

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of: )  
)  
PBS&J Corporation; )  
William S. DeLoach, Richard A Wickett, )  
H. Michael Dye, Maria M. Garcia, ) MUR 5903  
Rosario Licata, Shannan Ighodaro, )  
Sybil Thomas, Lourdes Fernandez, )  
Reinaldo Fernandez, Ana Quinones, )  
Victor Quinones, James Breland, )  
Larry Boatman )

**STATEMENT OF REASONS OF COMMISSIONERS  
CYNTHIA L. BAUERLY AND ELLEN L. WEINTRAUB**

This matter involves a long-standing, institutionalized pattern of corporate reimbursement of federal campaign contributions. On October 20, 2009, the Commission failed, by a vote of 3-3,<sup>1</sup> to authorize the Office of General Counsel (OGC) to enter into pre-probable cause conciliation negotiations with PBS&J Corporation (PBS&J) to attempt to settle the matter. The law and facts are straightforward and undisputed, as recited below and more fully in the General Counsel's Reports. The only question our colleagues raised was whether the matter was time-barred under the statute of limitations. As our colleagues point out in their Statement of Reasons, "tolling of limitations periods...is reserved only for rare occasions when particularly compelling circumstances arise."<sup>2</sup> We agree. This case represents one of those rare occasions due to the fraudulent, egregious conduct of the respondent to conceal the violations at issue in this matter.

Although the violations by the individual Respondents have been sufficiently addressed in the criminal context, the corporate Respondent has not been, and should be, held accountable. Because the undisputed factual record supported pursuing the corporation for its violations and this matter presents compelling facts under which the statute of limitations is equitably tolled, we voted to adopt OGC's recommendation to enter into pre-probable cause conciliation with PBS&J.

**I. BACKGROUND**

This matter arose from external information and a complaint alleging that PBS&J and its officers knowingly and willfully violated 2 U.S.C. § 441f, which prohibits making contributions

<sup>1</sup> Chairman Walther and Commissioners Bauerly and Weintraub voted to go forward with conciliation while Vice Chairman Petersen and Commissioners Hunter and McGahn voted to reject OGC's recommendations.

<sup>2</sup> See Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter and Donald F. McGahn in MUR 5903, dated December 16, 2009, at 6.

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in the name of another. The matter stemmed from an FBI investigation into multiple institutionalized, corporate-wide schemes to make contributions to federal candidates using corporate funds, and to reimburse with corporate funds employees who donated money to federal candidates. In September 2007, the Commission voted unanimously to pursue the matter, and found reason to believe that: (1) PBS&J knowingly and willfully violated 2 U.S.C. §§ 441b(a) and 441f; (2) H. Michael Dye, Maria Garcia, Rosario Licata, William Scott DeLoach,<sup>3</sup> and Richard Wickett, who were officers, directors and managers of PBS&J, knowingly and willfully violated 2 U.S.C. §§ 441b(a) and 441f; and (3) conduits Shannon Ighodaro, Sybil Thomas, Lourdes Fernandez, Reinaldo Fernandez, Ana Quinones, Victor Quinones, James Breland, and Larry Boatman violated 2 U.S.C. § 441f.<sup>4</sup>

At the time the Commission approved the First General Counsel's Report, some of the illegal activity in question (which began in 1991 and continued through 2004) would, under normal circumstances, have been time-barred under the five-year statute of limitations. The Commission, however, unanimously decided to proceed with the matter on the grounds that the statute of limitations would be equitably tolled based on the doctrine of fraudulent concealment until April 1, 2010, five years from when PBS&J reported the findings of its internal audit to federal authorities. The doctrine of fraudulent concealment and the basis for the Commission's reliance upon it are discussed in further detail in section II below.

Although the Commission authorized OGC to conduct an investigation into PBS&J's activities in September 2007, the Commission held its investigation in abeyance through June 2008 until the conclusion of the criminal prosecution of several PBS&J senior executives.<sup>5</sup> In June 2008, the Commission resumed its investigation and discovered the following undisputed facts, all of which are recounted in greater detail in the documents on the public record related to this matter:

- PBS&J is an incorporated, employee-owned engineering and consulting firm based in Florida. In 1985, PBS&J first began making political contributions to state and local candidates by establishing a state political committee registered in Florida. By 2000, PBS&J established political committees in seven other states. It registered a federal committee with the Commission in April 2003.

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<sup>3</sup> The Commission had previously found reason to believe that William Scott DeLoach violated 2 U.S.C. § 441f in connection with MUR 5822. See MUR 5822 (William Scott DeLoach), Certification dated Sept. 25, 2006.

<sup>4</sup> MUR 5903, Certification dated Sept. 12, 2007.

<sup>5</sup> Both Dye and Wickett pled guilty for violating 18 U.S.C. § 371 for conspiracy to make false statements relating to fraudulent concealment and diversion of PBS&J corporate funds to make illegal contributions to federal candidates. See Judgment, *U.S. v. Dye*, 07-CR-20144 (S.D. Fla. Aug. 6, 2007) ("Dye Judgment"); Judgment, *U.S. v. Wickett*, 07-CR-20145 (S.D. Fla. May 20, 2008) ("Wickett Judgment"). DeLoach pled guilty for violating 18 U.S.C. § 1349 for conspiracy to commit mail fraud relating to the embezzlement of PBS&J funds and 2 U.S.C. § 441f for the unlawful reimbursement of federal campaign contributions. See Judgment, *U.S. v. DeLoach*, 06-CR-20583 (July 19, 2007) ("DeLoach Judgment").

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- In March 2005, internal auditors at PBS&J discovered that William Scott DeLoach, Chief Financial Officer, had embezzled \$36 million from the company. One of the employees at the center of the embezzlement notified the FBI in April 2005. Subsequently, the FBI opened an investigation into DeLoach's activity at PBS&J and uncovered PBS&J's multiple contribution reimbursement schemes.
- In one scheme, which ran from 1992 through approximately 2004, PBS&J reimbursed employees with corporate funds for \$30,500 in federal contributions.
- The company concealed these reimbursements by falsifying expense reports, funneling funds through the corporate account of a wholly owned subsidiary, and issuing fraudulent bonus payments.
- In another scheme, starting in 1990, senior executives at PBS&J established two bank accounts designated as the "Out-of State PAC" accounts, and funded the accounts with corporate funds from PBS&J's operating account. The executives used these accounts to make direct contributions totaling \$9,750 to federal candidates until approximately 1996.
- PBS&J officers attempted to conceal contributions from the Out-of-State PAC accounts by removing the corporate name and address from the checks and keeping the accounts off of the company balance sheet.
- Finally, from 1993-2005, DeLoach, without the knowledge of other PBSJ officers, used some of the funds that he embezzled to make his own campaign contributions and reimbursed subordinates for making contributions to federal candidates.
- The reimbursement schemes involved officers and employees at all levels of the corporation and was not limited to a few rogue employees.
- Corporate records and memoranda dating back to the 1980s warned that reimbursing contributions was illegal.

Based on these facts, which demonstrate that multiple, multi-year fraudulent schemes existed at many levels of the corporation, OGC recommended that the Commission engage in pre-probable conciliation with PBS&J. Because the individual respondents had already been punished criminally, including time in jail for DeLoach, Garcia and Licata, and probation for Wickett and Dye, OGC recommended taking no further action with respect to them.

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## II. ANALYSIS

We believe the Commission has a duty to pursue enforcement of the serious violations in this matter and that, under these compelling circumstances, the statute of limitations does not bar engaging in conciliation negotiations with PBS&J to settle violations which began in 1991 and continued through 2004. While we strongly believe the five-year statute of limitations under 28 USC § 2462 is meaningful and important, we also recognize that in cases involving compelling circumstances, including fraudulent concealment, courts have set aside the limitations period under § 2462. See *FEC v. Williams*, 104 F.3d 237, 239 (9<sup>th</sup> Cir. 1996), citing *United States v. Core Laboratories, Inc.*, 759 F.2d 480, 484 (5<sup>th</sup> Cir. 1985); *United States v. Firestone Tire & Rubber Co.*, 518 F. Supp. 1021, 1036 (N.D. Ohio 1981). Here, PBS&J's own actions fraudulently concealed the activity at issue and thus equitably tolled the statute of limitations until April of 2010.

As an initial matter, this MUR was at the pre-probable cause conciliation stage, not the stage at which the Commission was asked to authorize suit authority. In the unlikely event pre-probable and then post-probable cause conciliation efforts broke down, the Commission at that point would have been faced with the decision of whether to file suit in the appropriate district court in Florida, which is within the Eleventh Circuit.<sup>6</sup> The Eleventh Circuit has determined that the statute of limitations is equitably tolled until the impediment to filing, such as fraudulent concealment, is removed, giving a plaintiff the entire limitations period to file. See *Cabello v. Fernandez-Larios*, 420 F.3d 1148, 1156 (11th Cir. 2005) (per curiam) ("Our Circuit's precedent indicates that the statutory clock is stopped while tolling is in effect . . . . When a statute is equitably tolled, the statutory period does not begin to run until the impediment to filing a cause of action is removed."); *Knight v. Schofield*, 292 F.3d 709, 712 (11th Cir. 2002) (per curiam).

The three elements for establishing equitable tolling for fraudulent concealment are: 1) defendants concealed conduct complained of; 2) plaintiffs failed to discover facts that form the basis of their claim; and 3) plaintiffs exercised due diligence to discover such facts. See, e.g., *Morton's Market, Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 832 (11th Cir. 1999) (holding defendants failed to establish that plaintiffs' claim was barred by statute of limitations as a matter of law). Courts have applied the doctrine to various forms of corporate malfeasance, including civil RICO actions, antitrust price fixing conspiracies, and securities fraud.<sup>7</sup>

<sup>6</sup> If suit were authorized by the Commission, it would file suit in the appropriate district in Florida where the company is headquartered and where the violations occurred.

<sup>7</sup> See, e.g., *Klehr v. A.O. Smith*, 521 U.S. 179, 194-95 (1997) (holding that dairy farmers exercising reasonable diligence could invoke the fraudulent concealment doctrine in civil RICO action); *Holmberg v. Armbrrecht*, 327 U.S. 392, 396-97 (1946) (holding that the fraudulent concealment doctrine "is read into every federal statute of limitation"); *In re International Admin. Svcs., Inc.*, 408 F.3d 689, 701 (11th Cir. 2005) (holding, in bankruptcy action involving a fraudulent transfer of assets, that the statute of limitations is tolled until the plaintiff discovers the fraud if the defendant has taken positive steps after the commission of the fraud to keep it concealed); *Morton's Market, Inc.*, 198 F.3d at 832, (holding that fraudulent concealment doctrine applies to antitrust action against large dairy producers alleging price-fixing conspiracy if the dairies fraudulently concealed their price-fixing activities); cf. *FEC v. Christian Coalition*, 965 F. Supp. 66, 70 (D.D.C. 1997) (suggesting that the fraudulent concealment doctrine could apply if the failure to discover the alleged FECA violation at issue stemmed from acts of fraudulent concealment).

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As to the first element of fraudulent concealment, the investigation showed that PBS&J took great pains to hide its illegal activities. PBS&J established corporate bank accounts to make contributions to federal candidates and then removed the corporate name from the checks to hide the true source of the contributions. Furthermore, PBS&J hid these accounts from its auditors. Finally, PBS&J concealed its corporate-wide reimbursement scheme by masking reimbursements for federal contributions in the form of fictitious business expenses, bonus payments, and payments from a corporate subsidiary. Indeed, two of PBS&J's most senior officers, H. Michael Dye and Richard Wickett pled guilty to charges that they fraudulently and falsely diverted corporate funds to federal candidates and thereby caused the filing of false statements by such candidates. As to the other two elements of fraudulent concealment, the Commission, despite its due diligence in reviewing the disclosure reports that contained the corporate contributions at issue, did not discover the violations until 2006 precisely because of the Respondent's extraordinary efforts to launder the corporate contributions through conduit employees. Under Eleventh Circuit precedent, it appears these facts are sufficient to establish fraudulent concealment that would toll the start of the statute of limitations.

As discussed above, the Eleventh Circuit has held that the statute of limitations does not begin to run until the impediment, such as fraudulent concealment, to filing is removed, and the plaintiff has the entire limitations period to file. *See Cabello*, 402 F.3d at 1156. In this matter, that impediment was removed in 2005, when the company undertook an internal audit and the fraudulent activity was reported to the FBI.

Our objecting colleagues have stated that they are concerned that the statute of limitations has run, therefore barring the Commission from pursuing a civil remedy in this matter. Our colleagues rely solely on *Federal Election Commission v. Williams*, 104 F.3d 237 (9th Cir. 1996). First, *Williams* was decided by a different circuit court of appeals and thus is not controlling law. One has to reach across the country to the opposite coast to find the circuit with the narrowest view of equitable tolling to avoid pursuing the egregious conduct in this case. Not only is *Williams* from a different circuit, the relevant circuit, which is the Eleventh Circuit, has specifically declined to follow *Williams*. While the Eleventh Circuit did not rule directly on equitable tolling for claims involving fraudulent concealment, in *United States v. Banks*, it refused to follow *Williams* and instead held that the statute of limitations under 2 U.S.C. § 2462 cannot bar the government's equitable claims when acting in its official enforcement capacity.<sup>8</sup> 115 F.3d 916, 919 n.60 (11th Cir. 1997).

Even if *Williams* were from the controlling circuit, it is factually distinguishable from the matter before us. In *Williams*, the court refused to toll the statute of limitations under 2 U.S.C. § 2462. *Id.* at 238. Large donors to Jack Kemp's 1988 presidential campaign had been allowed to purchase special NFL football tickets for \$100. *Id.* at 239. The defendant purchased forty of these tickets for \$40,000, advanced \$1,000 to twenty two Kemp contributors, and then resold the special football tickets to recover the sums advanced. *Id.* The court reasoned that FECA's reporting requirements were sufficient to give the Commission "notice of the facts that, if

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<sup>8</sup> Nothing in *Banks* could be read to preclude the Commission from negotiating a conciliation agreement with a Respondent. Furthermore, *Banks* supports the proposition that the Commission could seek equitable relief in federal court if those negotiations failed.

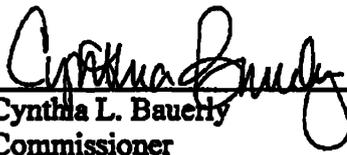
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investigated, would indicate the elements of a cause of action." *Id.* at 241 (internal citations omitted).

In the present case, PBS&J engaged in a much more extensive scheme to conceal reimbursements of campaign contributions than did the defendant in *Williams*. PBS&J established a corporate bank account to make out-of-state contributions to federal candidates. See MUR 5903, GCR #2 at 8. However, while labeled a "PAC," this account was never registered with any federal or state campaign agency, did not appear on the company's balance sheet, and had the company's name and address removed from the account's checks so that there was no information linking PBS&J to the contribution. *Id.* at 8-9. Unlike the relatively simplistic reimbursement scheme in *Williams* that provided direct evidence of campaign finance violations to the Commission, PBS&J's elaborate reimbursement scheme made it impossible for the Commission to have known that potential illegal activity in need of investigation was taking place. It is precisely to such activity that the doctrine of fraudulent concealment and corresponding remedy of equitable tolling applies.

### III. CONCLUSION

The failure of the Commission to attempt to conciliate this matter in this case where the facts are undisputed, the law is clear, and the conduct is egregious sends the wrong message to the public about the Commission's willingness to pursue serious violations. The corporate principals have pled guilty both to false statements relating to the fraudulent concealment and to the unlawful corporate reimbursement scheme. Although several of the PBS&J officers at the center of the scheme were held criminally liable, as a corporate entity, PBS&J will never be held liable for its blatant violations of campaign finance law. Given PBS&J's deliberate, far-reaching efforts, over the course of many years, to conceal its violations, we believe under the relevant case law, the statute of limitations has been tolled, and the Commission should have pursued this matter.

  
Cynthia L. Bauerly  
Commissioner

12/17/09  
Date

  
Ellen L. Weintraub  
Commissioner

12/17/09  
Date

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