From:	Michael Columbo (Dhillon Law)
To:	CommissionerTrainor (External); FEC Commissioner Ellen L. Weintraub; Steven T. Walther
Cc:	David Warrington (Dhillon Law); Saurav Ghosh; CELA
Subject:	MUR 7165 & 7196 (Jesse Benton) - Probable Cause Brief of Jesse Benton
Date:	Thursday, August 26, 2021 12:02:45 AM
Attachments:	MUR_7165_and_7196_PC_Brief_of_Jesse_Benton.pdf

Please find attached for your consideration the Probable Cause Brief of Mr. Jesse Benton in MUR 7165/7196.

Sincerely,

Michael A. Columbo, Esq.
Dhillon Law Group Inc.
177 Post St., Suite 700
San Francisco, CA 94108
415.433.1700 (o)

FEDERAL ELECTION COMMISSION

Jesse Benton,	)	MURs 7165 & 7196
Respondent	)	
	)	

JESSE BENTON'S PROBABLE CAUSE BRIEF

Respondent Jesse Benton respectfully requests that the Commission find that there is no probable cause to believe that he violated the Federal Election Campaign Act ("Act") or the Commission's regulations prohibiting the solicitation of a contribution from a foreign national.

I. BACKGROUND AND PROCEDURAL HISTORY

The facts in this matter are straightforward and largely undisputed in several key respects: In the weeks before the 2020 election, a foreign corporation targeted for public embarrassment a SuperPAC that supported President Trump, and by its sole choice of target and the timing of its scheme clearly did so to influence the impending election. Two of its agents in America approached the SuperPAC and secretly recorded their targets. The agents of the foreign corporation lied about who they were, and falsely claimed to represent a non-existent Chinese national who wanted to contribute $2 million to curry favor with the President. The foreign corporation posted its video with the desired effect, generating media commentary.

Despite receiving complaints immediately after the video was posted, the FEC did not launch its investigation until four and a half years later—but not into the foreign corporation for attempting to interfere in the U.S. election. Instead it is pursuing the Americans the foreign corporation targeted for embarrassment, thus compounding their foreign interference with the costs, burdens, and intrusions of a government investigation into a conversation about a wholly fictitious scenario that took place nearly five years and three election cycles ago. By pursuing this matter, the FEC risks facilitating and continuing the foreign corporation's election-influencing effort, and thus inviting more foreign influence in the next election, as well as behavior by copy-cat activists that risks criminal behavior, such as recording phone calls.

As for the alleged violation of Mr. Benton: The foreign corporation's plot immediately failed when the SuperPAC declined the phony contribution offer from the non-existent donor. Undeterred, they continued to offer the unsolicited PAC contribution to Mr. Benton and recorded some of their discussions. In a four-minute video that the foreign corporation produced before the election, comprising disjointed and low-quality clips of different conversations that required subtitles, they recorded the PAC and Mr. Benton discussing the actors possibly sending the $2 million they offered to his company or to nonprofits that he would form.

What Mr. Benton said before or after the brief, cherry-picked clips in the short video is not shown or discussed in the video or in articles written about the video. After the complaints were filed, the foreign corporation removed the video from its website. We can now only view

an unauthenticated copy on YouTube that is hopefully an accurate and unaltered copy. It appears that OGC did not even try to gather any further information from the foreign corporation that orchestrated and funded the scheme, so further recordings or information providing more context to the cherry-picked clips in the video are unavailable. If a complete copy of the foreign corporation's video recordings exists and OGC has it, OGC has not provided it to Mr. Benton or discussed the additional content in its Brief.

The FEC's investigation into part of a conversation that took place in October 2016 apparently did not begin until March 2021 when its records indicate it prepared a Notice to Mr. Benton informing him of the investigation. On March 24, 2021, Mr. Warrington entered an appearance in this matter as counsel for Mr. Benton. *See* Attachment 1. On July 20, 2021, OGC emailed Mr. Benton directly about the investigation, and Mr. Warrington immediately referred OGC to his Designation of Counsel, of which OGC was unaware. *See* Attachment 2.

Undersigned counsel immediately raised concerns about the legal theory underlying the Commission's Reason to Believe ("RTB") finding. OGC invited counsel for Mr. Benton to "provide additional information and make legal arguments in response to the Commission's F&LA, which the Commission would take into account in determining whether and how to move forward in this matter." This invitation was consistent with the FEC's published guidance. *See* Guidebook for Complainants and Respondents on the FEC Enforcement Process at 13, available at https://www.fec.gov/resources/cms-content/documents/respondent_guide.pdf ("Respondents should not hesitate to provide the Commission with relevant new information or present the Commission with any errors in the Commission's recitation of the facts or law. The Commission receives all responses and considers them when determining whether and how to proceed with an investigation or conciliation.") It also echoed the routine notice about the enforcement process OGC provides to respondents with each RTB finding as well as 11 C.F.R. 111.15, which permits respondents to file motions to quash subpoenas.

On August 3, 2021, counsel for Mr. Benton filed a document with the Commission identifying errors in the Factual and Legal Analysis ("FLA") on which the Commission's RTB finding was premised, and requesting that the subpoena to Mr. Benton be quashed and the matter closed. *See* Attachment 3 [Benton Motion]. Mr. Benton's Motion, including all of the arguments it raised, is incorporated by reference in its entirety with this Brief.

After having invited Mr. Benton to submit arguments against the F&LA consistent with the Commission's guidance, OGC then asserted that there was in fact no such process for the Commission to consider Mr. Benton's arguments. After Mr. Benton inquired about the Commission's response to its Motion, OGC asserted that the Commission was under no obligation to answer Mr. Benton's arguments. In an August 9, 2021 Letter, Mr. Benton highlighted OGC's disavowal of its own invitation and the Commission's published guidance to respondents assuring them the Commission would consider their arguments.

On August 10, 2021, OGC emailed its PC Brief to Mr. Benton, exploiting its successful duping of Mr. Benton into revealing his legal arguments by dramatically shifting its prosecution theory and pre-emptively responding to Mr. Benton's arguments. OGC did not immediately provide its case documents in compliance with the Commission's published *Agency Procedure*

for Disclosure of Documents and Information in the Enforcement Process, 76 Fed. Reg. 34,986 (June 15, 2011) ("Enforcement Disclosure Procedure"), even after a request by counsel. On August 13, 2021, three days after issuing its PC Brief, OGC finally delivered just 5 documents, albeit heavily redacted. Due to the delay it caused, which prejudices Mr. Benton's time to file his PC Brief, OGC offered to allow Mr. Benton additional time to file his PC brief—but only on condition that he waive his rights under the five-year statute of limitations.

On August 16, 2021, Mr. Benton filed an objection to OGC's delayed production of documents, extensive redaction of those documents, and its demand that Benton waive his rights under the SOL if he wanted an extension of time to file his Reply Brief to compensate for OGC's late disclosure of its file documents. *See* Attachment 4 [Benton Objection]. Mr. Benton's Objection, including all of the arguments it raised, is incorporated by reference in its entirety with this Brief. Mr. Benton notified the Commission of his intent to delay the filing of his PC brief by just three days, corresponding to OGC's late disclosure, but noted that OGC's violation of the disclosure procedure through its over-redactions was ongoing and arguably Mr. Benton was entitled to wait for OGC's violation to be cured.

Additionally, on Tuesday, August 17, 2021, we requested OGC provide a non-public document it cited in its brief, which was relevant to one of Mr. Benton's arguments. OGC refused to provide the document, on the grounds it was not obtained during the course of its investigation. *See* Attachment 5. However, OGC had already produced (heavily redacted) complaint responses and a conciliation agreement, which similarly were not documents obtained during the investigation. Moreover, vote certifications are made public at the close of the case, the part of the certification that concerns Mr. Benton does not contain any confidential information, and OGC has provided Mr. Benton with other documents (including its Brief) purportedly restating the Commission's findings.

This course of dealing between Mr. Benton and OGC, at a minimum, calls into question OGC's understanding of or compliance with the Commission's Enforcement Disclosure Procedure.

Finally, today, August 25, 2021, counsel for Mr. Benton contacted OGC as a courtesy because there had been no response from any component of the FEC to Mr. Benton's August 16 Objection to OGC's depriving Mr. Benton of three days of substantive review of the documents OGC was required to provide him under the Commission's Enforcement Disclosure Procedure, the extensive and unjustifiable redactions of relevant and exculpatory information in those documents, and OGC's demand that Mr. Benton waive his rights under the statute of limitations to make up for OGC's failure to timely comply with the Commission's Enforcement Disclosure Procedure. It would have been reasonable for Mr. Benton to assume that the lack of a response to his Objection signified the FEC's acquiescence to delaying his filing by three days. OGC responded at 8:01 p.m. Eastern, tonight, again asserting that it would not extend Mr. Benton's time to respond to OGC's brief unless he waived his rights. *See* Attachment 6. OGC gave no explanation for its silence for the preceding 9 days. Accordingly, despite yet another trespass on Mr. Benton's Due Process rights, Mr. Benton will file his Reply Brief tonight due to the uncertainty of how the Commission would reconcile OGC's noncompliance with the

Commission's Enforcement Disclosure Procedure with the Commission's regulations at 11 C.F.R. sections 111.6 and 111.7.

OGC's officious and languid handling of this matter in the last five months has prejudiced the Commission and Mr. Benton, needlessly delaying what was already a statute of limitations-imperiled matter and amplifying OGC's legal errors in a matter that should never have proceeded to this stage in the enforcement process.

* * * *

As demonstrated below, there is no probable cause to believe Mr. Benton violated the Act. OGC has dramatically altered its original prosecution theory in the wake of Mr. Benton's Motion, even if there was no official response to it. OGC has abandoned the dressings of both an attempted violation theory and a theory that Mr. Benton substantially assisted the PAC's violation. What little remains of OGC's original theory that justified the investigation in the first place is a wishful argument for what OGC believes the law should be rather than what it is. Even assuming *arguendo* the law and alleged facts as OGC portrays them, they do not describe a violation of current law. Unsurprisingly, OGC—which bears the burden of proof—could not find a single MUR, advisory opinion, court case, or analogous example of any kind of matter across all federal and state agencies to corroborate its theory.

As shown below, Mr. Benton did not actually, directly, and successfully solicit a contribution from a foreign national, as OGC now alleges. He did not make a solicitation because the foreign agents offered a contribution unsolicited. If he did make a solicitation, he did not solicit a contribution *from a foreign national* because the foreign corporation's agents had lied about the existence of a prospective foreign donor—simply put, like Santa Claus or the Easter Bunny, no foreign donor existed. For the Commission to change the meaning of the Act and Commission's regulations to encompass incomplete thought crimes and retroactively punish Mr. Benton would be a grave violation of Mr. Benton's Due Process rights.

II. OGC's INVESTIGATION FAILED TO CORROBORATE OR DEVELOP EVIDENCE OF THE ORIGINAL ALLEGATIONS

This matter was initiated based on a montage of cherry-picked clips of conversations in a four-minute online video. Those clips included brief excerpts of one conversation Mr. Benton had with two people who lied about who they were and what they were doing. The individuals with whom Mr. Benton was speaking were agents of a foreign corporation. Presumably, it paid them and paid to publish the video of their conversations to embarrass a Super PAC that supported former President Trump, and it do so just weeks before the 2016 election in order to influence that election.

Based on OGC's Brief, the documents disclosed by OGC, and what OGC did not disclose, it appears that OGC did not use its investigatory powers, or was not successful in using its investigatory powers, to obtain any further information from the makers of the video or the complainants. The Brief says nothing about what occurred in the foreign corporation's

recordings of conversations before or after the excerpts it included in the video, or in conversations between its agents and Mr. Benton that were not recorded.

III. OGC'S BRIEF ABANDONS THE THEORY THAT MR. BENTON UNSUCCESSFULLY *ATTEMPTED* TO SOLICIT A FOREIGN NATIONAL TO MAKE A CONTRIBUTION.

The Factual and Legal Analysis stated that there was reason to believe Mr. Benton solicited a foreign national to make a contribution despite there being no foreign national for Mr. Benton to solicit by relying on the doctrine of criminal "attempt" theories of liability. *See* F&LA at 8-10. Three pages and several dense footnotes of the F&LA were devoted to an examination of criminal cases involving attempt cases. The reason is clear: The foreign agents lied about representing a foreign donor, so there was no foreign national from whom Mr. Benton could solicit a contribution. A legal doctrine was needed that allows a person to be guilty of a violation even if the violation was somehow impossible. The F&LA reached for the idea that one can be convicted for an *attempt* crime even if the crime is factually impossible, as is the case in a police sting operation. *Id.*

But as Mr. Benton argued in his Motion, the Act does not punish unsuccessful *attempted* violations (possible or impossible) and, even in criminal law, an attempt conviction requires that a defendant do more than mere preparation for the prohibited act. *See* Attachment 3 [Benton Motion] at 9-10. Here, the foreign agents recorded Mr. Benton talking about what might be done. The nonprofits to which they discussed making donations for whatever purpose did not exist. This is a far cry from an attempt to do anything.

In response to the arguments in Mr. Benton's Motion, OGC has abandoned its attempt theory of liability. It concedes it is now alleging that "Benton's actions constituted a completed violation of the solicitation prohibition, not an attempted one" and, in a bit of revisionist history considering three pages in the F&LA focusing on attempt crimes and Mr. Benton's request to see the Commission's vote certification, it claims that an attempted violation "is not the violation for which the Commission found reason to believe in these matters." *Id*. at 15.

IV. OGC'S BRIEF ABANDONS ANY THEORY THAT MR. BENTON *ASSISTED* GREAT AMERICA PAC IN THE SOLICITATION OF A FOREIGN NATIONAL CONTRIBUTION

The Factual and Legal Analysis stated that "Commission regulations further prohibit any person from knowingly providing substantial assistance in soliciting, making, accepting, or receiving any such contribution or donation." F&LA at 4. In a footnote supporting this reference, the F&LA cited 11 C.F.R. § 110.20(h) and its Explanation and Justification, explaining that "'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.'" F&LA, n. 10.

The F&LA argued that this "substantial assistance" regulation "explicitly added another intent-based standard on top of the 'knowingly' requirement." *Id*. This regulation says and does

no such thing, but this statement in the F&LA underscores OGC's persistent confusion in this matter between prohibited *actions* and the *intent* requirements applicable to such actions, as discussed in greater depth below. The regulation prohibits providing "substantial assistance" to (or "active participation" with) another person who commits a prohibited act. This separate "assisting" prohibition has its own action requirement (assistance or participation) combined with a required intent element—that the prohibited assistance/participation be done "with an intent to facilitate successful completion of the transaction." This in no way adds, as OGC asserts, "another intent-based standard" to the separate solicitation prohibition's "knowingly" intent requirement.

The F&LA cited facts to support a violation of the "substantial assistance" prohibition—or a conflation of the two different violations (knowingly soliciting a contribution from a foreign national with active participation in the solicitation of a contribution from a foreign national). The F&LA alleged that after the foreign corporation's agents falsely "offer[ed] to contribute $2 million to GAP," a GAP officer "referred them to Benton, who was recorded meeting with the reporters to provide them with a specific 'method of making a contribution[.]"' F&LA at 12. These alleged facts presumably supported OGC's "substantial assistance theory." Similarly, in its Brief, OGC assures the Commission "[t]he Commission is aware of information confirming that Benton made the solicitation with GAP's knowledge and on its behalf," OGC Brief at 2, and "[t]hrough its investigation, the Commission has obtained information confirming Benton's role in soliciting a $2 million contribution from a foreign national on [Great America PAC's] behalf," that Great America PAC asked Benton "to discuss whether he could potentially help them with their proposed contribution," and that Benton was "acting on GAP's behalf and with its knowledge." OGC Brief at 3-4. Curiously, OGC has no citations to evidence for these statements.

In response to the F&LA's reliance on the "substantial assistance" regulation, Mr. Benton argued in his Motion to Rescind RTB Finding that the Court in *Swallow v. FEC* found that another such extra-statutory "aiding and abetting" regulation was unlawful and for the same reasons could not be the basis of Mr. Benton's RTB finding. *See* Motion at 7.

OGC's brief does not identify the secret source of this "information confirming that Mr. Benton made the solicitation with GAP's knowledge and on its behalf." Thus, both Mr. Benton and the commissioners are precluded from assessing its reliability or comparing it with the evidence OGC has been willing to share. Presumably, the information is not in the video or the complaints, otherwise they would have been cited. OGC's reason for relying on secret evidence is unclear. It is a fundamental principle of Due Process that Mr. Benton be confronted with any witnesses and evidence against him, yet OGC has failed to identify the source of this information.

No person, including a respondent, has a broad right to confidentiality regarding the factual information they provide to the FEC in the course of an investigation. The confidentiality provision at 52 U.S.C. § 30109(a)(12)(A) prohibits *the FEC and its personnel* from publishing any notices sent to a respondent, or more broadly identifying a person as the subject of an enforcement action, or the fact that the FEC is conducting an investigation. But nothing in that provision either (A) prohibits the Commission from stating that in the course of its investigation,

"person X informed the Commission that you . . ." or (B) gives OGC a secret political police power to get the Commissioners to punish Americans with no more than its own assurance to the Commission and respondents that it has unspecified information from unspecified sources that the respondent violated the law. Mr. Benton of course knows now that he was under investigation and that a competent investigation would have included OGC speaking to all of the potential witnesses, including the foreign corporation's agents who lied about who they were and what they were doing, as well as GAP personnel.

Admittedly, OGC could not disclose information derived in the course of a conciliation effort because such information cannot be disclosed without the permission of both the Commissioners (not OGC, alone) and the respondent. *See* 52 U.S.C. § 30109(a)(4)(B)(i). If the information on which OGC is relying came from a conciliation effort, it would be just as illegal to use it in a brief without attribution as it would with attribution.

It also could not have come from a completed conciliation agreement. The Act directs the Commission to publish completed conciliation agreements, *id.* § 30109(a)(4)(B)(ii), and the FEC does so routinely. Accordingly, the completed conciliation agreement with GAP (produced by OGC to Mr. Benton, albeit partially redacted) also cannot be the secret source of the alleged information OGC is using against Mr. Benton.

In any event, OGC's muddying of the waters with secret evidence that Mr. Benton was helping GAP get a foreign contribution is all the more odd because OGC expressly disclaims in its Brief that "Benton's actions did not amount to 'helping and assisting' in the making of a foreign national contribution and are not reflective of secondary liability for soliciting a prohibited foreign national contribution; they are instead reflective of primary liability through his direct solicitation of a contribution." OGC Brief at 18 (underscoring added).

One further point in this regard—if OGC is taking a substantively different position with regard to GAP and is hiding that from Mr. Benton via OGC's redactions to the conciliation agreement, that is a serious issue that calls into question OGC's candor to the respondents, both Mr. Benton and GAP, as well as its candor to the Commission. Further, where OGC changes the legal theory on which the RTB finding and investigation was based, it calls into question whether it is still proceeding with the support of the Commission and the authority of the RTB finding, or whether the RTB finding was indeed erroneous as Mr. Benton argued in his Motion. A substantive change at the probable cause briefing stage in the legal theory on which Mr. Benton has been prosecuted is a further affront to his Due Process rights.

V. THE SOLE REMAINING ALLEGED VIOLATION IN OGC'S BRIEF IS THAT MR. BENTON SUCCESSFULLY AND DIRECTLY SOLICITED A FOREIGN NATIONAL TO MAKE A CONTRIBUTION

As OGC scuttled both the "assisting" and "attempting" violation theories in the Factual and Legal Analysist, its Brief's sole theory is that Mr. Benton, in fact, successfully, completely, and by himself, directly solicited a contribution from a foreign national. OGC Brief at 1 (the Commission found reason to believe that Benton knowingly and willfully violated 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g) by knowingly soliciting a contribution from a foreign

national); *id.* at 2 ("The information developed through the investigation confirms that Benton knowingly solicited a contribution from a foreign national."); id. at 5 ("Benton knowingly solicited a contribution from a foreign national"); *id.* at 15 ("Benton's actions constituted a completed violation of the solicitation prohibition, not an attempted one"); *id.* at 18 ("Benton's actions did not amount to 'helping and assisting' in the making of a foreign national contribution and are not reflective of secondary liability for soliciting a prohibited foreign national contribution; they are instead reflective of primary liability through his direct solicitation of a contribution."); *id*. at 19 ("Benton knowingly and willfully violated the Act and Commission regulations by knowingly soliciting a contribution from a foreign national.").

VI. MR. BENTON DID NOT SOLICIT A FOREIGN NATIONAL TO MAKE A CONTRIBUTION

There is no probable cause to believe M. Benton violated the Act because he did not solicit a contribution and, even if he did, he did not solicit a foreign national to make a contribution.

There are only three elements in the Act for the alleged violation and four in the Commission's regulation. The Act simply states that "It shall be unlawful for . . . a person **to solicit** . . . **a contribution or donation** . . . **from a foreign national**." 52 U.S.C. § 30121(a) (emphasis added). To this, the regulation at 11 C.F.R. 110.20(g) only adds a qualifying intent standard, that is, that a person only violates this prohibition if they "knowingly" solicit a contribution from a foreign national.

The *actus reus* of the alleged violation, in both the statute and the regulation, thus comprises only three elements:

- a "solicitation"
- of a contribution or donation
- from a "foreign national."

The *mens rea* of the alleged violation, i.e., the intent requirement or required state of mind, is that these actions were undertaken "knowingly."

A. Mr. Benton Did Not Make a Solicitation

Not every contribution is solicited: the law recognizes that contributions may be unsolicited, and discussion of an unsolicited contribution from a prospective donor—including how an unsolicited contribution could be made—is not a solicitation of that contribution. This is important because the Act and Commission regulations impose requirements on solicitations that may not apply to other communications, requirements that impact every political committee, party, and candidate. So it is important in this matter to be clear about what is and what is not a regulated solicitation, without warping the definition in a way that has unintended and absurd consequences beyond this matter, or which creates new law.

OGC asserts that Mr. Benton solicited a contribution from the foreign corporation's agents, after they already offered to make an unsolicited contribution to the Committee, by merely speaking to them about potential ways they could use their funds. The Commission's regulation implementing the foreign national contribution solicitation ban incorporates by reference the general definition of "solicit" found at 11 C.F.R. § 300.2(m). *See* 11 C.F.R. § 110.20(a)(6). This common definition of solicit is also used for the Commission's disclaimer requirements. Equating, as section 110.20(a)(6) does, the definition of a solicitation for the purpose of the prohibition against soliciting a contribution from a foreign national with the definition of a solicitation for the purpose of the Commission's disclaimer rules means there is only one meaning for the word "solicitation," that is, there is only one class of communications that constitute a solicitation for all purposes of the Act and the Commission's regulation. Accordingly, if the Commission were to re-define the meaning of "solicitation" in this MUR it will have broad implications for compliance that the public will not be aware of.

Section 300.2(m) of the Commission's regulations explains the meaning of the word "solicitation," including illustrative examples of what are, and what are not, solicitations. Absent from the regulation is any warning that merely discussing an unsolicited contribution constitutes a solicitation, as OGC argues. The regulation begins with a straightforward statement that "*to solicit* means to ask, request, or recommend, explicitly or implicitly, that another person make a contribution . . ." It continues, further clarifying that a solicitation is a "clear message asking, requesting, or recommending that another person make a contribution . . ." Everything that follows necessarily illuminates the meaning of the word within this definition.

This definition comports with common sense and common usage. It is well established that this definition is not limited to only express solicitations. A web page on a candidate's website with a "donate" button, or an internal corporate newsletter that provides instructions for employees to make a contribution to the company's PAC necessarily constitute solicitations without expressly asking for them because they implicitly invite the reader to make a contribution. The list of examples included in section 300.2(m) accordingly corroborates that a solicitation is a statement from one person to another that asks them to make a contribution, including sending someone a communication that includes instructions for how to make a contribution, which implicitly asks for a contribution.

But a solicitation cannot include *any* conversation with someone who has already offered to make an unsolicited contribution. If the act of responding to an unsolicited contribution was itself a solicitation of a contribution, there would be no such thing as an unsolicited contribution and every discussion of any contribution would have to be handled as a solicitation. Had Congress wanted disclaimers included in any communication or discussion with a contributor, it could easily have said so—though it would be absurd. Nothing in the Commission's regulation suggests such a surreptitious trap for the unwary.

Indeed, the Commission has routinely acknowledged the possibility and propriety of, for example, separate segregated funds accepting *unsolicited* contributions. *See* FEC Corporation and Labor Organization Campaign Guide at 37 ("An SSF may accept an unsolicited contribution that is otherwise lawful[.]"); *compare* 11 C.F.R. § 114.5(g)(1) (an SSF may only solicit contributions from its restricted class) *with id.*, § 114.5(j) (an SSF "may accept contributions

from persons otherwise permitted by law to make contributions"); *Americans in Contact PAC*, First General Counsel's Report at 5, MUR 6746 ("An SSF may accept an unsolicited contribution that is otherwise lawful[.]"). The Commission cannot publish unequivocal guidance stating committees can lawfully accept unsolicited contributions but then punish people for discussing an unsolicited contribution with the contributor, including informing the contributor how they can make their unsolicited contribution.

Therefore, a conversation with a prospective donor who has offered an unsolicited contribution cannot be a solicitation under the existing text of the Act and Commission regulations.

There is no allegation here that Mr. Benton approached the foreign corporation's agents and solicited a contribution, that is, that he asked, requested, or recommended that the fictitious donor they lied about representing make a contribution to the Committee. Rather, the two agents made the approach, pretending to be agents of a foreign national that wanted to make a $2 million contribution to the Committee. *See* F&LA at 2. By offering to make the contribution, unsolicited, there was no contribution for Mr. Benton to solicit and merely discussing their unsolicited contribution does not constitute a solicitation.

In its Brief, OGC pedantically and repetitively points to examples in the regulation, relying on isolated text taken out of context and applied in a way that defies plain meaning and common usage. *See* OGC Brief at 8-11 ("Benton's words are analogous to the Commission's examples of statements that constitute a solicitation. . . . As in the Commission's example . . . . Benton's recorded statements . . . parallel Commission examples. . . . The list of examples in the regulation explicitly includes . . .[Benton's Motion] ignores several of the examples of "solicit" that the Commission provided"). The actual examples OGC cites are comically dissimilar to the facts in this case, such as a candidate approaching a person (winking and nudging their elbow?) with the line: "I am not permitted to ask for contributions, but unsolicited contributions will be accepted at the following address." *Id.* at 8; *id.* at 10 (repeating the same example). Or discussing "The money you *will* help us raise . . .," *id.* at 9 (italics added), which has no bearing on the unsolicited contribution the foreign agents were offering.

Squinting at the text of the regulation with one eye closed, OGC perceives that Mr. Benton solicited a contribution because he discussed how the agents unsolicited contribution could be made. *See* OGC Brief at 9-10 ("providing specific instructions" or "encouragement" in response to an unsolicited contribution is "plainly" a solicitation); *id*. at 14 (Benton "made the solicitation by recommending a method for the reporters' client to make a contribution to GAP"). Despite having nearly five years to research it, OGC has failed to identify a single MUR, court case, or advisory opinion in the Act's 50-year history espousing this strained interpretation. To be clear, OGC is contending that any individual approached with an <u>unsolicited</u> contribution of any size may be committing a federal felony if they say the contribution is a good idea, discusses how it might be used, or explain how exactly the donor can make the contribution. If the Commission adopts OGC's radical position, the Commission owes it to the public to immediately publish an alert about its new view of the words that can and cannot be lawfully spoken when discussing an unsolicited contribution, perhaps including a script it recommends.

Indeed, rather than taking a creatively aggressive view of its regulation, in a recently-closed MUR involving a Democratic party operative, the Commission instead demonstrated a more restrained view of solicitation. In MUR 7271 (Democratic National Committee, Alexandra Chalupa, *et al*.), a Democratic party operative emailed a foreign government to suggest it use its head of state's press conference to attack then-candidate Trump and suggested how to do so, also orchestrating an effort to have ABC News ask a question that she prepared the foreign official to answer for this purpose. A majority of the Commission rejected the Office of General Counsel's theory that this conduct constituted a solicitation of a foreign national. *See* Statement of Reasons of Commissioner Ellen Weintraub, MUR 7271 (DNC, Chalupa, *et al*.) at 3-4 (*inter alia*, "the email contains no solicitation"); Statement of Reasons of Vice Chair Allen Dickerson and Commissioners Sean J. Cooksey And James E. "Trey" Trainor III, MUR 7271 (*inter alia*, "the available evidence did not establish that Chalupa made a request to the official"). In that case, the respondent actually initiated a request to an actual foreign national to use its resources to influence the election—and yet the Commission saw no solicitation.

Even under OGC's erroneous view of the law, an inconvenient fact is fatal to its 'instruction-as-solicitation-theory': the video depicts a discussion about what might be done, not an instruction of what to do at that time. The video does not show an instruction, equivalent to a committee address or a "donate" button, where a contribution could be made. Instead, the brief clip of part of a conversation involves discussions of possible payments and the involvement of nonprofit entities that did not exist.

Here, Benton was allegedly talking to people pretending to be agents of a non-existent foreign national who lied about offering to make an unsolicited contribution to a PAC so their foreign corporate employer could make a video embarrassing the PAC. That PAC supported a presidential candidate and the foreign corporation published its video online shortly before the election. With the scheme thus designed and executed, there was nothing for Benton to solicit. To the extent Benton and the impostors discussed potential future actions, it was not equivalent to a solicitation communication that provides a means to make a contribution. His conversation therefore did not constitute a solicitation as defined in the law, as commonly understood, and as the Commission has interpreted that term.

B. There Was No Foreign National for Mr. Benton to Solicit, So Benton Could Not Have Solicited a Foreign National

As already shown, OGC has dropped the pretense of an attempted solicitation theory after considering Mr. Benton's Motion and now instead limits the FEC's prosecution theory to alleging Mr. Benton made a *direct* and *completed* solicitation of a contribution *from a fictitious foreign national*. Consequently, even if the Commission were to determine that replying to an unsolicited contribution with instructions on how to make it constitutes a solicitation, which is ridiculous, OGC is stuck with the inconvenient fact that there was no foreign national for Mr. Benton to solicit. The undisputed fact in this matter is that the foreign corporation's agents who offered the unsolicited contribution to Mr. Benton were lying about representing a nonexistent Chinese donor.

OGC's solution is to propose retroactively changing the prohibition from one that bars a certain objective action (asking a foreign national for money, even if it is a product of recklessness) into a thought crime (*thinking* you are asking a foreign national for money, whether you actually are or aren't). The F&LA even explains that a person could be convicted under this theory for soliciting foreign nationals even if they solicited Americans if the solicitor *thought* they were foreign nationals. *See* F&LA at 5-6. (And mind you, as discussed above, this would not be an *attempted* solicitation of a foreign national, but an actual solicitation of a foreign national.)

OGC does not claim that the plain text of the Act supports this theory. The device OGC urges the Commission to use to change the law is the "knowingly" *mens rea* requirement the Commission added to the text of the Act in its regulation. The Act contains no intent element, instead simply prohibiting soliciting contributions from foreign nationals, implying strict liability if read literally. The Commission's regulation instead clarifies the state of mind that one must have when soliciting a foreign national in order to violate the Act. Specifically, knowing the person solicited is a foreign national, soliciting a foreign national after having been "aware of facts that would lead a reasonable person to conclude that there is a substantial probability" the solicitee was a foreign national, and soliciting a foreign national after having been "aware of facts that would lead a reasonable person to" ask if they were a foreign national, but failing to do so. 11 CFR § 110.20(a)(4).

OGC contends that this intent element limiting the scope of liability that a literal reading of the statute would otherwise impose instead transforms the nature and reach of the Act's prohibition. Instead of liability for soliciting a contribution from someone who is a foreign national (whether the solicitor knew or should have known that) OGC asserts that the Commissions regulation adding the "knowing" element changed the Act's prohibition to create a thought crime. That is, *thinking* one is soliciting a foreign national even if one is not.

That of course is not what the Act or regulation says, and it is not what the regulation's Explanation and Justification describes as the purpose of the regulation. It is a striking expansion of the prohibition beyond what the Act prohibits, one for which there is no public notice, and it would be a silly rule for the Commission to try to enforce without psychic powers. After nearly five years to think about this case, OGC has not found a single example of the Commission viewing the prohibition in this way, or indeed any agency anywhere asserting such a view of a similar law.

C. Punishment of Mr. Benton for His Non-Solicitation of a Person Who Doesn't Exist Would Violate Due Process and Constitute an Unlawful Rulemaking

There is no provision of the Act or the Commission's regulations that prohibits thinking one is soliciting a foreign national when one is not in fact soliciting a foreign national. A creative expansion of the Act's prohibitions to reach a thought crime of that nature without a statutory foundation is not within the power of the Commission, even if done through a formal rulemaking. A fortiori, it is not something the Commission can do through a MUR. And retroactively punishing Mr. Benton for this new MUR-made rule would be a striking violation of his Due Process rights. *See* Attachment 3 [Benton Motion] at 6-11.

VII. CONCLUSION

This was a simple case in some respects. The Commission was presented with irrefutable evidence of a foreign corporation spending to influence a U.S. Presidential election, an elaborate scheme that involved deception and secret recordings of an American committee supporting one candidate, and a video published just before the election. Apparently, given the authority to investigate, OGC did not even question the foreign corporation or its agents about the purpose and extent of their activities. Indeed, instead of pursuing the actual foreign national who actually spent substantial funds to influence a U.S. election, or dismissing this matter for fear of encouraging foreign nationals to influence U.S. elections, OGC endorsed and enabled the foreign national's election-influencing operation by using its enforcement power to further harass the Americans that the foreign national corporation targeted. If this case is not conclusively shut down, the Commission will be declaring open season for foreign nationals to hunt American candidates, officials, and committees with similar schemes hoping for similar treatment by the American government.

Further, OGC has pursued the Americans targeted by the foreign national's agents through a peculiar theory that changes an objective prohibition against asking a foreign national to make a contribution into an unprecedented thought-crime of *thinking* that one is asking a foreign national for a contribution. As plainly stated in the F&LA, the Commission could use this new theory, based on the Commission's regulation implementing the Act, to punish Americans for soliciting contributions from Americans—or people who don't exist, as in this case. The Act does not support this bizarre distortion of its provisions, changing the law in this manner and retroactively punishing Mr. Benton would violate his Due Process rights, and no Court would uphold it.

OGC's procedural misfeasance in this matter, summarized above, compound the errors of law in its Brief and the insufficient evidence before the Commission. The impending expiration of the statute of limitations further exacerbates this matter's deficiencies because the Commission should not be rushed into hasty conclusions about redefining the meaning of solicitations for all purposes in the Act with wide-ranging implications for every candidate and committee without adequate deliberation. *Citizens for Resp. & Ethics in Washington v. Fed. Election Comm'n*, 892 F.3d 434, 438 (D.C. Cir. 2018) (upholding discretionary dismissal based on, inter alia, "statute of limitations had expired or was about to . . . and that any action against the association would raise 'novel legal issues that the Commission had no . . . time to decide.'"). Indeed, the separation of powers and the corollary doctrine in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), do not permit the Commission to invent new violations unsupported by the Act, and the Commission cannot promulgate new rules without the procedures and safeguards of a formal rulemaking.

For all the reasons stated in this Brief and Mr. Benton's attached Motion and Objection, there is no probable cause to believe that Mr. Benton violated the Act and the Commission should close this matter forthwith.

Respectfully submitted,

David A. Warrington
DHILLON LAW GROUP, INC.

Michael A. Columbo
DHILLON LAW GROUP, INC.

Counsel for Mr. Benton

Attachment 1

KUTAKROCK

Kutak Rock LLP
901 East Byrd Street, Suite 1000, Richmond, VA 23219-4071

FACSIMILE TRANSMISSION

DATE: March 24, 2021

To:

NAME:	FAX NO.:	PHONE NO.:
FEC	202-219-3923	

If you experience any problems in receiving these pages, please call 202-828-2437 as soon as possible. Thank you.

FROM: David A. Warrington **EMPL NO.:** 6052

SECRETARY: Marcia V. Plummer

RE: MUR 7165 & 7196

CLIENT NUMBER:	
NUMBER OF PAGES, INCLUDING COVER PAGE:	CONFIRM: No

MESSAGE:

Message

CONFIDENTIAL FACSIMILE TRANSMISSION

Operator: _____

FEDERAL ELECTION COMMISSION
Washington, DC 20463

Statement of Designation of Counsel

Provide one form for each Respondent/Witness
FAX 202-219-3923

CASE: MURs 7165 + 7196

Name of Counsel: DAVID A. WARRINGTON

Firm: KUTAK ROCK LLP

Address: 901 EAST BYRD STREET, SUITE 1000

RICHMOND, VA 23219-4071

Telephone: (202) 828-2437 **Fax:** (____) _____

The above named individual and/or firm is hereby designated as my counsel and is authorized to receive any notifications and other communications from the Commission and to act on my behalf before the Commission.

3-19-21	[redacted]	Individual
Date	**Signature**	**Title**

RESPONDENT: JESSE BENTON
(Committee Name/Company Name/Individual Named In Notification Letter)

MAILING ADDRESS:

LOUISVILLE, KY 40241

Telephone:(H): **(W):** _____

This form relates to a Election Commission matter that is subject to the confidentiality provisions of 52 U.S.C. § 30109(a)(12)(A). This section prohibits making public any notification or investigation conducted by the Federal Election Commission without the express written consent of the person receiving the notification or the person with respect to whom the investigation is made.

* * * COMMUNICATION RESULT REPORT (MAR. 24. 2021 4:17PM) * * *

FAX HEADER: KUTAK ROCK LLP

TRANSMITTED/STORED : MAR. 24. 2021 4:15PM

FILE MODE	OPTION	ADDRESS	RESULT	PAGE
140 MEMORY TX		12022193923	OK	2/2

REASON FOR ERROR
E-1) HANG UP OR LINE FAIL
E-2) BUSY
E-3) NO ANSWER
E-4) NO FACSIMILE CONNECTION

KUTAKROCK

Kutak Rock LLP
901 East Byrd Street, Suite 1000, Richmond, VA 23219-4071

FACSIMILE TRANSMISSION

DATE: March 24, 2021

To:

NAME:	FAX NO.:	PHONE NO.:
FEC	202-219-3923	

If you experience any problems in receiving these pages, please call 202-828-2437 as soon as possible. Thank you.

FROM: David A. Warrington **EMPL NO.:** 6052

SECRETARY: Marcia V. Plummer

RE: MUR 7165 & 7196

CLIENT NUMBER: 9-4	
NUMBER OF PAGES, INCLUDING COVER PAGE:	CONFIRM: No

MESSAGE:

Message

Operator: MAR 24 2021

Attachment 2

Michael Columbo (Dhillon Law)

From: David Warrington (Dhillon Law)
Sent: Tuesday, July 20, 2021 1:25 PM
To: SGhosh@fec.gov
Cc: Michael Columbo (Dhillon Law)
Subject: MURs 7165 and 7196
Attachments: bentondesignation_3-19-21.pdf; 1-1 _20210324_16483028530.pdf

Dear Mr. Ghosh,

This firm represents Mr. Jesse Benton. I understand that you have reached out to him directly about a time-sensitive matter. Please direct any correspondence to my attention.

On March 24, 2021 I faxed to the Commission the Designation of Counsel form signed by Mr. Benton in these matters and until today's email I have received no notices from the Commission. Attached are copies of the fax and the fax confirmation of that transmission.

Please note, I changed firms last month and my new firm contact is below—I am resident in the Alexandria, Virginia office.

I have copied my colleague Mike Columbo who is also working on this matter. Please include him on any correspondence.

Please confirm receipt of this email.

Thank you,

David A. Warrington | Partner | DHILLON LAW GROUP

2000 Duke Street, Suite 300
Alexandria, VA 22314
Direct: 703.328.5369

SAN FRANCISCO ADDRESS:
177 Post Street, Suite 700
San Francisco, California 94108
Phone: 415.433.1700| Fax: 415.520.6593
*Admitted Only in Virginia and Washington, D.C.

Attachment 3

FEDERAL ELECTION COMMISSION

Jesse Benton,	)	MURs 7165 & 7196
Respondent	)	
	)	

JESSIE BENTON'S MOTION TO RECONSIDER AND RESCIND REASON TO BELIEVE FINDING, QUASH SUBPOENA, AND CLOSE THE FILE

Through undersigned counsel, Respondent Jesse Benton respectfully requests that the Commission reconsider and rescind its reason to believe finding in this matter, quash the subpoena issued to him, and close the file in this matter. As a matter of law, there is no reason to believe ("RTB") Mr. Benton solicited a foreign national contribution, and it would not be a prudent use of the Commission's resources to pursue this matter further.

SUMMARY

There are two erroneous legal conclusions in the Factual and Legal Analysis ("F&LA") that led to the Commission's RTB finding, which was based on a wholly fictitious scenario that does not support any violation of the Federal Election Campaign Act ("Act").

The first legal error is that, for the first time in the Commission's 45-year history, the Commission asserts that a person's alleged attempted solicitation of a "fictitious foreigner," which was set up as a stunt by a media organization, constitutes a violation of Act. This assertion has no basis in the text of the Act or in Commission regulations.

The second erroneous legal conclusion is that a person like Benton, to whom a committee introduced an *unsolicited* donor already offering to make a contribution, solicits that donor by merely talking to them further about their *unsolicited* donation to the committee. Both of these legal propositions are essential to the Commission's RTB finding against Mr. Benton and both conclusions are wrong as a matter of law.

In addition to the erroneous legal foundation upon which the RTB is premised, it also has no factual basis. There was no foreign national for Mr. Benton to solicit. As the Commission concedes, the entire stunt was premised on a wholly fictitious foreigner and scenario. Thus any purported violation of the Act was factually impossible.

Given the factual impossibility of an actual violation, the Commission cannot now invent new violations that Congress did not include in the Act, such as a violation for an unsuccessful, indeed impossible, attempted solicitation of a foreign national contribution. Nor can the Commission adopt a new and expanded meaning of what it means to "solicit" that encompasses unsolicited contributions.

Even when the Commission has the power to create new rules, the Act prohibits using an enforcement matter to do so. And Due Process forbids the Commission from using an enforcement matter to retroactively punish Mr. Benton for violating new rules it creates in that enforcement matter.

Further, if the Commission is not inclined to conclusively determine that there is no reason to believe a violation of the Act has occurred, it should dismiss this matter in an exercise of its prosecutorial discretion pursuant to *Heckler v. Chaney*, 470 US 821 (1985).

Pursuit of an investigation into an allegedly attempted but impossible violation that did not occur involving a contributor that did not exist under new violations of law not found in the Act—all based on an event orchestrated by a foreign national entity—cannot be a prudent use of the Commission's resources in light of the Commission's backlog of hundreds of enforcement cases involving actual potential violations. Moreover, as explained below, pursuit of this matter into District Court could risk the loss of parts of the Commission's foreign national prohibition regulation that are not supported by the Act. Finally, the Commission has already obtained a settlement with the Committee to whom the fake unsolicited contribution was offered by the fictitious foreign national and extracted a penalty from that Committee. There is little to no apparent marginal benefit to pursuing Mr. Benton separately given the potential costs listed above.

The Commission should, therefore, reconsider and rescind its RTB finding, quash the subpoena, and close the file in this matter.

ANALYSIS

I. The Commission Does Not Have Authority to Punish "Attempted" Violations Under Existing Laws and Regulations

In this matter, two agents of the *Telegraph*, a foreign corporation,[1] "pos[ed] as representatives of a Chinese national offering to contribute $2 million to GAP." F&LA at 2. There is no dispute that these foreign agents approached a co-Chair of Great America PAC ("Committee") with their offer, unsolicited, as part of a sting operation in which they recorded their efforts for the purpose of causing embarrassment to the Committee immediately before the 2016 election. And there is no dispute that these foreign agents were lying about the existence of a foreign national donor. *Id.* at 1.

The FLA states that the Commission found reason to believe that, *after* the agents' subsequent introduction to Mr. Benton, he knowingly and willfully solicited a foreign national by speaking with these foreign agents about their unsolicited phony contribution. Although a solicitation is normally a simple matter to demonstrate, the lengthy F&LA comprises a tortuous

[1] The F&LA refers to the Telegraph's agents as journalists but there is no foundation for that characterization. The scandal-plagued Telegraph is not the conservative press entity it was years ago. See https://www.opendemocracy.net/en/opendemocracyuk/why-i-have-resigned-from-telegraph/. It is a foreign corporation, certainly, and it clearly creates online content. But participation in an online video featuring cherry-picked context-less secret recordings, standing alone, does not make one a "journalist." There is no Telegraph news article cited in the F&LA and no byline identifying the Telegraph employees who were in the video. The foreign company's choice to de-publish the video also raises questions about its reliability. That persons undertook actions at their foreign employer's expense to influence the American public and election through a published communication, now disavowed, raises additional questions, including substantial issues under the Foreign Agents Registration Act.

legal argument as to how Mr. Benton can be punished for soliciting a foreign national that didn't exist and soliciting a fictitious contribution that had already been offered.

The first solution in the F&LA was to create a new rule prohibiting attempted violations. *See* F&LA at 9-10, nn. 23, 27. Congress, however, did not authorize the Commission to punish attempted or intended, but unsuccessful or incomplete, violations of the Act. Congress certainly knew it could use the word "attempt" because it used it five times in the Act: once in reference to a tax code provision the Act was not meant to affect (52 U.S.C. § 30104(f)(7)), and four times in reference to the Commission's duties to attempt conciliation. *Id*., § 30109(4).

Rather, the Act empowers the Commission to investigate a complaint if there is reason to believe one of two things: either that a person "*has committed*, or *is about to commit*, a violation of the Act." *See* 52 U.S.C. § 30109(a)(2) (italics added). Following a finding of probable cause, the Commission is accordingly required to attempt "to *correct* or *prevent* such violation." *See id.*, § 30109(a)(2) (italics added). If the Commission cannot "correct" a past violation or "prevent" a future violation, it may file suit to seek an order for civil penalties for a past violation or an injunction to stop a future violation. *See id.*, § 30109(a)(6). There is no gray area in-between committing and not committing a past violation that the Commission may seek to correct. Congress never empowered the Commission to punish a person for a violation they haven't committed. But that is precisely the claimed authority in the F&LA under the rubric of a strained "attempted violation" theory.

Section 30121(a)(2), the Act's provision that the F&LA contends Mr. Benton violated, does not include the word "attempt" or any similar notion. It succinctly states that it is unlawful for "a person to solicit, accept, or receive a contribution or donation" from a foreign national. The F&LA instead depends on the Commission's regulation at 11 C.F.R. § 110.20 implementing this provision. That regulation goes far beyond Congress's prohibition in section 30121 and is therefore vulnerable if litigated, but even it does not come close to supporting the imaginatively expansive interpretation asserted in the F&LA.

Section 110.20(g) states that "[n]o person shall knowingly solicit, accept, or receive from a foreign national any contribution or donation." One way the regulation differs from the Act is its addition of the word "knowingly." The only plausible way to interpret the regulation's qualification of "solicit," "accept," or "receive" with the added "knowingly" adverb is that the regulation clarifies, by narrowing, the range of behavior constituting a violation from what it might otherwise be based on the plain the text of the Act. For example, the regulation makes it clear that the rule is not one of strict liability, that is, it certainly excludes a person who had no way of knowing that a person they solicited was a foreign national.

The regulation further defines its supplemental "knowingly" intent element to include, in addition to *actual knowledge* a person is a foreign national, a *negligent* solicitation of a foreign national as well as a duty to investigate potentially foreign sources. *See* 110.20(a)(4). But to violate regulation 110.20, a person must still solicit a person who is actually a foreign national (negligently or with actual knowledge). There is no other reasonable way to read the text of the statute or the regulation. In any event, the regulation's limiting intent requirement certainly does

not support the F&LA's contention that it conceals a massive expansion of the power of the Commission to punish incomplete, even impossible, non-violations based on a person's intent alone.

Accordingly, the unambiguous plain letter of the Act and Commission's regulation establish that, absent the involvement of an actual foreign national whom a person indeed solicited (deliberately or negligently), there is no reason to believe that a person violates section 30121(a)(2) or Commission regulation 110.20(g), under an "attempted solicitation" theory, by soliciting a contribution from people pretending to be agents of a non-existent foreign person for a click-bait video.[2]

II. Discussing an Unsolicited Contribution Offer is Not a Solicitation

Despite finding RTB that Mr. Benton solicited a foreign national, the F&LA does not identify a solicitation. Rather, the F&LA asserts that Mr. Benton solicited a contribution from the Telegraph's agents after they already offered to make an unsolicited contribution to the Committee by merely speaking to them about the contribution they offered.

The Commission's regulation implementing the foreign national contribution ban incorporates by reference the definition of "solicit" found at 11 C.F.R. § 300.2(m). *See* 11 C.F.R. § 110.20(a)(6). This common definition of solicit is also used for the Commission's disclaimer requirements. Equating, as section 110.20(a)(6) does, the concept of a solicitation for the purpose of the foreign national prohibitions with the concept of a solicitation for the purpose of the Commission's disclaimer rules means there is only one meaning for the word "solicitation," that is, there is only one class of communications that constitute a solicitation for all purposes of the Act. Accordingly, any new rule re-defining solicitations created by this MUR will affect the rest of the Commission's rules on solicitations with implications that are not discussed in the F&LA.

Section 300.2(m) is a remarkable regulation that thoroughly explains the meaning of the word "solicitation," and it includes illustrative examples of what are, and what are not, solicitations. The regulation begins with a straightforward statement that "*to solicit* means to ask, request, or recommend, explicitly or implicitly, that another person make a contribution . . ." It continues, further clarifying that a solicitation is a "clear message asking, requesting, or recommending that another person make a contribution . . ." Everything that follows necessarily illuminates the meaning of the word within this definition. The list of examples included in section 300.2(m) similarly corroborate that a solicitation is a statement from one person to another that asks them to make a contribution, including sending someone a communication that includes instructions for how to make a contribution, which implicitly asks for a contribution.

[2] We note that the actual RTB finding recited in the Commission's notification letter to Mr. Benton omits that the solicitation violation was an "attempted" violation (or an "intended" violation, as suggested by the language of the F&LA, which ominously sounds like a "thoughtcrime"). *See* George Orwell, 1984 (Harcourt 2003) (1949). Accordingly, the violation described in the F&LA does match the Commission's RTB finding.

But a solicitation cannot include *any* conversation with someone who has already offered to make a contribution. If the act of responding to an unsolicited contribution was itself a solicitation of a contribution, there would be no such thing as an unsolicited contribution and every discussion of any contribution would have to be handled as a solicitation. Had Congress wanted disclaimers included in any communication or discussion with a contributor, it could easily have said so—though it would be absurd.

Instead, the Commission has routinely acknowledged the possibility and propriety of, for example, separate segregated funds accepting *unsolicited* contributions. *See* FEC Corporation and Labor Organization Campaign Guide at 37 ("An SSF may accept an unsolicited contribution that is otherwise lawful[.]"); *compare* 11 C.F.R. § 114.5(g)(1) (an SSF may only solicit contributions from its restricted class) *with id.*, § 114.5(j) (an SSF "may accept contributions from persons otherwise permitted by law to make contributions"); *Americans in Contact PAC*, First General Counsel's Report at 5, MUR 6746 ("An SSF may accept an unsolicited contribution that is otherwise lawful[.]"). The Commission cannot publish unequivocal guidance stating committees can lawfully accept unsolicited contributions but then punish people for discussing an unsolicited contribution with the contributor, including informing the contributor where their unsolicited contribution can be sent. Therefore, a conversation with a donor who has offered an unsolicited contribution cannot be a solicitation under the existing text of the Act and Commission regulations.

There is no factual assertion in the F&LA indicating that Mr. Benton solicited any contribution, that is, that he asked, requested, or recommended that the fictitious donor make a contribution to the Committee. In this matter, the F&LA states that two *Telegraph* agents approached the committee pretending to be agents of a foreign national and offering to make a $2 million contribution to the Committee, which they recorded for a short-lived click-bait video they have since deleted. *See* F&LA at 2. By offering to make the contribution, unsolicited, there was no contribution for Mr. Benton to solicit.

Indeed, in a recently-closed MUR, the Commission instead demonstrated that it does not expansively interpret the concept of a solicitation. In MUR 7271 (Democratic National Committee, Alexandra Chalupa, *et al*.), a Democratic party operative emailed a foreign government to suggest it use its head of state's press conference to attack then-candidate Trump and suggested how to do so, orchestrating an effort to have ABC News ask a question that she prepared the foreign official to answer for this purpose. A majority of the Commission rejected the Office of General Counsel's theory that this constituted a solicitation of a foreign national. *See* Statement of Reasons of Commissioner Ellen Weintraub, MUR 7271 (DNC, Chalupa, *et al*.) at 3-4 (*inter alia*, "the email contains no solicitation"); Statement of Reasons of Vice Chair Allen Dickerson and Commissioners Sean J. Cooksey And James E. "Trey" Trainor III, MUR 7271 (*inter alia*, "the available evidence did not establish that Chalupa made a request to the official"). Here, Benton was allegedly introduced to phony agents of a non-existent foreign national who, unsolicited, lied about offering to make a contribution to the committee so their foreign employer could publish a video of clips of the conversation shortly before the election. There was nothing

for Benton to solicit at that point and his conversation did not constitute a solicitation as the Commission has interpreted that term.

An announcement in this MUR that discussing an unsolicited contribution is itself a solicitation would constitute the making of a new rule beyond that which is in the Act and Commission regulations, and a departure from the Commission's interpretation of what constitutes a solicitation.

III. The Factual and Legal Analysis Impermissibly Creates New Law Beyond the Provisions of the Act

To find RTB that Mr. Benton solicited a foreign national, the F&LA had to overcome two obstacles: First, Section 30121 requires a foreign national to be solicited but there was no foreign national for Mr. Benton to solicit; Second, the Telegraph's agents approached the Committee, unsolicited, offering to make a contribution, so there was no solicitation for Mr. Benton to make. The F&LA's solution to both of these challenges is to create two new extra-statutory rules: a rule that the Commission has the power to punish attempted violations of the Act and a rule that a solicitation includes discussing an already-offered unsolicited contribution.

Courts have repeatedly admonished the Commission for straying from its statutory mandate and yet the F&LA attempts to dramatically expand the Commission's power after failing to find *any* support in the Act for its attempted violation theory. In bold rhetorical Jiu Jitsu, the F&LA justifies its creation of a new "attempt" violation by citing the plain absence of any text in the Act supporting an attempt violation along with the obvious corollary statements that no prior Commission has "addressed the issue," the courts are silent on it, and there is no precedent on point. *See* F&LA at 4. These were all unmistakable signs that there is no such violation—not an unbounded license for the Commission to empower itself to use a MUR to create new law and use it to retroactively inflict punishment.

Where, as here, the Act's provisions are unambiguous, "[t]he Commission, as an independent agency created by Congress for the sole purpose of enforcing FECA ha[s] no authority to write a regulation that [goes] beyond the Act itself." *Swallow v. FEC*, 304 F.Supp.3d 1113, 1115 (D.Utah 2018). No matter how good an idea it may or may not be to add a new kind of violation to the Act, "such expansion may happen only through an Act of Congress, pursuant to Article I of the United States Constitution. Such power does not exist in an independent agency comprised of six unelected commissioners." *Id*. at 1116.

The claimed existence of a secret "attempt" violation in this matter that nobody has noticed since the Commission's creation is similar to the Commission's unsuccessful contentions in *Swallow*. In that case, the rule the Commission created to prohibit aiding and abetting (i.e., assisting) a violation of the Act's prohibition against the making of a contribution in the name of another was based on the Commission's expansive re-interpretation of one word, "make." The Court flatly rejected the Commission's reinterpretation as "illogical." *Id.* at 1117. What the Commission cannot do by promulgating a regulation, it surely cannot do in a MUR.

The *Swallow* case is also relevant to the F&LA's counter-factual insistence that Mr. Benton solicited a contribution. The plain facts in the F&LA state that the Telegraph's agents sought to entrap and record *the Committee* accepting their offer of an unsolicited foreign contribution, and that they were then introduced to Mr. Benton to discuss the making of the contribution. As in *Swallow*, the Commission in this matter is attempting to make unlawful Mr. Benton's alleged assistance in the commission of an alleged violation by another principal (the Committee), albeit a fabricated extra-statutory "attempted" violation that doesn't exist and was impossible to begin with.

The Court in Swallow found that "the statute is unambiguous" so "the prohibition under the Act" applies to the principal who commits the violation, "not a person whose role is limited to helping or assisting the" principal. "Again, the law clearly focuses on principals, not the secondary actors who . . . only perform a supporting role. *Id.* "[T]he government cannot infer secondary liability when the statute in question is silent on that subject. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994); *see also Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685 –89 (7th Cir. 2008) (en banc) ("[S]tatutory silence on the subject of secondary liability means there is none."), *cert. denied sub nom. Boim v. Salah*, 558 U.S. 981, 130 S.Ct. 458, 175 L.Ed.2d 324 (2009).[3]

The Commission cannot use this MUR, and the novel "attempted" violation theory, to resurrect its unlawful practice of imposing secondary liability.

The F&LA's justification for the Commission's power to create new rules is deeply flawed. The F&LA: (a) inverts a basic principle of administrative law by assuming that the FEC has unfettered power to expand its own authority unless Congress or the Courts stand in its way; (b) finds "plain meaning" for the desired authority in the Act's utter omission of the proposition the F&LA is trying to prove; (c) claims license to legislate in furtherance of the spirit of the Act; and (d) claims power through selective clippings of provisions of the Act not at issue here, in addition to inappropriate references to criminal law. The F&LA thus states: "In the absence of any precedent squarely on point, the Commission interprets the Act and forms a conclusion based on the plain meaning of section 30121(a)(2), the policy behind the longstanding prohibition on foreign national involvement in elections, the act's parallel restriction on soliciting soft money, and the interpretation of related federal anti-corruption statutes." There is no authority cited to support this proposition and each element withers under the lightest scrutiny.

As explained above, the Commission has no authority to deviate from or add to the plain meaning of the statute it is charged with implementing. There is no ambiguity in the meaning of

[3] The F&LA cites a regulatory provision at 11 C.F.R. § 110.20(h) that prohibits knowingly providing "substantial assistance in the solicitation, making, acceptance, or receipt" of a prohibited foreign national contribution, a prohibition not found in the Act, but the RTB finding did not state that Mr. Benton violated this regulation. This provision is certainly liable to being struck, as the similar provision in the Commission's straw donor regulation was eliminated in *Swallow* on the same grounds.

section 30121(a)(2), the plain meaning of which is summarized above. The absence of a power an agency desires in its statute is not "ambiguity." To illustrate the F&LA's circular reasoning: an "absence of precedent" punishing people for a rule that did not exist until it was fabricated in the F&LA at issue is not a statutory ambiguity that permits the Commission to fabricate that rule in the F&LA at issue.

The F&LA—in its "plain meaning" analysis—goes off the rails with this sentence:

> Thus, by implication, the person making a solicitation does not need to know for certain that the target of a solicitation . . . is a foreign national. Rather, it is sufficient for the solicitor to be aware of facts that would lead to a reasonable conclusion that the potential contributor is a foreign national, even if that conclusion is ultimately wrong because, e.g., the person being solicited is a U.S. national, or is fictitious.

F&LA at 5-6. In sum, the Commission is asserting that it can investigate and punish a person for violating the federal prohibition against the solicitation of contributions from foreign nationals to a state or federal committee *even if the person they solicit is in fact an American* —and, by extension, the Department of Justice can presumably imprison them for knowingly and willfully soliciting an American they erroneously thought was a foreign national.

The linchpin of the F&LA's theory is that the Commission's addition of the word "knowing" to the statutory prohibition makes unlawful the solicitation of Americans if a reasonable person would have incorrectly thought they were not Americans. As discussed above, the "knowing" qualification *narrows* the reach of the foreign national prohibition to the solicitation of an actual foreign national where there was actual knowledge or reason to know the person was a foreign national. The F&LA's theory appears to be that a *knowing* solicitation of a foreign national includes a person *not knowing* they are *not* soliciting a foreign national.

Having concluded the "plain meaning" of section 30121 prohibits the solicitation of contributions from Americans or fictitious people under some circumstances, the F&LA goes on to examine the history of the foreign national prohibition. But if the statute is unambiguous, why appeal to legislative history? The F&LA thus attempts to explain why it believes a statute meant to "prevent foreign national funds from influencing elections" applies with full force to the solicitation of contributions from Americans and people who don't exist.

The next section of the F&LA refers to the Bipartisan Campaign Reform Act's application of the foreign national contribution ban to soft money contributions. There is no analysis in this section before a conclusory *non sequitur*: "In light of Congress's decision to broaden the scope of section 30121 in BCRA, Section 30121 forecloses any solicitation of foreign money into the electoral process, even if such a solicitation could not have succeeded because of a circumstance unknown to the person soliciting the contribution or donation." There is nothing about the application of Section 30121 to soft money contributions that causes Section 30121 to apply when a foreign national is not being solicited, either because the solicited person is not a foreign national or doesn't exist.

The F&LA then begins a selective and self-serving foray into criminal law. The American legal system is divided into criminal and civil laws, which courts have interpreted into wholly different bodies of precedent and norms governed by different procedures and handled by differently specialized attorneys. The Commission has "exclusive jurisdiction with respect to the civil enforcement of" the Act but no authority to prosecute criminal violations of the Act, 52 U.S.C. §§ 30106(b)(1); 30107(a)(6), or any experience interpreting criminal law. Criminal prosecutions implicate a host of special Constitutional rights and corresponding limitations in codes and common law on the government's fearsome criminal power. The Commission, as a creation of civil administrative law empowered only to civilly enforce its statute, is not competent or authorized to cherry pick powers from the realm of criminal law for its own convenience.

The Factual and Legal Analysis inappropriately plucks notions from criminal law to reach the startling conclusion that there is an unwritten "attempt" violation that complements every violation in the Act, which the Commission has never before realized in its 45-year existence. Federal criminal law includes statutes specifically prohibiting attempted violations, unlike the Act which does not have any provisions prohibiting attempted violations. *See, e.g.*, 18 U.S. Code § 3301 (a "'securities fraud offense' means a violation of, or a conspiracy or an attempt to violate" various listed laws); 18 U.S.C. § 872 (attempted extortion); 18 U.S.C. § 1344 (attempt to defraud a financial institution); 21 U.S.C. § 846 (attempt to commit drug offense); 26 U.S.C. § 7201 (attempt to evade or defeat tax). So, there is no basis to assume all federal laws, much less the Act's civil provisions regulating the public's political activity, include an *unstated* "attempt" violation.

In fact, when rejecting a defense that an attempted crime was impossible, courts often look to the statute to determine whether in fact Congress intended for an impossible attempt to be prosecutable. The notable absence of a prohibition against attempted violations, in addition to the sensitive nature of the political activity that the Act regulates, and a 45-year run without any sign of this secret power, further establishes there is no attempt violation in the Act.

The F&LA states that law enforcement officers can run sting operations in which criminals poised to commit serious crimes can be caught using fake transactions staged by the officers. Not one case cited involves a civil enforcement agency, much less the FEC or one that similarly regulates core First Amendment activity. That criminal law tolerates the American government conducting sting operations to catch and prosecute serious criminals preying on Americans has no bearing on the FEC's processing of a complaint in which a sketchy foreign company pretends to offer a contribution from a non-existent foreign national to embarrass an American political committee shortly before an election.

If the Commission is going to dabble in criminal law, then its analysis must at least address the basic elements of an alleged federal attempt crime, which are curiously omitted from the F&LA. "A person is guilty of an attempt to commit a crime when the defendant '(1) acted with the requisite intent to violate the statute, and (2) performed an act that, under the circumstances as he believes them to be, constitutes a substantial step in the commission of the crime.'" *United States v. Walker*, 824 F. App'x 124, 127 (3d Cir. 2020). "[T]he 'substantial step'

element requires something more than 'mere preparation' but falls short of completion of the offense." *Id.*, at 127. The Commission cannot give itself quasi-criminal prosecutorial power beyond that granted by Congress, much less omit the half of the equation that protects the targets of that power from being punished prematurely.

Here, the basis of the F&LA is limited to a few selective clips of a retracted video by a disgraced foreign corporation that only show Mr. Benton talking with people who offered an unsolicited contribution while they lied about working for a nonexistent foreign national. The F&LA shows nothing beyond initial discussions that would even amount to "mere preparations," which still would not be enough to constitute an attempt under criminal law doctrine.

IV. New Rules, Consistent with the Act, May Only Be Adopted Pursuant to the Commission's Rulemaking Process

As shown above, the Act and Commission regulations against soliciting a foreign national contribution do not impose liability on a person for not soliciting a contribution from a person who doesn't exist (or might be an American!) under an "attempted violation" theory that has invisibly hidden in the law undiscovered for 45 years. The only way the Commission could try to make such an odd rule is through its rulemaking process, not an enforcement proceeding.

The Commission has the authority to make rules "to carry out the provisions of the Act," 52 U.S. Code §§ 30107(a)(8); 30111(a)(8), pursuant to the procedures in 30111(d)—but: (1) "as an independent agency created by Congress for the sole purpose of enforcing FECA [it has] no authority to write a regulation that [goes] beyond the Act itself," *Swallow* at 1115; and (2) the rulemaking process is the *only* method of proposing "[a]ny rule of law which is not stated in this Act." 52 U.S.C. § 30108(b).

Congress did not grant the Commission the power to punish attempted violations and the Commission cannot create a new rule through an enforcement matter. A rulemaking in which the Commission considers expanding its own enforcement power to include punishing attempted violations involves complex and unclear ramifications across all substantive violations must take place pursuant to the legally required procedures, which require notices, drafts, and public comment before the rule can be enacted.

V. Due Process Forbids the Commission from Retroactively Punishing Respondent Under a Novel Rule Prohibiting "Attempted" Violations or for Merely Discussing an Unsolicited Contribution

The Supreme Court has held that it is a "fundamental principle . . . that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required" and that the "rule of law entails . . . that '[all persons] are entitled to be in-formed as to what the State commands or forbids." *Federal Communications Commission v. Fox Television Stations*, 567 U.S. 239, 253 (2012) (internal citations omitted). "This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment." *Id.* "When speech is involved," the government must act with "rigorous adherence" to "two connected but discrete due process concerns: first, that regulated parties should know what is

required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Id. at 253-254.*

The public has no notice that the Commission would punish attempted violations of the Act because there is no provision of the Act or the Commission's regulations that indicates it could and Commission has never asserted that power in its forty-five-year existence. Further, given the well-established permissibility of accepting unsolicited contributions, there is no notice to the public that the Commission would regulate, as a solicitation, a person's discussion of an unsolicited contribution.

VI. Unlawfully Pursuing Allegations of Impossible Non-Violations Based on a Foreign Corporation's Retracted 3-Minute Click-Bait Video Is A Poor Use of Commission Resources Under the Commission's Current Circumstances

If the Commission is not inclined to drop this matter with a no reason to believe finding, it is also ripe for dismissal in an exercise of the Commission's prosecutorial discretion.

There was no foreign national contributor or contribution, and thus no risk of a foreign national spending funds to influence U.S. elections (other than the *Telegraph*'s financing and publication of a since-retracted video targeting an American political committee shortly before the election). Proceeding with the matter does entail identifiable risks in the form of potential elimination of components of the Commission's foreign national contribution regulation that go beyond the prohibitions in the Act, as was done to the Commission's straw donor regulation in the *Swallow* case. A reviewing court would also scrutinize the unsupported violation theories examined here and the attempts to create new violations in the enforcement process and retroactively apply them to punish Mr. Benton. This includes theories of liability for attempted but impossible violations, and the asserted power to punish, as solicitations of foreign nationals, a person's solicitation of Americans or fictitious persons and the treatment of discussions of unsolicited contributions as solicitations. Leaving aside substantive issues and litigation risk, the Commission must have higher priorities than pursuing Mr. Benton over cherry-picked clips of a nearly five-year old secretly recorded conversation appearing in a video that has been retracted after the Commission has already conciliated with the Committee.

In sum, it is not a prudent use of Commission resources to pursue a stale extra-statutory non-violation posing no risk to the public that was staged by a foreign national corporation for a selective video montage that has been retracted, particularly given the Commission's backlog of hundreds of enforcement matters that may actually involve a harm done through violations that Congress tasked the Commission with punishing.

VII. Commission's Consideration of Exculpatory Evidence

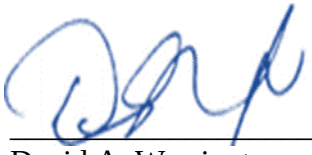
This entire enforcement matter is predicated on a single retracted video originally posted by a foreign national entity. The short video is itself merely a series of disjointed clips of recordings, selectively chosen by the foreign entity and released shortly before the November 2016 election. The F&LA makes no mention of any other evidence, including portions of the

recorded conversations that the foreign entity did not include in its retracted video, or unrecorded conversations that add essential context to the recorded clips. Mr. Benton contends that the video omitted exculpatory statements made by him that would have led the Commission to not find RTB, or to close this matter if discovered after its RTB finding. If the Office of General Counsel obtained any such information, Mr. Benton requests that this information be presented to the Commission forthwith and appropriately documented for production to Mr. Benton if the Commission proceeds with this matter.

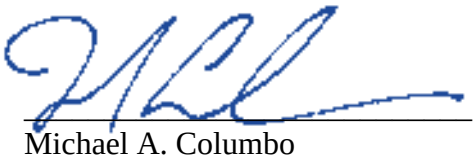
* * * *

For these reasons, Mr. Benton respectfully requests that the Commission reconsider and rescind its RTB finding, quash the subpoena issued to Mr. Benton, and close this matter.

Respectfully submitted,



David A. Warrington
DHILLON LAW GROUP, INC.
2000 Duke Street, Suite 300
Alexandria, VA 22314
Direct: 703.328.5369
Facsimile: 415.520.6593
dwarrington@dhillonlaw.com



Michael A. Columbo
DHILLON LAW GROUP, INC.
177 Post Street, Suite 700
San Francisco, California 94108
Phone: 415.433.1700
Facsimile: 415.520.6593
mcolumbo@dhillonlaw.com

cc: Shana M. Broussard, Chair
Allen Dickerson, Vice Chair
James E. "Trey" Trainor III, Commissioner
Sean J. Cooksey, Commissioner
Ellen L. Weintraub, Commissioner
Steven T. Walther, Commissioner

Attachment 4

DAVID WARRINGTON
DWARRINGTON@DHILLONLAW.COM
Michael A. Columbo
MCOLUMBO@DHILLONLAW.COM

VIA FEDERAL EXPRESS

AUGUST 16, 2021

Shana Broussard, Chair
Allen Dickerson, Vice Chair
James E. "Trey" Trainor III, Commissioner
Steven T. Walther, Commissioner
Ellen L. Weintraub, Commissioner
Sean J. Cooksey, Commissioner
Federal Election Commission
1050 First Street, NE
Washington, DC 20002

Re: ***MURs 7165/7196 (Jesse Benton) – Objection and Notice***

Dear Commissioners:

On behalf of Jesse R. Benton, we are filing for your consideration the enclosed six copies of an Objection and Notice in Matters Under Review 7165 and 7196. This matter is in the probable cause briefing stage and the attached document relates to actions taken by the Office of General Counsel (OGC) in connection with its obligations at this stage pursuant to the Commission's *Agency Procedure for Disclosure of Documents and Information in the Enforcement Process*, 76 Fed. Reg. 34986 (June 15, 2011). We are also emailing copies to the Office of Complaints Examination & Legal Administration and the assigned attorney, as well as those commissioners who have published their email addresses.

Respectfully Submitted,

David Warrington

Michael A. Columbo

cc: Commissioner Steven T. Walther - swalther@fec.gov
Commissioner Ellen L. Weintraub - CommissionerWeintraub@fec.gov
Commissioner James E. "Trey" Trainor III -- CommissionerTrainor@fec.gov
FEC Office of Complaints Examination and Legal Administration - cela@FEC.gov
Staff Attorney Saurav Ghosh – sghosh@fec.gov

FEDERAL ELECTION COMMISSION

Jesse Benton,	)	MURs 7165 & 7196
Respondent	)	Probable Cause Briefing Stage
	)	

OBJECTION TO OFFICE OF GENERAL COUNSEL'S FAILURE TO PRODUCE EXCULPATORY AND RELEVANT INFORMAITON IN VIOLATION OF COMMISSION PROCEDURE, STAFF'S UNAUTHORIZED DEMAND FOR TOLLING TO MITIGATE ITS LATE DISCLOSURE, AND NOTICE OF INTENT TO DELAY FILING OF PROBABLE CAUSE BRIEF

Respondent Jesse Benton respectfully notifies the Commission of, and objects to, the Office of General Counsel's ("OGC") violation of the Commission's procedure for disclosure of exculpatory and relevant evidence at the probable cause briefing stage. OGC failed to timely disclose exculpatory and relevant evidence with its probable cause brief as required by the Commission's procedure. Instead, OGC produced five excessively redacted documents three days into Mr. Benton's short time to respond to OGC's probable cause brief. OGC's actions violate both the Commission's published procedure and Mr. Benton's Due Process rights.

Without the exculpatory and other relevant information, Mr. Benton is prevented from fully responding to OGC's probable cause brief so that the Commission may make a fair and accurate determination of probable cause. The reasonable solution would be to extend the reply brief's deadline until OGC's violation has been cured or the Commission informs Mr. Benton that it condones OGC's actions. Even if the Commission were to approve OGC's redactions, OGC's delayed production of the documents, standing alone, warrants a commensurate extension of his deadline to respond. OGC has offered to postpone Mr. Benton's deadline to compensate for its late disclosure—but only if Mr. Benton waives his rights under the statute of limitations. As explained below, Mr. Benton will not agree to OGC's request to waive his rights in response to OGC's prejudicial actions.

Unless the Commission directs otherwise, Mr. Benton will therefore extend the filing deadline for his reply brief by at least three days, matching OGC's late disclosure of the documents that should have accompanied its brief.

A. The Office of General Counsel's Role at the Probable Cause Briefing Stage

The investigation is closed in this matter and OGC has served Mr. Benton with a notice stating that it intends to recommend probable cause, enclosing its probable cause brief, in accordance with 11 C.F.R. § 111.16. The briefing stage of an enforcement matter "allows the Commission to be informed not only by the recommendations of its General Counsel, but also by the factual presentations and legal arguments of respondents." *Agency Procedure for Disclosure of Documents and Information in the Enforcement Process*, 76 Fed. Reg. 34986 (June 15, 2011).

At this stage, Respondent's communications are not filtered through memoranda prepared by the OGC in its capacity, as in earlier stages of the enforcement process, as an agent

acting on behalf of the Commission. Rather, the Commission now acts as a tribunal considering information submitted by staff and respondents before it determines whether or not there is probable cause to believe Respondent's actions constituted a violation of the Act. *A fortiori*, OGC's capacity as an adversarial advocate before the Commission at this stage requires a degree of functional separation from the Commission. That is, OGC cannot simultaneously speak and act as both a party before the Commission that is adverse to Mr. Benton and simultaneously as an agent of the Commission that, in a quasi-judicial capacity, will be considering OGC's and Mr. Benton's briefs.

Because we are in the briefing stage and FEC staff is now formally in an adversarial posture against Mr. Benton, with the Commission serving as an adjudicator of the arguments that will be raised in the briefs, we address this Objection directly to the Commission.

B. Staff's Late Production and Unjustified Over-Redactions of Exculpatory and Relevant Information Violates Commission Procedure and Mr. Benton's Due Process Rights

By violating the Commission's Enforcement Disclosure Procedure, OGC's actions violate Mr. Benton's Due Process rights. Where an agency has provided for some form of discovery in their proceedings, that agency is bound to ensure that its procedures meet due process requirements, and discovery must be granted if in the particular situation a refusal to do so would so prejudice a party as to deny him due process. *McClelland v. Andrus*, 606 F.2d 1278, 1285-86 (D.C. Cir. 1979).

1. The Commission's Disclosure Procedure

More than ten years ago, the Commission published a procedure requiring OGC to disclose documents to respondents when it serves its probable cause brief. *See Agency Procedure for Disclosure of Documents and Information in the Enforcement Process*, 76 Fed. Reg. 34986 (June 15, 2011) ("Enforcement Disclosure Procedure" or "Procedure"). The Commission explained:

> probable cause considerations and subsequent conciliation efforts are furthered when, in presenting their respective positions, respondents have the greatest practicable access to documents and information gathered by the agency, including certain information that might be favorable to the respondent. This allows both the Commission's Office of General Counsel and the respondents that are under investigation to present fully informed submissions and frame legal issues for the Commission's consideration.

Id. at 34,989.

The Enforcement Disclosure Procedure "clarifies how the Commission will, consistent with the confidentiality provisions of [52 U.S.C. 30109(A)(12)], enhance its enforcement process by permitting increased access to documents and information held by the Commission." The Procedure is intended to "allow efficient, fair and just resolution of issues regarding disclosure of exculpatory information and avoid unnecessary consumption of respondent and Commission

staff resources in future proceedings." *Id*. Further, the Commission intended that "formalizing the procedure will promote fairness in the Commission's Section 437g enforcement process[, . . .] "promote administrative efficiency and certainty, and will contribute to the Commission's goal of open, fair and just investigations and enforcement proceedings." *Id.*

The Procedure directs OGC to "make available to a respondent **all relevant documents** gathered by the Office of General Counsel in its investigation, not publicly available and not already in the possession of the respondent, in connection with its investigation of allegations against the respondent." *Id*. at 34,990 (emphasis added). The Commission specified that "all relevant documents" necessarily must "include":

(i) Documents, not in possession of a respondent, turned over in response to any subpoenas or other requests, written or otherwise;
(ii) All deposition transcripts and deposition transcript exhibits; and
(iii) Any other documents, not otherwise publicly available and not in possession of a respondent, gathered by the Commission from sources outside the Commission.

Id. at 34,990 (italics added).

The Enforcement Disclosure Procedure unambiguously states that only the Commission, "by an affirmative vote of four or more Commissioners," can withhold or produce "any other document" not covered by the Procedure. *Id*. There are two key aspects to this rule: (a) only a majority of the Commission can decide to withhold documents that he Procedure otherwise directs OGC to disclose or to produce documents not addressed by the Procedure; and (b) the Commission did not even reserve for itself the power to withhold documents that the Procedure directs should be disclosed. In sum, OGC does not have unilateral authority to withhold information the Commission's Procedure directs it to disclose to respondents, or to conceal exculpatory and relevant evidence unless an exception in the Procedure applies.

The Procedure permits only five grounds for OGC to withhold a document from a Respondent:

(i) The document contains attorney-client communications, attorney work product, [FEC] staff work product or work product subject to the [FEC's] deliberative process privilege" unless the privileged portion can be redacted;
(ii) "The document or category of documents is determined by the General Counsel to be not relevant to the subject matter of the proceeding";
(iii) Laws or regulations prohibit the Commission "from disclosing the information or documents, including, under certain circumstances, information obtained from, or regarding, co-respondents";
(iv) A portion of the document contains information that cannot be disclosed for the reasons noted here "and that portion cannot be excised or redacted without affecting the main import of the document"; or
(v) "The Commission obtained the information or documents from the Department of Justice or another government entity[.]"

Id.

The Enforcement Disclosure Procedure distinguished its new mandate from a prior practice in which OGC only provided respondents with information "cited or relied upon" in its PC brief, and then only summarizing "relevant information derived from [a] document, and not the document itself" where a potential privilege applied to the document. *Id*. at 34,989.

2. **OGC's Deficient Production of Documents**

In the evening of August 10, 2021, OGC transmitted its probable cause brief to counsel for Mr. Benton but it did not provide relevant documents as required by the Procedure. Early on August 11, 2021, counsel requested the documents to which Mr. Benton was entitled under the Enforcement Disclosure Procedure. OGC did not produce any documents on August 11, or August 12. On Friday, August 13, 2021, OGC transmitted five extensively redacted documents to counsel (summarized below). This set comprised four pieces of correspondence from co-respondent and co-respondents' conciliation agreement. *See* Attachments 1-5.

Because all of these documents were generated by or shared between co-respondent and the Commission in this enforcement matter and were about this enforcement matter, exemptions (i), (ii), (iv) and (v) listed above are inapplicable. That is, they are not privileged or FEC attorney work product, the documents are relevant to the subject matter of the proceedings, they are indeed capable of being disclosed with redactions as OGC has clearly determined, and they did not come from another agency. Therefore, the only potential basis for withholding information within any given document can be that laws or regulations prohibit the Commission "from disclosing the information or documents, including, under certain circumstances, information obtained from, or regarding, co-respondents."

There are two confidentiality provisions in the Act. First, the Commission is prohibited by 52 U.S.C. § 30109(a)(12) from 'making public' "[a]ny notification or investigation made . . . without the written consent of the person receiving such notification or the person with respect to whom such investigation is made." Considering the nature and context of this matter, this provision is practically inapplicable. That is, the Telegraph video and article are already public, as is one of the complaints. Mr. Benton obviously knows that the co-respondents are Great America PAC and Eric Beach because they are the only other two persons identified in the Complaints. In any event, this provision would merely require OGC to redact the name of a respondent, only, as it typically does when producing documents or drafting Factual and Legal Analyses that refer to co-respondents. This rule does not provide any basis to redact numerous sentences, paragraphs, and whole multi-page sections within a document that otherwise must be disclosed, particularly when the document provides exculpatory and essential relevant evidence. In fact, like the Complaint, the non-redacted fraction of the documents OGC produced include references to Mr. Beach and Great America PAC, so this provision does not seem to be the basis of OGC's redactions.

Second, 52 USC 30109(a)(4)(B)(i) states that "[n]o action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission under subparagraph (A) may be made public by the Commission without the

written consent of the respondent and the Commission." This provision, which clearly applies only to statements made by a respondent during settlement discussions, doesn't apply to co-respondents' Responses to the Complaints, which are two of the five documents, responses to OGC's discovery request, which appears to be the other correspondence, or to an executed conciliation agreement, which is a final legal document that will be a matter of public record and is not itself confidential information a respondent submits in a conciliation process.

As explained below, these two provisions cannot justify a fraction of the wholesale redactions OGC made to co-respondents' letters and conciliation agreement. There do not appear to be any legal issues raised by federal privacy laws, either. Accordingly, upon receipt, it was impossible to determine the grounds upon which OGC relied to support its redactions. And until today, three further days into Mr. Benton's briefing period, OGC did not deign to explain its redactions, as would be routine in any other matter in which a party withheld information it was required to disclose, and which is necessary for both the Commission and Mr. Benton to evaluate OGC's compliance with the Commission's Enforcement Disclosure Procedure.

3. Summary of Produced Documents and OGC's Redactions

The five heavily redacted documents produced by OGC are attached and summarized below.

January 5, 2017 Co-Respondents' Response to the Complaint in MUR 7196[1]

This 8-page document appears to be co-respondents' Response to the Complaint in MUR 7196. On the first page, OGC has redacted the names of co-respondents from the introductory sentence and the "RE" line, and all of the law firm's letterhead information. Extensive portions of pages 2-8 of the Response are also redacted. There are no valid grounds for redacting all of this information—which even includes heavy redactions in a section titled "Allegations" and a section that explains Mr. Benton's relationship with Great America PAC. *See* Attachment 1.

January 5, 2017 Co-Respondents' Response to the Complaint in MUR 7165[2]

Mr. Benton incorporates by reference all of the statements above regarding Co-Respondent's response to the Complaint in MUR 7196. In this document, OGC has audaciously redacted everything other than the allegations in the Complaint and a few quotations of the law, including, again, redacting co-respondent counsel's letterhead. *See* Attachment 2.

March 17, 2021 Letter

This document appears to be a letter from co-respondents following the Commissions reason to believe finding. There are three entire paragraphs redacted on the first page in addition to a large section within the only remaining paragraph. It is difficult to imagine that all three paragraphs and the redacted lines within the other paragraph are just respondents' names or information they submitted in the conciliation process, or that redaction in their entireties is

[1] The date on the letter is January 5, 2016, but that is before the complaints were filed. We safely assume that there is a typo in the date and that it was in fact filed on January 5, 2017.
[2] The date on the letter is also January 5, 2016. We assume this document, too, was filed on January 5, 2017.

necessary. Page 2 has another entirely redacted paragraph and large redacted sections within four more paragraphs in a "Factual Background" section. The redacted text is too extensive to be justified on any recognized basis. The third page is similarly heavily redacted and the fourth through tenth pages are essentially redacted in their entirety, including a virtually entirely redacted "Legal Analysis" section that cannot qualify for treatment as confidential information or settlement information, but is almost certainly exculpatory or relevant. *See* Attachment 3.

May 10, 2021 Letter

This letter is in response to a letter from OGC dated April 20, 2021 (which was not provided). Larger portions of pages 1, 2 and 4 are redacted, as well as all of page 3. Based on the non-redacted text, this appears to be part of a response to an OGC discovery request.

The non-redacted portions include references to co-respondents by name and reveal glimpses of co-respondents' arguments, which again begs the question of why so much of the March 17 letter was redacted and why the particular parts of each letter were redacted. The redactions are mystifying, including a redacted sentence on page 2 that concludes with an non-redacted citation to the Restatement (Third) of Agency. On what possible grounds has OGC withheld information that is related to the subject matter of the complaint, and seemingly an exculpatory aspect of this letter premised on the law of agency—while not redacting other seemingly similar points on the same page? All of page 3 is redacted as is half of a bullet point on page 4. *See* Attachment 4.

Conciliation Agreement

Perplexingly, OGC produced its conciliation agreement but the main piece of information it redacted appears from context to be respondents' exculpatory contention language. Random words appear to be redacted, in addition to the terms of the conciliation agreement. OGC's grounds for redacting co-respondents' contention language and the terms of the conciliation agreement are unclear. They do not identify the respondents or include *information* submitted to induce the Commission to conciliate and the terms will be made public anyway. Indeed, if OGC truly felt it was necessary (it isn't), the Procedure suggests one option would have been to segregate these respondents and closed their case to allow it to be published and disclosed to Mr. Benton. *See* Attachment 5.

* * * *

Mr. Benton objects to the extensive redactions in these documents. OGC has prejudiced Mr. Benton's right to receive exculpatory and other evidence, as provided in the Commission's Procedure, by redacting virtually all exculpatory information from these documents in addition to extensive relevant information. Until today, OGC had not explained its redactions of the exculpatory and other information in these documents. As explained below, its justifications establish that it is violating the letter and spirit of the Commission's Enforcement Disclosure Procedure.

4. OGC Violated the Commission's Procedure By Failing To Take the Required Measures to Resolve Confidentiality Issues To Enable Disclosure of Exculpatory and Relevant Information.

If OGC believed the documents contained confidential information and sought co-respondent's waiver but was refused, OGC violated the Procedure by failing to ask Mr. Benton to sign a confidentiality agreement, summarize the information, segregate and close the co-respondents' matter, or seek the Commission's resolution of the issue.

The Enforcement Disclosure Procedure specifies how OGC is to address the need to disclose documents to one respondent that came from another respondent. Procedure at 34,991. For any information protected from disclosure that the Procedure might require OGC to disclose, OGC must try to obtain a confidentiality wavier from the co-respondent. If the co-respondent refuses to waive confidentiality, OGC may summarize the confidential information, or ask a respondent to sign a confidentiality agreement, which would stop the information from becoming public and therefore avoid a violation of a confidentiality rule. Additionally, a co-respondent's matter can be segregated and closed, which was possible here because the co-respondents conciliated.

OGC did not ask Mr. Benton to sign a confidentiality agreement. OGC also did not summarize any information but instead extensively redacted the documents it disclosed. OGC apparently did not avail itself of the opportunity, provided in the Enforcement Disclosure Procedure, to ask the Commission to determine how to balance its disclosure obligations with the confidentiality rules when a co-respondent refuses to waive confidentiality. *Id.*

The Enforcement Disclosure Procedure is crystal clear, however, that "[i]f any document or information provided to the Commission by one co-respondent contains exculpatory information, . . . that information or document will be provided to the other co-respondent," subject to the Procedure's various mitigation measures. *Id*. Further:

> Before disclosing any portion of the document that raises an unresolved confidentiality issue, the General Counsel shall seek a determination by the Commission, by an affirmative vote of four or more Commissioners, that disclosure of a document containing exculpatory information (redacted, summarized, or in any other way altered) conforms to the confidentiality provisions of 2 U.S.C. 437g(a)(4)(B)(i) and 437g(a)(12)

Id.

To the extent that confidentiality issues conflicted with OGC's duty under the procedure to produce exculpatory information, OGC was obligated by the Procedure to use the other means provided to resolve the issue or seek a determination by the Commission. OGC has provided no indication that it obtained a determination by the Commission to resolve any conflicts between confidentiality rules and its duty to disclose exculpatory information. It instead appears to have unilaterally redacted the documents it disclosed, and it did so to such a degree that it rendered the documents useless and obscured the exculpatory and relevant information they contain. Until today, six days into Mr. Benton's fifteen day reply period, OGC had also failed to state the basis

for the extensive redactions it made, further suggesting OGC redacted far more than permitted. And that it did not seek the required determination by the Commission to resolve any perceived conflicts between the Commission Procedure and the confidentiality provisions of the Act.

C. Staff's Unauthorized and Improper Demand for Mr. Benton to Toll the Statute of Limitations to Cover the Delay OGC is Causing Violates the Commission's Procedure and is an Abuse of Its Position at this Stage in the Enforcement Process

The Commission's Enforcement Disclosure Procedure states that OGC "shall produce" the documents specified in the Procedure on "the date" when it serves its probable cause notice and brief. Enforcement Disclosure Policy at 34,991. As already stated, OGC provided its notice and Brief to Mr. Benton on August 10, but did not provide the required disclosure. To the extent OGC asserts it was waiting for a request from Mr. Benton, that request was immediately provided the following morning. Even after counsel for Mr. Benton requested the documents on August 11, OGC did not disclose them until the afternoon of Friday, August 13. OGC's unilateral delay effectively shortened Mr. Benton's time to fulsomely respond by at least three days.

Because of the statutory 15-day period for Respondent to reply to OGC's probable cause brief, and the Enforcement Disclosure Procedure specifying that documents must be provided with OGC's brief, the process described for navigating co-respondent issues (redaction, summarization, alteration, co-respondent waiver, and seeking Commission resolution of conflicting duties) only makes sense if it is done *before* OGC transmits its probable cause brief to a respondent. This necessarily requires planning ahead. This has to be the consequence, otherwise the documents may not be ready within the 15-day time frame, thwarting the Policy designed to assist the Commission's consideration of the probable cause briefs. Because OGC is in total control of when it sends its probable cause notice and brief to a respondent, it must bear the consequences if it chooses to do so without adequate preparation.

One alternative when facing a late disclosure is to toll respondents' 15-day reply period. In fact, this must be permissible in addition to being fair and reasonable, because OGC offered to do so in the email transmitting the documents. But, OGC also cannot serve its brief and demand respondents waive their rights under the statute of limitations to rescue OGC from its failure to plan ahead and follow the process established in the Procedure. A respondent cannot be compelled to waive rights under the SOL when it is not the party that caused the delay. As an adversarial party at this stage in the process, it is not even OGC's place to ask for tolling. As the Procedure makes clear, it is the Commission that, in certain circumstances, limited to itself the power to seek tolling at this stage.

The Enforcement Disclosure Procedure states that the respondent may submit a timely request for *additional documents* beyond those initially disclosed by OGC. *Id.* "If respondent submits such a written request, respondent must, <u>if requested to do so by the Commission</u>, sign a tolling agreement for the time necessary to resolve the request." *Id.* As this provision of the Procedure makes clear, it is the Commission's prerogative to ask a respondent for tolling if the respondent asks for more documents than the Procedure states they should receive.

Mr. Benton is not asking for additional documents. He is, however, objecting to OGC's flouting of the Commission's Enforcement Disclosure Procedure, seeking an advantage as an adversarial party by usurping the Commission's prerogative to determine the information a respondent will receive. There is no provision of the Procedure indicating that a respondent must waive the statute of limitations if OGC violates the Commission's policy or needs more time to comply with it after choosing to issue its brief. OGC is thus appropriating the Commission's sole authority to seek tolling from Mr. Benton in a limited circumstance to compensate for OGC's failure to follow the Procedure.

It is incredible that OGC, by design or neglect, apparently made no arrangements to obtain a waiver from co-respondents before serving its brief, or if none was received, no effort to obtain a confidentiality agreement from Mr. Benton, no effort to summarize the exculpatory and other information instead of redacting it, no effort to segregate and close co-respondents' matter to permit disclosure of their documents, and/or no effort to ask the Commission to resolve the requirements of the Enforcement Disclosure Procedure with whatever OGC will claim is the reason for the redactions.

The Commission's Procedure is meant to protect the Due Process rights of the citizens with matters before it and to help the commissioners reach an accurate resolution of alleged violations after a complete exposition of the issues in a fair process. OGC's initial failure to provide the legal basis for its redactions and its unpersuasive explanations offered today (addressed below) are salt in the wound, but the audacity of asking Mr. Benton to toll the statute of limitations as the price for his rights under the Procedure is beyond outrageous.

D. The Commission Should Evaluate OGC's Redactions and Ratify or Correct Its Disclosures, and Order OGC to Justify Each Redaction as it Routinely Does for FOIA Responses or By Using a Privilege Log

At this stage in the enforcement process, the Commission sits as the tribunal to which OGC and Mr. Benton submit their arguments. The Commission has issued a clear Procedure that instructed OGC to disclose exculpatory and other relevant evidence, or resolve issues through various means, but OGC has seemingly ignored the Commission's directions. The Commission has the authority to review OGC's redaction decisions and either ratify or correct them, and Mr. Benton asks that it do so. Mr. Benton will gladly and quickly sign a confidentiality agreement to enable the production of information by ensuring it is not "made public," if that is the concern. If the Commission ratifies OGC's determinations, Mr. Benton will also proceed to file his brief as soon as possible based on the information available to him. Finally, if OGC re-produces the documents in a manner that provides Mr. Benton with the evidence to which he is entitled under the Commission's Procedure, he will also endeavor to file his brief as soon as possible thereafter.

E. OGC's Justification for Its Redactions Violates the Commission's Enforcement Disclosure Procedure and Would Open the Door to Its Arbitrary Abuse of the Process

In an email received today, August 16 (six days into Mr. Benton's fifteen days to respond to their Brief), OGC acknowledged that it redacted from the documents it produced what it called "legal arguments, procedural history, and administrative information" on the theory that such information was *not* exculpatory and is "confidential" or "privileged." *See* Attachment 6. OGC's explanation turns the Enforcement Disclosure Period on its head and is a power grab by OGC that would invite abuse and which the Commission cannot allow.

First, as established above, the starting point has to be that the Enforcement Disclosure Procedure broadly requires the disclosure of "all relevant documents," and is especially (but not exclusively) concerned with the disclosure of exculpatory information. The Procedure permits only the redaction of certain narrow classes of information specified in the Procedure. Information not falling into the narrow classes of information that potentially pose a conflict must be disclosed per the plain terms of the Procedure. (The Procedure includes ways for OGC to resolve conflicting mandates in order to fulfill the Commission's directions in the Procedure, including appealing to the Commission for guidance when it cannot resolve a conflict or segregating and closing a co-respondent's matter—options that OGC did not pursue here.) The Commission did not delegate to OGC the power to withhold information from Respondents for any other purpose or reason.

Second, there is no doubt that "legal arguments, procedural history, and administrative information" are relevant to the subject matter of a MUR. OGC's contention that they are somehow exempt from disclosure as "privileged" or "confidential" is nonsensical, groundless, and offends both the letter and spirit of the Procedure. There is no broad privilege against disclosure of *anything* a respondent submits or says to the FEC as confidential or privileged information. Moreover, OGC as well as co-respondents surely know that the FEC is poised to publish in their entirety all of the documents that OGC redacted, which precludes any belief that their contents are somehow privileged or submitted in confidence. Finally, the Procedure suggests that a confidentiality agreement can cure any concern with the disclosure of information, but OGC has not offered that option to fulfill the Commission's procedure.

Third, all three of these terms are undefined, vague, and scopeless. The claim that a "legal argument" one respondent makes to the Commission is either not exculpatory or is privileged is particularly absurd. This unpublished exception, not sanctioned by the Commission, swallows the disclosure rule. Everything that respondents submit in response to an allegation they violated the Act, except an unqualified confession, can be classified as a legal argument. An argument that an allegation is premised on a misunderstanding of the law, or an argument that the law is correctly stated but does not prohibit the conduct at issue, or an argument that there is a procedural defect in the proceeding that warrants the Commission not finding that a violation occurred, are all exculpatory and indeed comprise the bulk of what is contained in any respondent's submissions.

OGC's contention that "legal arguments," as a whole, are not exculpatory amounts to a startling admission of its view of what "exculpatory" means, its ignorance of what it means, or its claimed power to arbitrarily define exculpatory to its advantage on a case-by-case basis. OGC cannot, as it has done here, dodge its disclosure duty by unilaterally labeling exculpatory information as disclosure-exempt "legal arguments." By asserting this manufactured and self-serving exemption to the Commission's directions in the Procedure, OGC is conferring upon itself unfettered discretion to decide what it will disclose to respondents.

Further, the "legal argument" exception is a standard that, in practice, cannot be applied consistently as shown by OGC's redactions, which at times obliterated whole pages, at times just sentences, and at times leaving in the legal authority that was cited but not the actual exculpatory point.

Fourth, the Procedure is clear that OGC must disclose covered documents at the time it provides its Brief. In its email today, OGC asserts an unprecedented interpretation of the Procedure that empowers it to decide, without Commission oversight, when to disclose information to a respondent—even, as here, days into the short window of time Mr. Benton has to respond to OGC's Brief.

Fifth, OGC's email today acknowledges it has prejudiced Mr. Benton's ability to respond to OGC's Brief, and therefore offered to extend his time to respond to OGC's Brief. However, its insistence that he sacrifice his rights under the statute of limitations for the purpose of mitigating its own actions is an inappropriate government tactic that OGC is not authorized to undertake during this adversarial stage of the enforcement process, and is in fact a uniquely Commission prerogative pursuant to the Procedure.

F. With Nearly Six of Fifteen Days, and Counting, to Respond to OGC's Brief Wasted Due to OGC's Failure to Disclose Exculpatory and Relevant Evidence, the Timing of Mr. Benton's Reply Brief Is Unclear

At the time of this filing, we are entering the sixth day since OGC transmitted its probable cause brief and we have only been given five documents taunting Mr. Benton with the prospect of exculpatory and relevant information concealed under pages of OGC's mass redactions. Because of OGC's apparent refusal to comply with the numerous options within the Procedure for resolving issues, Mr. Benton is left with few options. This is both an affront to the Commission, which instituted the policy in part to aid its decision-making, as well as to Mr. Benton's Due Process rights.

We await further direction from the Commission as to its enforcement of its Procedure. We note that even when the Commission cannot agree on an outcome in an advisory opinion, it can agree to inform the requestor that it could not agree. We request the courtesy of such a notification if a majority of the Commission cannot agree about OGC's actions so that Mr. Benton can assess his options. Given that we are in the probable cause briefing stage, we also ask that OGC specify in any forthcoming communications whether it is speaking in its capacity as an agent acting at the direction of and speaking for the Commission, or if it is speaking for itself as

an adverse party in the briefing stage without direction or an endorsement of its actions by the Commission.

As it stands, even if the Commission were to inform Mr. Benton that it approves OGC's redactions, Mr. Benton intends to submit his probable cause brief on August 28, fifteen days after OGC's late delivery of the redacted documents.

Respectfully submitted,

David A. Warrington
DHILLON LAW GROUP, INC.
2000 Duke Street, Suite 300
Alexandria, VA 22314
Direct: 703.328.5369
Facsimile: 415.520.6593
dwarrington@dhillonlaw.com

Michael A. Columbo
DHILLON LAW GROUP, INC.
177 Post Street, Suite 700
San Francisco, California 94108
Phone: 415.433.1700
Facsimile: 415.520.6593
mcolumbo@dhillonlaw.com

Attachment 1

[redacted]

January 5, 2016

Federal Election Commission
Office of Complaints Examination
& Legal Administration
Attn: Mary Beth deBeau, Paralegal
999 E Street, N.W.
Washington, D.C. 20436

RE: Response to MUR 7196 [redacted]

Dear Ms. deBeau:

Please accept this response [redacted] in the above-captioned matter.

[redacted] This Complaint is based [redacted] on allegations contained in a [redacted] article published in a United Kingdom newspaper and a [redacted] online video detailing foreign reporters' [redacted] *See* Compl. at 2; *see also* Investigations Team, *Exclusive Investigation: Donald Trump Faces Foreign Donor Fundraising Scandal*, THE TELEGRAPH (Oct. 24, 2016, 8:10 P.M.), (hereafter, "*Foreign Donor Fundraising*") *available at* http://www.telegraph.co.uk/news/2016/10/24/exclusive-investigation-donald-trump-faces-foreign-donor-fundrai/.

As the *New York Times* recognized, the video upon which the article rests does not "show the full exchange," "does not show how the reporters identified themselves," and "reflects only snippets of the reporters' conversations," thereby "making it difficult to verify exactly what . . . had [been] offered or whether any laws were broken." Nicholas Confessore, *Consultant with Ties to Donald Trump Linked to Offer to Hide Source of Donations*, N.Y. TIMES, Oct. 24, 2016, http://www.nytimes.com/2016/10/25/us/politics/consultant-with-ties-to-donald-trump-linked-to-offer-to-hide-source-of-donations.html?_r=0. The Complaint's fundamental allegation, based on the article, is "[s]enior figures involved with the Great America PAC . . . sought to channel $2 million from a Chinese donor into a campaign to elect the billionaire despite laws prohibiting donations from foreigners." *Foreign Donor Fundraising*, *supra*; *see also* Compl. at 4. [redacted].

First, the central figure at the heart of the article, Jesse Benton, had resigned from GAP long before the events at issue occurred. His resignation had been widely reported at the time.[1]

[1] *See, e.g.*, Matea Gold, *Trump Supporters Ask Where to Send Money*, WASH. POST, May 17, 2016, at A1.

[redacted]

[redacted]

At all times relevant to these allegations, he was acting solely in his personal capacity or on behalf of his own company, Titan Strategies LLC (hereafter, "Titan"), and not as an agent of GAP, GAP co-chair Eric Beach, or any other entity.

[redacted]

Fourth, [redacted] the purported foreign national who was allegedly solicited—an unnamed fictitious Chinese businessman—did not exist. As the article itself admits, the businessman for whom the undercover reporters claimed to be acting as intermediaries was entirely fabricated. [redacted]

[redacted]

ALLEGATIONS

In or around October 2016, foreign reporters purporting to represent a wealthy Chinese businessman contacted Beach, GAP's co-chair, claiming "a Chinese client wished to donate" to GAP "to support Mr. Trump's campaign." *Foreign Donor Fundraising*, *supra*; *see also* Compl. at 2. Beach responded he "need[ed] to know the donor's identity" and "rais[ed] concerns about his nationality." *Foreign Donor Fundraising, supra*. He likewise insisted he would "need to know the origins" of any money contributed to GAP. *Id.* [redacted]

[redacted] According to the article, Beach "suggested the donation could be put through a social welfare organization called a 501(c)(4)—or C4—which unlike a PAC is not subject to a blanket ban on receiving foreign money." *Foreign Donor Fundraising, supra*. Beach further emphasized, "[A]ny path we recommend is legal." *Id.* [redacted] Beach is that he was allegedly "ambivalent" and the reporters'

[redacted]

[redacted]

call to him "did not appear unwelcome." *Foreign Donor Fundraising*, *supra*. [redacted]

[redacted]

Benton was operating his own independent political consulting company, Titan, at the time. He had resigned from GAP the previous May, *see supra* note 1; in Fall 2016, he was not an officer, agent, employee, or volunteer of GAP, or otherwise affiliated with it in any way. *Foreign Donor Fundraising*, *supra*. The article itself acknowledges Benton had been "a senior figure at the PAC ***until being convicted in May*** in connection with buying a senator's endorsement on a prior campaign." *Id.* (emphasis added). It goes on to quote both Benton and GAP as reiterating that he had not worked for GAP "at all since May." *Id.* Benton was never asked to solicit direct or "indirect" contributions for GAP following his resignation.

[redacted]

[redacted]

The Complaint and article claim that, as a result of this referral, the reporters received an e-mail from Benton. Compl. at 2; *accord Foreign Donor Fundraising*, *supra*. During their ensuing conversation, Benton explained the need for Beach to have a "deliberate disengagement" from any contributions the hypothetical Chinese businessman may choose to make. Compl. at 2-3; *see also Foreign Donor Fundraising*, *supra*. Benton allegedly suggested the businessman's "Singapore-based communications consultancy" could pay $2 million to Titan Strategies LLC, Benton's public affairs firm, which had no connection whatsoever to GAP. *Foreign Donor Fundraising*, *supra*. He was allegedly noncommittal about how those funds would be spent. *Id.* Benton mentioned the firm ***might*** contribute those funds to two 501(c)(4) organizations (which would be legal), which might in turn choose to make contributions to GAP or instead fund projects he believes GAP supported, such as grassroots campaigning or advertising. *Foreign Donor Fundraising*, *supra*. [redacted]

[redacted]

[redacted]

[redacted] the article quoted Benton as stating he had been assured by his attorney the proposed transactions would be legal. *Foreign Donor Fundraising*, *supra*. He later reemphasized, "[E]verything that we're doing is legal." *Id.* The article likewise contends that, during his second and only other conversation with the reporters, Beach declared, "[A]ny path we recommend is legal," and further insisted he "would never let you guys give to the PAC, to give to the C4, because that's illegal. . . . See the C4 is technically not illegal, but it's not—it's just not the best way to go." *Foreign Donor Fundraising*, *supra*.

[redacted]

[redacted] The reporters who contacted Beach [redacted] were not agents of a foreign national; [redacted] the article CFC cites candidly admits the reporters were "purporting to represent [a] fictitious donor." *Foreign Donor Fundraising*, *supra*. The Federal Election Campaign Act ("FECA") makes it illegal for a person to "solicit" a "foreign national, directly or indirectly, to make a contribution or donation of money or other thing of value, or to make an express or implied promise to make a contribution or

[redacted]

[redacted]

donation, in connection with a Federal, State, or local election." 52 U.S.C. § 30121(a)-(b); *accord* 11 C.F.R. § 110.20(g); *see also* Compl. ¶¶ 16, 19. Federal regulations go on to prohibit a person from "knowingly provid[ing] substantial assistance" in making such solicitations. 11 C.F.R. § 110.20(h)(1); *see also* Compl. ¶ 20.

Both FECA and federal regulations expressly define "foreign national" as a "foreign principal" under the Foreign Agents Registration Act of 1938, *see* 22 U.S.C. § 611(b), or an individual who is not a U.S. citizen, national, or lawful permanent resident. 52 U.S.C. § 30121(b)(1)-(2); 11 C.F.R. § 110.20(a)(3); *see also* Compl. ¶ 18. [redacted]

[redacted] 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g)-(h). The article [redacted] that Beach insisted he "need[ed] to know the donor's identity" and "the origins" of any contributions to GAP, and "rais[ed] concerns" about the fabricated businessman's "nationality." *Foreign Donor Fundraising, supra.* It further points out that Beach emphasized that "any path we recommend is legal," and mentioned the fully legal possibility of contributing to a 501(c)(4) organization as one possible alternative to contributing to GAP. *Foreign Donor Fundraising, supra.* [redacted]

[redacted]

[redacted]

[redacted] According to that article, Beach stated "I would never let you guys give to the PAC, to give to the C4, because that's illegal. See the C4 is technically not illegal, but it's not—it's just not the best way to go." *Foreign Donor Fundraising*. [redacted]

III. JESSE BENTON'S RELATIONSHIP WITH GREAT AMERICA PAC TERMINATED IN MAY 2016, AND HE HAS NOT BEEN AN AGENT FOR GREAT AMERICA PAC SINCE THAT TIME

The Complaint and article focus primarily on Benton's statements and potential plans. [redacted] By October 2016, when Benton interacted with the reporters, he was no longer associated in any way with GAP. The article [redacted] recognized he had resigned from GAP in May 2016, *Foreign Donor Fundraising*, [redacted]

[redacted] the article underlying the Complaint contends Benton insisted that Beach be kept in the dark about the structure of any transaction to which the [redacted] Chinese businessman might agree. *Foreign Donor Fundraising*, *supra* (discussing Benton's caution that Beach "needed to be kept 'deliberately ignorant' of the 'exact arrangements'"). Indeed, the article further recognizes that, during the second and last interaction between Beach and the reporters, [redacted] *Id.* ("I would never let you guys give to the PAC, to give to the C4, because that's illegal. See the C4 is technically not illegal, but it's not—it's just not the best way to go."). [redacted]

[redacted]

[redacted]

the article claims Benton discussed a range of possible alternatives, some of which may have raised serious legal concerns, while others would not have involved GAP. [redacted], Benton discussed the possibility of the non-existent businessman's company paying Benton's firm, which would then make contributions to 501(c)(4) groups, which may then decide to contribute to GAP. *See* Compl. at 3; *accord Foreign Donor Fundraising*, *supra*. [redacted] he mentioned the possibility the 501(c)(4) companies would simply independently choose to spend the money on things GAP had planned to do itself.[3] [redacted]

[redacted]

Attachment 2

[redacted]

January 5, 2016

Federal Election Commission
Office of Complaints Examination
& Legal Administration
Attn: Donna Rawls, Paralegal
999 E Street, N.W.
Washington, D.C. 20436

Digitally signed by Christal Dennis
Date: 2017.01.09 15:10:36 -05'00'

RE: Response to MUR 7165 [redacted]

Dear Ms. Rawls:

Please accept this response [redacted] in the above-captioned matter.

[redacted] This Complaint is based [redacted] on allegations contained in a [redacted] article published in a United Kingdom newspaper and a [redacted] online video detailing foreign reporters' [redacted] *See* Compl. ¶ 5; *see also* Investigations Team, *Exclusive Investigation: Donald Trump Faces Foreign Donor Fundraising Scandal*, THE TELEGRAPH (Oct. 24, 2016, 8:10 P.M.), (hereafter, "*Foreign Donor Fundraising*") *available at* http://www.telegraph.co.uk/news/2016/10/24/exclusive-investigation-donald-trump-faces-foreign-donor-fundrai/.[1]

As the *New York Times* recognized, the video upon which the article rests does not "show the full exchange," "does not show how the reporters identified themselves," and "reflects only snippets of the reporters' conversations," thereby "making it difficult to verify exactly what . . . had [been] offered or whether any laws were broken." Nicholas Confessore, *Consultant with Ties to Donald Trump Linked to Offer to Hide Source of Donations*, N.Y. TIMES, Oct. 24, 2016, http://www.nytimes.com/2016/10/25/us/politics/consultant-with-ties-to-donald-trump-linked-to-offer-to-hide-source-of-donations.html?_r=0. The Complaint's fundamental allegation, based on the article, is that "[s]enior figures involved with the Great America PAC . . . sought to channel $2 million from a Chinese donor into a campaign to elect the billionaire despite laws prohibiting

[1] A second article, Investigations Team & Ruth Sherlock, *Exclusive: Pro-Trump Campaign Group Should Face Inquiry Over "Foreign Donor," Leading Election Lawyer States* (Oct. 25, 2016, 11:59 P.M.), http://www.telegraph.co.uk/news/2016/10/25/exclusive-pro-trump-campaign-group-should-face-inquiry-over-fore/, [redacted]

[redacted]

[redacted]

donations from foreigners." *Foreign Donor Fundraising*, *supra*; *see* Compl. ¶ 2. [redacted]

First, the central figure at the heart of the article, Jesse Benton, had resigned from GAP long before the events at issue occurred. His resignation had been widely reported at the time.[2] At all times relevant to these allegations, he was acting solely in his personal capacity or on behalf of his own company, Titan Strategies LLC (hereafter, "Titan"), and not as an agent of GAP, GAP co-chair Eric Beach, or any other entity.

[redacted]

Fourth, [redacted] the purported foreign national who was allegedly solicited—an unnamed fictitious Chinese businessman—did not exist. As the article itself admits, the businessman for whom the undercover reporters claimed to be acting as intermediaries was entirely fabricated. [redacted]

[redacted]

ALLEGATIONS

In or around October 2016, foreign reporters purporting to represent a wealthy Chinese businessman contacted Beach, GAP's co-chair, claiming "a Chinese client wished to donate" to GAP "to support Mr. Trump's campaign." *Foreign Donor Fundraising*, *supra*; *see also* Compl. ¶ 5. Beach responded he "need[ed] to know the donor's identity" and "rais[ed] concerns about his nationality." Compl. ¶ 6; *accord Foreign Donor Fundraising, supra*. He likewise insisted he would "need to know the origins" of any money contributed to GAP. Compl. ¶ 6; *accord Foreign Donor Fundraising*, *supra*.

[2] *See, e.g.*, Matea Gold, *Trump Supporters Ask Where to Send Money*, WASH. POST, May 17, 2016, at A1.

[redacted]

[redacted] According to the Complaint, "[h]e suggested the donation could be put through a social welfare organization called a 501(c)(4)—or C4—which unlike a PAC is not subject to a blanket ban on receiving foreign money." Compl. ¶¶ 6, 30; *accord Foreign Donor Fundraising, supra*. Beach further emphasized, "[A]ny path we recommend is legal." Compl. ¶ 6; *accord Foreign Donor Fundraising*, *supra*. [redacted] Beach is that he was allegedly "ambivalent" and the reporters' call to him "did not appear unwelcome." *Foreign Donor Fundraising*, *supra*.

[redacted] Benton was operating his own independent political consulting company, Titan, at the time. He had resigned from GAP the previous May, *see supra* note 2; in Fall 2016, he was not an officer, agent, employee, or volunteer of GAP, or otherwise affiliated with it in any way. *Foreign Donor Fundraising*, *supra*. The article itself acknowledges Benton had been "a senior figure at the PAC ***until being convicted in May*** in connection with buying a senator's endorsement on a prior campaign." *Id*. (emphasis added). It goes on to quote both Benton and GAP as reiterating that he had not worked for GAP "at all since May." *Id*. Benton was never asked to solicit direct or "indirect" contributions for GAP following his resignation.

[redacted]. The Complaint likewise asserts, "[A]fter his conviction in May on federal campaign finance charges Great America PAC has described him as a 'volunteer.'" Compl. ¶ 4. [redacted] A later piece, *see* Maggie Haberman, *"Super PAC" Backing Donald Trump Reveals List of Supporters*, N.Y. TIMES (May 19, 2016), does make such a claim, [redacted].

[redacted].

[redacted]

[redacted]

The Complaint and article claim that, as a result of this referral, the reporters received an e-mail from Benton. Compl. ¶¶ 6, 31; *accord Foreign Donor Fundraising*, *supra*. During their ensuing conversation, Benton explained the need for Beach to have a "deliberate disengagement" from any contributions the hypothetical Chinese businessman may choose to make. *Id*. Benton allegedly suggested the businessman's "Singapore-based communications consultancy" could pay $2 million to Titan Strategies LLC, Benton's public affairs firm, [redacted] He was allegedly noncommittal about how those funds would be spent. *Id*. Benton mentioned the firm ***might*** contribute those funds to two 501(c)(4) organizations (which would be legal), which might in turn choose to make contributions to GAP or instead fund projects he believes GAP supported, such as grassroots campaigning or advertising. Compl. ¶¶ 7, 9; *accord Foreign Donor Fundraising*, *supra*. [redacted]

One of the 501(c)(4) entities Benton [redacted] mentioned was Vision for America ("VFA"), which Beach allegedly runs. Compl. ¶ 8; *accord Foreign Donor Fundraising*, *supra*. [redacted]

Benton [redacted] assured the reporters Trump would know they have been "participating indirectly or directly" and their generosity would be "whispered into Trump's ear." Compl. ¶ 10; *accord Foreign Donor Fundraising*, *supra*. [redacted] article quoted Benton as stating he had been assured by his attorney the proposed transactions would be legal. *Foreign Donor Fundraising*, *supra*; *see also* Compl. ¶ 15. He later reemphasized, "[E]verything that we're doing is legal." Compl. ¶ 11; *accord Foreign Donor Fundraising*, *supra*. [redacted]

[redacted]

Benton [redacted] encouraged the reporters to attend a highly publicized and free party GAP was hosting in Las Vegas on October 19. Compl. ¶ 11; *accord Foreign Donor Fundraising*, *supra*.

[redacted]

[redacted]

Benton himself did not go. Compl. ¶ 11. No one, including the reporters, was required or asked to make any contributions or payments as a condition for attending this [redacted] event. [redacted] Beach stated, "[A]ny path we recommend is legal," and further insisted he "would never let you guys give to the PAC, to give to the C4, because that's illegal. . . . See the C4 is technically not illegal, but it's not—it's just not the best way to go." Compl. ¶ 13; *accord Foreign Donor Fundraising*, *supra*. [redacted]

Complaint alleges, "Beach said he needed to be kept 'deliberately ignorant' of the 'exact arrangements,' but indicated he was aware of the plan discussed with Benton." Compl. ¶ 12. The article, however, makes clear that ***Benton*** told the reporters Beach "needed to be kept 'deliberately ignorant' of the 'exact arrangements.'" *Foreign Donor Fundraising*, *supra*. [redacted] the Article's quotes from Beach to further place his activities in a misleadingly negative light. *Id*. ¶ 32. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

I. [redacted]

[redacted] were not agents of a foreign national; [redacted], the article CFC cites candidly admits the reporters were "purporting to represent [a] fictitious donor." *Foreign Donor Fundraising*, *supra*. The Federal Election Campaign Act ("FECA") makes it illegal for a person to "solicit" a "foreign national, directly or indirectly, to make a contribution or donation of money or other thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a Federal, State, or local election." 52 U.S.C. § 30121(a)-(b); *accord* 11 C.F.R. § 110.20(g); *see also* Compl. ¶¶ 16, 19. Federal regulations go on to prohibit a person from "knowingly provid[ing] substantial assistance" in making such solicitations. 11 C.F.R. § 110.20(h)(1); *see also* Compl. ¶ 20.

Both FECA and federal regulations expressly define "foreign national" as a "foreign principal" under the Foreign Agents Registration Act of 1938, *see* 22 U.S.C. § 611(b), or an individual who is not a U.S. citizen, national, or lawful permanent resident. 52 U.S.C. § 30121(b)(1)-(2); 11 C.F.R. § 110.20(a)(3); *see also* Compl. ¶ 18. [redacted]

[redacted] 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g)-(h). The Complaint itself alleges that Beach insisted he "need[ed] to know the donor's identity" and "the origins" of any contributions to GAP, and "rais[ed] concerns" about the fabricated businessman's "nationality." Compl. ¶ 6; *accord Foreign Donor Fundraising, supra*. It further alleges that Beach

[redacted]

[redacted]

emphasized that "any path we recommend is legal," and mentioned the fully legal possibility of contributing to a 501(c)(4) organization as one possible alternative to contributing to GAP. Compl. ¶¶ 6, 30; *accord Foreign Donor Fundraising*, *supra*. [redacted]

Beach's only other alleged interaction with the reporters was at an event GAP held in mid-October in Las Vegas. The Complaint claims that Beach speculated Trump would be likely to "remember[]" them if they "participat[ed] indirectly or directly" in some way. Compl. ¶ 14; *accord Foreign Donor Fundraising*, *supra*. [redacted]

[redacted] According to that article, Beach stated "I would never let you guys give to the PAC, to give to the C4, because that's illegal. See the C4 is technically not illegal, but it's not—it's just not the best way to go." *Foreign Donor Fundraising*. [redacted]

III. JESSE BENTON'S RELATIONSHIP WITH GREAT AMERICA PAC TERMINATED IN MAY 2016, AND HE HAS NOT BEEN AN AGENT FOR GREAT AMERICA PAC SINCE THAT TIME

The Complaint and article focus primarily on Benton's statements and potential plans. [redacted] By October 2016, when Benton interacted with the reporters, he was no longer associated in any way with GAP. The article [redacted] recognized he had resigned from GAP in May 2016, *Foreign* [redacted]

[redacted]

Donor Fundraising, [redacted]

[redacted] the Complaint alleges Beach repeatedly exhorted that any arrangements be fully legal. *Id.*; *see also* Compl. ¶¶ 6, 13, 15. [redacted] the article underlying the Complaint contends Benton insisted that Beach be kept in the dark about the structure of any transaction to which the [redacted] Chinese businessman might agree. *Foreign Donor Fundraising*, *supra* (discussing Benton's caution that Beach "needed to be kept 'deliberately ignorant' of the 'exact arrangements'"). Indeed, the article [redacted] "I would never let you guys give to the PAC, to give to the C4, because that's illegal. See the C4 is technically not illegal, but it's not—it's just not the best way to go."). [redacted]

[redacted]

[redacted] the article claims Benton discussed a range of possible alternatives, some of which may have raised serious legal concerns, while others would not have involved GAP. [redacted] Benton discussed the possibility of the non-existent businessman's company paying Benton's firm, which would then make contributions to 501(c)(4) groups, which may then decide to contribute to GAP. *See* Compl. ¶ 7; *accord Foreign Donor Fundraising*, *supra*. [redacted] he mentioned the possibility the 501(c)(4) companies would simply independently choose to spend the money on things GAP had planned to do itself.[4] [redacted]

[redacted]

Attachment 3

[redacted]

March 17, 2021

Acting General Counsel Lisa J. Stevenson
Federal Election Commission
1050 First Street, NE
Washington, DC 20463

RE: [redacted] MURs 7165 & 7196

Dear Ms. Stevenson,

In the above-captioned matters, the Federal Election Commission ("FEC" or "the Commission") has found reason to believe Respondent [redacted] iolated 52 U.S.C. § 30121(b)(2) by soliciting a contribution from a foreign national, as well as 11 C.F.R. § 110.20(h) by knowingly providing substantial assistance in such solicitation.

[redacted]

[redacted]

To the extent Benton's conduct may give rise to allegations he violated federal law, he did so independently of GAP—not as an agent of GAP. GAP had no control over Benton, and he was not acting at its direction. [redacted] evidence directly relating to GAP is the [redacted] statement by its co-chair, "I would never let you guys give to the PAC . . . because that's illegal." Investigations Team, *Exclusive Investigation: Donald Trump Faces Foreign Donor Fundraising Scandal*, THE TELEGRAPH, at 12 (Oct. 24, 2016) (hereafter, "The Article"); *see also* The Telegraph, *Pro-Trump Fundraisers Agree to Accept Illegal Foreign Donation*, YOUTUBE, at 3:16 to 3:21 (Oct. 24, 2016), https://www.youtube.com/ watch?v=xQnOxM9iqOw (hereafter, "The Video").

[redacted]

[redacted]

[redacted]

FACTUAL BACKGROUND

[redacted] an article that appeared on the website of a foreign newspaper, *The Telegraph*, along with a video [redacted] arose from an undercover "sting" operation [redacted] by foreign reporters allegedly pretending to be intermediaries for a Chinese billionaire.

[redacted] the video does not show ***any*** of the initial exchange between Beach and the reporters. Following that conversation, Beach referred the reporters to Benton, [redacted]. The video does not contain the entirety of either the ensuing exchange between Benton and the reporters, or Beach's subsequent conversation with the reporters after their meeting with Benton. [redacted]

There is no indication as to the order in which any of the statements in the video were made, the questions to which many of those statements were responding, or any additional context, explanation, or qualifications that may have been provided later in the conversation. Rather, the video jumps back and forth between fragments of two different conversations with two different people (Beach and Benton) at two different points in time. [redacted] the *New York Times* [redacted]—a [redacted] "[T]he video does not show how the reporters identified themselves and reflects only snippets of the reporters' conversations with Mr. Benton, making it difficult to verify exactly what Mr. Benton had offered or whether any laws were broken." 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. [redacted]

[redacted]

[redacted]

[redacted] The Video contains an image stating the reporters "offered $2m to a super PAC raising money to support the Trump campaign." [redacted].

[redacted] the Article reveals [redacted] "a Chinese client wished to donate to the PAC to support [Mr.] Trump's campaign." The Article, *supra* at 4. Beach suggested it might be legal for the Chinese donor to instead contribute to a 501(c)(4) organization. *Id.* ("[Beach] suggested the donation could be put through a social welfare organization called a 501(c)(4)—or C4—which unlike a PAC is not subject to a blanket ban on receiving foreign money . . . ."); *see also id.* at 8 (explaining Beach made "a suggestion involving a 501(c)(4)—a tax-exempt 'social welfare organization'—which he described as a 'non-disclose entity' through which the client could make a contribution for a 'specific purpose'").[1] Beach further emphasized, "[A]ny path we recommend is legal." *Id.* [redacted]

[redacted] each "rais[ed] concerns about [the putative donor's] nationality." *Id.* at 2, line 9. Beach also emphasized he would "need to know the origins" of any contribution to GAP before accepting it. *Id.* at 2, lines 9-10. Likewise, when the reporters returned to Beach after meeting with Benton [redacted] Beach reiterated, "I would never let you guys give to the PAC, to give to the C4, because that is illegal." *See* The Article, *supra* at 12; The Video, *supra* at 3:16 to 3:20. [redacted]

After the initial conversation in which Beach told the reporters GAP could not accept their contribution, *see id.* he referred them to Jesse Benton, a former advisor to GAP who ran an independent political strategy firm called Titan Strategies, LLC ("Titan"). [redacted]

[redacted]

[redacted]

Benton stopped being GAP's agent in May 2016. [redacted] the *Telegraph* article [redacted] recognizes Benton resigned from GAP in May 2016. *See* The Article, *supra* at 9. And Benton emphasizes Beach—GAP's co-chair—"needed to be kept 'deliberately ignorant' of the 'exact arrangements'" to which Benton and the reporters agreed. *Id.* at 12. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] Benton had his own independent consulting firm. Beach referred Benton a potential client. [redacted]

[redacted]

[redacted]

[redacted]

LEGAL ANALYSIS

[redacted]

[redacted] GAP's co-chair [redacted] told the reporters he would "never let [them] give to the PAC . . . because that's illegal" since they were representing a non-citizen. The Article, *supra* at 12; The Video, *supra* at 3:16 to 3:20. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

FEC regulations provide to "solicit" means "to ask, request, or recommend, explicitly or implicitly, that another person make a contribution." 11 C.F.R. §§ 110.20(a)(6); 300.2(m). The regulations provide a safe harbor, however, specifying, "A solicitation does not include . . . mere guidance as to the applicability of a particular law or regulation." *Id.* § 300.2(m). [redacted]

[redacted]

[redacted]

Attachment 4

Saurav Ghosh, Esq.
Federal Election Commission
1050 First Street, NE
Washington, DC 20463

May 10, 2021

RE: MURS 7165 & 7196

Dear Mr. Ghosh,

I write in response to your letter of April 20, 2021, [redacted]

First, [redacted] Jesse Benton was not an agent of GAP at any time after May 2016, including during the events at issue in October 2016. To whatever extent Benton's conduct violated federal law, he did so independently of GAP. GAP had no control over Benton, and he was not acting at its direction. [redacted] *See* FEC, *Factual and Legal Analysis*, MURs 7165 & 7196, at 12 n.33 [hereinafter, "*FEC Analysis*"].

[redacted] Benton resigned from GAP in May 2016—a fact that was publicly reported on at the time [redacted] *See Restatement (Third) of Agency*, §§ 3.06(5), 3.10(1) (explaining an agency relationship is terminated through "renunciation by the agent to the principal" of his position). Between his resignation in May 2016, through the events at issue here in October 2016, and continuing on to the present, neither Benton nor his company Titan have: (i) held any positions with GAP, (ii) provided any services to GAP, (iii) entered into any contracts with GAP, (iv) received any payments from GAP, or (v) been expressly or implicitly authorized to hold themselves out as agents, officers, employees, or contractors of GAP. [redacted] There is simply no evidence Beach or anyone else at GAP "manifest[ed] . . . assent" for Benton to act as GAP's agent following his resignation. *Cf. FEC Analysis*, at 12 n.33 (quoting *Restatement (Third) of Agency*).

At most, the lack of an agency relationship between GAP and Benton may have been insufficiently emphasized when the reporters were referred to Benton. [redacted]

[redacted] A mere professional referral of the reporters to an independent political consulting firm to seek potential advice is insufficient to create either an actual or apparent agency relationship. [redacted] *See Restatement (Third) of Agency*, § 3.03(b) (explaining a person's "apparent authority" as an agent can only "originate[] with expressive conduct ***by the principal*** toward a third party . . . Apparent [agency] authority is present only when a third party's belief [an agency relationship exists] is traceable to manifestations of the principal"). [redacted]

Second, [redacted] As discussed above, however, Benton was not acting as an agent of GAP at the time of his actions. At most, GAP may have failed to adequately convey Benton's independence to the reporters.

The record is undisputed, however, GAP's co-chair Eric Beach emphasized to the reporters, "I would never let you guys give to the PAC . . . because that's illegal." Investigations Team, *Exclusive Investigation: Donald Trump Faces Foreign Donor Fundraising Scandal*, THE TELEGRAPH, at 12 (Oct. 24, 2016) (hereafter, "The Article"); *see also* The Telegraph, *Pro-Trump Fundraisers Agree to Accept Illegal Foreign Donation*, YOUTUBE, at 3:16 to 3:21 (Oct. 24, 2016), https://www.youtube.com/watch?v=xQnOxM9iqOw (hereafter, "The Video"). The Article is clear Beach "rais[ed] concerns about [the putative donor's] nationality" and emphasized he would "need to know the origins" of any contribution to GAP before accepting it. *The Article*, *supra* at 2.

[1] As discussed later in this letter, Benton never claims to be acting on behalf of GAP. To the contrary, he never utters the words "Great America," "Great America PAC" or "GAP." Indeed, he goes so far as to tell the reporters Eric Beach, GAP's co-chair, "needed to be kept 'deliberately ignorant' of the 'exact arrangements'" to which Benton and the reporters agreed. The Article, *supra* at 12.

[redacted]

- [redacted] already noted above the recordings do not mention GAP, but rather discuss "the Super PAC." Moreover, [redacted] are not in a position to make any certifications as to what Benton's subjective thoughts or intent may have been. None of Benton's statements, either in the recording or quoted in the article, assert he sought "to obscure the true nature of the contribution" or the funds were being transmitted "without being linked back to their client." [redacted].

[redacted]

[redacted]

[redacted]

Attachment 5

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
[redacted]	)	MURs 7165 and 7196
	)	

CONCILIATION AGREEMENT

These matters were initiated by signed, sworn, and notarized complaints submitted by Campaign Legal Center and American Democracy Legal Fund. The Federal Election Commission ("Commission") found reason to believe that [redacted] the "Respondents") knowingly and willfully violated 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g) by soliciting a contribution from a foreign national.

NOW, THEREFORE, the Commission and the Respondents, having participated in informal methods of conciliation, prior to a finding of probable cause to believe, agree as follows:

I. The Commission has jurisdiction over the Respondents and the subject matter of this proceeding, and this agreement has the effect of an agreement entered pursuant to 52 U.S.C. § 30109(a)(4)(A)(i).

II. Respondents have had a reasonable opportunity to demonstrate that no action should be taken in this matter.

III. Respondents enter voluntarily into this agreement with the Commission.

IV. The pertinent facts in this matter are as follows:

1. GAP is a hybrid political committee, or "*Carey* committee," *see Carey v. Federal Election Commission*, 791 F. Supp. 2d 121 (D.D.C. 2011), with a separate,

segregated account used exclusively for independent expenditures that supported Donald J. Trump during the 2016 presidential election. Eric Beach was one of GAP's co-chairs at all relevant times.

2. Jesse Benton was a strategist for GAP until May 2016, when he resigned. He owned and operated an independent political consulting firm, Titan Strategies LLC ("Titan"). Benton remained in contact with Beach after ending his employment with GAP.

3. According to a news article and recorded video published online by the *Telegraph UK*, both of which were cited in the complaints, undercover reporters contacted Beach in the fall of 2016 posing as representatives of a Chinese national — who did not actually exist — who wanted to contribute to GAP. Beach expressed interest but stated that he needed more information about the donor and had concerns about his nationality, and that he would need to know the origins of contributions to GAP. Beach further emphasized, "[A]ny path we recommend is legal."

4. Beach also suggested during this initial phone call that the donation could be directed to a 501(c)(4) organization through which the reporters' purported foreign national client could make a contribution for a specific purpose.

5. Beach referred the reporters to Benton to discuss whether he could potentially help them with their proposed contribution. Benton sent an email introduction to the reporters and later met with them in person. At their meeting, which the reporters recorded, Benton offered to transmit the $2 million contribution through his company, Titan. Benton was recorded meeting with the reporters and recommending to them a specific plan, or "method of making a contribution" without being linked back to their

client. 11 C.F.R. § 300.2(m)(1)(i). Benton was recorded on video telling the reporters that he would "send . . . [the] money from my company to both," referring to two 501(c)(4) organizations, whose names he did not mention at the time, and confirmed that the funds would be passed through Benton's company, Titan, into the 501(c)(4)s. Benton also confirmed that "all of it" — which meant the full $2 million that the reporters' client intended to donate — would then be "pass[ed] on" to "the super PAC" from the 501(c)(4)s. Benton also warned the reporters that they "shouldn't put any of this on paper."

6. The Act and Commission regulations prohibit any "foreign national" from directly or indirectly making a contribution or donation of money or other thing of value, or an expenditure, independent expenditure, or disbursement, in connection with a federal, state, or local election. 52 U.S.C. § 30121(a)(1); 11 C.F.R. § 110.20(b), (c), (e), (f). A "contribution" includes "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A).

7. The Act further prohibits any person from soliciting, accepting, or receiving any such contribution or donation from a foreign national. 52 U.S.C. § 30121(a)(2). The Commission's regulation implementing this provision provides that "[n]o person shall *knowingly* solicit, accept, or receive from a foreign national any contribution or donation." 11 C.F.R. § 110.20(g).

8. Commission regulations define "knowingly," to include "actual knowledge" that the person being solicited is a foreign national, "aware[ness] of facts that would lead a reasonable person to conclude that there is a substantial probability that the

source of the funds" is a foreign national, or "aware[ness] of facts that would lead a reasonable person to inquire whether the source of the funds . . . is a foreign national," but fail to "conduct a reasonable inquiry." 11 C.F.R. § 110.20(a)(4).

9. The Act's definition of "foreign national" includes an individual who is not a citizen or national of the United States and who is not lawfully admitted for permanent residence. 52 U.S.C. § 30121(b)(2).

10. To "solicit" means to "ask, request, or recommend, explicitly or implicitly, that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value," 11 C.F.R. § 110.20(a)(6) (cross-referencing 11 C.F.R. § 300.2(m)), including by making a communication "that provides a method of making a contribution" or "provides instructions on how or where to send contributions." *Id.* § 300.2(m)(1)(i)-(ii).

11. Benton made a "solicitation" under the Act, and [redacted] the Commission has found that Benton did so with GAP's knowledge and on its behalf. Benton's recorded statements, which provide a detailed plan for the reporters' client to make a contribution to a political committee that one of the reporters referred to as "the super PAC" without public disclosure of their client's identity, indicate that he asked, requested, or recommended, explicitly or implicitly, that the reporters' client make a contribution. [redacted] the Commission has found, based on the context of Beach's referral to Benton and the purpose of Benton's meeting with the reporters, that Benton and the reporters understood "the super PAC" to refer to GAP.

12. Benton's statements and proposal to funnel the $2 million contribution to "the super PAC" through two layers of conduits — to obscure the true source of those funds — indicate that Benton knew or was aware of sufficient facts to reasonably

conclude that the person being solicited to provide funds was a foreign national who could not legally make a contribution to a political committee or appear on its disclosure reports. By proceeding to recommend a plan for the undercover reporters' client to make a contribution to "the super PAC," having been informed that the source of the contribution would be a foreign national, Benton solicited a $2 million contribution from someone he knew or reasonably believed to be a foreign national. [redacted] the Commission has found that Benton solicited that foreign national contribution for GAP's benefit.

13. Benton engaged in an "elaborate scheme for disguising" a foreign national contribution. *See United States v. Hopkins*, 916 F.2d 207, 214-15 (5th Cir. 1990). Benton was recorded on video explicitly telling the reporters, "You shouldn't put any of this on paper." The foregoing actions and statements reflect that Benton knew that his plan was illegal and that he took steps to conceal it.

[redacted]

1. [redacted]

2. [redacted]

3. [redacted]

4. [redacted]

VI. The Commission, on request of anyone filing a complaint under 52 U.S.C. § 30109(a)(1) concerning the matters at issue herein or on its own motion, may review compliance with this agreement. If the Commission believes that this agreement or any requirement thereof has been violated, it may institute a civil action for relief in the United States District Court for the District of Columbia.

VII. This agreement shall become effective as of the date that all parties hereto have executed the same and the Commission has approved the entire agreement.

VIII. Respondents shall have no more than 30 days from the date this agreement becomes effective to comply with and implement the requirements contained in this agreement and to so notify the Commission.

IX. This Conciliation Agreement constitutes the entire agreement between the parties on the matters raised herein, and no other statement, promise, or agreement, either written or

oral, made by either party or by agents of either party, that is not contained in this written agreement shall be enforceable.

FOR THE COMMISSION:

Lisa J. Stevenson
Acting General Counsel

[redacted]

[redacted]

Attachment 6

Michael Columbo (Dhillon Law)

From: Saurav Ghosh <SGhosh@fec.gov>
Sent: Monday, August 16, 2021 9:39 AM
To: Michael Columbo (Dhillon Law)
Cc: Claudio Pavia; David Warrington (Dhillon Law)
Subject: RE: MURs 7165 & 7196 - General Counsel's Brief

External email

Mike,

If you are unable to access any of the PDF files we provided, please give me a call and I'd be happy to try to help. We are not aware of any technical or transmittal issues with the PDFs.

If you need more time to file the reply brief, an extension of time is available only with tolling for the period of the extension, which is standard Commission practice.

Regarding the documents we provided, all factual and potentially exculpatory language was provided. Only text that disclosed the identity of a co-respondent and other privileged information, such as legal arguments, procedural history, and administrative information, was redacted because the co-respondent that submitted those documents to the Commission did not waive confidentiality. We made our best efforts to obtain a waiver of confidentiality but, since we could not resolve the confidentiality issue, we provided the documents with the confidential information redacted, as the Commission's disclosure policy requires. If your client is willing to provide tolling, we could attempt to take additional steps to resolve the confidentiality issue, but whether to waive confidentiality is ultimately the co-respondent's decision.

To our knowledge, no one in OGC has said anything to co-respondent's counsel about not speaking with you or your client. If you have any specific information, please let us know.

Your client's motion to quash the Commission's subpoena was mooted by the conclusion of the investigation (which ended without any response to the Commission's duly authorized subpoena) and the service of the General Counsel's Brief. Moreover, the Act and Commission regulations do not require the Commission to respond to a motion to reconsider or rescind a reason to believe finding, and, though the Commissioners have received the submission, the Commission is thus not required to and in fact has not provided any answer. As you know, the Act's administrative enforcement process proceeds through stages, and at this stage your client may now submit a brief stating his position on the legal and factual issues of the case, and replying to the General Counsel's brief, which shall be considered by the Commission.

Regards,
Saurav

Saurav Ghosh
Federal Election Commission
Office of the General Counsel
(202) 694-1643

From: Michael Columbo (Dhillon Law) <MColumbo@dhillonlaw.com>
Sent: Friday, August 13, 2021 5:47 PM
To: Saurav Ghosh <SGhosh@fec.gov>
Cc: Claudio Pavia <CPavia@fec.gov>; David Warrington (Dhillon Law) <DWarrington@dhillonlaw.com>
Subject: Re: MURs 7165 & 7196 - General Counsel's Brief

Saurav,

I'm traveling on business today and unable to open the zip file to make use of its contents. I can only see on my phone a preview of a one document that is heavily redacted. I'm working with colleagues to try to break it up into emailable PDFs so I don't lose another couple of days.

Even so, we are now *three* days into our response period, a 20% loss. You could have had this material ready to be produced before serving the brief to avoid this situation. Producing presumably exculpatory information to which we were entitled several days into a short deadline period prejudices our ability to respond in the limited time allotted. You are correct that this must toll our response deadline. However, as the party prejudiced by the government's unilateral conduct, we are not under a reciprocal obligation to toll the SOL to benefit the government. We will therefore extend the 15 day response period hour for hour since we submitted our request for these documents.

Further, the one document I can see is heavily redacted. What precisely is the basis of OGC's redactions? We are entitled to know why the information is being withheld as is standard in any situation where one party claims a privilege against disclosure to another party. Additionally, to the extent the information is covered by another party's privilege, please also explain the government's efforts to obtain a waiver of that privilege pursuant to the disclosure policy.

Moreover, it has come to our attention that someone in OGC instructed or at least strongly encouraged counsel for co-respondents - who are material witnesses possessing relevant and exculpatory information - to not speak with us. We demand an immediate explanation.

Finally, we note that you have not responded to our Motion. In your most recent communication on the subject, you in fact asserted that the Commission recognizes no such process despite the Commission's published guidance and your own invitation to submit arguments against the FLA. Instead, you exploited the information in our Motion to preemptively rebut our arguments in your brief. What is the Commission's answer to the Motion?

Respectfully,

Michael A. Columbo
David Warrington
Counsel to Jesse Benton

Sent from my iPhone

> On Aug 13, 2021, at 11:52 AM, Saurav Ghosh <SGhosh@fec.gov> wrote:
>
> External email
>
> _____

Hi Mike,

Please find the documents responsive to your request attached to this email. In light of the two days it took for us to provide them, we would be willing to extend the time to respond to the General Counsel's Brief by two days, conditioned on tolling for the same. If you would like such an extension, please sign and return the attached tolling agreement. Otherwise, we will expect your reply on Wednesday, August 25.

As a reminder, we need an updated Designation of Counsel form listing you and Mr. Warrington, and your law firm, as Mr. Benton's counsel.

Thank you.

Best,
Saurav

Saurav Ghosh
Federal Election Commission
Office of the General Counsel
(202) 694-1643

From: Michael Columbo (Dhillon Law) <MColumbo@dhillonlaw.com>
Sent: Wednesday, August 11, 2021 10:59 AM
To: Claudio Pavia <CPavia@fec.gov>; David Warrington (Dhillon Law) <DWarrington@dhillonlaw.com>
Cc: Saurav Ghosh <SGhosh@fec.gov>
Subject: RE: MURs 7165 & 7196 - General Counsel's Brief

Claudio; Saurav:

Good morning. Pursuant to Part IV(a) an (d) of the Commission's Agency Procedure for Disclosure of Documents and Information in the Enforcement Process, https://www.fec.gov/resources/cms-content/documents/fedreg_notice_2011-06.pdf<https://gcc02.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.fec.gov%2Fresources%2Fcms-content%2Fdocuments%2Ffedreg_notice_2011-06.pdf&data=04%7C01%7CSGhosh%40fec.gov%7C9ac51985df44427ec45408d95cd98434%7Cee91fa706c9d45e0bb084a355de91010%7C0%7C1%7C637642911588296022%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C1000&sdata=hKnn2mMrmJF7%2Bb6LgS%2F604Nvzy8ok7sL3rYopJ2exqE%3D&reserved=0>, and routine agency practice, we request that you provide us with the investigation file.

We specifically note that the policy requires the disclosure of exculpatory evidence and, when necessary, seeking waivers to produce otherwise confidential information. Specifically, we request the full set of video and/or recordings made by the Telegraph personnel in connection with their work on this matter, including those used to make the three minute video cited in the PC Brief, in addition to any other information created or provided by the Telegraph, the complainants, or any other person about the issues in this matter. This includes attorney or investigator notes summarizing discussions with anyone interviewed during the investigation. Further, please provide any documents, including phone records, obtained of the persons involved. Pursuant to part (e) of the policy, please include any information provided by co-respondents in any context, including communications or summaries of discussions in which they dispute the allegations.

Exculpatory information includes any witness account that differs from any other witness account, in addition to the statement of any person who disputed or disagreed with the alleged facts in this matter, as well as any information tending to undermine the credibility of any witness, including the Telegraph and its personnel who participated in the events at issue in this matter.

Sincerely,

Michael A. Columbo, Esq.
Dhillon Law Group Inc.
177 Post St., Suite 700
San Francisco, CA 94108
415.433.1700 (o)

From: Claudio Pavia [mailto:CPavia@fec.gov]
Sent: Tuesday, August 10, 2021 3:36 PM
To: Michael Columbo (Dhillon Law)
<MColumbo@dhillonlaw.com<mailto:MColumbo@dhillonlaw.com>>; David Warrington (Dhillon Law)
<DWarrington@dhillonlaw.com<mailto:DWarrington@dhillonlaw.com>>
Cc: Saurav Ghosh <SGhosh@fec.gov<mailto:SGhosh@fec.gov>>
Subject: MURs 7165 & 7196 - General Counsel's Brief

External email

_____

Dear Messrs. Columbo and Warrington,

Attached please find the General Counsel's Brief in MURs 7165 and 7196. I should note that Mr. Ghosh remains the primary point of contact in this matter, but he is currently experiencing a power outage. Given recent email issues, I'd appreciate it if you could confirm receipt of this correspondence.

Cheers,
CJ

Claudio J. Pavia
Acting Assistant General Counsel
Federal Election Commission, Enforcement Division
(202) 694-1597

<MURs 7165 7196 - Production to Benton - Redacted.zip>
<MURs 7165 and 7196 (Benton) - Tolling Agreement.pdf>

Attachment 5

Michael Columbo (Dhillon Law)

From: Saurav Ghosh <SGhosh@fec.gov>
Sent: Wednesday, August 18, 2021 8:14 AM
To: Michael Columbo (Dhillon Law)
Cc: Claudio Pavia; David Warrington (Dhillon Law)
Subject: RE: MURs 7165 & 7196 - General Counsel's Brief

External email

Mike,

A Commission vote certification is not subject to the disclosure policy, as it is not a document "gathered by the Office of General Counsel in its investigation." As the Act and Commission regulations require, we provided Mr. Benton with notice of the Commission's findings pertaining to him, namely, that the Commission found reason to believe that Mr. Benton knowingly and willfully violated 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g). Footnote 3 of the General Counsel's Brief cites to this part of the certification to substantiate that the Commission made such a finding.

Regards,
Saurav

Saurav Ghosh
Federal Election Commission
Office of the General Counsel
(202) 694-1643

From: Michael Columbo (Dhillon Law) <MColumbo@dhillonlaw.com>
Sent: Tuesday, August 17, 2021 3:02 PM
To: Saurav Ghosh <SGhosh@fec.gov>
Cc: Claudio Pavia <CPavia@fec.gov>; David Warrington (Dhillon Law) <DWarrington@dhillonlaw.com>
Subject: RE: MURs 7165 & 7196 - General Counsel's Brief

Saurav,

The OGC Brief in footnote 3 cites a Commission certification. As a relevant non-public document in this matter, and one is cited and relied upon in the brief, it is covered by the disclosure policy and does not fall within any exemption. We have specifically made an issue of precisely how the RTB finding was framed and the OGC brief cites the RTB finding in this case as precedent for the theory advanced in the brief, so this is a material record. Could you please forward it at your earliest convenience?

Thanks,

Michael A. Columbo, Esq.
Dhillon Law Group Inc.
177 Post St., Suite 700
San Francisco, CA 94108
415.433.1700 (o)

From: Saurav Ghosh [mailto:SGhosh@fec.gov]
Sent: Monday, August 16, 2021 9:39 AM
To: Michael Columbo (Dhillon Law) <MColumbo@dhillonlaw.com>
Cc: Claudio Pavia <CPavia@fec.gov>; David Warrington (Dhillon Law) <DWarrington@dhillonlaw.com>
Subject: RE: MURs 7165 & 7196 - General Counsel's Brief

External email

Mike,

If you are unable to access any of the PDF files we provided, please give me a call and I'd be happy to try to help. We are not aware of any technical or transmittal issues with the PDFs.

If you need more time to file the reply brief, an extension of time is available only with tolling for the period of the extension, which is standard Commission practice.

Regarding the documents we provided, all factual and potentially exculpatory language was provided. Only text that disclosed the identity of a co-respondent and other privileged information, such as legal arguments, procedural history, and administrative information, was redacted because the co-respondent that submitted those documents to the Commission did not waive confidentiality. We made our best efforts to obtain a waiver of confidentiality but, since we could not resolve the confidentiality issue, we provided the documents with the confidential information redacted, as the Commission's disclosure policy requires. If your client is willing to provide tolling, we could attempt to take additional steps to resolve the confidentiality issue, but whether to waive confidentiality is ultimately the co-respondent's decision.

To our knowledge, no one in OGC has said anything to co-respondent's counsel about not speaking with you or your client. If you have any specific information, please let us know.

Your client's motion to quash the Commission's subpoena was mooted by the conclusion of the investigation (which ended without any response to the Commission's duly authorized subpoena) and the service of the General Counsel's Brief. Moreover, the Act and Commission regulations do not require the Commission to respond to a motion to reconsider or rescind a reason to believe finding, and, though the Commissioners have received the submission, the Commission is thus not required to and in fact has not provided any answer. As you know, the Act's administrative enforcement process proceeds through stages, and at this stage your client may now submit a brief stating his position on the legal and factual issues of the case, and replying to the General Counsel's brief, which shall be considered by the Commission.

Regards,
Saurav

Saurav Ghosh
Federal Election Commission
Office of the General Counsel
(202) 694-1643

From: Michael Columbo (Dhillon Law) <MColumbo@dhillonlaw.com>
Sent: Friday, August 13, 2021 5:47 PM

To: Saurav Ghosh <SGhosh@fec.gov>
Cc: Claudio Pavia <CPavia@fec.gov>; David Warrington (Dhillon Law) <DWarrington@dhillonlaw.com>
Subject: Re: MURs 7165 & 7196 - General Counsel's Brief

Saurav,

I'm traveling on business today and unable to open the zip file to make use of its contents. I can only see on my phone a preview of a one document that is heavily redacted. I'm working with colleagues to try to break it up into emailable PDFs so I don't lose another couple of days.

Even so, we are now *three* days into our response period, a 20% loss. You could have had this material ready to be produced before serving the brief to avoid this situation. Producing presumably exculpatory information to which we were entitled several days into a short deadline period prejudices our ability to respond in the limited time allotted. You are correct that this must toll our response deadline. However, as the party prejudiced by the government's unilateral conduct, we are not under a reciprocal obligation to toll the SOL to benefit the government. We will therefore extend the 15 day response period hour for hour since we submitted our request for these documents.

Further, the one document I can see is heavily redacted. What precisely is the basis of OGC's redactions? We are entitled to know why the information is being withheld as is standard in any situation where one party claims a privilege against disclosure to another party. Additionally, to the extent the information is covered by another party's privilege, please also explain the government's efforts to obtain a waiver of that privilege pursuant to the disclosure policy.

Moreover, it has come to our attention that someone in OGC instructed or at least strongly encouraged counsel for co-respondents - who are material witnesses possessing relevant and exculpatory information - to not speak with us. We demand an immediate explanation.

Finally, we note that you have not responded to our Motion. In your most recent communication on the subject, you in fact asserted that the Commission recognizes no such process despite the Commission's published guidance and your own invitation to submit arguments against the FLA. Instead, you exploited the information in our Motion to preemptively rebut our arguments in your brief. What is the Commission's answer to the Motion?

Respectfully,

Michael A. Columbo
David Warrington
Counsel to Jesse Benton

Sent from my iPhone

> On Aug 13, 2021, at 11:52 AM, Saurav Ghosh <SGhosh@fec.gov> wrote:
>
> External email
>
> _____
>
> Hi Mike,

Please find the documents responsive to your request attached to this email. In light of the two days it took for us to provide them, we would be willing to extend the time to respond to the General Counsel's Brief by two days, conditioned on tolling for the same. If you would like such an extension, please sign and return the attached tolling agreement. Otherwise, we will expect your reply on Wednesday, August 25.

As a reminder, we need an updated Designation of Counsel form listing you and Mr. Warrington, and your law firm, as Mr. Benton's counsel.

Thank you.

Best,
Saurav

Saurav Ghosh
Federal Election Commission
Office of the General Counsel
(202) 694-1643

From: Michael Columbo (Dhillon Law) <MColumbo@dhillonlaw.com>
Sent: Wednesday, August 11, 2021 10:59 AM
To: Claudio Pavia <CPavia@fec.gov>; David Warrington (Dhillon Law) <DWarrington@dhillonlaw.com>
Cc: Saurav Ghosh <SGhosh@fec.gov>
Subject: RE: MURs 7165 & 7196 - General Counsel's Brief

Claudio; Saurav:

Good morning. Pursuant to Part IV(a) an (d) of the Commission's Agency Procedure for Disclosure of Documents and Information in the Enforcement Process, https://www.fec.gov/resources/cms-content/documents/fedreg_notice_2011-06.pdf<https://gcc02.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.fec.gov%2Fresources%2Fcms-content%2Fdocuments%2Ffedreg_notice_2011-06.pdf&data=04%7C01%7CSGhosh%40fec.gov%7C9ac51985df44427ec45408d95cd98434%7Cee91fa706c9d45e0bb084a355de91010%7C0%7C1%7C637642911588296022%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C1000&sdata=hKnn2mMrmJF7%2Bb6LgS%2F604Nvzy8ok7sL3rYopJ2exqE%3D&reserved=0>, and routine agency practice, we request that you provide us with the investigation file.

We specifically note that the policy requires the disclosure of exculpatory evidence and, when necessary, seeking waivers to produce otherwise confidential information. Specifically, we request the full set of video and/or recordings made by the Telegraph personnel in connection with their work on this matter, including those used to make the three minute video cited in the PC Brief, in addition to any other information created or provided by the Telegraph, the complainants, or any other person about the issues in this matter. This includes attorney or investigator notes summarizing discussions with anyone interviewed during the investigation. Further, please provide any documents, including phone records, obtained of the persons involved. Pursuant to part (e) of the policy, please include any information provided by co-respondents in any context, including communications or summaries of discussions in which they dispute the allegations.

Exculpatory information includes any witness account that differs from any other witness account, in addition to the statement of any person who disputed or disagreed with the alleged facts in this matter, as well as any information tending to undermine the credibility of any witness, including the Telegraph

and its personnel who participated in the events at issue in this matter.

Sincerely,

Michael A. Columbo, Esq.
Dhillon Law Group Inc.
177 Post St., Suite 700
San Francisco, CA 94108
415.433.1700 (o)

From: Claudio Pavia [mailto:CPavia@fec.gov]
Sent: Tuesday, August 10, 2021 3:36 PM
To: Michael Columbo (Dhillon Law)
<MColumbo@dhillonlaw.com<mailto:MColumbo@dhillonlaw.com>>; David Warrington (Dhillon Law)
<DWarrington@dhillonlaw.com<mailto:DWarrington@dhillonlaw.com>>
Cc: Saurav Ghosh <SGhosh@fec.gov<mailto:SGhosh@fec.gov>>
Subject: MURs 7165 & 7196 - General Counsel's Brief

External email

Dear Messrs. Columbo and Warrington,

Attached please find the General Counsel's Brief in MURs 7165 and 7196. I should note that Mr. Ghosh remains the primary point of contact in this matter, but he is currently experiencing a power outage. Given recent email issues, I'd appreciate it if you could confirm receipt of this correspondence.

Cheers,
CJ

Claudio J. Pavia
Acting Assistant General Counsel
Federal Election Commission, Enforcement Division
(202) 694-1597

<MURs 7165 7196 - Production to Benton - Redacted.zip>
<MURs 7165 and 7196 (Benton) - Tolling Agreement.pdf>

Attachment 6

Michael Columbo (Dhillon Law)

From: Saurav Ghosh <SGhosh@fec.gov>
Sent: Wednesday, August 25, 2021 5:01 PM
To: Michael Columbo (Dhillon Law)
Cc: David Warrington (Dhillon Law)
Subject: RE: MUR 7165 & 7196 (Jesse Benton)

External email

Hi Mike,

Thanks for submitting the updated Designation of Counsel form.

As I mentioned in my August 16 email, an extension of time to file the reply brief is available only with tolling for the period of the extension, which is standard Commission practice. We have offered to provide you with additional time, should you agree to toll the statute of limitations. However, without a tolling agreement, the reply brief is due today, and we will proceed accordingly.

Thank you.

Regards,
Saurav

Saurav Ghosh
Federal Election Commission
Office of the General Counsel
(202) 694-1643

From: Michael Columbo (Dhillon Law) <MColumbo@dhillonlaw.com>
Sent: Wednesday, August 25, 2021 4:10 PM
To: Saurav Ghosh <SGhosh@fec.gov>
Cc: David Warrington (Dhillon Law) <DWarrington@dhillonlaw.com>
Subject: MUR 7165 & 7196 (Jesse Benton)

Saurav,

As requested, please find attached a Designation of Counsel form with an updated firm name and contact information.

We've received no response regarding the due date of the Brief in response to the issues we raised on August 16. Accordingly, as between filing a brief today despite the delayed production of documents to the prejudice of Mr. Benton, or an indefinite postponement until the issues we noted are addressed, we will proceed with the modest compromise of filing the brief on Friday, August 28, corresponding to 15 days following the production of the redacted documents on August 13. This 3-day adjustment should have no material impact on the FEC's interests and are a reasonable accommodation of the circumstances.

Regards,

Michael A. Columbo, Esq.
Dhillon Law Group Inc.
177 Post St., Suite 700
San Francisco, CA 94108
415.433.1700 (o)

From: Michael Columbo (Dhillon Law)
Sent: Monday, August 16, 2021 4:06 PM
To: 'CommissionerTrainor@fec.gov' <CommissionerTrainor@fec.gov>; 'CommissionerWeintraub@fec.gov' <CommissionerWeintraub@fec.gov>; 'swalther@fec.gov' <swalther@fec.gov>
Cc: David Warrington (Dhillon Law) <DWarrington@dhillonlaw.com>; Saurav Ghosh <SGhosh@fec.gov>; 'cela@fec.gov' <cela@fec.gov>
Subject: MUR 7165 & 7196 (Jesse Benton)

Commissioners,

On behalf of respondent Jesse R. Benton in MURs 7165 and 7196, we are submitting the attached Objection and Notice in relation to an issue that has arisen at the probable cause briefing stage in this matter. In addition to this email, which includes CELA and the assigned staff attorney, we have sent six copies by Federal Express in one package addressed to the six commissioners.

Respectfully,

David Warrington
Michael A. Columbo, Esq.
Dhillon Law Group Inc.
177 Post St., Suite 700
San Francisco, CA 94108
415.433.1700 (o)