April 25, 2015

SENT VIA EMAIL AND FIRST CLASS MAIL
Federal Election Commission
999 E Street NW
Washington, DC 20463
audit@fec.gov

Dear Commissioners:

Pursuant to 11 C.F.R. § 9038.5(a), I request a rehearing with respect to Gary Johnson 2012, Inc.'s ("GJ2012" or "Committee") repayment obligation. Pursuant to § 9038.2(d)(1), I also request a 90-day extension of time to repay the $1,250 found to be owed that is not being disputed.[1]

I. RELIEF DESIRED

The Committee seeks an abatement of the repayment obligation, or a finding that the Federal Election Campaign Act ("FECA") and the holding in *Kennedy for President Committee v. FEC*, 734 F.2d 1558 (D.C. Cir. 1984) do not permit the Commission to treat a committee's public matching funds and private primary contributions as commingled, when such funds are in fact segregated in separate accounts, and a recalculation of the repayment obligation.

II. LEGAL AND FACTUAL BASIS IN SUPPORT

A. Scrivener's Error and Contributor Intent

The Committee's oversight in not updating the disclaimer language on its contribution page after the primary election amounted to nothing more than a scrivener's error, and should be treated accordingly. When a written agreement does not properly reflect the intent of the parties due to a drafting error, the contract may be reformed to bring its language in line with that intent. 27 *Williston on Contracts* § 70:93 (4th ed.). In the instant case, the Commission should retroactively read the post-primary disclaimer language to properly reflect what was both the Committee's and the contributors' intent.

The Committee's intent was to allocate the first $250 of all contributions to the primary election, and any remaining amount, up to $2,500, to the general election. This has been extensively discussed throughout this proceeding, and never disputed by the Commission. As to the contributors who actually made the private contributions at issue, the Committee agrees that it is their intentions, and not the Committee's, that matters. The Commission argues that the disclaimer as-written is the best evidence of how the contributors intended to designate their contributions, Statement of Reasons at 14-15, but this is clearly incorrect for a number of reasons.

[1] Pursuant to § 9038.5(a)(2), the timely filing of this petition suspends repayment of the $332,191 being disputed until the Commission has acted on the petition. However, since the Committee lacks sufficient funds to repay even the much smaller amount properly due, it is separately requesting an extension of time for that amount.

First, and most plainly, is that contributors do not read disclaimers. The allocation formula, along with the other "fine print" on the Committee's contribution page, was skimmed over like so much boilerplate legalese – which it was. The contributors were on that page in order to support a candidate that they liked, not to read about the minutiae of campaign finance law or make designation decisions between elections. Not a single contributor would have cared what the disclaimer said if they had read it; whether their contribution was for the general instead of the primary matters about as much to the average contributor as whether their contribution is used to pay for campaign signs instead of coffee creamer. Contributors know that candidates need money for a wide variety of campaign activities, and contribute to the campaign overall. If paying for coffee creamer would be more helpful than paying for campaign signs, then that is how the contributors would want the campaign to use their contributions, but in general they defer entirely to the committees they support to decide how best to maximize whatever contribution they can make.

Further, contributors were not given any option to change how their contributions were designated. There were no sliders to adjust or box to fill in with the contributor's preferred designation; the only options were to contribute or not to contribute. Only the Committee had the ability to change the allocation formula given on the page. Indeed, this entire repayment issue came about as a result of inaction by the Committee, not because of any act or omission on the part of the contributors. If anything, the disclaimer as-written is at most reflective of what the Committee's intentions were, and, as established above, even that is not the case.

The Committee can appreciate the difficult position that this puts the Commission in, not having any clear indicator of contributor intent as to designation, but instead of relying on clearly unreliable indicators, it should look at the two clear indicators that are available: the contributors' desire to support the candidate and the specific way in which the Committee treated and used those funds. Designating the first $2,500 to the primary election is clearly not in the best interest of the candidate in this case, so ascribing that intent to contributors requires a powerful justification – one that is clearly lacking here. In the end, the Commission's decision may end up working more harm against the contributors than against the Committee.

B. Lack of Funds

A more practical consideration, and one that the Commission has not yet addressed, is that the Committee has no funds available with which to make a repayment. As seen on the Committee's most recent periodic report, the Committee had a negative cash on hand balance as of March 31, 2016, as a result of monthly bank fees overdrawing the account. Though the Committee anticipates securing sufficient contributions to cover that shortfall before the next report, the amount needed is orders of magnitude less than what would be necessary to cover the full repayment amount, as it is currently calculated.

It is not reasonable to expect the Committee to be able to raise funds in that amount within the time allotted for repayment, even accounting for the extensions available. In fact, the Committee has such poor prospects of raising funds it is doubtful it could ever obtain the necessary amount.

In light of this reality, it would seem imprudent of the Commission to spend limited administrative resources pursuing this matter. The Commission, to the extent it wishes to affirm precedent for its argument in this matter, could both make the finding and still abate the penalty, which in all likelihood could never be paid.

C. Abuse of System

Finally, though the Commission argues that the Committee's proposed method – treating federal matching funds and private primary contributions as separate when they are in fact maintained in separate bank accounts – would be "ripe for abuse," Statement of Reasons at 9-10, the fact remains that the Committee only ever acted in a good faith belief that its allocation and use of post-primary contributions was lawful. Even if the Committee's method would be open to abuse – a notion which the Committee strongly rejects – that does not permit the Commission to ignore the facts of the case that no abuse in fact occurred. The Committee is simply asking that the Commission consider the totality of the circumstances in what is a peculiar situation unlikely to reoccur.

III. QUESTIONS NOT RAISED DURING ORIGINAL HEARING

The questions of law and fact raised here were not and could not have been raised during the original repayment dispute because they are directly responsive to the arguments presented in the Commission's Statement of Reasons, not made available to the Committee until April 5, 2016. Further, the Committee's financial position and its assessment of its fundraising prospects have changed since the original hearing, presenting novel considerations relevant to the case.

Sincerely,
/s/
Dan Backer
(202) 210-5431 Direct
dbacker@dbcapitolstrategies.com

CC: jblume@fec.gov
lholloway@fec.gov