



FEDERAL ELECTION COMMISSION
Washington, DC 20463

August 9, 2021

Thomas J. Spulak
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RE: MUR 7613

Dear Mr. Spulak:

On May 24, 2019, the Federal Election Commission (“Commission”) notified your clients, Zekelman Industries, Inc., Wheatland Tube, LLC, and Barry Zekelman, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. Copies of the complaint were forwarded to your clients at that time. Upon review of the allegations contained in the complaint and information supplied by your clients, the Commission, on July 29, 2021, found reason to believe that Zekelman Industries, Wheatland Tube, and Barry Zekelman violated 52 U.S.C. § 30121(a)(1)(A), a provision of the Act. The Factual and Legal Analysis, which formed a basis for the Commission’s finding, is enclosed for your information.

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

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

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

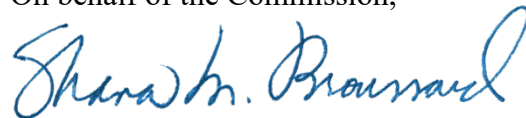
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Requests for extensions of time are not routinely granted and may be conditioned on your clients entering into a tolling agreement with the Commission. Requests must be made in writing at least five days prior to the due date of the response, and good cause must be demonstrated. In addition, OGC ordinarily will not grant extensions beyond 20 days. Pre-probable cause conciliation, extensions of time, and other enforcement procedures and options are discussed more comprehensively in the Commission's "Guidebook for Complainants and Respondents on the FEC Enforcement Process," which is available on the Commission's website at http://www.fec.gov/em/respondent_guide.pdf.

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

This matter will remain confidential in accordance with 52 U.S.C. §§ 30109(a)(4)(B) and 30109(a)(12)(A) unless you notify the Commission in writing that your clients wish the matter to be made public. For your information, we have enclosed a brief description of the Commission's procedures for handling possible violations of the Act. If you have any questions, please contact Aaron Rabinowitz, the attorney assigned to this matter, at (202) 694-1476 or arabinowitz@fec.gov.

On behalf of the Commission,



Shana M. Broussard
Chair

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

FEDERAL ELECTION COMMISSION**FACTUAL AND LEGAL ANALYSIS**

RESPONDENTS: Zekelman Industries, Inc.
Wheatland Tube, LLC
Barry Zekelman

MUR 7613

I. INTRODUCTION

The Complaint alleges that Wheatland Tube, LLC (“Wheatland Tube”), a U.S.-based subsidiary of another U.S. company, Zekelman Industries, Inc., made \$1.75 million in prohibited foreign national contributions to America First Action, Inc., and Jon Proch in his official capacity as Treasurer (“AFA”) during the 2018 election cycle.¹ The Complaint asserts that foreign national Barry Zekelman, the chief executive officer and executive chairman of Zekelman Industries, participated in Wheatland Tube’s decision to contribute when, after a lawyer for the company contacted him about the potential contributions, he proceeded to discuss the matter with executives of both companies who report to him.² The Complaint additionally alleges that Zekelman Industries knowingly solicited, and provided substantial assistance in the making of, the prohibited contributions based on the actions of the company’s lawyer and its executives.³

Wheatland Tube, Barry Zekelman, and Zekelman Industries (collectively, the “Zekelman Respondents”) submitted a joint Response denying that the contributions were prohibited foreign national contributions.⁴ They assert that Wheatland Tube’s president is a United States citizen

¹ See Compl. ¶¶ 1-2, 9-11 (Zekelman Industries, Inc., *et al.*) (May 21, 2019).

² *Id.* ¶¶ 9-11, 28-30.

³ *Id.* ¶¶ 2, 36, 38.

⁴ Wheatland Tube, LLC, Barry Zekelman, and Zekelman Industries Resp. at 3, MUR 7613 (July 5, 2019) (“Zekelman Resp.”).

1 who, after consulting with another Wheatland Tube officer, authorized and approved the
2 contributions to AFA.⁵

3 As discussed below, information received from the Zekelman Respondents indicates that
4 Barry Zekelman participated in Wheatland Tube's decision-making process to contribute to AFA
5 and that Zekelman Industries, through the actions of its executives, provided substantial
6 assistance in Wheatland Tube's making of prohibited foreign national contributions.
7 Accordingly, the Commission finds reason to believe that Wheatland Tube, LLC, Barry
8 Zekelman, and Zekelman Industries, Inc., violated 52 U.S.C. § 30121(a)(1)(A).

9 II. FACTUAL BACKGROUND

10 Wheatland Tube is a pipe and tube manufacturer that is organized under the laws of
11 Pennsylvania and is owned by Zekelman Industries, a company that is incorporated in Delaware
12 and headquartered in Illinois.⁶ Barry Zekelman, a Canadian citizen, is the CEO and executive
13 chairman of Zekelman Industries, and is also an owner of the company.⁷ Mickey McNamara is a
14 United States citizen and, according to the Zekelman Respondents, serves simultaneously as the
15 president of Wheatland Tube and general counsel of Zekelman Industries.⁸ In addition, Mike
16 Graham is a United States citizen and is Zekelman Industries' chief financial officer.⁹ Both
17 Graham and McNamara also serve as directors of Wheatland Tube.¹⁰ AFA is registered with the

⁵ *Id.*

⁶ Compl. ¶ 5; Zekelman Resp. at 1.

⁷ Compl. ¶ 5; Zekelman Resp. at 1.

⁸ Zekelman Resp. at 1.

⁹ *Id.*

¹⁰ *Id.* Complete information regarding Wheatland Tube's structure and governance, including whether it has additional directors, is unknown at this time.

1 Commission as an independent expenditure-only committee.¹¹ It has described itself, in an
2 archived version of its website from the time of the contributions in this matter, as “the primary
3 super PAC dedicated to electing federal candidates who support the agenda of the Trump-Pence
4 administration.”¹²

5 The Complaint’s allegations involve three contributions that Wheatland Tube made to
6 AFA in 2018: \$1 million on April 5, 2018; \$250,000 on June 4, 2018; and \$500,000 on October
7 17, 2018.¹³ The Complaint relies on a *New York Times* article to support the allegation that
8 Zekelman participated in Wheatland Tube’s decision to make the contributions.¹⁴

9 The joint Response submitted by Wheatland Tube, Zekelman, and Zekelman Industries
10 does not respond to the Complaint’s attached *New York Times* article.¹⁵ In a sworn declaration,
11 Zekelman acknowledges that he “discussed Wheatland Tube’s potential contributions to America
12 First” with McNamara.¹⁶ Zekelman also identifies Roger Schagrin as the “outside attorney” for
13 Zekelman Industries referenced in the Complaint, attesting that Schagrin “suggested to [him] that
14 a U.S.-based company with which [he is] affiliated should consider contributing to America
15 First” and this “led [him] to believe that [he] could communicate with others about potential

¹¹ AFA, Statement of Organization (Apr. 12, 2017).

¹² <https://web.archive.org/web/20180616235258/https://www.alapac.org/> (snapshot of June 16, 2018, showing quoted language in homepage header).

¹³ See Compl. ¶¶ 6-8; see also AFA, Amended 12-Day Pre-Election Report for the Primary at 23 (Aug. 22, 2018); AFA, June 2018 Quarterly Report at 34 (July 15, 2018); AFA, Amended 12-Day Report for the General Election, at 43 (Jan. 25, 2019).

¹⁴ Compl. ¶ 9 (citing Eric Lipton, *He’s One of the Biggest Backers of Trump’s Push to Protect American Steel. And He’s Canadian*, NEW YORK TIMES (May 20, 2019), <https://www.nytimes.com/2019/05/20/us/politics/hes-one-of-the-biggest-backers-of-trumps-push-to-protect-american-steel-and-hes-canadian.html> (“NYT Article”).

¹⁵ See generally Zekelman Resp.

¹⁶ *Id.*, Zekelman Decl. ¶ 4.

1 contributions.”¹⁷ McNamara, in a sworn declaration, states that after speaking with Zekelman,
2 he made the decision, in consultation with Graham, to contribute to AFA.¹⁸ McNamara attests
3 that he exercised “independent judgment and determined that the contributions were an
4 appropriate and beneficial corporate expenditure,” because he “believed that President Trump’s
5 trade policies were well-aligned with Wheatland Tube’s corporate interests.”¹⁹ The Zekelman
6 Respondents argue that “[t]hey did not know that having Mr. Zekelman participate in
7 communications about a contribution . . . could have any legal implications.”²⁰

8 **III. LEGAL ANALYSIS**

9 **A. Legal Standard**

10 The Act and Commission regulations prohibit any “foreign national” from directly or
11 indirectly making a contribution or donation of money or other thing of value, or an expenditure,
12 independent expenditure, or disbursement, in connection with a federal, state, or local election.²¹
13 The Act’s definition of “foreign national” includes an individual who is not a citizen or national
14 of the United States and who is not lawfully admitted for permanent residence, as well as a
15 “foreign principal” as defined at 22 U.S.C. § 611(b), which, in turn, includes a “partnership,

¹⁷ Zekelman Resp., Zekelman Decl. ¶ 3.

¹⁸ *Id.*, McNamara Decl. ¶¶ 5-7.

¹⁹ *Id.*, McNamara Decl. ¶ 6.

²⁰ Zekelman Resp. at 3.

²¹ 52 U.S.C. § 30121(a)(1); 11 C.F.R. § 110.20(b), (c), (e), (f). Courts have consistently upheld the provisions of the Act prohibiting foreign national contributions on the ground that the government has a clear, compelling interest in limiting the influence of foreigners over the activities and processes that are integral to democratic self-government, which include making political contributions and express advocacy expenditures. *See Bluman v. FEC*, 800 F. Supp. 2d 281, 288-89 (D.D.C. 2011), *aff’d* 132 S. Ct. 1087 (2012); *United States v. Singh*, 924 F.3d 1030, 1040-44 (9th Cir. 2019).

1 association, corporation, organization, or other combination of persons organized under the laws
2 of or having its principal place of business in a foreign country.”²²

3 Commission regulations implementing the Act’s foreign national prohibition provide that
4 “a foreign national shall not direct, dictate, control, or directly or indirectly participate in the
5 decision-making process of any person, such as a corporation . . . with regard to such person’s
6 . . . election-related activities, such as decisions concerning the making of contributions. . . .”²³
7 Commission regulations also prohibit any person from knowingly²⁴ soliciting, accepting, or
8 receiving a contribution from a foreign national,²⁵ and provide that “[n]o person shall knowingly
9 provide substantial assistance in the solicitation, making, acceptance, or receipt of a
10 contribution” prohibited by 11 C.F.R. § 110.20(b)-(d) and (g).²⁶

11 The Commission has found that not all participation by foreign nationals in the election-
12 related activities of others will violate the Act. In MUR 6959, for example, the Commission
13 found no reason to believe that a foreign national violated 52 U.S.C. § 30121 by performing

²² 52 U.S.C. § 30121(b); 22 U.S.C. § 611(b)(3); *see also* 11 C.F.R. § 110.20(a)(3).

²³ 11 C.F.R. § 110.20(i).

²⁴ The term “knowingly” is defined as having “actual knowledge” that the source of the funds is a foreign national, being aware of “facts that would lead a reasonable person to conclude that there is a substantial probability” that the source is a foreign national, or being aware of facts that would lead a reasonable person to inquire whether the source of the funds solicited is a foreign national, but the person failed to conduct a reasonable inquiry. 11 C.F.R. § 110.20(a)(4).

²⁵ 11 C.F.R. § 110.20(g); *see also* 52 U.S.C. § 30121(a)(2) (not including the “knowingly” standard). 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. § 300.2(m) (incorporated by reference at 11 C.F.R. § 110.20(a)(6)).

²⁶ 11 C.F.R. § 110.20(h)(1). The Commission has explained that substantial assistance “means active involvement in the solicitation, making, receipt, or acceptance of a foreign national contribution or donation with an intent to facilitate successful completion of the transaction.” Explanation & Justification, Assisting Foreign National Contributions or Donations, 67 Fed. Reg. 67,928, 67,945 (Nov. 19, 2002). Moreover, substantial assistance “covers, but is not limited to, those persons who act as conduits or intermediaries for foreign national contributions or donations.” *Id.* at 66,946.

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1 clerical duties, such as online research and translations, during a one month-long internship with
2 a party committee.²⁷ Similarly, in MURs 5987, 5995, and 6015, the Commission found no
3 reason to believe that a foreign national violated 52 U.S.C. § 30121 by volunteering his services
4 to perform at a campaign fundraiser and agreeing to let the political committee use his name and
5 likeness in its emails promoting the concert and soliciting support, where the record did not
6 indicate that the foreign national had been involved in the committee's decision-making process
7 in connection with the making of contributions, donations, expenditures, or disbursements.²⁸ By
8 contrast, the Commission has consistently found a violation of the foreign national prohibition
9 where foreign national officers or directors of a U.S. company participated in the company's
10 decisions to make contributions or in the management of its separate segregated fund,²⁹ or where
11 foreign funds were used by a U.S. subsidiary of a foreign corporation to make contributions or
12 donations in connection with U.S. elections.³⁰ The Commission has specifically determined that

²⁷ Factual and Legal Analysis at 4-5, MUR 6959 (Cindy Nava) (noting that the available information, which was based on two press reports that did not detail the foreign national's activities, did not indicate that the foreign national participated in any political committee's decision-making process). The Commission also found that a \$3,000 stipend that the foreign national received from third parties resulted in an in-kind contribution from the third parties to the committee, but the value of the foreign national volunteer's services to the committee was not a contribution. *Id.* at 4-5 (citing 52 U.S.C. § 30101(8)(A)(ii); 11 C.F.R. § 100.54; Advisory Op. 1982-04 (Apodaca)).

²⁸ Factual and Legal Analysis at 6-9, MURs 5987, 5995, and 6015 (Sir Elton John); *see also* Factual and Legal Analysis at 5, MUR 5998 (Lord Jacob Rothschild); Advisory Op. 2004-26 (Weller).

²⁹ *See, e.g.*, Conciliation Agreement, MUR 6093 (Transurban Grp.) (U.S. subsidiary violated Act by making contributions after its foreign parent company's board of directors directly participated in determining whether to continue political contributions policy of its U.S. subsidiaries); Conciliation Agreement, MUR 6184 (Skyway Concession Company, LLC) (U.S. company violated Act by making contributions after its foreign national CEO participated in company's election-related activities by vetting campaign solicitations or deciding which nonfederal committees would receive company contributions, authorizing release of company funds to make contributions, and signing contribution checks); Conciliation Agreement, MUR 7122 (American Pacific International Capital, Inc. ("APIC")) (U.S. corporation owned by foreign company violated Act by making contribution after its board of directors, which included foreign nationals, approved proposal by U.S. citizen corporate officer to contribute).

³⁰ *See* MUR 6203 (Itinere North America).

1 “no director or officer of the company or its parent who is a foreign national may participate in
2 any way in the decision-making process with regard to making . . . proposed contributions.”³¹

3 **B. There is Reason to Believe that Zekelman and Wheatland Tube Made**
4 **Prohibited Foreign National Contributions and Zekelman Industries**
5 **Provided Substantial Assistance in the Making of the Contributions**
6

7 The Zekelman Respondents assert that Wheatland Tube’s contributions to AFA were
8 funded by its corporate accounts and were not reimbursed by Zekelman or any other entity.³²
9 There is currently no information contradicting these assertions.³³

10 The available information nevertheless indicates that there is reason to believe that
11 Zekelman, a foreign national, directed or participated in Wheatland Tube’s decision-making
12 process to make the contributions, and Zekelman Industries, through the actions of its executives
13 who report to Zekelman, provided substantial assistance in the making of the prohibited
14 contributions. The Zekelman Respondents acknowledge that Zekelman participated in
15 discussions with top management at both Zekelman Industries and Wheatland Tube regarding
16 one of the companies making contributions to AFA.³⁴ In his sworn declaration, Zekelman
17 acknowledges that he “discussed Wheatland Tube’s potential contributions to America First”
18 with McNamara, after Schagrin suggested that one of the U.S.-based companies with which he is
19 affiliated consider contributing to AFA.³⁵ And McNamara acknowledges in his declaration not

³¹ Advisory Op. 1989-20 (Kuilima) at 2; *see also* Advisory Op. 1985-03 (Diridon) (stating that no person who is a foreign national can have any decision-making role or control with respect to any political contribution made by domestic company).

³² Zekelman Resp. at 3.

³³ Although their Response does not explicitly state that the funds were generated solely by Wheatland Tube’s domestic operations, there is no information in the record indicating that the contributions were funded by a foreign national.

³⁴ Zekelman Resp. at 3.

³⁵ Zekelman Resp., Zekelman Decl. ¶¶ 3-4.

1 only discussing the contributions with Zekelman, whom he knew to be a foreign national, but
2 also discussing them with Graham, director of Wheatland Tube and chief financial officer of
3 Zekelman Industries, before authorizing the contributions from Wheatland Tube.³⁶

4 The available information outlined above is similar to the facts and circumstances before
5 the Commission in MUR 7122 (APIC). In that matter, the Commission entered into a
6 conciliation agreement after an investigation revealed that a domestic company's foreign
7 national director and owner was solicited to make a contribution, discussed the company making
8 a contribution, and then emailed a U.S. director of the company to "follow up" on the potential
9 contributions.³⁷ The Commission concluded that the U.S. director, by effectuating the transfer of
10 funds for the contributions, per the participation of the foreign national in that decision-making
11 process, knowingly provided substantial assistance in the making of prohibited foreign national
12 contributions by the domestic company.³⁸ Similarly, here, as in MUR 7122 (APIC), the record
13 shows that the foreign national CEO of Wheatland Tube's parent company, Zekelman Industries,
14 discussed the matter with at least McNamara, another executive in both companies, who then
15 consulted another top official in the companies, before carrying out the making of the
16 contributions through U.S.-based Wheatland Tube.³⁹ As in MUR 7122 (APIC), the available
17 record here indicates that Zekelman directed or participated in Wheatland Tube's decision-
18 making process to make contributions in connection with a federal election, in a manner contrary

³⁶ Zekelman Resp., McNamara Decl. ¶¶ 6-7; Zekelman Resp. at 3.

³⁷ Conciliation Agreement § IV.7, MUR 7122 (APIC); Second General Counsel's Report at 2, 7, MUR 7122 (APIC); *see also* Factual and Legal Analysis at 7, MUR 7122 (APIC).

³⁸ Commission Certification (Aug. 7, 2018); Conciliation Agreement V, MUR 7122 (APIC); *see also* Second General Counsel's Report at 7, MUR 7122 (APIC).

³⁹ *See generally* Zekelman Resp.

1 to the Act’s foreign national prohibition and, further, that Zekelman Industries, through the
2 actions of its executives, knowingly provided substantial assistance in the making of such
3 contributions.

4 The Zekelman Respondents argue that the contributions were not prohibited because
5 McNamara, a U.S. citizen, determined that they “served Wheatland Tube’s interests” and
6 “exercised independent judgment” in approving them.⁴⁰ However, as discussed above, the key
7 issue is not whether a U.S. citizen or national had final decision-making authority or final say
8 regarding the making of the contribution or donation, but whether any foreign national directed,
9 dictated, controlled, or directly or indirectly participated in a decision-making process in
10 connection with election-related spending. Indeed, the Act’s prohibition on foreign nationals
11 directly or indirectly making contributions, as implemented by the Commission, requires that “no
12 director or officer of the company or its parent who is a foreign national may participate in *any*
13 *way* in the decision-making process with regard to making . . . proposed contributions.”⁴¹
14 Notably, the respondents in MUR 7122 (APIC) raised a nearly identical argument, which did not
15 persuade the Commission.⁴² The Commission specifically noted that a U.S. director’s assertion
16 that he had sole decision-making authority over a domestic company’s political contributions did
17 not “exclude the possibility that in his role as decision-maker” he sought approval from foreign
18 national directors and owners of the company, as he publicly acknowledged doing.⁴³ As such,

⁴⁰ Zekelman Resp. at 3-4.

⁴¹ Second General Counsel’s Report at 7, MUR 7122 (APIC) (quoting Advisory Opinion 1989-20 at 2) (emphasis added).

⁴² See Conciliation Agreement §§ IV.10, V, MUR 7122 (APIC); Factual and Legal Analysis at 5-6, MUR 7122 (APIC).

⁴³ Factual and Legal Analysis at 5-6, MUR 7122 (APIC).

1 regardless of whether the final decision on whether to contribute was McNamara’s, Zekelman’s
2 acknowledged role in contacting McNamara with the contribution proposal and discussing it
3 with him supports the inference that Zekelman participated in the decision-making process
4 regarding the contributions. Even if McNamara “exercised independent judgment” in approving
5 the contributions, that does not foreclose the possibility that Zekelman, as the CEO and chairman
6 of Zekelman Industries — the company that owns Wheatland Tube — vested McNamara with
7 the authority to make the contributions.⁴⁴ Additionally, the Zekelman Respondents’
8 acknowledgment that the contributions were made following the suggestion to Zekelman by
9 “Roger Schagrin, an outside lawyer for Zekelman Industries,”⁴⁵ indicates that Zekelman
10 Industries was aware of the circumstances of the contributions and thus knowingly provided
11 substantial assistance in the making of Wheatland Tube’s contributions.

12 Accordingly, the Commission finds reason to believe that: (1) Wheatland Tube violated
13 52 U.S.C. § 30121(a)(1)(A) by making foreign national contributions; (2) Zekelman violated 52
14 U.S.C. § 30121(a)(1)(A) by directing or participating in the decision-making process concerning

⁴⁴ The Commission has explained that foreign nationals must not be involved in selecting individuals who will make decisions regarding a company’s contributions and must also avoid selecting and giving those individuals election-related work assignments. *See* Factual & Legal Analysis at 6 n.30, MUR 7122 (APIC) (explaining that foreign national foreign corporate board members must abstain from voting on matters concerning an SSF, “including the selection of individuals to operate the SSF and to exercise decision making authority regarding contributions and expenditures” (quoting Factual & Legal Analysis at 11, MUR 3460 (Sports Shinko Co., Ltd.))); Advisory Opinion 2000-17 at 8 (Extendicare) (“selecting and giving PAC work assignments to personnel who will serve on the PAC Committee must be made only by US citizens or individuals lawfully admitted for permanent residence in the United States”); *see also* Advisory Opinion at 1990-8; Advisory Op. 2000-17 at 5-6. The Zekelman Respondents do not provide information regarding the structure of Wheatland Tube, whether Zekelman had any involvement in selecting individuals who have decision-making authority over contributions by Wheatland Tube, or whether he is involved in submitting contribution or other election-related requests or proposals to board members, though it may be inferred that Zekelman had such authority by virtue of his position as CEO and chairman of the company that owns Wheatland Tube and the admitted conversations regarding the contributions to AFA.

⁴⁵ Zekelman Resp. at 3.

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- 1 Wheatland's contributions; and (3) Zekelman Industries violated 52 U.S.C. § 30121(a)(1)(A) by
- 2 knowingly providing substantial assistance in the making of foreign national contributions.