is a foreign national, or “[b]e aware of facts that would lead a reasonable person to  
 20 inquire whether the source of the funds . . . is a foreign national,” but fail to “conduct a

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<sup>12</sup> 52 U.S.C. § 30121(a)(2); 11 C.F.R. § 110.20(g); *see* 11 C.F.R. § 110.20(a)(4).

<sup>13</sup> 52 U.S.C. § 30121(a)(2).

<sup>14</sup> 11 C.F.R. § 110.20(g) (emphasis added).

MURs 7165 & 7196 (Great America PAC)

Factual and Legal Analysis

Page 6 of 16

1 reasonable inquiry.”<sup>15</sup> Thus, by implication, the person making a solicitation does not need to  
 2 know for certain that the target of the solicitation (the potential source of the contribution) is a  
 3 foreign national. Rather, it is sufficient for the solicitor to be aware of facts that would lead to a  
 4 reasonable conclusion that the potential contributor is a foreign national, even if that conclusion  
 5 is ultimately wrong because, *e.g.*, the person being solicited is a U.S. national, or is fictitious.  
 6 Accordingly, the regulations seem to acknowledge the possibility that a person may violate the  
 7 Act when he subjectively believes, or has reason to believe, that he is requesting foreign money.

8                   2.        History of the Foreign National Prohibition

9               The history of the statutory prohibition on foreign national contributions and solicitations  
 10 further supports the conclusion that the Act prohibits soliciting anyone that the solicitor  
 11 reasonably believes to be a foreign national.<sup>16</sup> The Commission has explained that the long-  
 12 standing purpose behind the prohibition on foreign national contributions is to “prevent foreign  
 13 national funds from influencing elections.”<sup>17</sup>

14               That the Act prohibits not just the provision of foreign national contributions but also the  
 15 *solicitation* of such contributions indicates that even the appearance of foreign national influence  
 16 in U.S. elections is a major congressional concern. Viewed in light of that concern, section

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<sup>15</sup> *Id.* § 110.20(a)(4).

<sup>16</sup> The foreign national prohibition, and Congress’s concern about the potential influence of foreigners in U.S. elections, pre-dates the Act: Congress enacted the first prohibition on soliciting foreign contributions in 1966 as an amendment to the Foreign Agents Registration Act of 1938 (“FARA”), prohibiting the solicitation of “foreign principals” and the agents of “foreign principals.” Foreign Agents Registration Act Amdts. of 1966, Pub. L. No. 89-486, § 613, 80 Stat. 244, 248-49. In 1974, Congress extended FARA to prohibit the solicitation of “foreign nationals,” which included a broader category of foreign actors. Fed. Elections Campaign Act Amdts. of 1974, Pub. L. No. 93-443, § 613, 88 Stat. 1263, 1269. It then moved the restrictions on foreign contributions and solicitations from FARA to the Act, Fed. Elections Campaign Act Amdts. of 1976, Pub. L. No. 94-283, § 324, 90 Stat. 475, 493, amending the text most recently with BCRA. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 303, 116 Stat. 81, 96

<sup>17</sup> E&J at 69,945.

MURs 7165 & 7196 (Great America PAC)

Factual and Legal Analysis

Page 7 of 16

1 30121 reaches conduct *intended* to inject foreign influence into the electoral process, even where  
 2 — because of circumstances unknown to the person engaged in the conduct — there is actually  
 3 no possibility of such foreign influence resulting from their conduct.

4                   3.        The Act's Comparable Soft Money Prohibitions

5                   There are only three instances in which the Act prohibits the solicitation of an entire class  
 6 of funds: soft money contributions, contributions from federal contractors, and contributions  
 7 from foreign nationals.<sup>18</sup> In considering the scope of the prohibition on foreign national  
 8 solicitations in section 30121(a)(2), the legislative history of the soft money prohibition is  
 9 instructive: The Bipartisan Campaign Finance Reform Act of 2002 (“BCRA”) not only created  
 10 the Act’s current restrictions on soliciting soft money, it also amended the Act to prohibit foreign  
 11 national contributions, donations, or solicitations “in connection with a Federal, State, or local  
 12 election”<sup>19</sup> and clarified that the “ban on contributions [by] foreign nationals applies to soft  
 13 money donations.”<sup>20</sup>

14                   The Act’s foreign national prohibition goes to the fundamental question of who should be  
 15 able to participate in our democratic process.<sup>21</sup> In light of Congress’s decision to broaden the

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<sup>18</sup>               52 U.S.C. § 30119(a)(2) (federal contractors), § 30121(a)(2) (foreign nationals), § 30125(a)(1), (d), (e)(1) (soft money). There are other provisions of the Act that prohibit certain solicitation tactics, such as coercive solicitations, solicitations based on fraudulent misrepresentations, and solicitations using information obtained from Commission reports, among others, but we are concerned with substantive solicitation prohibitions based on the source of the funds. *See, e.g., id.* §§ 30111(a)(4), 30118(b)(3), 30124(b).

<sup>19</sup>               Compare 2 U.S.C. § 441e(a) (2000), with *id.* § 441e(a)(1)(A) (2004).

<sup>20</sup>               E&J at 69,944 (quoting 148 Cong. Rec. S1991-97 (daily ed. Mar. 18, 2002) (statement of Sen. Feingold)); *see* 148 Cong. Rec. S2774 (daily ed. Mar. 22, 2002) (statement of Sen. Lieberman).

<sup>21</sup>               In *Bluman v. FEC*, a federal district court (affirmed without opinion by the U.S. Supreme Court) held that BCRA’s prohibition on foreign national contributions was constitutional because it was supported by the government’s compelling interest “in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process.” *Bluman v. FEC*, 800 F. Supp. 2d 281, 287 (D.D.C. 2011) (quoting *Bernal v. Fainter*, 467 U.S. 216, 220 (1984)), *aff’d*, 565 U.S. 1104 (2012).

MURs 7165 & 7196 (Great America PAC)

Factual and Legal Analysis

Page 8 of 16

1 scope of section 30121 in BCRA, section 30121 forecloses any solicitation of foreign money into  
 2 the electoral process, even if such a solicitation could not have succeeded because of a  
 3 circumstance unknown to the person soliciting the contribution or donation.

4. Related Federal Anti-Corruption Laws

5 Federal courts regularly uphold the criminal convictions of defendants who engage in  
 6 corrupt transactions with undercover operatives or fictitious parties, when there is evidence that  
 7 the defendant intended to complete the crime and reasonably believed he or she could obtain the  
 8 fruits of the corrupt bargain. For instance, courts routinely uphold such convictions under the  
 9 federal bribery statute, which prohibits the offer of “anything of value” to a “public official” with  
 10 intent to “influence any official act,” and conversely prohibits a “public official” from soliciting  
 11 or accepting “anything of value” in connection with “the performance of any official act.”<sup>22</sup> The  
 12 “public official” element of the bribery statute mirrors the “foreign national” element of section  
 13 30121(a)(2), and, in interpreting the former, courts have focused on a defendant’s intent to enter  
 14 into a corrupt transaction as the essential element of the crime, stating that bribery occurs when a  
 15 person offers or asks for money with the requisite intent to influence an official act, regardless of  
 16 whether there is actually any public official to be bribed.<sup>23</sup>

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<sup>22</sup> 18 U.S.C. § 201(b)(1)-(2). .

<sup>23</sup> See *Lopez v. United States*, 373 U.S. 427, 428-32 (1963) (upholding the conviction of a defendant charged with “attempted bribery,” based on the defendant trying to avoid tax liability by giving money to an Internal Revenue Service (“IRS”) agent acting as an informant); *United States v. Wright*, 665 F.3d 560, 568 (10th Cir. 2012) (stating, in an honest services fraud case, that “[i]ntent is determinant”); *United States v. Arbelaez*, No. 94-20349, 1995 WL 103637, at \*1-2 (5th Cir. Mar. 2, 1995) (affirming a defendant’s conviction for bribing an undercover agent posing as an immigration official); *United States v. Opdahl*, 930 F.2d 1530, 1535 (11th Cir. 1991) (stating that it is the undercover agent’s “purported role as an IRS official, not his actual status as an internal investigator for the IRS, that is relevant to the issue of the defendant’s intent”); *United States v. Pilarinos*, 864 F.2d 253, 253-55 (2d Cir. 1988) (upholding a bribery conviction arising from a sting operation in which there was no actual public official involved); *United States v. Gallo*, 863 F.2d 185, 189 (2d Cir. 1988) (stating, where a bribe was to be passed through a conduit and ultimately to a fictitious “connection in Washington,” that “[w]hether or not there was a federal official to whom bribes were actually paid is not determinative” and “the public official who is the target of the bribe . . . need not even exist”); *United States v. Jacobs*, 431 F.2d 754, 757-60 (2d Cir. 1970) (stating that “[t]he

MURs 7165 & 7196 (Great America PAC)

Factual and Legal Analysis

Page 9 of 16

1 For example, in *United States v. Hood*, which involved a politician soliciting campaign  
 2 contributions in exchange for promises to appoint potential contributors to nonexistent offices,  
 3 the Supreme Court stated: “Whether the corrupt transaction would or could ever be performed is  
 4 immaterial,” and that it is “no less corrupt to sell an office one may never be able to deliver than  
 5 to sell one he can.”<sup>24</sup> Similarly, the U.S. Court of Appeals for the Second Circuit concluded that  
 6 a bribery conviction could stand even though the “object of the bribe could not be attained,”  
 7 thereby rejecting the so-called “factual impossibility” defense based on the purported public  
 8 official seeking the bribe actually being an undercover police officer.<sup>25</sup>

9 In the context of federal bribery law, federal courts have widely recognized that “factual  
 10 impossibility” is not a viable defense and that convictions can stand even when the defendant is  
 11 trying to enter into a corrupt transaction that cannot be completed (often because the person  
 12 offering or seeking the bribe is an undercover officer and not, in fact, a “public official”).<sup>26</sup>  
 13 Additionally, most jurisdictions reject factual impossibility as a defense to inchoate crimes, *i.e.*,

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statute makes attempted bribery a crime” because “so long as a bribe is ‘offered or promised’ with the requisite intent ‘to influence any official act’ the crime is committed”).

<sup>24</sup> *United States v. Hood*, 343 U.S. 148, 149-51 (1952).

<sup>25</sup> *United States v. Rosner*, 485 F.2d 1213, 1229 (2d Cir. 1973). In another case, the Second Circuit rejected the impossibility defense when real public officials were accepting and receiving corrupt payments from undercover agents. *United States v. Myers*, 692 F.2d 823, 826-28 (2d Cir. 1982).

<sup>26</sup> Federal courts have also interpreted state-level bribery statutes in a fashion that makes intent the determinative factor. *See, e.g.*, *United States v. Traitz*, 871 F.2d 368, 386 (3d Cir. 1989) (stating, with respect to Pennsylvania’s and New Jersey’s bribery statutes, that “[e]ach defendant should be judged by what he thought he was doing and what he meant to do . . .”); *United States v. Mazzio*, 501 F. Supp. 340, 343 (E.D. Pa. 1980) (rejecting an impossibility argument premised on the fact that the person the defendant bribed was an undercover officer). Furthermore, in the Department of Justice’s (“DOJ’s”) first-ever sting operation to enforce the Foreign Corrupt Practices Act (“FCPA”), which criminalizes bribing foreign officials, the D.C. District Court denied a defendant’s motion to dismiss the indictment on the grounds that no actual foreign official participated in the FCPA bribery scheme, finding that there may be a conviction when the foreign official was actually an undercover agent. *See* Mot. to Dismiss, *United States v. Goncalves*, No. 09-335 (D.D.C. Mar. 9, 2011), ECF No. 271; Resp., *Goncalves*, No. 09-335 (Mar. 23, 2011), ECF No. 298; Min. Entry, *Goncalves*, No. 09-335 (May 6, 2011). Since the so-called “Africa Sting” case, it does not appear that the DOJ has tried any additional FCPA sting cases.

MURs 7165 & 7196 (Great America PAC)

Factual and Legal Analysis

Page 10 of 16

1 attempt, conspiracy, and solicitation.<sup>27</sup> They reason that impossibility is not a defense “when  
2 adequate proof of intent to commit a specific crime exists.”<sup>28</sup>

3 Section 30121, in sum, prohibits all “knowing” solicitations of foreign nationals, whether  
4 the person making the solicitation has “actual knowledge” that the person being solicited is a  
5 foreign national, or is aware of facts that would lead a reasonable person to conclude that the  
6 person being solicited is a foreign national — even if that conclusion is ultimately wrong.

7 Reading the Act to proscribe such conduct comports with section 30121’s plain meaning; the  
8 longstanding congressional concern, underlying section 30121’s enactment, with foreign  
9 influence over the U.S. political process; and the interpretation and application of the Act’s  
10 prohibition of soft money solicitations and the federal bribery statute.

11 **B. GAP, Through its Agent Benton, Solicited a Contribution from a Source that  
12 Benton Knew or Reasonably Believed to be a Foreign National**

13 The available information indicates that there is reason to believe that GAP, through its  
14 agent Benton, knowingly solicited a contribution from a foreign national because Benton’s  
15 conduct satisfies the three elements of the statutory prohibition at section 30121(a)(2): Benton,

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<sup>27</sup> See, e.g., *United States v. Temkin*, 797 F.3d 682, 690 (9th Cir. 2015) (“[F]actual impossibility is not a defense to an inchoate offense.”); *United States v. Washington*, 106 F.3d 983, 1006 (D.C. Cir. 1997) (explaining that, “but for the fact that the crime was made factually impossible because the ‘principals’ were really undercover government agents,” it would have occurred, making “factual impossibility [ ] no defense”); *United States v. Hamrick*, 43 F.3d 877, 885 (4th Cir. 1995) (“[W]e now join those circuits that have expressly held that [factual impossibility] is not a defense to an attempt crime.”); *United States v. Peete*, 919 F.2d 1168, 1175-76 (6th Cir. 1990) (providing, as an example of factual impossibility, a situation in which “a public official induces a payment to achieve some result despite the fact that the official has no actual ability to achieve that result,” and stating that factual impossibility would not be a defense in that situation); *United States v. Johnson*, 767 F.2d 673, 675 (10th Cir. 1985) (“Factual impossibility may fall away as a defense to an attempt charge when adequate proof of intent to commit a specific crime exists.”); *United States v. Innella*, 690 F.2d 834, 835 (11th Cir. 1982) (stating that impossibility is not a defense when “the defendant’s objective actions, taken as a whole, . . . strongly corroborate the required culpability”); *United States v. Oviedo*, 525 F.2d 881, 885 (5th Cir. 1976) (rejecting the impossibility defense when there is evidence of unique acts that “mark the defendant’s conduct as criminal in nature,” thereby allowing for an inference that the defendant had criminal intent).

<sup>28</sup> *Johnson*, 767 F.2d at 675.

MURs 7165 & 7196 (Great America PAC)

Factual and Legal Analysis

Page 11 of 16

1 acting as GAP's agent, solicited a contribution, and he knew or reasonably believed that he was  
 2 soliciting a foreign national to provide that contribution.

3                   1.        Solicitation

4               Benton's communications with the reporters indicate that he made a "solicitation" for the  
 5 Act's purposes. As applicable here, to "solicit" means to "ask, request, or recommend, explicitly  
 6 or implicitly, that another person make a contribution, donation, transfer of funds, or otherwise  
 7 provide anything of value,"<sup>29</sup> including by making a communication "that provides a method of  
 8 making a contribution" or "provides instructions on how or where to send contributions."<sup>30</sup>

9 Furthermore:

10               A solicitation is an oral or written communication that, construed  
 11 as reasonably understood in the context in which it is made,  
 12 contains a clear message asking, requesting, or recommending that  
 13 another person make a contribution, donation, transfer of funds, or  
 14 otherwise provide anything of value. A solicitation may be made  
 15 directly or indirectly. The context includes the conduct of persons  
 16 involved in the communication. A solicitation does not include  
 17 mere statements of political support or mere guidance as to the  
 18 applicability of a particular law or regulation.<sup>31</sup>

19 The Commission has also explained that "the Commission's objective standard hinges on  
 20 whether the recipient should have reasonably understood that a solicitation was made."<sup>32</sup>

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<sup>29</sup>               11 C.F.R. § 110.20(a)(6) (cross-referencing 11 C.F.R. § 300.2(m)).

<sup>30</sup>               *Id.* § 300.2(m)(1)(i)-(ii).

<sup>31</sup>               *Id.* § 300.2(m).

<sup>32</sup>               Solicitation E&J, 71 Fed. Reg. at 13,929 ("[I]t is necessary to reasonably construe the communication in context, rather than hinging the application of the law on subjective interpretations of the Federal candidate's or officeholder's communications or on the varied understandings of the listener. The revised definition reflects the need to account for the context of the communication and the necessity of doing so through an objective test.").

MURs 7165 & 7196 (Great America PAC)

Factual and Legal Analysis

Page 12 of 16

1        The available information indicates that GAP, through its agent Benton, made a  
 2        “solicitation” under the Act.<sup>33</sup> The *Telegraph* video indicates that after undercover journalists  
 3        posing as representatives of a Chinese national contacted Beach offering to contribute \$2 million  
 4        to GAP, Beach referred them to Benton, who was recorded meeting with the reporters to provide  
 5        them with a specific “method of making a contribution” so that it could not be traced back to  
 6        their client.<sup>34</sup> Benton told the reporters that he would “send . . . [the] money from my company  
 7        to both” 501(c)(4) organizations, and confirmed the reporter’s queries “about logistics” — *i.e.*  
 8        that the funds would be passed through Benton’s company into the 501(c)(4).<sup>35</sup> Benton also  
 9        confirmed that “all of it” — meaning the full \$2 million that the reporters’ client intended to  
 10        donate — would then be “pass[ed] on to the Super PAC [GAP]” from the 501(c)(4)s.<sup>36</sup>

11        Benton further confirmed that the money would be provided to GAP for its activities in  
 12        support of Trump’s 2016 presidential candidacy when he told the reporters: “It [the donation]  
 13        will definitely allow us to spend two million more dollars on digital and television advertising  
 14        for Mr. Trump.”<sup>37</sup> He confirmed the reporter’s question that those funds “would be spent by the

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<sup>33</sup>        See Restatement (Third) of Agency 3d § 300.1 (2006) (“Actual authority . . . is created by a principal’s manifestation to an agent that, as reasonably understood by the agent, expresses the principal’s assent that the agent take action on the principal’s behalf.”); *see also* 11 C.F.R. § 110.20(a)(6) (cross-referencing 11 C.F.R. § 300.2(m)) (prohibiting the solicitation of a foreign national contribution “directly or indirectly”) (emphasis added); *cf.* 11 C.F.R. § 300.2(b)(1)(i) (defining “agent” in the context of soft-money rules as “any person who has actual authority, either express or implied, . . . [t]o solicit . . . any contribution, donation, or transfer of funds”). Benton was an agent of GAP for the purposes of this solicitation because, as a consultant for GAP to whom Beach apparently delegated authority to act, he had actual authority to act on GAP’s behalf, despite assertions to the contrary. *See* MUR 7165 Resp. at 2-3, 7-8; MUR 7196 Resp. at 1-3, 6.

<sup>34</sup>        11 C.F.R. § 300.2(m)(1)(i).

<sup>35</sup>        *Telegraph* Video.

<sup>36</sup>        *Id.*

<sup>37</sup>        *Telegraph* Video.

MURs 7165 & 7196 (Great America PAC)

Factual and Legal Analysis

Page 13 of 16

1 Super PAC [GAP].”<sup>38</sup> Benton’s recorded statements, which provide a detailed plan for the  
 2 reporters’ client to make a contribution to GAP without public disclosure of their client’s  
 3 identity, indicate that he, as an agent of GAP, “ask[ed], request[ed], or recommend[ed],  
 4 explicitly or implicitly,” that the reporter’s client make a contribution to GAP.<sup>39</sup>

5 Benton’s statements also contradict any potential argument that he was not actually  
 6 soliciting a contribution for GAP, but was instead soliciting money for the 501(c)(4)s, which  
 7 could choose how to spend the funds: When the reporters asked Benton how much of the money  
 8 would be passed on to the Super PAC, GAP, he told them, “All of it.”<sup>40</sup> He also added that the  
 9 contribution would “allow us to spend two million more dollars on digital and television  
 10 advertising for Mr. Trump.”<sup>41</sup> These statements plainly indicate that Benton’s proposal to have  
 11 the \$2 million funneled through 501(c)(4) organizations was not intended to fund those  
 12 organizations’ own activities or to be spent at their discretion, but rather was intended to provide  
 13 the \$2 million contribution to GAP. Accordingly, Benton made a “solicitation” under the Act  
 14 while acting as an agent of GAP.

15                   2.        Contribution or Donation

16                   The available information indicates that Benton sought a “contribution” under the Act. A  
 17 “contribution” includes “any gift, subscription, loan, advance, or deposit of money or anything of  
 18 value made by any person for the purpose of influencing any election for Federal office.”<sup>42</sup>

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<sup>38</sup>               *Id.*

<sup>39</sup>               11 C.F.R. § 110.20(a)(6) (cross-referencing 11 C.F.R. § 300.2(m)).

<sup>40</sup>               Telegraph Video.

<sup>41</sup>               *Id.*

<sup>42</sup>               52 U.S.C. § 30101(8)(A).

MURs 7165 & 7196 (Great America PAC)

Factual and Legal Analysis

Page 14 of 16

1 According to the *Telegraph* video, the reporters said that they represented a Chinese national  
2 offering to provide a \$2 million donation to GAP in support of Trump's 2016 presidential  
3 candidacy, which clearly would have constituted a "contribution."

4                   3.        Foreign National Source

5                   The available information indicates that Benton "knowingly" solicited a contribution  
6 from a foreign national — *i.e.*, he actually knew, or was "aware of facts that would lead a  
7 reasonable person to conclude that . . . the source of the funds solicited . . . is a foreign  
8 national."<sup>43</sup> The discussions captured in the *Telegraph* video are not consistent with discussion  
9 of a lawful domestic contribution, and respondents have suggested no alternative interpretation  
10 of those exchanges.<sup>44</sup> Accordingly, there is reason to believe that Benton provided the reporters  
11 with a detailed plan for the Chinese national to make a contribution to GAP through his company  
12 and two 501(c)(4) organizations.<sup>45</sup> Benton confirmed that "all of" the \$2 million would be  
13 provided to GAP, and reiterated that the contribution would allow GAP, specifically, to "spend  
14 two million more dollars on digital and television advertising for Mr. Trump."<sup>46</sup> Benton also  
15 assured the reporters that their client's contribution would have the effect of ensuring he would  
16 not be treated as just "A N Other" supporter, but one whose name could be "whispered into Mr.  
17 Trump's ear whenever your client feels it's appropriate."<sup>47</sup> Considered together, Benton's  
18 statements and proposal to funnel the \$2 million contribution to GAP through two layers of

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<sup>43</sup> 11 C.F.R. § 110.20(a)(4)(ii).

<sup>44</sup> *Telegraph* Video.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

MURs 7165 & 7196 (Great America PAC)

Factual and Legal Analysis

Page 15 of 16

1 conduits — to obscure the true source of those funds — support the inference that Benton knew  
 2 or was aware of sufficient facts to reasonably conclude that the person being solicited to provide  
 3 the funds was a foreign national who could not legally make a contribution to GAP or appear on  
 4 GAP's disclosure reports.

5 By proceeding with discussions with the undercover reporters with apparent knowledge  
 6 that their client was a foreign national, Benton evidenced an intent to solicit a \$2 million  
 7 contribution to GAP in support of its electoral activities during the 2016 election from someone  
 8 he knew or reasonably believed to be a foreign national. That conduct is sufficient to support  
 9 finding reason to believe GAP, acting through its agent Benton, violated the Act and  
 10 Commission regulations.

11 **C. There is Reason to Believe the Violations Were Knowing and Willful**

12 The available information indicates that the respondents' violations were knowing and  
 13 willful. A violation of the Act is knowing and willful when the respondent acts "with full  
 14 knowledge of all the relevant facts and a recognition that the action is prohibited by law."<sup>48</sup> This  
 15 standard does not require proving knowledge of the specific statute or regulation the respondent  
 16 violated.<sup>49</sup> Rather, it is sufficient to demonstrate that a respondent "acted voluntarily and was  
 17 aware that his conduct was unlawful."<sup>50</sup> This awareness may be shown through circumstantial  
 18 evidence, such as a "defendant's elaborate scheme for disguising" her actions, or other "facts and

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<sup>48</sup> 122 Cong. Rec. H3778 (daily ed. May 3, 1976).

<sup>49</sup> See *United States v. Danielczyk*, 917 F. Supp. 2d 573, 579 (E.D. Va. 2013) (citing *Bryan v. United States*, 524 U.S. 184, 195 & n.23 (1998) (holding that, to establish that a violation is willful, the government needs to show only that the defendant acted with knowledge that her conduct was unlawful, not knowledge of the specific statutory provision violated)).

<sup>50</sup> *Id.* (internal quotation marks omitted).

## MURs 7165 & 7196 (Great America PAC)

## Factual and Legal Analysis

Page 16 of 16

1 circumstances from which the jury reasonably could infer [the defendant] knew her conduct was  
2 unauthorized and illegal.”<sup>51</sup>

3       Based on the *Telegraph* video, there is evidence that Benton was aware that his conduct  
4       was illegal and engaged in an elaborate scheme to conceal it. Benton’s plan to use two layers of  
5       conduits to obscure the true contributor, whom he believed to be a foreign national, as well as to  
6       conceal his role in facilitating the contribution, was an “elaborate scheme for disguising” an  
7       illegal foreign national contribution.<sup>52</sup> Moreover, Benton explicitly told the reporters, “You  
8       shouldn’t put any of this on paper.”<sup>53</sup> Benton therefore appears to have known that his plan was  
9       illegal and took numerous steps to conceal it.<sup>54</sup>

10 \* \* \* \* \*

11 Accordingly, the Commission finds reason to believe that GAP knowingly and willfully  
12 violated 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g) by knowingly soliciting a  
13 contribution from a foreign national.

<sup>51</sup> *United States v. Hopkins*, 916 F.2d 207, 213-15 (5th Cir. 1990) (internal quotation marks omitted). As the *Hopkins* court noted, “It has long been recognized that ‘efforts at concealment [may] be reasonably explainable only in terms of motivation to evade’ lawful obligations.” *Id.* at 214 (quoting *Ingram v. United States*, 360 U.S. 672, 679 (1959)).

52 *Hopkins* at 213-15.

53 Telegraph Video.

<sup>54</sup> See 122 Cong. Rec. H3778; Hopkins, 916 F.2d 207, 213-15; Danielczyk, 917 F. Supp. 2d at 579.

## **QUESTIONS AND DOCUMENT REQUESTS**

Please answer the following questions regarding Great America PAC and Dan Backer in his official capacity as treasurer (“GAP”). Identify any individuals with personal recollection, knowledge, or understanding of the answers and provide us with any communications, documents, records, or other information that provide a basis for your answers. If you do not know the complete answer to any question, please answer to the extent possible and indicate your inability to answer the remainder of the question. If you believe you cannot answer any question based on a legal limitation or claim of privilege, please state the basis for your belief that you cannot answer and provide as much information as you believe you can provide.

In each of these questions and document requests, unless otherwise specified: Any reference to “GAP” means Great America PAC and Dan Backer in his official capacity as treasurer, including any chairs or co-chairs, officers, managers, employees, or agents thereof; any reference to the “Telegraph journalists” means the individuals that contacted GAP in October 2016, as described in an article published online by the *Telegraph UK* on October 24, 2016, which is cited in the complaints in MURs 7165 and 7196, *see* Investigative Team, *Exclusive Investigation: Donald Trump Faces Foreign Donor Fundraising Scandal*, TELEGRAPH UK (Oct. 24, 2016, 8:10 PM), <http://www.telegraph.co.uk/news/2016/10/24/exclusive-investigation-donaldtrump-faces-foreign-donor-fundrai/>; and any reference to “501(c)(4) organization” means a nonprofit organization exempt from federal taxes under Section 501(c)(4) of the Internal Revenue Code.

1. List all of GAP’s officers, managers, or directors between February 1, 2016, and December 31, 2016.
  - a. List Eric Beach’s title(s) and the duration of his tenure with GAP, and describe his roles, responsibilities, and functions.
  - b. List Jesse Benton’s title(s) and the duration of his tenure with GAP, and describe his roles, responsibilities, and functions. When and why did Benton’s formal employment with GAP end?
  - c. Describe Benton’s relationship to GAP after he was no longer formally employed by GAP. Did he ever act on GAP’s behalf after his formal employment with GAP ended?
  - d. Describe Benton’s relationship with Beach after Benton was no longer formally employed by GAP. To what extent did Beach discuss GAP’s affairs with Benton after Benton was no longer formally employed by GAP, and for what purposes?
2. Describe the initial contact between GAP (including Beach and Benton) and the Telegraph journalists.
  - a. How did the Telegraph journalists introduce and describe themselves to GAP, including their official titles, roles, responsibilities, and functions?

MURs 7165 and 7196 – Questions and Document Requests – Great America PAC  
Page 2 of 4

- b. What representations or information did the Telegraph journalists provide about their purported client, including the client's name, nationality, place of residence, occupation, and current address?
  - c. When did GAP (through Beach, Benton, or anyone else) become aware that the Telegraph journalists claimed to represent a client that was a foreign national interested in making a \$2 million contribution to GAP? Upon becoming aware, how did GAP respond?
3. Describe all communications between GAP (including Beach) and the Telegraph journalists during the period from October 1, 2016, through December 31, 2016, and provide all written communications, including but not limited to emails, text messages, instant messages, and messages on any social media platforms. When was the last communication between GAP and the Telegraph journalists?
4. Describe all communications pertaining to the Telegraph journalists, their client, or the donation to GAP between Benton and GAP (including Beach's communications) during the period from October 1, 2016, through December 31, 2016, and provide all written communications, including but not limited to emails, text messages, instant messages, and messages on any social media platforms. When was the last communication between GAP and the Telegraph journalists?
5. GAP's Response indicates that Beach "made a normal business referral of the reporters to Benton." Describe the circumstances of Beach referring the Telegraph journalists to Benton, and provide documents substantiating those circumstances.
  - a. What was the purpose behind that referral? What did Beach ask or direct Benton to do for the Telegraph journalists?
  - b. Explain what information was conveyed to Benton, including information about the Telegraph journalists, their purported client's identity, nationality, and interest in making a contribution to GAP.
  - c. Did GAP (through Beach or anyone else) discuss, request, or direct Benton to assist the Telegraph journalists with making a contribution to GAP?
  - d. Describe whether GAP (through Beach or anyone else) suggested or proposed that the Telegraph journalists' client's make a donation to GAP through one or more 501(c)(4) organizations.
  - e. Describe Benton's communications with GAP (including Beach) after the referral, and provide all written communications, including but not limited to emails, text messages, instant messages, and messages on any social media platforms.
6. Describe what GAP (including Beach) knew about Benton's communications or interactions with the Telegraph journalists.

MURs 7165 and 7196 – Questions and Document Requests – Great America PAC  
Page 3 of 4

- a. When and how did GAP become aware that Benton met with the Telegraph journalists to discuss a \$2 million contribution to GAP?
  - b. When and how did GAP become aware that Benton recommended that the Telegraph journalists' client provide the \$2 million donation to GAP through conduits, including a limited liability company he owned, Titan Strategies LLC, and two 501(c)(4) organizations?
  - c. Was GAP aware of the purpose for this transaction structure? Describe whether GAP offered any suggestions or expressed any concern over the legality of the contribution or the transaction structure.
  - d. Describe all communications between GAP (including Beach) and Benton after Benton met with the Telegraph journalists, and provide all written communications, including but not limited to emails, text messages, instant messages, and messages on any social media platforms.
7. It has been reported that the Telegraph journalists attended a GAP event in Las Vegas, Nevada, on October 19, 2016. Describe GAP's knowledge or awareness of the Telegraph journalists attending this event.
  - a. Describe all interactions between Beach and the Telegraph journalists at the event, including the substance of any discussions.
  - b. Identify anyone else from GAP who interacted with the Telegraph journalists at the event, and describe the substance of their discussions
  - c. Describe all communications between GAP (including Beach) and the Telegraph journalists in connection with the event, and provide all written communications, including but not limited to emails, text messages, instant messages, and messages on any social media platforms.
  - d. Did GAP (including Beach) and the Telegraph journalists discuss the Telegraph journalists' client making a contribution to GAP at the event?
  - e. On or before the date of the event, was GAP aware that the Telegraph journalists claimed to represent a foreign national?
  - f. Produce documents reflecting any interactions the Telegraph journalists had with GAP (including Beach and Benton) after the event.
8. Beach, while acting as GAP's co-chair, was recorded on video making the following statements to the Telegraph journalists; for each, describe when and where the statement was made, who else was present, and explain what the statement means in relation to the Telegraph journalists and their purported foreign national client's interest in making a \$2 million contribution to GAP.
  - a. "You can get credit, but don't overdo it with the influence. That's the key."

MURs 7165 and 7196 – Questions and Document Requests – Great America PAC  
Page 4 of 4

- b. “[Trump’s] going to win the election, so again, I’m not going to twist your arm or anything. I just think that there’s no way that this group — and you guys have been participating indirectly or directly — won’t be remembered.”
- c. “I would just manage expectations; say ‘You’re going to get credit, but your non-disclosed is not disclosed. Not just for your benefit, but for everyone’s benefit.’ I mean, so, it’s true, it’s not illegal, what we’re... the whole construction. But it’s, you know... I would never let you guys give to the PAC, to give to the C4, because that is illegal.”