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7

8 **BEFORE THE FAIR POLITICAL PRACTICES COMMISSION**
9 **OF THE STATE OF CALIFORNIA**
10

11 In the Matter of:

12 **BILL BERRYHILL, TOM BERRYHILL,**
13 **BILL BERRYHILL FOR ASSEMBLY -**
14 **2008, BERRYHILL FOR ASSEMBLY**
15 **2008, STANISLAUS REPUBLICAN**
16 **CENTRAL COMMITTEE (STATE**
ACCT.), and SAN JOAQUIN COUNTY
REPUBLICAN CENTRAL
COMMITTEE/CALIF. REPUBLICAN
VICTORY FUND,

17 Respondents.
18

OAH Case No. 2012101024

FPPC Case No. 10/828

OPENING BRIEF OF THE ENFORCEMENT
DIVISION OF THE FAIR POLITICAL
PRACTICES COMMISSION RE: PROPOSED
DECISION OF ADMINISTRATIVE LAW
JUDGE JONATHAN LEW

19 **I. INTRODUCTION**

20 This case was heard before Administrative Law Judge ("ALJ") Jonathan Lew of the Sacramento
21 Office of Administrative Hearings on November 12th, 13th, 14th, 19th, 21st, and 22nd, 2013.

22 The Fair Political Practices Commission ("FPPC" or "Commission") was represented by Neal
23 Bucknell, Senior Commission Counsel, Enforcement Division.

24 Respondents were represented by their attorneys, Charles H. Bell, Jr. and Brian T. Hildreth.

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1 On January 31st, 2014, the ALJ issued a proposed decision imposing an administrative penalty in
2 the amount of \$40,000 against the above-named respondents for numerous violations of the Political
3 Reform Act.¹

4 On February 3rd, 2014, the Executive Director of the FPPC, caused a copy of the proposed
5 decision to be served on the Enforcement Division and Respondents' counsel. The proposed decision is
6 attached hereto as Exhibit A.

7 The Enforcement Division submits this opening brief pursuant to Regulation 18361.9 and
8 respectfully recommends that the Commission adopt the proposed decision of the ALJ with limited,
9 minor, technical changes of a clarifying nature—as discussed more fully below.

10 **II. DISCUSSION**

11 **A. Summary of the Case**

12 In 2008, Respondent Bill Berryhill was a non-incumbent candidate for the California State
13 Assembly, 26th District. Respondent Bill Berryhill for Assembly – 2008 was his candidate controlled
14 committee. (Hereafter, the committee is referred to as “Bill Berryhill for Assembly.”)

15 At the same time, Respondent Tom Berryhill was seeking re-election as the incumbent candidate
16 for the California State Assembly, 25th District. Respondent Berryhill for Assembly 2008 was his
17 candidate controlled committee. (Hereafter, the committee is referred to as “Tom Berryhill for
18 Assembly.”)

19 Respondents Bill and Tom Berryhill are brothers.

20 The general election was held on November 4th, 2008, and both of the Berryhill brothers won.

21 At all relevant times, Respondent Stanislaus Republican Central Committee (State Acct.) was a
22 political party committee within the meaning of Section 85205 in that it was the Republican county
23
24

25 _____
26 ¹ The Political Reform Act is contained in Government Code sections 81000 through 91014.
27 All statutory references are to the Government Code, unless otherwise indicated. The regulations of the
28 Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the
California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California
Code of Regulations, unless otherwise indicated.

1 central committee for Stanislaus County. (Hereafter, the committee is referred to as the “Stanislaus
2 County Republican Central Committee.”)

3 Also, at all relevant times, Respondent San Joaquin County Republican Central Committee/Calif.
4 Republican Victory Fund was a political party committee within the meaning of Section 85205 in that it
5 was the Republican county central committee for San Joaquin County. (Hereafter, the committee is
6 referred to as the “San Joaquin County Republican Central Committee.”)

7 At the hearing, Respondents were charged with 16 violations of the Political Reform Act, which
8 are summarized below:

9 **Money Laundering and Unlawful Circumvention of Campaign Contribution Limits**

10 COUNT 1: On or about October 29th and 30th, 2008, as part of a money laundering scheme to
11 help Respondent Bill Berryhill get elected to the California State Assembly,
12 Respondent Tom Berryhill, by and through his controlled committee, Respondent
13 Tom Berryhill for Assembly, made a contribution in the amount of \$20,000 to
14 Respondent Bill Berryhill for Assembly, but the true source of the contribution
15 was concealed. This was accomplished by making the contribution in the name of
16 another, Respondent Stanislaus County Republican Central Committee, an entity
17 which aided and abetted in the carrying out of this concealment (within the
18 meaning of Section 83116.5) by allowing itself to be used as a conduit for the
19 contribution and by acting as if it were the true source of the contribution—when
20 in fact it was a mere intermediary for the funds. In this way, Respondents Tom
21 Berryhill, Tom Berryhill for Assembly, and the Stanislaus County Republican
22 Central Committee violated Section 84301, which prohibits the making of a
23 contribution in the name of another.

24 COUNT 2: On or about October 29th and 30th, 2008, as part of a money laundering scheme to
25 help Respondent Bill Berryhill get elected to the California State Assembly,
26 Respondents Bill Berryhill, Bill Berryhill for Assembly, Tom Berryhill, Tom
27 Berryhill for Assembly, and the Stanislaus County Republican Central Committee
28 unlawfully circumvented the campaign contribution limit for contributions to a
candidate for elective state office. At the time, the contribution limit for
contributions to Respondent Bill Berryhill was \$3,600. However, Respondent
Tom Berryhill, by and through his controlled committee, Respondent Tom
Berryhill for Assembly, exceeded this limit by making the contribution in the
amount of \$20,000 that is described in Count 1, and Respondent Bill Berryhill, by
and through his controlled committee, Respondent Bill Berryhill for Assembly,
accepted this over-the-limit contribution. Additionally, Respondent Stanislaus
County Republican Central Committee aided and abetted in the making and receipt
of this over-the-limit contribution (within the meaning of Section 83116.5) by
allowing itself to be used as a conduit for the contribution and by acting as if it
were the true source of the contribution—when in fact it was a mere intermediary
for the funds. (The Stanislaus County Republican Central Committee would not

1 have been subject to this same contribution limit, which is why the contribution
2 was laundered through the committee.) In this way, Respondents Bill Berryhill,
3 Bill Berryhill for Assembly, Tom Berryhill, Tom Berryhill for Assembly, and the
4 Stanislaus County Republican Central Committee violated Section 85301,
subdivision (a), as well as Sections 83124 and 85305, which prohibit the making
and acceptance of over-the-limit contributions.

5 COUNT 3: On or about October 30th and 31st, 2008, as part of a money laundering scheme to
6 help Respondent Bill Berryhill get elected to the California State Assembly,
7 Respondent Tom Berryhill, by and through his controlled committee, Respondent
8 Tom Berryhill for Assembly, made a contribution in the amount of \$20,000 to
9 Respondent Bill Berryhill for Assembly, but the true source of the contribution
10 was concealed. This was accomplished by making the contribution in the name of
11 another, Respondent San Joaquin County Republican Central Committee, an entity
12 which aided and abetted in the carrying out of this concealment (within the
13 meaning of Section 83116.5) by allowing itself to be used as a conduit for the
14 contribution and by acting as if it were the true source of the contribution—when
15 in fact it was a mere intermediary for the funds. In this way, Respondents Tom
16 Berryhill, Tom Berryhill for Assembly, and the San Joaquin County Republican
17 Central Committee violated Section 84301, which prohibits the making of a
18 contribution in the name of another.

14 COUNT 4: On or about October 30th and 31st, 2008, as part of a money laundering scheme to
15 help Respondent Bill Berryhill get elected to the California State Assembly,
16 Respondents Bill Berryhill, Bill Berryhill for Assembly, Tom Berryhill, Tom
17 Berryhill for Assembly, and the San Joaquin County Republican Central
18 Committee unlawfully circumvented the campaign contribution limit for
19 contributions to a candidate for elective state office. At the time, the contribution
20 limit for contributions to Respondent Bill Berryhill was \$3,600. However,
21 Respondent Tom Berryhill, by and through his controlled committee, Respondent
22 Tom Berryhill for Assembly, exceeded this limit by making the contribution in the
23 amount of \$20,000 that is described in Count 3, and Respondent Bill Berryhill, by
24 and through his controlled committee, Respondent Bill Berryhill for Assembly,
25 accepted this over-the-limit contribution. Additionally, Respondent San Joaquin
26 County Republican Central Committee aided and abetted in the making and receipt
27 of this over-the-limit contribution (within the meaning of Section 83116.5) by
28 allowing itself to be used as a conduit for the contribution and by acting as if it
were the true source of the contribution—when in fact it was a mere intermediary
for the funds. (The San Joaquin County Republican Central Committee would not
have been subject to this same contribution limit, which is why the contribution
was laundered through the committee.) In this way, Respondents Bill Berryhill,
Bill Berryhill for Assembly, Tom Berryhill, Tom Berryhill for Assembly, and the
San Joaquin County Republican Central Committee violated Section 85301,
subdivision (a), as well as Sections 83124 and 85305, which prohibit the making
and acceptance of over-the-limit contributions.

COUNT 5: In connection with a fundraiser that was held on or about October 28th, 2008, and
as part of a money laundering scheme to help Respondent Bill Berryhill get elected

1 to the California State Assembly, Respondents Bill Berryhill, Bill Berryhill for
2 Assembly, Tom Berryhill, and Tom Berryhill for Assembly unlawfully
3 circumvented the campaign contribution limit for contributions to a candidate for
4 elective state office. At the time, the contribution limit for contributions to
5 Respondent Bill Berryhill was \$3,600 per election, and Respondent Tom Berryhill,
6 by and through his controlled committee, Respondent Tom Berryhill for
7 Assembly, already had contributed the maximum allowed amount to Respondent
8 Bill Berryhill for Assembly as of the end of 2007. However, Respondent Tom
9 Berryhill, by and through his controlled committee, made an additional, over-the-
10 limit in-kind contribution to Respondent Bill Berryhill for Assembly by paying in
11 excess of \$4,000 toward the cost of organizing and holding the above-referenced
12 fundraiser of October 28th, which was for the benefit of Respondent Bill Berryhill.
13 Respondent Bill Berryhill, by and through his controlled committee, Respondent
14 Bill Berryhill for Assembly, attended the fundraiser and accepted this over-the-
15 limit in-kind contribution from his brother. In this way, Respondents Bill
16 Berryhill, Bill Berryhill for Assembly, Tom Berryhill, and Tom Berryhill for
17 Assembly violated Section 85301, subdivision (a), as well as Sections 83124 and
18 85305, which prohibit the making and acceptance of over-the-limit contributions.

False Reporting

13 COUNT 6: On or about October 31st, 2008, as part of a money laundering scheme to help
14 Respondent Bill Berryhill get elected to the California State Assembly,
15 Respondent Bill Berryhill, by and through his controlled committee, Respondent
16 Bill Berryhill for Assembly, filed a false late contribution report with the Secretary
17 of State. This filing concealed the violations described in Counts 1 through 4 by
18 falsely reporting that the two contributions in question (in the amounts of \$20,000
19 each) were received from Respondents Stanislaus County Republican Central
20 Committee and San Joaquin County Republican Central Committee—when in fact
21 both contributions were received from Respondent Tom Berryhill for Assembly,
22 and the central committees were mere intermediaries for the transactions. In this
23 way, Respondents Bill Berryhill and Bill Berryhill for Assembly violated Section
24 84203, subdivision (a), which requires accurate reporting of information about the
25 sources of contributions received.

21 COUNT 7: On or about February 3rd, 2009, as part of a money laundering scheme to help
22 Respondent Bill Berryhill get elected to the California State Assembly,
23 Respondent Bill Berryhill, by and through his controlled committee, Respondent
24 Bill Berryhill for Assembly, filed a false semi-annual campaign statement with the
25 Secretary of State. This filing concealed the violations described in Counts 1
26 through 4 by falsely reporting that the two contributions in question (in the
27 amounts of \$20,000 each) were received from Respondents Stanislaus County
28 Republican Central Committee and San Joaquin County Republican Central
Committee—when in fact both contributions were received from Respondent Tom
Berryhill for Assembly, and the central committees were mere intermediaries for
the transactions. In this way, Respondents Bill Berryhill and Bill Berryhill for
Assembly violated Section 84211, subdivision (f), which requires accurate
reporting of information about the sources of contributions received.

1 COUNT 8: On or about October 29th, 2008, as part of a money laundering scheme to help
2 Respondent Bill Berryhill get elected to the California State Assembly,
3 Respondent Tom Berryhill, by and through his controlled committee, Respondent
4 Tom Berryhill for Assembly, filed a false late contribution report with the
5 Secretary of State. This filing concealed the violations described in Counts 1
6 through 2 by falsely reporting that the contribution in question (in the amount of
7 \$20,000) was made to Respondent Stanislaus County Republican Central
8 Committee—when in fact the contribution was made to Respondent Bill Berryhill
9 for Assembly, and the central committee was a mere intermediary for the
10 transaction. In this way, Respondents Tom Berryhill and Tom Berryhill for
11 Assembly violated Section 84203, subdivision (a), which requires accurate
12 reporting of information about the recipients of contributions.

13 COUNT 9: On or about October 30th, 2008, as part of a money laundering scheme to help
14 Respondent Bill Berryhill get elected to the California State Assembly,
15 Respondent Tom Berryhill, by and through his controlled committee, Respondent
16 Tom Berryhill for Assembly, filed a false late contribution report with the
17 Secretary of State. This filing concealed the violations described in Counts 3
18 through 4 by falsely reporting that the contribution in question (in the amount of
19 \$20,000) was made to Respondent San Joaquin County Republican Central
20 Committee—when in fact the contribution was made to Respondent Bill Berryhill
21 for Assembly, and the central committee was a mere intermediary for the
22 transaction. In this way, Respondents Tom Berryhill and Tom Berryhill for
23 Assembly violated Section 84203, subdivision (a), which requires accurate
24 reporting of information about the recipients of contributions.

25 COUNT 10: On or about February 3rd, 2009, as part of a money laundering scheme to help
26 Respondent Bill Berryhill get elected to the California State Assembly,
27 Respondent Tom Berryhill, by and through his controlled committee, Respondent
28 Tom Berryhill for Assembly, filed a false semi-annual campaign statement with
the Secretary of State. This filing concealed the violations described in Counts 1
through 4 by falsely reporting that the two contributions in question (in the
amounts of \$20,000 each) were made to Respondents Stanislaus County
Republican Central Committee and San Joaquin County Republican Central
Committee—when in fact both contributions were made to Respondent Bill
Berryhill for Assembly, and the central committees were mere intermediaries for
the transactions. In this way, Respondents Tom Berryhill and Tom Berryhill for
Assembly violated Section 84211, subdivision (k), which requires accurate
reporting of information about the recipients of contributions.

Failure to Report the Making and Receipt of an In-kind Contribution

25 COUNT 11: Regarding the in-kind contribution described in Count 5, Respondents Bill
26 Berryhill and Bill Berryhill for Assembly failed to report receipt of the
27 contribution by filing a late contribution report with the Secretary of State within
28 48 hours of receiving the contribution, in violation of Sections 84203, subdivisions
(a) and (b), and 84203.3, subdivision (b).

1 The ALJ ruled in favor of Respondents as to the remaining counts (5 and 11 through 16), which
2 alleged the making/receipt of an over-the-limit in-kind contribution, failure to report the contribution, and
3 failure to report receipt of certain gifts on a Statement of Economic Interests. Hereafter, these remaining
4 counts are referred to as the non-money laundering counts.

5 At the hearing, undersigned counsel for the FPPC requested imposition of the maximum penalty
6 of \$5,000 per count for the money laundering counts. As for the non-money laundering counts, which
7 were less egregious, only \$2,000 to \$3,000 per count was requested—with the exception of Counts 15
8 and 16, for which only \$200 per count was requested.

9 No penalty was imposed for the non-money laundering counts because the ALJ ruled in favor of
10 Respondents on those counts. As for the money laundering counts, however, the ALJ imposed a total
11 penalty in the amount of \$40,000, of which:

- 12 ➤ Respondents Tom Berryhill and Tom Berryhill for Assembly are jointly and severally liable
13 for \$35,000. This is the maximum penalty allowed by law because the highest penalty that
14 may be imposed is \$5,000 per count, and Respondents Tom Berryhill and his committee only
15 were named in seven of the nine money laundering counts. This maximum penalty is in
16 keeping with the ALJ's finding that "[t]he violations were serious and deliberate" and
17 "involved an intention to conceal, deceive or mislead." (See Ex. A, p. 39.)
- 18 ➤ Respondents Bill Berryhill and Bill Berryhill for Assembly are jointly and severally liable for
19 \$10,000. This is one-half of the maximum penalty allowed by law. Respondents Bill
20 Berryhill and his committee only were named in four of the nine money laundering counts.
21 This reduced penalty is in keeping with the ALJ's finding that although "[t]he violations were
22 serious and deliberate," and "[t]here was an intention to conceal, deceive or mislead," Bill
23 Berryhill's responsibility is based upon agency liability due to the actions of his campaign
24 staff, and his own, personal "actions were negligent or inadvertent" at best. (See Ex. A, p.
25 39.)
- 26 ➤ Respondent Stanislaus County Republican Central Committee is jointly and severally liable
27 for \$10,000. This is the maximum penalty allowed by law. Respondent Stanislaus County
28 Republican Central Committee only was named in two of the nine money laundering counts.

1 This maximum penalty is in keeping with the ALJ's finding that "[t]he violations were serious
2 and deliberate" and "involved an intention to conceal, deceive or mislead." Also, "[t]here was
3 evidence that this county central committee engaged in similar conduct on at least one other
4 occasion." (See Ex. A, p. 40.)

- 5 ➤ Respondent San Joaquin County Republican Central Committee is jointly and severally liable
6 for \$10,000. This is the maximum penalty allowed by law. Respondent San Joaquin County
7 Republican Central Committee only was named in two of the nine money laundering counts.
8 This maximum penalty is in keeping with the ALJ's finding that "[t]he violations were serious
9 and deliberate" and "involved an intention to conceal, deceive or mislead." (See Ex. A, p.
10 40.)

11 **B. Enforcement Division's Position**

12 Regulation 18361.9 requires the Enforcement Division to submit this opening brief but does not
13 mandate its contents. Rather, subdivision (b)(1) of that regulation provides that the Enforcement
14 Division may address the following matters in its opening brief:

15 **1. Whether the facts stated in the proposed decision are consistent with the evidence**
16 **presented.**

17 The ALJ did an excellent job of summarizing key pieces of evidence, including the following:

- 18 ➤ Respondent Tom Berryhill used his own District Office Manager and Chief of Staff to carry
19 out the laundering.
20 ➤ Emails between Respondent Tom Berryhill and his brother's campaign consultant (Carl
21 Fogliani) painted a clear picture of the money laundering scheme.
22 ➤ Other emails—as well as telephone records and records of text messages—helped show the
23 existence of Respondents' money laundering scheme.

24 Ideally, the ALJ's proposed decision also would have pointed out a few other matters, such as the
25 fact that neither central committee had made a single monetary contribution to Bill Berryhill prior to
26 laundering Tom Berryhill's contributions. (All of the central committees' prior monetary contributions
27 had gone to other candidates.) However, such additional matters are not necessary to support the ALJ's
28 proposed decision.

1 After the hearing, the parties were afforded the opportunity to submit closing briefs for the ALJ's
2 consideration. The closing brief of the FPPC is attached hereto as Exhibit B. For more information
3 about evidence of Respondents' wrongdoing, please see pages 25 through 36 of Exhibit B, which are
4 incorporated herein by reference—as if in full.

5 **2. Whether the proposed decision contains an accurate statement and/or application of**
6 **the law.**

7 Ideally, the ALJ's proposed decision would have adopted a broader definition of what constitutes
8 earmarking—instead of adopting a narrower definition at the urging of Respondents.² However, this is a
9 moot point that need not be addressed by the Commission because, even with a narrower definition, the
10 ALJ still found that Respondents earmarked the contributions in question. Also, should Respondents
11 choose to file an appeal, it is unlikely that any issue will be taken with the ALJ's adoption of a narrower
12 definition (at Respondents' urging).

13 In his proposed decision, the ALJ points out that central committees should not be prevented from
14 communicating to the public—and potential donors—essential political information about whom such
15 central committees *may* support, what they consider target races, etc. (Ex. A, pp. 11, 31, and 32.) Also,
16 the ALJ suggests that the FPPC or the Enforcement Division disagrees with this general statement of the
17 law. (*Ibid.*) For the record, the Enforcement Division *agrees* with this *general* statement of the law,
18 subject to the following discussion, which was submitted to the ALJ in the FPPC's closing brief (Ex. B,
19 pp. 10-11):

20 Something else to consider is that a contribution may be earmarked
21 in the opposite situation where the "condition" is imposed by the
22 committee and made known to the donor before the donor makes the
23 contribution. For example, a committee makes it known that any funds
24 received will be contributed to a particular candidate. A donor learns of
25 this and makes a contribution to the committee. When he does so, he
26 understands that the contribution is subject to the "condition" that the
27 money will go to the candidate. Another way to think about this is in terms
28 of an "agreement." When the committee makes it known that any
contributions received will go to the candidate, this is an offer, which is

² For more information about the Enforcement Division's position with respect to the elements of
earmarking and campaign money laundering, please see pages 3 through 24 of Exhibit B, which are
incorporated herein by reference as if in full.

1 accepted by the donor when the donor makes the contribution—resulting in
2 an “agreement.”

3 This is a type of earmarking that does not require any
4 communication by the original donor. All of the communication originates
5 from the committee. [FN8: This is similar to the Red Cross example that
6 Respondents’ counsel was asked about during opening statements.
7 (Transcript of Nov. 12th, 20:9-21.)]

8 An example of this is discussed in the *Bell Advice Letter* (A-11-
9 102), Attachment 7 hereto, which addressed fundraising efforts of the
10 California Republican Leadership Fund (“CRLF”). The letter described
11 how the CRLF intended to raise contributions and transmit the
12 contributions to participating county central committees pursuant to a joint
13 fundraising agreement. The agreement was to be between the CRLF and
14 the ultimate recipients of contributions—not between donors and the
15 CRLF. Nevertheless, the advice letter stated that the donors would be the
16 true contributors—and the CRLF merely would be an intermediary—
17 because the donors would be put on notice with advertisements about the
18 intended allocation of funds. (*Id.*, at pp. [*12]-[*16].) This is no different
19 than a committee making it known that any contributions received will go
20 to a particular candidate. Such behavior gives rise to an intermediary
21 relationship because it makes sense and because to hold otherwise would
22 be to render meaningless the individual campaign contribution limit of
23 \$3,600 per election.

24 When a central committee, which is not subject to the same
25 contribution limits as individuals, makes it known that any funds received
26 will go to Candidate A, the committee becomes a funnel for maxed out
27 contributors to Candidate A—unless the law classifies the committee as an
28 intermediary. For this reason, during opening statements, undersigned
counsel for the FPPC stated the theme of this case in terms of a question:
“[W]hat’s the point of contribution limits if they can do this?” (Transcript
of Nov. 12th, 11:17-19.)

29 In this case, however, the ALJ’s above-described general statement of law and the foregoing
30 position of the Enforcement Division are immaterial because they involve a different type of situation
31 than the wrongdoing that the ALJ found in his proposed decision. The ALJ did not find that money
32 laundering occurred because the central committees communicated to the public—and potential donors—
33 essential political information about whom such central committees might support, what they considered
34 target races, etc. Rather, the ALJ found that money laundering occurred because Respondent Tom
35 Berryhill exercised “direction and control” over his funds, earmarking them with a “prohibited agreement
36 or condition under Government Code section 85704,” and the involved parties deceived the public by

1 filing false campaign statements; also, the ALJ found that the violations were serious, deliberate and
2 involved the intent to conceal, deceive or mislead. (See Ex. A, pp. 34-35, ¶¶ 99-101; and pp. 38-43.)

3 As for Counts 15 and 16, which involved Respondent Tom Berryhill's failure to report receipt of
4 gifts on a Statement of Economic Interests, the ALJ appears to suggest that even though these might be
5 violations, no penalties should be assessed for these counts because of extenuating circumstances. (Ex.
6 A, pp. 36-37, ¶¶ 105 and 106.) The Enforcement Division takes issue with the ALJ's proposed decision
7 in this regard. However, at this time, no request is being made to modify the ALJ's decision as to Counts
8 15 and 16 because the money laundering counts are far more important from a public harm standpoint.
9 (At the hearing, the Enforcement Division requested the maximum penalty of \$5,000 per count for the
10 money laundering counts—and only \$200 per count for the gift reporting counts.)

11 **3. Whether there is additional material evidence that could not, with reasonable**
12 **diligence, have been discovered and presented at the administrative hearing.**

13 No such evidence is known to exist.

14 **4. Which of the dispositions provided for in Government Code section 11517 is**
15 **recommended by the Enforcement Division and why.**

16 Section 11517, subdivision (c)(2), provides that within 100 days of the Commission's receipt of
17 the proposed decision, the Commission may do any of the following:

- 18 • Adopt the proposed decision in its entirety.
- 19 • Reduce or otherwise mitigate the proposed penalty and adopt the balance of the proposed
20 decision.
- 21 • Make technical or other minor changes in the proposed decision and adopt it as the decision.
22 However, action by the Commission in this regard is limited to "a clarifying change or a
23 change of a similar nature that does not affect the factual or legal basis of the proposed
24 decision." (Gov. Code, § 11517, subd. (c)(2)(C).)
- 25 • Reject the proposed decision and refer the case back to the ALJ to take additional evidence
26 and prepare a revised, proposed decision.
- 27 • Reject the proposed decision, and decide the case upon the record, including the transcript, or
28 upon an agreed statement of the parties, with or without taking additional evidence. (By

1 stipulation of the parties, the Commission may decide the case upon the record without
2 including the transcript.) If the Commission chooses this option, all of the following
3 provisions apply:

4 (i) A copy of the record shall be made available to the parties. The Commission may
5 require payment of fees covering direct costs of making the copy.

6 (ii) The Commission itself shall not decide the case without affording the parties the
7 opportunity to present either oral or written argument before the Commission itself. If
8 additional oral evidence is introduced before the Commission itself, no Commission
9 member may vote unless the member heard the additional oral evidence.

10 (iii) The authority of the Commission itself to decide the case in this regard includes
11 authority to decide some but not all issues in the case.

12 In this case, the Enforcement Division recommends that the Commission adopt the proposed
13 decision of the ALJ with the following limited, minor, technical changes of a clarifying nature (pursuant
14 to Section 11517, subs. (c)(2)(A) and (C)):

15 ➤ On page 3, the first sentence of paragraph 8 mischaracterizes some of the counts in the
16 Accusation. This is a minor mistake and the ALJ's itemization of the counts on pages 3 and 4
17 shows that he understood the nature of each count. Nevertheless, the first sentence of
18 paragraph 8 should be stricken or re-written to read: "The remaining Accusation allegations
19 relate to the alleged making/receipt of an over-the-limit in-kind contribution in the form of a
20 fundraiser, false reporting in connection with the alleged money laundering, failure to report
21 the aforesaid in-kind contribution, and failure to report receipt of gifts on a Statement of
22 Economic Interests."

23 ➤ On page 4, the bracketed lists of Respondents for Counts 2 and 4 should include "Bill
24 Berryhill and Bill Berryhill for Assembly (accepted funds)." This omission was a minor
25 oversight. The ALJ understood that Counts 2 and 4 involved the making *and acceptance* of
26 over-the-limit contributions. (See p. 41, ¶ 3; and p. 42, ¶ 6.) Also, the ALJ found against
27 Respondents Bill Berryhill and Bill Berryhill for Assembly in connection with Counts 2 and

28 ///

1 4. (See the last paragraph of p. 41 as well as the paragraph immediately preceding paragraph
2 7 on p. 42.)

3 ➤ On page 6, there is a typographical error in the paragraph immediately preceding paragraph
4 13. “Gov. Code, § 82013, subd. (b)” should be changed to “Gov. Code, § 82013, subd. (a).”

5 ➤ On page 8, paragraphs 17 through 19 discuss current contribution limits as well as the
6 contribution limits that were in effect in 2008 (at the time of the violations in this case). The
7 references to the 2008 contribution limits are correct (\$3,600 and \$30,200 per election), but
8 the references to current contribution limits are incorrect. (\$3,000 should be changed to
9 \$4,100, and \$25,000 should be changed to \$34,000.) There are similar issues with the first
10 two paragraphs of page 11. However, this is harmless error because current contribution
11 limits are irrelevant, and the 2008 contribution limits were correctly stated.

12 ➤ On page 13, there is a typographical error in the paragraph immediately preceding paragraph
13 27. “Government Code section 85404” should be changed to “Government Code section
14 85704.” Also, the quoted portion of the statute should be changed from “*unless the*
15 *contribution is disclosed*” to “*unless the contribution is fully disclosed.*”

16 ➤ On page 21, paragraph 59 and the paragraph immediately following it include minor errors.
17 Currently, the paragraphs reflect that contributions in the amounts of \$20,000 each were
18 received from Respondents Stanislaus County Republican Central Committee and San
19 Joaquin County Republican Central Committee. This is correct for Stanislaus, but the
20 paragraphs should be changed to reflect that the amount received from San Joaquin was
21 \$21,000. Paragraph 78 (on p. 27) shows that the judge was aware of the correct amount and
22 that this simply was a minor mistake.

23 ➤ On page 32, the last paragraph mentions that Tom Berryhill exchanged “eight text messages
24 with the chair and vice chair of the Stanislaus County Republican Central Committee.”
25 However, “vice chair” should be changed to “treasurer.” It is apparent from the judge’s
26 earlier findings (p. 18, ¶ 41) that this simply was a mistake.

27 ➤ Paragraph 98 (which continues onto p. 34), contains a typographical error. The reference to
28 the email from Carl Fogliani of “October 30, 2008, 2:18 p.m.” should be changed to “October

1 31, 2008, 2:18 p.m.” Beginning on page 20, the ALJ described the events of October 31,
2 2008, and the email is mentioned as part of this discussion in paragraph 58 (on p. 21). This
3 shows that the judge knew of the correct date, and this was a simple typographical error.
4 (Also, see ¶¶ 96 and 97 on p. 33, which further support this conclusion.)

5 **5. Any other issue the Enforcement Division determines to be relevant.**

6 In a case such as this, the burden of proof rests upon the party making the charges. (*Parker v.*
7 *City of Fountain Valley* (1981) 127 Cal.App.3d 99, 113; Evid. Code, § 115.)

8 The standard of proof is a preponderance of the evidence. (Evid. Code, § 115.)

9 The phrase “preponderance of evidence” is usually defined in terms of probability of truth or
10 more likely to be true than not true. (1 Witkin, Cal. Evid. (4th ed. 2012) Burden of Proof and
11 Presumptions, § 36.)

12 This is the standard that was applied by the ALJ in this case. (See Ex. A, p. 32, second-to-last
13 paragraph: “Here, the substance of the transaction is best gleaned by considering both the
14 communications and the actions of the parties and their representatives. And having thus considered the
15 record in this case, *it was established by a preponderance of the evidence that there was an earmarking*
16 *arrangement.*” Emphasis added.)

17 In a situation where Respondents deny wrongdoing, but there is incriminating evidence to the
18 contrary, the ALJ must weigh the evidence and decide which version of events is more likely to be true
19 than not true. In this case, even though Respondents denied wrongdoing, the ALJ rightfully disbelieved
20 Respondents and found that they violated the Political Reform Act—as set forth in Counts 1 through 4
21 and 6 through 10 of the Accusation—because of substantial incriminating evidence, including the
22 following:

- 23 ➤ Respondent Tom Berryhill used his own District Office Manager and Chief of Staff to carry
24 out the laundering.
- 25 ➤ Emails between Respondent Tom Berryhill and his brother’s campaign consultant (Carl
26 Fogliani) painted a clear picture of the money laundering scheme.
- 27 ➤ Other emails—as well as telephone records and records of text messages—helped show the
28 existence of Respondents’ money laundering scheme.

1 The ALJ's proposed penalty of \$40,000 is very close to the maximum penalty (\$45,000) that the
2 law allows (based upon nine counts with a maximum penalty of \$5,000 per count).³ Such a penalty is
3 appropriate because campaign money laundering is one of the most serious violations of the Political
4 Reform Act. It undermines transparency, depriving the public of important information about the true
5 source of campaign contributions, and it facilitates the unlawful circumvention of campaign contribution
6 limits. Also, it gives one side an unfair advantage in an election—which is exactly what happened in this
7 case.

8 **III. CONCLUSION**

9 For the foregoing reasons, it is respectfully submitted that the Commission should adopt the
10 proposed decision of the ALJ with the limited, minor, technical changes of a clarifying nature that are
11 described more fully above.

12
13 Dated: 2/13/14

FAIR POLITICAL PRACTICES COMMISSION

14
15 By: 
16 NEAL P. BUCKNELL
17 Senior Commission Counsel
18 Enforcement Division
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28 ³ Coincidentally, or not, the ALJ's proposed penalty matches the amount laundered in this case. Respondents laundered \$40,000, and the ALJ proposes that they be fined \$40,000.

Exhibit A

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See separate Proposed Decision

Intentionally left blank

Exhibit B

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7
8 **BEFORE THE FAIR POLITICAL PRACTICES COMMISSION**
9 **STATE OF CALIFORNIA**

10
11 In the Matter of

12 **BILL BERRYHILL, TOM BERRYHILL,**
13 **BILL BERRYHILL FOR ASSEMBLY -**
14 **2008, BERRYHILL FOR ASSEMBLY**
15 **2008, STANISLAUS REPUBLICAN**
16 **CENTRAL COMMITTEE (STATE**
17 **ACCT.), and SAN JOAQUIN COUNTY**
18 **REPUBLICAN CENTRAL**
19 **COMMITTEE/CALIF. REPUBLICAN**
20 **VICTORY FUND,**

21 Respondents.

OAH Case No. 2012101024
FPPC Case No. 10/828

**CLOSING BRIEF OF THE FAIR POLITICAL
PRACTICES COMMISSION**

Administrative Hearing

Date: November 12-22, 2013

Time: 9:00 a.m.

Place: Office of Administrative Hearings
2349 Gateway Oaks Drive, Suite 200
Sacramento, California

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I. INTRODUCTION

Counts 1 through 4 and 6 through 10 of the Accusation pertain to Respondents' money laundering scheme. The FPPC has presented a mountain of circumstantial evidence in support of these counts. Tom Berryhill deliberately laundered \$40,000 through the central committees in this case because he had to circumvent the Political Reform Act's contribution limits to help his brother get elected. Tom Berryhill gave his money to the central committees, and the central committees held onto the funds for the briefest period of time before returning the same money back to Tom Berryhill's employees to be delivered to Bill Berryhill so that everyone could *pretend* that the money came from the central committees. This is classic money laundering. The FPPC has met its burden of proof by a preponderance of the evidence

///

1 because it is unreasonable to believe that all of the evidence discussed in this brief could exist in a single
2 case in the absence of money laundering.

3 Also, this brief will address how the FPPC has met its burden of proof with respect to the
4 remaining counts in the Accusation.

5 Counts 5 and 11 through 14 pertain to the making and acceptance of an over-the-limit in-kind
6 contribution. This count is based upon evidence that Tom Berryhill was a maxed out contributor to his
7 brother, but he paid in excess of \$4,000 toward the cost of organizing and holding a fundraiser, which
8 wound up being for the benefit of his brother. It is the cost of throwing the fundraiser—not the amount
9 of funds that were raised—that gives rise to this violation. Tom Berryhill testified that part way through
10 the fundraiser, he decided to make it about his brother. However, he was impeached in this regard, and it
11 was established that he changed the fundraiser to be for his brother *before* the fundraiser was held—even
12 going so far as to make this known by calling people in advance of the fundraiser.

13 Counts 15 and 16 pertain to Tom Berryhill's failure to report receipt of certain gifts until after the
14 reporting deadline—when he received a letter about the matter from the FPPC's Enforcement Division.
15 Despite defense counsel's arguments to the contrary, these are straightforward violations. After Tom
16 Berryhill received the above-described letter, he amended his statement of economic interests to disclose
17 the previously undisclosed gifts—thereby admitting that he received them. Additionally, during his
18 interview, when he was asked to elaborate as to what happened, he stated simply that his failure to report
19 was an oversight.

20 Throughout this brief, references are made to the official transcript of the hearing, which is
21 submitted herewith. Since the hearing spanned six days (Nov. 12th, 13th, 14th, 19th, 21st, and 22nd, 2013),
22 there is a separate transcript for each day. Citations to the transcript are by date, page, and line number.

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1 Attachments 1 through 7 hereto are advice letters of the FPPC.¹ These letters help illustrate how
2 funds may be earmarked under the Political Reform Act.² Unless otherwise indicated, all references to
3 attachments are references to these letters, and all references to exhibits are references to the exhibits that
4 were introduced at the hearing.

5 For the reasons stated during oral closing arguments, the FPPC is requesting imposition of:

- 6 ➤ the maximum penalty of \$5,000 per count for counts 1 through 4 and 6 through 10;
- 7 ➤ a penalty in the range of \$2,000 to \$3,000 per count for counts 5 and 11 through 14; and
- 8 ➤ a penalty in the amount of \$200 per count for counts 15 and 16.

9 Before discussing the facts of this case, this brief will address certain areas of the law that have
10 been misrepresented by Respondents.

11 II. DISCUSSION

12 A. Campaign Money Laundering Defined

13 Section 84301 provides:

14 No contribution shall be made, directly or indirectly, by any person
15 in a name other than the name by which such person is identified for legal
16 purposes.

17 Violations of this statute are known as campaign money laundering. As the probable cause
18 hearing officer found in this case (in Ex. 3.1, at 6:28-7:4):

19 The term “money laundering” is used to describe a situation where
20 the source or nature of funds is intentionally disguised by channeling funds

21 ¹ FPPC advice letters are issued pursuant to Government Code section 83114, subdivision (b), and
22 California Code of Regulations, title 2, section 18329. They offer guidance to the public, and under certain
23 circumstances, the requestor may use the advice as a defense in an enforcement proceeding. Although the ultimate
24 resolution of legal issues regarding statutory interpretation lies with the courts, the advice of the FPPC as an
25 agency empowered by the Legislature to interpret and enforce the Political Reform Act is entitled to weight.
26 (*People v. Thrasher* (2009) 176 Cal.App.4th 1302, 1308-10.)

27 Generally, advice letters are requested in advance of certain, intended conduct—not after-the-fact—by
28 members of the regulated community who want to know if their intended conduct will be legal. (Regulation
18329, subs. (b)(8)(A) and (c)(4)(A).) For this reason, advice letters about earmarking tend to involve questions
about explicit, well-defined agreements or conditions that are contemplated in advance. However, the legal
considerations applicable to these explicit forms of earmarking are helpful in evaluating subtler forms of
earmarking that involve implicit agreements or conditions.

² The Political Reform Act is contained in Government Code sections 81000 through 91014. All statutory
references are to the Government Code, unless otherwise indicated. FPPC regulations are contained in Sections
18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2,
Division 6 of the California Code of Regulations, unless otherwise indicated.

1 through an intermediary. The term is commonly used to describe
2 concealment of the true source of funds in the area of campaign finance law
3 in California and around the nation. That is the precise activity
4 Enforcement has charged Respondents with in this matter and therefore the
5 use of the term is appropriate.

6 Section 84301's use of the phrase "directly or indirectly" shows that the statute's prohibition is
7 broad, encompassing any situation where the public is deceived about the true source of a contribution.
8 The statutory prohibition must be broad because money laundering may be accomplished in a variety of
9 ways.

10 **1. Laundering with a False Name**

11 One form of money laundering involves the use of a false name by the contributor (without the
12 use of an intermediary). In this situation, the public is deceived about the true name of the contributor,
13 which means the contribution has been made in the name of another in violation of Section 84301.

14 **2. Laundering through a Straw Donor under *United States v. O'Donnell***

15 The case of *United States v. O'Donnell* (9th Cir. Cal. 2010) 608 F.3d 546 involved money
16 laundering under Title 2 United States Code section 441f, which provides: "No person shall make a
17 contribution in the name of another person or knowingly permit his name to be used to effect such a
18 contribution, and no person shall knowingly accept a contribution made by one person in the name of
19 another person." The court held that the statute prohibits straw donor contributions where a contributor
20 solicits others to donate to a candidate in their own names and furnishes the money either through an
21 advance or a prearranged reimbursement. (*United States v. O'Donnell, supra*, 608 F.3d at p. 556.) In
22 reaching its conclusion, the court noted (at p. 550, with emphasis added):

23 In a straw donor situation, the person who actually transmits the
24 money acts merely as a mechanism, whereas it is the original source who
25 has made the gift by arranging for his money to finance the donation. *To*
26 *identify the individual who has made the contribution, we must look past*
27 *the intermediary's essentially ministerial role to the substance of the*
28 *transaction. Accordingly, the statutory language applies when a*
defendant's funds go to a campaign either directly from him or through an
intermediary. In either case, for purposes of § 441f, the defendant has
made that contribution—and he has violated the statute if his own name
was not provided as the source.

29 Although federal election law differs from California's Political Reform Act in many respects,
30 there are similarities between the federal and state money laundering statutes. Accordingly, *O'Donnell's*

1 general rule about looking “past the intermediary’s essentially ministerial role to the substance of the
2 transaction” is worthy of consideration in this case.

3 As described above, *O’Donnell* specifically deals with a situation where a donor furnishes money
4 to intermediaries or straw donors and solicits them to contribute the money to a particular candidate in
5 their own names. For this reason, *O’Donnell* talks about intermediaries or straw donors acting at the
6 direction of the original donor, and the court did not have occasion to address whether or not there could
7 be laundering without solicitation by the donor.³ However, the next section of this brief is a discussion
8 about laundering through concealed earmarking under Sections 85704 and 84302. This discussion will
9 include an explanation as to how earmarking and money laundering can occur in a variety of ways under
10 California law—including a situation where there would be no solicitation by the donor (similar to the
11 Red Cross example that was discussed during the hearing). Also, this discussion will address the terms
12 “condition” and “agreement” in the context of earmarking under California law, which encompass the
13 activity in *O’Donnell* where a donor solicits an intermediary.

14 Another matter *O’Donnell* did not address was the issue of discretion, direction or control on the
15 part of the intermediary.⁴ However, the next section of this brief will discuss this as well—within the
16 context of California’s earmarking statutes, Sections 85704 and 84302.

17 *O’Donnell’s* general rule about looking “past the intermediary’s essentially ministerial role to the
18 substance of the transaction” is an important rule to remember for purposes of identifying money
19 laundering. However, since it is based upon federal law, it supplements—but does not supplant—the
20 following discussion about laundering through concealed earmarking under California law.

21 ///

23 ³ *United States v. Boender* (7th Cir. Ill. 2011) 649 F.3d 650, 661, fn. 5: “Like the Ninth Circuit in
24 *O’Donnell*, we have no occasion to consider whether § 441f criminalizes the mere reimbursement of campaign
25 contributions, without an [*sic*] prior solicitation. . . . Nor do we address Boender’s fatally undeveloped argument
that the government’s interpretation of § 441f violates the First Amendment by criminalizing ‘encouraging others
to make campaign contributions.’”

26 ⁴ *United States v. O’Donnell, supra*, 608 F.3d at p. 550, fn. 2: “We need not decide whether and under
27 what circumstances the intermediary should also be understood to have made a contribution, such that the
intermediary’s name must jointly be reported. We note, however, the Federal Election Commission regulation
28 stating that when an intermediary exercises direction or control over a gift, the entire amount must be attributed to
both the original source and the intermediary.”

1 **3. Laundering through Concealed Earmarking under Sections 85704 and 84302**

2 Another form of money laundering can occur when a committee, such as a county central
3 committee, receives a contribution from a donor where the contribution has been earmarked to go to a
4 particular candidate, and the committee thereafter gives the contribution to that candidate.

5 Under former law, such a transaction was prohibited because Section 85703, which was repealed
6 in 2000, provided:

7 No person shall make and no person, other than a candidate or the
8 candidate's controlled committee, shall accept any contribution on the
9 condition or with the agreement that it will be contributed to any particular
candidate. The expenditure of funds received by a person shall be made at
the sole discretion of the recipient person.

10 Under current law, this outright prohibition has been lifted in favor of a statutory scheme that
11 allows earmarking *if there is full disclosure to the public that the original donor is the true contributor*
12 *and that the committee merely is an intermediary.* This required disclosure serves the important public
13 purpose of transparency, which recognizes that “[r]eceipts and expenditures in election campaigns should
14 be fully and truthfully disclosed in order that the voters may be fully informed and improper practices
15 may be inhibited [such as circumvention of the Political Reform Act’s campaign contribution limits].”
16 (Section 81002, subd. (a).)

17 In this regard, Section 85704, which replaced former Section 85703 in 2000, provides (with
18 emphasis added):

19 A person may not make any contribution to a committee on the
20 condition or with the agreement that it will be contributed to any particular
21 candidate *unless the contribution is fully disclosed pursuant to Section*
84302.

22 Section 84302 requires full disclosure of the intermediary relationship and identification of the
23 original contributor as the true source of funds. Specifically, the statute provides (with emphasis added):

24 No person shall make a contribution on behalf of another, or while
25 acting as the intermediary or agent of another, without disclosing to the
26 recipient of the contribution both his own full name and street address,
27 occupation, and the name of his employer, if any, or his principal place of
28 business if he is self-employed, and the full name and street address,
occupation, and the name of employer, if any, or principal place of business
if self-employed, of the other person. The recipient of the contribution
shall include in his campaign statement the full name and street address,

1 occupation, and the name of the employer, if any, or the principal place of
2 business if self-employed, of *both the intermediary and the contributor*.

3 Regulation 18432.5, subdivision (a)(1), further explains Section 84302 by providing:

4 (a) For purposes of Government Code Section 84302, a person, as
5 defined in Government Code Section 82047 [which includes any
6 "committee, and any other organization or group of persons acting in
concert"], is an intermediary for a contribution if any of the following
applies:

7 (1) The recipient of the contribution would consider the person to
8 be the contributor without the disclosure of the identity of the true source of
the contribution.⁵

9 Thus, under current law, when a committee receives a contribution from a donor where the
10 contribution has been earmarked to go to a particular candidate, if the committee thereafter gives the
11 contribution to that candidate, then the disclosure requirements of Sections 85704 and 84302 must be
12 fulfilled. First, the committee must disclose to the candidate that the committee is an intermediary and
13 that the original donor is the true contributor. Second, the candidate is required to disclose "both the
14 intermediary and the contributor" on the candidate's campaign statement. (Section 84302.) Failure to
15 abide by these disclosure requirements makes the entire transaction unlawful.

16 Additionally, since this statutory scheme classifies the original donor as the true contributor, the
17 campaign statements filed by the original donor (and the other parties) must reflect that the donor made
18 the contribution to the candidate *through* the committee as an *intermediary*. If false campaign statements
19 are filed, which untruthfully characterize the intermediary as the true contributor to the candidate, then
20 the public has been deceived as to the identity of the true contributor. In such case, the transaction
21 amounts to money laundering because the contribution has been made in the name of another in violation
22 of Section 84301.

23 Since this type of laundering involves an intermediary relationship that arises from the
24 earmarking of funds, it is important to understand the various ways that earmarking can occur.

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27 ⁵ However, if an intermediary fails to disclose the true source of a contribution to a recipient, the
28 recipient's duty to properly report the true source of the contribution is not excused if the recipient knows or has
reason to know of the true source of the funds. (Regulation 18432.5, subd. (c).)

1 a. **Funds are earmarked if they have been given to a committee on the**
2 **“condition” or with the “agreement” that the money will be contributed to a**
3 **particular candidate—and these terms are to be liberally construed.**

4 The test for earmarking under Section 85704 is whether the contribution was given to the
5 committee “on the condition or with the agreement” that it will be contributed to a particular candidate.
6 This language is to be liberally construed to accomplish the purposes of the Political Reform Act.
7 (Section 81003.)

8 One of the main purposes of the Political Reform Act is to ensure that receipts and expenditures
9 in election campaigns are fully and truthfully disclosed in order that the voters may be fully informed and
10 improper practices may be inhibited. (Section 81002, subd. (a).) This is more commonly known as
11 transparency.

12 Section 84301 serves this important purpose by prohibiting the making of a contribution in the
13 name of another—whether “directly *or indirectly*.”

14 Liberal construction of what constitutes earmarking helps carry out Section 84301’s regulation of
15 *indirect* money laundering—which by its very nature involves subtle and creative ways of earmarking
16 funds to thwart transparency and campaign contribution limits. For this reason, Section 81003 requires
17 liberal construction of the phrase, “on the condition or with the agreement.”

18 i. **Even a wink and a nod would be an “agreement.”**

19 Liberal construction of “agreement” includes any agreement whatsoever, regardless of whether it
20 is oral, written, direct, indirect (through messengers/representatives), explicit, or implicit. Even a wink
21 and a nod could be an agreement.⁶

22 ii. **“Condition” merely means an expression of donor intent, and**
23 **“agreement” is not required.**

24 Liberal construction of “condition” recognizes that a “condition” is less than an “agreement.”
25 Whereas “agreement” connotes the donor and the committee being on the same page about who should
26

27 ⁶ On the first day of the hearing, defense counsel admitted that an agreement could be implicit. (Transcript
28 of Nov. 12th, 20:7-8.) As stated above, an implicit agreement can be formed with a mere wink and a nod—
especially where the parties know each other well.

1 receive the contribution, “condition” merely connotes that the donor intends for the money to go to a
2 particular candidate and that the committee is made aware of this fact. This boils down to an expression
3 of donor intent.

4 This is consistent with the *Krausse Advice Letter* (A-96-349), Attachment 1 hereto, which defines
5 “earmarking” in the context of Section 84302 as follows (at p. [*4]):

6 Under the Act, a person may collect a contribution from a third
7 party on behalf of a committee. (See Section 84302; Regulation 18432.5.)
8 The contribution is considered to be from the third party, not from the
9 intermediary collecting the contribution, if the third party knowingly and
10 unambiguously intends at the time of making the contribution that it is to
11 be eventually deposited with the committee. . . . In the vernacular, the third
12 party must “earmark” the contribution for the committee. Thus, if an
13 organization, O, collects a contribution of \$50 from one of its members, M,
14 who intends at the time of making the contribution that it is to be
15 transferred to a committee, C, then the contribution is considered to be
16 from M to C, not from O to C.

17 Along these lines, the *Dichiara Advice Letter* (I-02-040), Attachment 5 hereto, addresses the
18 question of whether a contributing candidate can discuss the beneficiary of PAC distributions with a
19 PAC, noting (at p. [*4], with emphasis added):

20 [T]he contributing candidate may not direct *that* the PAC use his or
21 her contribution for a specific candidate. The Act prohibits such
22 earmarking. Section 85704 states that “[a] person may not make any
23 contribution to a committee on the condition or with the agreement that it
24 will be contributed to any particular candidate unless the contribution is
25 fully disclosed pursuant to section 84302 [contributions by intermediary or
26 agent].”

27 Both advice letters contemplate the situation where a donor intends for his money to go to a
28 particular recipient, and this intent is made known to the committee—thereby earmarking the funds such
that the donor is the true contributor and the committee is an intermediary.⁷

Some examples of how this can happen include any of the following statements made by a donor
(or the donor’s messenger, courier, or representative) at or near the time that the donor makes a
contribution to a committee:

///

⁷ This is similar to the facts of the *O'Donnell* case where a donor furnishes funds to an intermediary and solicits the intermediary to contribute the funds to a particular candidate.

- 1 ➤ “This is for Bill.”
- 2 ➤ “Bill needs this.”
- 3 ➤ “We need to get this to Bill.”
- 4 ➤ “Bill really needs this ASAP.”
- 5 ➤ “Bill *desperately* needs money to pay for a TV commercial. We’re *overnighting* a check
- 6 to you.”

7 It is not required that the “condition” rise to the level of an “agreement.” If this were the case,
8 Section 85704 would not refer to “agreement” as an alternative to “condition.”

9 **iii. Conversely, a “condition” may be imposed by the committee, and the**
10 **“condition” will become an “agreement” if the donor gives money to**
11 **the committee with knowledge of the “condition.”**

12 Something else to consider is that a contribution may be earmarked in the opposite situation
13 where the “condition” is imposed by the committee and made known to the donor before the donor
14 makes the contribution. For example, a committee makes it known that any funds received will be
15 contributed to a particular candidate. A donor learns of this and makes a contribution to the committee.
16 When he does so, he understands that the contribution is subject to the “condition” that the money will go
17 to the candidate. Another way to think about this is in terms of an “agreement.” When the committee
18 makes it known that any contributions received will go to the candidate, this is an offer, which is
19 accepted by the donor when the donor makes the contribution—resulting in an “agreement.”

20 This is a type of earmarking that does not require any communication by the original donor. All
21 of the communication originates from the committee.⁸

22 An example of this is discussed in the *Bell Advice Letter* (A-11-102), Attachment 7 hereto, which
23 addressed fundraising efforts of the California Republican Leadership Fund (“CRLF”). The letter
24 described how the CRLF intended to raise contributions and transmit the contributions to participating
25 county central committees pursuant to a joint fundraising agreement. The agreement was to be between
26

27 ⁸ This is similar to the Red Cross example that Respondents’ counsel was asked about during opening
28 statements. (Transcript of Nov. 12th, 20:9-21.)

1 the CRLF and the ultimate recipients of contributions—not between donors and the CRLF.
2 Nevertheless, the advice letter stated that the donors would be the true contributors—and the CRLF
3 merely would be an intermediary—because the donors would be put on notice with advertisements about
4 the intended allocation of funds. (*Id.*, at pp. [*12]-[*16].) This is no different than a committee making
5 it known that any contributions received will go to a particular candidate. Such behavior gives rise to an
6 intermediary relationship because it makes sense and because to hold otherwise would be to render
7 meaningless the individual campaign contribution limit of \$3,600 per election.

8 When a central committee, which is not subject to the same contribution limits as individuals,
9 makes it known that any funds received will go to Candidate A, the committee becomes a funnel for
10 maxed out contributors to Candidate A—unless the law classifies the committee as an intermediary. For
11 this reason, during opening statements, undersigned counsel for the FPPC stated the theme of this case in
12 terms of a question: “[W]hat’s the point of contribution limits if they can do this?” (Transcript of Nov.
13 12th, 11:17-19.)

14 iv. **“Understanding” is encompassed by “condition” or “agreement.”**

15 Regardless of how a contribution is earmarked, there must be an understanding. In the case of an
16 agreement, the understanding is the agreement itself; in the case of a condition imposed by the donor, the
17 understanding is the committee’s knowledge of the donor’s intent; and in the case of a condition imposed
18 by the committee, the understanding is the donor’s knowledge of the committee’s intent. For this reason,
19 it is fair to say that “understanding” is encompassed by Section 85704’s reference to “condition” and
20 “agreement.”⁹

21 Also, use of the term “understanding” in the context of earmarking is consistent with the *Bauer*
22 *Advice Letter* (I-02-338), Attachment 6 hereto, in which a former assemblyman, David Knowles, wanted
23 to contribute surplus campaign funds to certain central committees with the “understanding” that if he ran
24 for public office in the future, the central committees would return an equivalent amount to him. The
25 letter stated (at p. [*4], with emphasis added):

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27
28 ⁹ It would appear that Respondents’ attorneys also believe this to be true; throughout the hearing, they kept a blow-up on an easel, which defined earmarking in terms of a “condition,” “*understanding*,” or “agreement.”

1
2 You propose that the funds provided to the central committees be
3 encumbered with an “*understanding*” that an equivalent amount of funds
4 be contributed by these central committees to Mr. Knowles should he
5 decide to run for public office at a future date. *This understanding*
6 *essentially “earmarks” the Committee’s contribution* for use by the
7 recipient central committees to support a future candidate for elective
8 office, namely Mr. Knowles. This purpose is contrary to sections
9 89519(b)(4) and (b)(5) [regarding permissible contributions that may be
10 made with surplus campaign funds].

11 Although the advice letter talks about earmarking for an improper purpose (under Section 89519),
12 it does not specifically address the reporting requirements that arise under Sections 85704 and 84302 in
13 the case of earmarking. This makes sense because the improper purpose (under Section 89519) would be
14 apparent at the beginning of the transaction—whereas disclosure of the true contributor and the
15 intermediary roles of the central committees would not be required by Sections 85704 and 84302 unless
16 and until the central committees were to give the funds back to one of Mr. Knowles committees pursuant
17 to their “understanding.” In fact, if Mr. Knowles never decides to run for public office again, the central
18 committees never would have to be reported as intermediaries. Nevertheless, the advice letter provides
19 an example of how an “understanding” may give rise to “earmarking.”

20 Essentially, there can be no “condition” or “agreement” without some sort of “understanding.”
21 For example, a donor gives a check to a courier and asks the courier to deliver the check to a central
22 committee. Also, the donor asks the courier to tell the central committee that the check is for Candidate
23 A. If the courier delivers the check, but forgets to tell the committee that the check is for Candidate A,
24 then the donor’s attempted earmarking fails because the committee did not achieve an “understanding” of
25 the donor’s intent. However, if the courier conveys both the check and the message, then the funds are
26 earmarked because the committee achieves an “understanding” of the donor’s intent.

27 v. **A “condition” may be implicit.**

28 Just as an “agreement” may be explicit or implicit—so too may a “condition” be explicit or
implicit.¹⁰ Implicit conditions may be conveyed by conduct in addition to statements. However, the

¹⁰ This is in keeping with the required liberal construction of the Political Reform Act, which is discussed above. (Section 81003.)

1 *Krausse Advice Letter* (A-96-349), Attachment 1 hereto, does require the message to be clear. At page
2 [*4], the letter describes earmarking as a situation where the contributor “knowingly and
3 unambiguously” intends that the contribution “is to be eventually deposited” with a particular recipient.

4 In this case, Tom Berryhill stood up at a fundraiser—with his brother—and addressed a large
5 group of people. He talked about how important it was for his brother to win the election, and in this
6 regard, he directed everyone to make their contributions to the Stanislaus central committee. This was
7 done in the presence of the Vice Chair of the central committee. The next day, Tom Berryhill exchanged
8 eight text messages with the officers of that same central committee and contributed \$20,000 to the
9 committee. When the committee received the money, it knew exactly where Tom Berryhill intended for
10 the funds to go because of his statements and conduct at the fundraiser (not to mention the eight text
11 messages). This is all that is required for there to be a “condition” that gives rise to earmarking and an
12 intermediary relationship.¹¹

13 vi. **“Control” is not a required element of earmarking.**

14 Section 85704 does not use the term “control.” Rather, as discussed above, it uses the terms
15 “condition” or “agreement,” neither of which support an argument that the original donor must “control”
16 the contribution through the central committee.

17 At the most, “condition” connotes the original donor’s *attempt* to influence or control the
18 committee through a knowing and unambiguous expression of donor intent. As for “agreement,” this
19 term connotes a meeting of the minds—not “control.” A “condition” or “agreement” certainly could rise
20 to the level of “control” if the donor had a position of authority over the committee or if the “condition”
21 or “agreement” were coupled with a threat, but this is not required to establish earmarking.

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27 ¹¹ As discussed above, “agreement” by the central committee was not required for there to be a
28 “condition,” but there is no evidence that the Vice Chair of the central committee objected or disagreed with Tom
Berryhill’s statements and conduct at the fundraiser—which is consistent with the existence of an “agreement.”

1 vii. **Respondents' counsel has misrepresented the law with respect to**
2 **discretion. When a committee receives a contribution that has been**
3 **earmarked for a particular candidate, the committee cannot "un-**
4 **earmark" the contribution by claiming that the committee exercised its**
5 **own discretion, direction, or control.**

6 Respondents argue that an intermediary in an earmarking transaction can exercise discretion,
7 direction or control over the contribution to "un-earmark" the contribution or sever the earmarking. In
8 this regard, Respondents rely upon a former version of Section 85703, which was repealed and
9 replaced—over 13 years ago—by the current version of Section 85704. (Respondents' *Corrected Post*
10 Trial Brief, 10:19-11:7.)

11 Former Section 85703 provided:

12 No person shall make and no person, other than a candidate or the
13 candidate's controlled committee, shall accept any contribution on the
14 condition or with the agreement that it will be contributed to any particular
15 candidate. The expenditure of funds received by a person shall be made at
16 the sole discretion of the recipient person.

17 Current Section 85704 provides:

18 A person may not make any contribution to a committee on the
19 condition or with the agreement that it will be contributed to any particular
20 candidate unless the contribution is fully disclosed pursuant to Section
21 84302.

22 The old statute talks about making *and* acceptance. On the other hand, the newer statute only
23 talks about making; acceptance is not mentioned. However, acceptance is an inherent part of the newer
24 statute because the newer statute's disclosure requirements are not triggered unless and until the
25 intermediary committee *accepts* the earmarked contribution (and conveys the contribution to the intended
26 candidate).

27 Acceptance is an important point in time under both statutes because it is a manifestation of
28 assent to the terms of the earmarking transaction. Both statutes recognize that it would be disingenuous
for a committee to deny that it was an intermediary even though it accepted an earmarked contribution
and conveyed the contribution to the intended candidate. Under the old statute, the transaction was
unlawful at the moment when the committee accepted such a contribution—even before the committee

1 had a chance to exercise alleged discretion and convey the contribution.¹² Likewise, the newer statute
2 does not allow any room for alleged discretion; it unconditionally provides that the transaction is
3 unlawful *unless* the transaction is “fully” disclosed under Section 84302, which requires disclosure of
4 “both the intermediary and the contributor.”

5 There never has been an option for a committee to accept an earmarked contribution, convey it to
6 the intended candidate, and somehow not be an intermediary by claiming independent exercise of
7 discretion, direction or control. If the Political Reform Act had intended for this to be possible, it would
8 not have banned earmarking entirely with the old statute.

9 Respondents argue that the second sentence of the old statute somehow operates as a defense
10 against earmarking in this regard. That sentence reads: “The expenditure of funds received by a person
11 shall be made at the sole discretion of the recipient person.” However, that sentence does not undo the
12 prohibition of the old statute’s first sentence, which reads: “No person shall make and no person, other
13 than a candidate or the candidate's controlled committee, shall accept any contribution on the condition
14 or with the agreement that it will be contributed to any particular candidate.” The old statute’s first
15 sentence is an outright prohibition against earmarking funds to go to a particular candidate. The old
16 statute’s second sentence actually expands the prohibition and *does not* serve as a defense or exception to
17 the first sentence. (*Sutton Advice Letter (A-97-333)*, Attachment 2 hereto, p. [*2]: “While the first
18 sentence arguably proscribes only those contributions earmarked for ‘any particular candidate,’ the
19 second sentence of Section 85703 *goes further*. . . . [Emphasis added.]”)

20 In any case, the “sole discretion” required by the old statute’s second sentence becomes a legal
21 impossibility when a committee accepts a contribution that is earmarked for a particular candidate.
22 (*Vanderhoof Advice Letter (I-97-391)*, Attachment 3 hereto, p. [*4]: “A contribution accepted under a
23 condition that it be spent for a specific purpose places the recipient in a position of not having sole
24 discretion regarding the expenditure of those funds.”) At the very least, the committee must return
25 earmarked funds to the donor if the committee wants to retain its “sole discretion.” (*Sutton Advice Letter*

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¹² *Sutton Advice Letter (A-97-487)*, Attachment 4 hereto, p. 3, fn. 2: “Note that Section 85703’s prohibition applies to acceptance with an unlawful condition; actual use of the money is irrelevant.”

1 (A-97-487), Attachment 4 hereto, at page 3: “You have indicated that the CRP will return contributions
2 earmarked for a particular candidate and will include a disclaimer that it retains sole discretion over the
3 funds it receives. Under the second sentence of Section 85703, the CRP must go further and in fact
4 decide how to expend all contributions that it receives. [Underline added.]”)

5 The newer statute does not include the old statute’s second sentence about “sole discretion,” but
6 there is good reason for this. Under the old statute, earmarking was prohibited entirely—so it was
7 appropriate for the old statute to state: “The expenditure of funds received by a person shall be made at
8 the sole discretion of the recipient person.”

9 However, under the newer statute, earmarking is allowed if it is accompanied by full disclosure as
10 to the identities of the intermediary and the true contributor. This is a big change from the former law.
11 When you allow an intermediary to carry out an earmarking transaction, you are allowing the
12 intermediary to break the “sole discretion” rule. This is why the “sole discretion” rule properly was not
13 included in the newer statute. It conflicts with the new policy of allowing earmarking so long as there is
14 full disclosure of the identities of the intermediary and the true contributor (and so long as the true
15 contributor does not exceed contribution limits or otherwise violate the Political Reform Act).

16 If current Section 85704 intended to allow for discretion, direction or control as a defense to
17 earmarking, it would have been a simple matter for the statute to include language to this effect. The best
18 approach is to recognize that:

- 19 ➤ If the earmarking arises from a “condition,” then the “condition” becomes an “agreement”
20 when the committee accepts the contribution subject to the “condition.” By failing to
21 return the contribution to the donor, the committee is agreeing to the terms of the
22 earmarking.
- 23 ➤ If the earmarking arises from an “agreement” between the donor and the committee—or if
24 it arises from a “condition” that becomes an “agreement” as described above—then
25 discretion, direction and control become non-issues because they are overshadowed by the
26 “agreement.”

27 To hold otherwise would open the door to the following argument by the intermediary: “Well,
28 even though the contribution was earmarked because the donor told us he wanted it to go to Bill, we also

1 wanted the money to go to Bill—so we were the true contributor actually.” If this were an acceptable
2 defense, it would create an unintended loophole that would thwart enforcement of the money laundering
3 and earmarking statutes.

4 If a donor is interested in earmarking or laundering a contribution through an intermediary, the
5 donor is going to use a certain type of intermediary. Generally, the intermediary will be someone
6 trustworthy, who shares a common interest with the donor. The donor might even have some leverage or
7 authority over the intermediary—or clout that inspires obedience or a willingness to carry out the donor’s
8 will. For example, a member of the Assembly Republican Caucus is not going to launder contributions
9 through a Democratic county central committee. Rather, he is going to launder contributions through
10 Republican county central committees because he trusts them; he shares a common interest with them;
11 and his clout as a member of the Assembly Republican Caucus will be greatly respected by such
12 committees. If he is prosecuted for laundering contributions through the central committees, of course
13 the central committees are going to say they wanted the contributions to go to that candidate anyway.
14 After all, they gave the money to the candidate, and they share similar political beliefs with the candidate
15 and the original donor. It is to be expected that they would want the money to go to the same candidate.
16 This is precisely why discretion is a red herring. Similar interests are an expected part of an earmarking
17 transaction. However, these similar interests—and any claimed independent discretion, direction or
18 control—are overshadowed by the intermediary accepting or entering into an earmarking arrangement.

19 The important thing to remember is that the public has the right to know the truth about who
20 really is making the contribution. (Section 81002, subd. (a).) Were the central committees the true
21 contributors, or was it the original donor? This question is answered by looking at who furnished the
22 money and whether the funds were earmarked with a “condition” or “agreement” within the meaning of
23 Section 85704. If the original donor furnished the funds, and if the funds were earmarked, then the
24 public has the right to know that the original donor was the true contributor—and the central committees
25 were just intermediaries.

26 **b. Once a committee receives an earmarked contribution, it cannot give the**
27 **contribution to the intended recipient without being an intermediary for the**
28 **original donor.**

1 By its very nature, earmarking involves a donor making a contribution through an intermediary,
2 such as a committee, to a particular recipient, such as a candidate.

3 There are good reasons to disfavor such transactions. They pave the way for concealment of the
4 identities of the true contributors. This undermines transparency and results in deception of the voters—
5 contrary to one of the main purposes of the Political Reform Act. (Section 81002, subd. (a).) Also,
6 concealment of the identities of contributors makes it more difficult to enforce campaign contribution
7 limits. Frequently, the sole purpose of earmarking is to break the law; otherwise, the contributor simply
8 would give the contribution directly to the intended recipient. The gist of these concerns is that the
9 intermediary will be seen as the true contributor—and the true contributor will be unknown.

10 However, these concerns disappear if the campaign statements of the parties provide full
11 disclosure that the original donor was the true contributor—and that the committee was just an
12 intermediary for conveying the contribution to the candidate.

13 Section 85704 recognizes this by prohibiting a donor from making “any contribution to a
14 committee on the condition or with the agreement that it will be contributed to any particular candidate
15 *unless the contribution is fully disclosed pursuant to Section 84302.*” (Emphasis added.)

16 The reference to Section 84302 does not mean that full disclosure is required only *if* the
17 committee is an intermediary. Rather, the reference means that full disclosure is required *because* the
18 committee is an intermediary by virtue of accepting an earmarked contribution and conveying it to the
19 intended candidate. This interpretation provides the maximum amount of information to the public about
20 the transaction, which is consistent with liberal construction of the Political Reform Act to carry out the
21 purpose of transparency. (Sections 81002, subd. (a), and 81003.) Also, by requiring full disclosure of
22 the intermediary relationship, Section 85704 addresses all of the concerns discussed above that give
23 reason to disfavor earmarking transactions.

24 Essentially, there is no way for a committee to accept earmarked funds and give the funds to the
25 intended candidate without being an intermediary. If a committee does not want to be an intermediary, it

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1 can and should reject any intermediary relationship by returning the earmarked funds to the donor.¹³
2 Otherwise, if the committee accepts the earmarked funds and conveys them to the intended candidate, the
3 committee has accepted the intermediary relationship.

4 Under these circumstances, Section 85704's reference to full disclosure under Section 84302
5 requires the committee to let the candidate know that the original donor is the true contributor and that
6 the committee is just an intermediary. Also, Section 84302 requires the candidate to disclose "both the
7 intermediary and the contributor" on the candidate's campaign statement.

8 It might be argued that Section 84302 merely dictates what must be *disclosed* by the intermediary
9 and the candidate—and that the statute does not actually *classify* the original donor and the committee as
10 the true contributor and the intermediary, respectively. However, the main purpose of the Political
11 Reform Act is to ensure that "[r]eceipts and expenditures in election campaigns" are "*fully and truthfully*
12 *disclosed* in order that the voters may be fully informed." (Section 81002, subd. (a). Emphasis added.)
13 This purpose of full and truthful disclosure would be thwarted if the parties to an earmarking transaction
14 were *classified* one way, but *disclosed* in another way.

15 Thus, the best approach is to view Sections 85704 and 84302 as comprising a statutory scheme,
16 which puts the regulated community on notice that the original donor is the true contributor in any
17 earmarking transaction—and the committee is just an intermediary. This is consistent with the following
18 statement made by Respondents' counsel during closing arguments (Transcript of Nov. 22nd, 62:5-11):

19 It is clear that a donor can give the maximum amount to a
20 candidate. And if there had been an earmarked contribution, whether
21 disclosed or not, in excess of that limit, it would have been over the limits.
22 There is just no doubt about that. That's the law.

23 The question is really whether it's earmarked. I think that brings us
24 back to condition or agreement.

25 4. Other Types of Money Laundering

26 Most types of campaign money laundering are going to fall into the category of laundering with a
27 false name or laundering through concealed earmarking—both of which have been discussed above.

28 ¹³ In the alternative, the committee might choose to give the funds to an entirely different candidate (but
this would run the risk of angering the donor who might never contribute to the committee again).

1 If the Political Reform Act's earmarking statute is liberally construed in accordance with Section
2 81003, then it is unlikely that another category of money laundering would need to be considered in this
3 case. However, if for some reason, it is found that the earmarking statute is not broad enough to
4 encompass Respondents' conduct, then it is important to remember the following general rule in
5 determining whether a contribution has been made, directly or indirectly, in the name of another in
6 violation of Section 84301: "To identify the individual who has made the contribution, we must look
7 past the intermediary's essentially ministerial role to the substance of the transaction." (*United States v.*
8 *O'Donnell, supra, 608 F.3d at p. 550.*)

9 Something else to keep in mind is the definition of "contribution." A "contribution" includes any
10 payment except to the extent that full and adequate consideration is received, unless it is clear from the
11 surrounding circumstances that the payment is not made for political purposes. (Section 82015, subd.
12 (a).) Such a payment made at the "behest" of a candidate or committee is a contribution *to* the candidate
13 or committee. (Section 82015, subd. (b).) "Made at the behest of" includes contributions that are made
14 in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the
15 express, prior consent of, the true recipient. (Regulation 18225.7, subd. (a).)

16 For example, if a donor makes a contribution to a candidate pursuant to a request for money from
17 the candidate (or the candidate's staff), then the contribution was made at the "behest" of the candidate
18 (since "behest" includes request). Likewise, if a donor makes a contribution to a candidate based upon
19 communications amounting to cooperation, consultation, coordination, etc. with the candidate (or the
20 candidate's staff), then this also would meet the definition of "behest" set forth above. In both cases, the
21 contribution is a contribution to the candidate because it was made at the "behest" of the candidate.
22 (Section 82015, subd. (b).) This analysis is not somehow invalid if the donor chooses to launder the
23 contribution through a "straw donor" or intermediary. The contribution still was made at the "behest" of
24 the candidate.

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1 During closing arguments, Respondents' counsel cited Regulation 18215, subdivision (d), for the
2 proposition that any "behesting"¹⁴ by Bill Berryhill's campaign was "behesting" Tom Berryhill to make
3 contributions to the central committees—such that the contributions should not count as contributions to
4 Bill Berryhill. However, there is no evidence that Bill Berryhill or his campaign staff "behested" Tom
5 Berryhill to make contributions to the central committees.

6 Rather, the evidence shows that Tom Berryhill's contributions were in furtherance of a plan to
7 help Bill Berryhill pay for a television advertisement (which was expected to cost approximately
8 \$100,000), and the contributions were based, in substantial part, on Tom Berryhill's knowledge of Bill
9 Berryhill's *campaign needs and plans* from communicating with Bill Berryhill's campaign consultant,
10 Carl Fogliani (who was pressuring Tom Berryhill for money). The significance of this is that Tom
11 Berryhill's contributions are *presumed by law* to have been made at the "behest" of his brother's
12 campaign because the contributions were based on information from his brother's campaign consultant
13 about his brother's *campaign needs and plans*. In this regard, Regulation 18225.7, subdivision (c)(1),
14 provides that an expenditure is "*presumed to be made at the behest of a candidate or committee*" if it is
15 "[b]ased on information about the candidate's or committee's *campaign needs or plans* provided to the
16 expending person by the candidate or committee." (Emphasis added.) Since Tom Berryhill's
17 contributions are presumed by law to have been made at the *behest* of his brother's committee, they were
18 contributions *to* his brother's committee. (Section 82015, subd. (b) [a payment made at the "behest" of a
19 candidate or committee is a contribution to the candidate or committee].)

20 Respondents cite the foregoing regulation in their brief and rely upon it heavily. (Respondents
21 *Corrected Post Trial Brief*, 5:7-6:26.) This is surprising for two reasons. First, as shown above, the
22 regulation hurts their case significantly, creating a *presumption* against their interests. Second, although
23 subdivision (a) of the regulation provides a good definition of the phrase "[m]ade at the behest of," the
24 rest of the regulation focuses on differentiating between a contribution and an independent expenditure—
25 which is an issue that involves special considerations that are unique to independent expenditures. (For
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28 ¹⁴ Spell check is not a fan of lending verb-like qualities to "behest," but "behesting" and "behested" make
appearances in Regulation 18215, subs. (b)(3) and (d).

1 example, see subd. (a)'s reference to Section 82031, which defines "independent expenditure"; and subd.
2 (f)'s reference to Regulation 18550.1 re: independent vs. coordinated expenditures.) Given this focus, an
3 argument may be made that the regulation is inapplicable in this case. However, if the regulation is
4 deemed to apply, then it is important to note the foregoing presumption under subdivision (c)(1) that
5 Tom Berryhill's contributions were made at the behest of—and hence the contributions were made *to*—
6 his brother's campaign.

7 Respondents disapprove of the FPPC's "behest" arguments because looking at who really
8 "behested" Tom Berryhill's contributions cuts to the heart of this case. Where, as here, a candidate
9 winds up receiving contributions through indirect transfers involving intermediaries or "straw donors,"
10 the "ministerial role" of the intermediaries or "straw donors" is more easily identified by considering
11 whether the contributions were made at the "behest" of the candidate who ultimately wound up receiving
12 the money. This boils down to looking at the "substance of the transaction" under *O'Donnell*. If the
13 candidate (or his staff) is communicating with the donor about the need for funds via email and telephone
14 calls, this amounts to "behesting." When the donor makes contributions based on this, the donor is
15 intending for the money to go to the candidate. Thereafter, if the money goes through intermediaries or
16 "straw donors" who possess the funds for a fleeting moment in time before giving the same money back
17 to the original donor's campaign staff to be delivered to the original donor's intended recipient—then the
18 transaction is money laundering. The only way this would not be money laundering is if the original
19 donor were disclosed to be the true source of funds—because then, the public would not be deceived.

20 5. Summary of Examples of Money Laundering

21 For all of the foregoing reasons, any of the following examples are sufficient to establish
22 earmarking under Section 85704:

- 23 ➤ Any "agreement" about the money going to a particular candidate is sufficient, regardless of
24 whether the earmarking "agreement" is oral, written, direct, indirect (through
25 messengers/representatives), explicit, or implicit. *Even a wink and a nod is sufficient.*
- 26 ➤ Any of the following statements made by a donor (or the donor's messenger, courier, or
27 representative) at or near the time that the donor makes a contribution to a committee are
28 sufficient to be an earmarking "condition":

- ❖ “This is for Bill.”
- ❖ “Bill needs this.”
- ❖ “We need to get this to Bill.”
- ❖ “Bill really needs this ASAP.”
- ❖ “Bill *desperately* needs money to pay for a TV commercial. We’re *overnighting* a check to you.”

- A committee makes it known that any funds received will be contributed to a particular candidate. This is both an offer (to be an intermediary) and an earmarking “condition.” If this is known to a contributor at the time of making a contribution to the committee, then the offer and “condition” become an earmarking “agreement.”
- A donor stands up at a fundraiser—with Candidate A—and addresses a large group of people. He talks about how important it is for Candidate A to win the election, and in this regard, he directs everyone to make their contributions to a particular central committee. This is done in the presence of the Vice Chair of the central committee. The next day, the donor exchanges eight text messages with the officers of that same central committee and makes a contribution to the committee. When the committee receives the money, it knows exactly where the donor intends for the funds to go because of his statements and conduct at the fundraiser (not to mention the text messages). This is an implicit earmarking “condition.”

In the above examples, the donor is the true contributor. Concealment of this fact—such as by filing false campaign statements that make the intermediary look like the true contributor—results in deception of the public. This is money laundering in violation of Section 84301.

Also, in keeping with Section 84301’s broad prohibition against making a contribution, directly or indirectly, in the name of another, money laundering through an intermediary or “straw donor” may be identified by looking “past the intermediary’s essentially ministerial role to the substance of the transaction.” (*United States v. O’Donnell, supra, 608 F.3d at p. 550.*) For example, if a candidate (or his staff) is communicating with a donor about the need for funds via email and telephone calls, this amounts to “behesting.” When a donor makes contributions based on this, the donor is intending for the money to go to the candidate. Thereafter, if the money goes through intermediaries or “straw donors” who possess

1 the funds for a fleeting moment in time before giving the same money back to the original donor's
2 campaign staff to be delivered to the original donor's intended recipient—then the transaction is money
3 laundering—unless the original donor is disclosed to be the true source of the contribution.

4 With these examples of campaign money laundering in mind, let us turn to the evidence in this
5 case.

6 **B. The Sufficiency of Circumstantial Evidence**

7 **1. By definition, inferences are required to be drawn from circumstantial evidence.**

8 “The term ‘circumstantial evidence’ emphasizes the effect of the evidence—the necessity of
9 drawing inferences from it.” (1 Witkin, Cal. Evid. (4th ed. 2012) Ch. IV, Circumstantial Evidence, § 1.)

10 “An inference is a deduction of fact that may logically and reasonably be drawn from another fact
11 or group of facts found or otherwise established in the action.” (Evid. Code, § 600, subd. (b).)

12 When a fact is first proved, all reasonable deductions may be drawn from it. In this regard, an
13 inference may be based upon another inference (where the first inference is properly drawn from
14 sufficient evidence, and the second inference is not too remote) because reasoning does not stop when
15 one deduction has been made. (3 Witkin, Cal. Evid. (4th ed. 2012) Ch. XI, Presentation at Trial, § 154.)

16 **2. Where there are conflicting inferences, the inference to be drawn is the one that is**
17 **most reasonable or probable. Unfavorable inferences need not be wholly excluded.**

18 Some confusion appears in cases where circumstantial evidence gives rise to conflicting
19 inferences. In such a situation, the complainant cannot prevail merely by showing that the circumstances
20 are consistent with its theories; rather, the complainant must show that the favorable inferences are more
21 reasonable or probable than the conflicting inferences. In this regard, a party's proof need not wholly
22 exclude all unfavorable inferences. For example, the party is not required to show that the inference in
23 his or her favor is the only one that reasonably can be drawn. (See 3 Witkin, Cal. Evid. (4th ed. 2012) Ch.
24 XI, Presentation at Trial, § 153.)

25 **3. A judgment may be based upon inferences drawn from circumstantial evidence—**
26 **even though there is opposing direct testimony.**

27 It is frequently said that a judgment may be based upon inferences drawn from circumstantial
28 evidence—even though there is opposing direct testimony. It is not necessary that the circumstantial

1 evidence rise to such a degree of certainty that it excludes every other reasonable conclusion. (See 3
2 Witkin, Cal. Evid. (4th ed. 2012) Ch. XI, Presentation at Trial, § 152.) This is consistent with the fact that
3 the most reasonable or probable inferences that arise from circumstantial evidence are every bit as
4 important as direct evidence, and ultimately, in a case where the complainant has the burden of proof by
5 a preponderance of the evidence, the question is whether the allegations are more likely true than not
6 true.

7 **C. The FPPC has proved campaign money laundering by a preponderance of the evidence.**

8 **1. The contributions that are charged as money laundering in Counts 1-4 and 6-10**
9 **were part of a larger scheme to raise over \$100,000 for Bill Berryhill's campaign, but**
10 **because of contribution limits, the money had to be funneled to Bill Berryhill's**
11 **campaign through political party committees.**

12 According to Tom Berryhill, on or about October 22nd or 23rd, 2008, the leader of the Assembly
13 Republican Caucus, Mike Villines, called Tom Berryhill with a plan to raise \$100,000¹⁵ for Bill
14 Berryhill's campaign to pay for a television commercial (because it had just been discovered that the
15 Democrats spent \$100,000 in support of Bill Berryhill's opponent, John Eisenhut). (Transcript of Nov.
16 14th, 108:21-109:25.)

17 Mike Villines denied this in his second interview with the FPPC. (Ex. 22, 58:7-9.) Also, in his
18 first interview, he said Bill Berryhill's seat never was in danger, and the money the Democrats spent
19 against Bill Berryhill was a "red herring" to force Republicans to spend money on a less important race.
20 (Ex. 34.)¹⁶

21 Regardless of which story might be true, one thing is certain: on or about October 26th, 2008,
22 Tom Berryhill was being pressured for contributions by his brother's campaign consultant, Carl Fogliani,
23 because as Mr. Fogliani put it, Mr. Fogliani's "ass" was "hanging in the wind," and his "business
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25 ¹⁵ Bill Berryhill's campaign consultant, Carl Fogliani, said the amount needed to pay for television was
26 approximately \$87,000. (Ex. 88, 37:13-39:4.)

27 ¹⁶ Mike Villines' statements in this regard are consistent with the fact that Republican voter registration in
28 Bill Berryhill's district actually *improved* from being five or six percentage points in favor of Democrats to only
being 2.31 percentage points in favor of Democrats as of October 20th, 2008. (Compare Ex. 17, 26:10-18, with the
last page of Ex. 3 to Respondents' Request for Administrative Notice.)

1 situation” and the need for campaign funds were “damn scary.” (Ex. 88, 46:13-55:1. Also, see Ex. 79, p.
2 25 of 35, which shows that Bill Berryhill loaned \$75,000 to his own campaign on 10/24/08.)

3 In response, Tom Berryhill told Carl Fogliani, “We’ll see what we can do.” (Ex. 7, p. 22.)

4 At the time, Tom Berryhill already was a “maxed out” contributor to his brother’s campaign; he
5 was not allowed to contribute any more due to the Political Reform Act’s contribution limits of \$3,600
6 per election; and he knew it was going to be “very tough” to get his brother the money needed to pay for
7 television—because other potential donors were bound by the same contribution limit. (Ex. 76, p. 6 of
8 42 [shows Tom Berryhill already had contributed \$7,200 as of the end of 2007, which was the maximum
9 allowed amount per the contribution limits set forth in Ex. 3.3]; Transcript of Nov. 14th, 131:17-20.)

10 In order to overcome this problem, it was necessary to transfer money to Bill Berryhill through
11 political party committees such as the California Republican Party (“CRP”), the Stanislaus County
12 Republican Central Committee, and the San Joaquin County Republican Central Committee because the
13 contribution limit of \$3,600 per election did not apply to them.

14 A large chunk of the money needed for television was transferred on October 30th and 31st, 2008,
15 when the CRP made two separate contributions to Bill Berryhill in the amounts of \$25,000 each, for a
16 total of \$50,000. (Ex. 79, p. 8 of 35.) This is not surprising for two reasons. First, as of October 1st,
17 2008, Tom Berryhill had contributed over \$60,000¹⁷ to the CRP during that election cycle. Second, Tom
18 Berryhill was a member of Mike Villines’ leadership team in the Assembly Republican Caucus, and
19 Mike Villines accidentally admitted that he was in a position to influence and even direct CRP spending.
20 (Attachment 1 to Ex. 2; Ex. 22, 61:3-20. See also, Ex. 22, 38:6-42:9 [which talks about discussions he
21 would have with the CRP about available funds, and if there were not enough funds, “I may have to you
22 know, pull the plug. Let’s say we wanted to do an ad, you know, in—in Abrams’ seat and do something,
23 we just may not have the money to do it.”])

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¹⁷ One of the reasons why Tom Berryhill stopped giving money to the CRP was because in 2008, he gave over \$60,000 to the CRP, but the CRP only passed along \$50,000 to his brother. (Transcript of Nov. 14th, 119:19-120:8.) He described that the CRP was “expensive” and a “bad investment” because it took “too big a cut” off of his contributions before giving the money to the candidate who he thought needed it. (*Id.*, at 117:9-120:8; 121:16-24.) On the other hand, giving money to the central committees “was *direct* money” with “better bang for your buck.” (*Id.*, at 119:10-13; emphasis added.)

1 Another large chunk of the money needed to pay for Bill Berryhill's television commercial was
2 transferred to Bill Berryhill's committee on October 31st, 2008. On that date, the Stanislaus central
3 committee deposited \$20,000 from the Chukchansi Indians—and by happy coincidence, the central
4 committee *immediately* wired the *same* amount of money to Bill Berryhill. (Ex. 31, p. 0003; 84, pp. 4
5 and 6 of 14.) Another happy coincidence is that Tom Berryhill was the reason why the central committee
6 received the money in the first place; he had asked the Chukchansi Indians for the money for his brother,
7 but he directed them to write their check to the central committee—consistent with his above-described
8 need to overcome the normal contribution limit of \$3,600 per donor per election. (Transcript of Nov.
9 14th, 114:4-22.)

10 The last chunk of money for Bill Berryhill's television commercial came from Tom Berryhill's
11 own committee via two separate contributions of \$20,000 each, totaling \$40,000. These are the money
12 laundering contributions that comprise Counts 1 through 4 and 6 through 10 of the Accusation, and they
13 are discussed in more detail below.

14 **2. It is unreasonable to believe that all of the evidence described below could exist in a**
15 **single case without an earmarking/money laundering arrangement.**

16 The two contributions described above—totaling \$40,000—were transferred from Tom
17 Berryhill's committee to his brother's campaign through the Stanislaus and San Joaquin central
18 committees on October 30th and 31st, 2008. (These are the same dates as the other transfers described
19 above because all of the transfers were part of a larger scheme to finance Bill Berryhill's campaign needs
20 relative to paying for a television commercial.) These two contributions from Tom Berryhill were
21 funneled through the central committees under the following circumstances:

- 22 ➤ As described above, on or about October 26th, 2008, when Tom Berryhill was being pressured
23 for funds by his brother's campaign consultant, Tom Berryhill said, "We'll see what we can
24 do." At the time, Tom Berryhill was a "maxed out" donor to his brother.
25 ➤ Tom Berryhill says he asked donors to support his brother by making their payments to the
26 Stanislaus and San Joaquin central committees; *he described such donors as people who were*
27 *giving to his brother—even though they wrote their checks to the central committees.* (Ex. 16,
28 49:5-19.) This provides a great deal of insight into Tom Berryhill's mind, showing that he
considered these contributions to the central committees to be contributions to his brother.

1 Such thinking does not reasonably occur in the absence of earmarking/money laundering
2 arrangements.¹⁸

- 3 ➤ Campaign statements reflect that the Stanislaus and San Joaquin central committees had not
4 made a single monetary contribution to Bill Berryhill; in fact, the central committees had
5 spent their money on *other* candidates. For this reason, it is unreasonable to believe that Tom
6 Berryhill would have directed donors to support his brother by making payments to the
7 central committees—unless Tom Berryhill knew that earmarking/money laundering
8 arrangements were in place.
- 9 ➤ On October 28th, 2008, Tom Berryhill stood up at a fundraiser—with his brother—and
10 addressed a large group of people. He talked about how important it was for his brother to
11 win the election, and in this regard, he directed everyone to make their contributions to the
12 Stanislaus central committee. (Transcript of Nov. 21st, 80:17-81:10; 83:4-84:13.) This was in
13 the presence of Jim DeMartini, Vice Chair of the Stanislaus central committee. (*Id.*, at 90:16-
14 91:2.) It is unreasonable to believe that Tom Berryhill would do this in front of the Stanislaus
15 Vice Chair—unless he had an earmarking/money laundering arrangement with Mr. DeMartini
16 (or unless he was conveying donor intent to Mr. DeMartini—which would have been an
17 earmarking “condition” for the check in the amount of \$20,000 that Tom Berryhill overnight
18 mailed to the Stanislaus central committee the very next day).
- 19 ➤ On October 29th, 2008, the day after the fundraiser, Tom Berryhill exchanged eight text
20 messages with the Chair and the Treasurer of the Stanislaus central committee, and he
21 contributed \$20,000 to the central committee (by overnight mail). (Exs. 1.2, ll. 22, 29, 36, 46,
22 53-56 (see also l. 64); 62, p. 5 of 5; 66, p. 1 of 2; Transcript of Nov. 13th, 77:22-78:5.) When
23 Stanislaus received the money, it knew exactly where Tom Berryhill intended for the funds to
24 go because of his statements and conduct at the fundraiser (not to mention the eight text
25 messages).
- 26 ➤ The evening of the 29th, after Tom Berryhill mailed his contribution to Stanislaus, he
27 corresponded with Carl Fogliani via text messages and email, and in one email Tom Berryhill
28 stated, “Think I can get mony [*sic*] earlier. Tom. Late morning.” (Ex. 1.2, ll. 57-59, 61-62.)
The most reasonable or probable explanation for this email is that Tom Berryhill was talking
about the money laundering contributions that are the subjects of Counts 1 through 4 of the
Accusation. He had just overnight mailed his check for \$20,000 to Stanislaus—so of course
he was talking about that money. Also, the next day is when the San Joaquin central
committee picked up the other check in the amount of \$20,000 from Tom Berryhill. Even
Tom Berryhill admitted that the email was referring to this money (before his own attorney
cut him off). (Transcript of Nov. 14th, 80:21-82:2 [referring to Ex. 1.2, mentioning the check
to San Joaquin, and later, cut off by his attorney after saying, “I know we were trying to get it
to *him*. Yeah.”] Emphasis added because a central committee is not a “him,” but Bill
Berryhill or Carl Fogliani would be a “him.”) This email was sent the evening *before* the
central committees received Tom Berryhill’s money. This is not the kind of email that you
send when you *hope* that the central committees will get the money to your brother; rather,

26 ¹⁸ The only known donor (besides Tom Berryhill himself) that actually transferred the money through the
27 central committees in this way was the Chukchansi Indian tribe, which funneled \$20,000 to Bill Berryhill through
28 the Stanislaus central committee. The tribe also attempted to funnel another \$20,000 through the San Joaquin
central committee, but due to an unknown delay, that central committee did not receive the money until well after
the election. (Ex. 75, p. 4/29.)

1 this is the email you send when you *know* they will. The language of the email talks about
2 getting the money “earlier.” Getting the money never was in question. The only question
was the timing.

- 3 ➤ The next day, on October 30th, 2008, the Treasurer of the Stanislaus central committee, Gary
4 McKinsey, went to the post office and picked up the \$20,000 check from Tom Berryhill.
5 Then, he called the Stanislaus Chair, Joan Clendenin, and told her that he had picked up the
6 check (because she had inquired earlier if he had gone to the post office). She said the check
7 “needs to go in the bank today. And then issue a check to Bill Berryhill.” Gary McKinsey
8 resisted because he was on his lunch break, and he had a project. However, at Joan
9 Clendenin’s urging, he wrote a check to Bill Berryhill for the same amount as Tom
10 Berryhill’s check, and he took both checks to the bank to deposit Tom Berryhill’s check.
11 Joan had told him she would call him and tell him what to do with the check for Bill
12 Berryhill, but as he was walking from the bank back to his car, he encountered Bob Phelan.
13 (There is a stipulation that Bob Phelan was Tom Berryhill’s District Office Manager. See
14 Attachment 1 to Ex. 2. Also, see Transcript of Nov. 14th, 25:18-22.) Somehow, Bob Phelan
15 had been informed that Gary McKinsey had a check for Bill Berryhill—so instead of waiting
16 to hear back from Joan Clendenin about what to do with the check, Gary McKinsey gave the
17 check to Bob Phelan. (Transcript of Nov. 13th, 77:11-79:24, 85:19-24, 87:5-16, 88:8-11.)¹⁹
- 18 ➤ That same day, on October 30th (still the next day after Tom Berryhill sent the email about
19 getting the money “earlier”), at 12:46 p.m., San Joaquin was looking into how to receive and
20 send funds via wire. (Ex. 1.2, l. 83 [Dale Fritchen, the San Joaquin Chair, was waiting on the
21 telephone while his Treasurer, Louis Lemos, emailed a consultant about the feasibility of
22 receiving *and* sending wire transfers].) Dale Fritchen admitted that this was when they were
23 looking into the Berryhill transaction. (Transcript of Nov. 12th, 74:11-17.) Also, the central
24 committee did not receive any other contributions around this time, so it is reasonable to infer
25 that the only wire transfer they were considering receiving was Tom Berryhill’s contribution
26 for \$20,000. (Ex. 30, p. 0025.) *Thus, the San Joaquin central committee was trying to figure
27 out how to quickly receive Tom Berryhill’s money—and just as quickly transmit it to his
28 brother.* Ultimately, Dale Fritchen picked up the check that afternoon instead of receiving it
via wire. (Ex. 1.2, l. 93.) There was no time for delivery by overnight mail because Tom
Berryhill reported that he made the contribution to San Joaquin on October 30th, which was
that same day. (Ex. 63, p. 2 of 2.) The central committee wound up not wiring the funds to
Bill Berryhill because as Dale Fritchen put it, he had met with Bill Berryhill, and “[t]hey are
willing to take a check.” (Ex. 1.2, l. 93.)

¹⁹ Respondents’ counsel recognizes how significant it is that Tom Berryhill’s own District Office Manager
picked up the check from Gary McKinsey. For this reason, the first question Respondents’ counsel asked of Gary
McKinsey appeared to be an attempt to trick or confuse the witness into changing the name from Bob Phelan to
Tom Phelan—but this attempt failed. (Transcript of Nov. 13th, 78:21-24, 84:20-85:1.) Then, Respondents’
counsel attempted to contradict the stipulation that Bob Phelan worked for Tom Berryhill (Attachment 1 to Ex. 2)
by insinuating that Bob Phelan picked up the check as an agent of Bill Berryhill; however, Gary McKinsey said he
did not know whether Bob Phelan was acting on behalf of Tom Berryhill or Bill Berryhill. (Transcript of Nov.
13th, 85:2-86:10, 88:8-11.) Finally, Respondents’ counsel attempted to argue that Bob Phelan may have been on
personal time or loaned out, but Tom Berryhill admitted that he does not really recall if this was true at the time,
and no other evidence—such as time cards or vacation requests—were offered by Respondents to contradict the
stipulation that Bob Phelan was working for Tom Berryhill. (Transcript of Nov. 14th, 103:19-104:14.)

- 1 ➤ However, by the end of the day, the San Joaquin central committee still had not delivered any
2 money to Bill. This explains why Landon Whitney, Bill Berryhill's campaign manager (per
3 Attachment 1 to Ex. 2) was calling Dale Fritchen at the end of the day. (Ex. 1.2, l. 101.)
4 Also, this explains what Dale Fritchen and Carl Fogliani were talking about the next morning
5 on October 31st, at 9:33 a.m. (*Id.*, at l. 110.) Dale Fritchen explained that the Berryhill people
6 were worried that San Joaquin would change its mind. (Transcript of Nov. 12th, 32:6-37:12.)
7 This fear explains why Carl Fogliani *immediately* called Tom Berryhill after talking with Dale
8 Fritchen. (Ex. 1.2, ll. 110-111.) Carl Fogliani's phone call with Tom Berryhill lasted six
9 minutes, which means it would have ended at approximately 9:40 a.m. (*Id.*, at l. 111.) *Within*
10 *nine minutes after that*, a gentleman by the name of Chuck Hahn sent the following email to
11 Dale Fritchen: "Carl (berryhill) really needs the check from you all – asap." (*Id.*, at l. 112.)
12 The most reasonable or probable inference that arises from all of this is that the central
13 committee hesitated, for whatever reason, about getting the money to Bill Berryhill, and all it
14 took was one call from—Carl Fogliani to Tom Berryhill—to get Chuck Hahn to tell the
15 central committee to get the check to Bill Berryhill "asap."
- 16 ➤ This is significant because Chuck Hahn was an important person with the CRP who also
17 worked with Mike Villines. (Exs. 11, p. 9 [Villines spelled Millines; also, even though Dale
18 Fritchen claims on p. 9 that he did not think Carl Fogliani was with Bill Berryhill's campaign,
19 there is no reason to believe Mr. Fritchen's denial in this regard because Chuck Hahn's email
20 (at Ex. 1.2, l. 112) used the language "Carl (berryhill)"]; 88, 82:13-87:11 [Carl Fogliani said
21 he did not know why he was corresponding with Chuck Hahn about the San Joaquin
22 contribution, and he did not know what Chuck Hahn's role was, but Mr. Fogliani proved
23 himself to be untruthful because he accidentally wrote "CRP Role Hahn" on Exhibit 8 to his
24 own deposition during the deposition]; Transcript of Nov. 12th, 40:17-41:4, 111:9-14.)
- 25 ➤ To reiterate, Carl Fogliani was worried that San Joaquin was changing its mind about getting
26 Tom Berryhill's money to Bill Berryhill, and *all it took was a single phone call from Carl*
27 *Fogliani to Tom Berryhill* to get a CRP representative (who worked with Mike Villines) to tell
28 the central committee to get the money to Bill Berryhill "asap."
- A little later in the morning of October 31st, Carl Fogliani attempted to facilitate the transfer
of funds by sending an email to Tom Berryhill containing all information needed to wire
funds to Bill Berryhill. (Ex. 1.2, l. 114.)
- Then, there is an email reflecting that the San Joaquin officers have begun bowing and
scraping to Chuck Hahn (despite the fact that Dale Fritchen said he would be offended if the
CRP tried to boss him around). (Ex. 1.2, l. 115.) Chuck Hahn forwards this email to Carl
Fogliani in order to let Carl Fogliani know what is happening with the money. (*Id.*, at l. 116.)
- Carl Fogliani tries to help expedite the money transfer by forwarding information to Chuck
Hahn about how to wire funds to Bill Berryhill. (Ex. 1.2, l. 117.) Chuck Hahn (an important
CRP representative who works with Mike Villines) is offended at being treated like a "middle
man," but he sends the wire transfer information to the San Joaquin officers anyway. (*Id.*, at
ll. 117-119.)
- When Dale Fritchen was cross-examined about how San Joaquin's contribution to Bill
Berryhill was delivered to Bill Berryhill's campaign on October 31st, at first, he tried to say it
was wired, but ultimately, he had to admit that it was not wired and that he gave it to someone
(although he claims he cannot even remember the gender of the person). (Transcript of Nov.
12th, 42:4-48:24.) He was trying to hide the fact that he gave it to Laura Ortega, Tom
Berryhill's Chief of Staff. (Her capacity is set forth in Attachment 1 to Ex. 2.)

- 1 ➤ The most reasonable or probable inference that arises from the following facts is that Laura
2 Ortega, Tom Berryhill's Chief of Staff, was responsible for delivering San Joaquin's
3 contribution to Bill Berryhill's campaign. As of 12:23 p.m. on October 31st, Bill Berryhill's
4 campaign already had received both \$20,000 contributions from Stanislaus, plus one CRP
5 contribution in the amount of \$25,000, and there was another CRP contribution in the amount
6 of \$25,000 that was in the process of being wired to the committee. (Ex. 1.2, l. 125.) Two
7 minutes later, in response to this information, Carl Fogliani sent an email to Bill Berryhill's
8 bookkeepers that said, "Laura Ortega [Tom Berryhill's Chief of Staff] is delivering almost
9 30K in a matter of moments." (*Id.*, at l. 126.) When you rule out the foregoing contributions
10 from Stanislaus and the CRP that already were accounted for (and in some cases were wire
11 transfers—not bank deposits), and when you look at what Bill Berryhill received on October
12 31st, 2008 and what was deposited into his bank account—the *only way you get close to*
13 "*30K,*" as mentioned in Carl Fogliani's email, is if you include the check in the amount of
14 \$21,000 from San Joaquin/Dale Fritchen. (Exs. 1.3, p. 2; 29, p. 0058; Transcript of Nov.
15 12th, 42:4-48:24.) This is consistent with Tom Berryhill using Bob Phelan, his District Office
16 Manager, to pick up the check from the Stanislaus central committee the day before. Tom
17 Berryhill was in a rush, so he used his employees to expedite the money laundering. Tom
18 Berryhill tried to contradict the stipulation that both Bob Phelan and Laura Ortega worked for
19 him (Attachment 1 to Ex. 2) with claims that maybe they were loaned out or on vacation, *but*
20 *Tom Berryhill admitted he actually does not recall if that happened*; so such argument is pure
21 speculation. (Transcript of Nov. 14th, 103:19-104:14.)
- 22 ➤ On the afternoon of October 31st, 2008, Carl Fogliani sent an email to Tom Berryhill that said,
23 "Find any new dough?" (Ex. 1.2, l. 128.) This was the same afternoon that Bill Berryhill's
24 campaign received San Joaquin's check in the amount of \$21,000.
- 25 ➤ According to bank records, the accounts from which both central committees wrote their
26 checks to Bill Berryhill had insufficient funds to write the checks—but for the checks they
27 received from Tom Berryhill. (Exs. 30, p. 0025; 31, p. 0003; 49, second page.)
- 28 ➤ The Chairs of both central committees knew about the plan to raise money to get Bill
Berryhill on television. (Ex. 11, p. 6; and Ex. 47.)

19 It is unreasonable to believe that all of the foregoing facts could exist in a single case in the
20 absence of an earmarking/money laundering arrangement. Stanislaus received \$20,000 from Tom
21 Berryhill and cut a check to Bill Berryhill for the *same amount* before even depositing Tom Berryhill's
22 check. San Joaquin did virtually the same thing (except that it added an extra thousand dollars of its own
23 money). Both central committees immediately turned the money back around to Tom Berryhill by
24 giving it to his employees so Tom Berryhill could get the laundered money to his brother and everyone
25 could *pretend* the money came from the central committees because the names of the central committees
26 were on the checks. In the absence of an earmarking/money laundering arrangement—this timing and
27 the same dollar amounts and the involvement of Tom Berryhill's own employees would require a
28 completely far-fetched, happy coincidence (that still would not explain the other evidence described

1 above such as the way Tom Berryhill acted, in the email to Carl Fogliani and in communications to
2 donors, as if there were an earmarking/money laundering arrangement in place).

3 Respondents insinuate that the timing and the same dollar amounts would not require a far-
4 fetched, happy coincidence in light of the spending on Bill Berryhill's opponent by the Democrats.
5 Essentially, Respondents suggest that the central committees would have done *exactly* what Tom
6 Berryhill wanted them to do and would have contributed the same amount of money that Tom gave
7 them—when he gave it to them—because the central committees would have been aware of the spending
8 by the Democrats.

9 However, this argument fails because both central committees had thousands of dollars lying
10 around that they could have spent on Bill Berryhill *at any time*, but they *never* made any monetary
11 contributions to Bill Berryhill until they received Tom Berryhill's money. Even then, Stanislaus only
12 contributed *exactly* what it received from Tom Berryhill (and the \$20,000 that Tom Berryhill solicited for
13 his brother from the Chukchansi Indians to go through Stanislaus), and the committee did not dip into
14 any of its other funds. For San Joaquin, it was virtually the same scenario, except that San Joaquin threw
15 in \$1,000 of its own money.²⁰

18 ²⁰ In this regard, on October 28th, 29th, 30th, and for part of the 31st, San Joaquin had \$16,000 lying in its
19 account. Prior to these dates, the committee had even more money lying in its account. (See Ex. 30, p. 0025.)

20 In the case of Stanislaus, the account against which that committee wrote contribution checks had over
21 \$1,100 in it that could have been given to Bill Berryhill, but Stanislaus chose not to spend that money. Jim
22 DeMartini claims this was because they needed to save money to pay for expenses like rent. (Transcript of Nov.
23 13th, 42:4-14.) However, financial records reflect that no expenses (not even rent) were paid out of that account;
24 rather, they were paid out of the federal account, which had thousands of dollars in it. (Ex. 31, pp. 3-6.)

25 Also, Stanislaus had a "state" account. On October 16th, 2008, Stanislaus transferred \$12,500 from the
26 "state" account to its "candidate support" account, which was the account against which Stanislaus wrote its
27 contribution checks. For the rest of October, the "state" account had over \$5,000 in it, which could have been
28 transferred to the "candidate support" account to make a contribution to Bill Berryhill at any time if the central
committee really wanted to support Bill Berryhill on its own. (Ex. 31, pp. 3 and 8. Technically, all of the
contributions for state candidates should have come out of the "state" account, and the "candidate support" account
should have been used for other purposes, such as supporting local candidates. See generally Regulation 18534 re:
required committee bank accounts.)

26 Additionally, Stanislaus had *another* account called a "Levin" account with nearly \$30,000 in it that could
27 have been used to write checks to Bill Berryhill. (Ex. 31, p. 7. Regulation 18530.3 discusses making contributions
28 from such "Levin" accounts.)

For more information about the various Stanislaus accounts and their balances, see the Treasurer's reports
in the minutes. (Ex. 48, pp. 0018 and 0020.)

1 Another thing that was talked about at the hearing was the central committees' failure to follow
2 their own policies with respect to the making of the contributions. For example, San Joaquin normally
3 would take 10% or more off the top of incoming contributions, but this was not done for Tom Berryhill's
4 check and the contribution to Bill Berryhill. (Transcript of Nov. 12th, 28:16-30:13.)

5 Also, the normal procedure for both central committees was to have a vote about decisions
6 involving the making of contributions. This was not done for either central committee.

7 In the case of San Joaquin, Gordon Lindstrom was a prior treasurer who testified that allowing
8 one person to make such decisions unilaterally—such as the chair—was a deviation from past practices,
9 which was corroborated by another past treasurer, Nathaniel Foote. (Ex. 15.) Respondents know that
10 such unilateral decision-making was contrary to the bylaws, and for this reason Dale Fritchen, Louis
11 Lemos and Nancy Cochran talked about some sort of special meeting of the Executive Committee where
12 they allegedly gave special powers to Dale Fritchen in this regard. However, they could not agree on
13 when the meeting took place, or who called it, and there were no minutes of the meeting—even though
14 minutes were required to be reported by the bylaws. Additionally, the San Joaquin Secretary, Nancy
15 Cochran, had partial hand-written notes, but apparently the notes ended before that meeting started—and
16 notably, the last page had been ripped out of her spiral binder.

17 In the case of Stanislaus, Jim DeMartini talked about how any large contributions, such as
18 anything over \$1,000 would need to be put to a vote, and they would call a special meeting of the
19 Executive Committee if they were trying to be reactive to money coming in and going out. (Transcript of
20 Nov. 13th, 53:2-55:13.) However, they did not do that in this case. The Stanislaus Chair admitted that
21 the contribution to Bill Berryhill was approved in a “loosey-goosey” manner. (Transcript of Nov. 19th,
22 99:10-100:7.)

23 Finally, if you have any doubt about Stanislaus, all you have to do is look at what they did with
24 Joel Anderson in 2009 to see that they have no problem earmarking/launders money for a complete
25 stranger—who was not even in an election. Even Jim DeMartini, Vice Chair of Stanislaus, admitted that
26 the Anderson transaction was a “dumb move” on his central committee's part. (Transcript of Nov. 13th,
27 64:2-24.) Both he and the committee Treasurer pointed the finger at Joan Clendenin, but she claimed she
28 had nothing to do with Stanislaus' contribution to Anderson. (Transcript of Nov. 19th, 38:2-7.) Joan

1 understands that you just cannot talk with donors about where the donors might want their money to go
2 because it is against the law; and she had no explanation as to how the Joel Anderson scandal happened
3 at all. (*Id.*, at 100:11-101:14.) Respondents try to argue that since the FPPC did not prosecute Stanislaus
4 for the Anderson scandal, this means the Anderson scandal should be ignored. However, Joan Clendenin
5 made it clear that the FPPC was concerned about even bigger violations involving other central
6 committees. An exercise of the Enforcement Division's discretion in this regard should not preclude
7 reference to the Anderson scandal for all of the evidentiary purposes that were discussed in the FPPC's
8 prehearing conference statement and in the opening hearing brief. Joan Clendenin talked with Jim
9 DeMartini about the Anderson scandal, and Jim DeMartini told her that Anderson was in trouble for
10 making contributions to Placer, Fresno, and Stanislaus—but that the problems with the other central
11 committees were more significant, and Stanislaus was going to get a letter from the FPPC saying that
12 “we shouldn't do that again.” (*Id.*, at 34:4-23.) This makes sense because the money was refunded, and
13 the FPPC had bigger concerns. Nevertheless, the Anderson matter still shows a serious reason to be
14 concerned with Stanislaus' compliance with the earmarking provisions of Section 85704.

15 In summary, it is unreasonable to believe that all of the foregoing evidence could exist in a single
16 case in the absence of money laundering. Respondents have not shown a more reasonable or probable
17 explanation or inference to draw from the totality of the evidence.

18 Accordingly, it is respectfully submitted that the FPPC has met its burden of proof by a
19 preponderance of the evidence with respect to Counts 1 through 4 and 6 through 10. Respondents should
20 have truthfully disclosed that Tom Berryhill was the true source of the contributions to his brother.
21 Pretending that the central committees were the true sources of funds was a deception of the public and a
22 violation of the Act's campaign contribution limits.

23 **D. The FPPC has proved the remaining counts in the Accusation by a preponderance of the**
24 **evidence.**

25 Counts 5 and 11 through 14 pertain to the making and acceptance of an over-the-limit in-kind
26 contribution. This count is based upon evidence that Tom Berryhill was a maxed out contributor to his
27 brother, but he paid in excess of \$5,000 toward the cost of organizing and holding a fundraiser, which
28 wound up being for the benefit of his brother. (Ex. 33.) It is the cost of throwing the fundraiser—not the

1 amount of funds that were raised—that gives rise to this violation. Tom Berryhill testified that *after* the
2 fundraiser started is when he decided to make the “main thrust” of the fundraiser about raising money for
3 his brother. However, he was impeached in this regard, and it was established that he changed the
4 fundraiser to be for his brother *before* the fundraiser was held—even going so far as to make this known
5 by calling people in advance of the fundraiser. (Transcript of Nov. 14th, 138:23-139:21.) This is not
6 merely volunteer personal services. He was letting people know in advance. He was wining and dining
7 them—and then asking them to support his brother. This turned out to be a fundraiser for Bill Berryhill.
8 Sometimes fundraisers are successful. Sometimes they are not. Either way, the cost of throwing them
9 has value to the candidate being supported, which is why the cost of the fundraiser (over \$5,000) was a
10 non-monetary or in-kind contribution from Tom Berryhill to his brother as alleged in the Accusation.

11 Counts 15 and 16 pertain to Tom Berryhill’s failure to report receipt of certain gifts until after the
12 reporting deadline—when he received a letter about the matter from the FPPC’s Enforcement Division.
13 Despite defense counsel’s arguments to the contrary, these are straightforward violations. After Tom
14 Berryhill received the above-described letter, he amended his statement of economic interests to disclose
15 the previously undisclosed gifts—thereby admitting that he received them. Additionally, during his
16 interview, when he was asked to elaborate as to what happened, he stated simply that his failure to report
17 was an oversight. (See Ex. 16, 61:10-62:15; and Exs. 52-54.)

18 Respondents argue that there was some sort of direction—back in 2010—from FPPC
19 commissioners who are no longer affiliated with the FPPC with respect to perhaps issuing warning letters
20 instead of imposing fines for these types of violations. Contrary to Respondents’ counsel’s arguments,
21 Exhibit 85 (which is comprised of numerous FPPC agenda summaries and minutes) shows that Tom
22 Berryhill is not being treated any differently than other people who committed reporting violations with
23 respect to their statements of economic interests.

24 In 2008, Regulation 18944 provided the following with respect to gifts:

25 (a) For purposes of Government Code section 82028, a single gift
26 given to both a public official or candidate (hereinafter “official”) and one
27 or more members of the official’s immediate family is a gift to the official
for the full value of the gift.

28 (b) A gift given to a member or members of an official’s immediate
family is not a gift to the official unless it confers a personal benefit on the
official. A gift given to a member or members of an official’s immediate

1 family confers a "personal benefit" on the official for purposes of this
2 regulation, when any of the following factors apply:

3 (1) Benefit: The official enjoys direct benefit from the gift,
4 except for a benefit of nominal value;

5 (2) Use: The official uses the gift, and the official's use is
6 not nominal or incidental to the use by the member or members of the
7 official's immediate family;

8 (3) Discretion and Control: The official exercises discretion
9 and control over who will use the gift or dispose of the gift.

10 (c) Notwithstanding the provisions of subdivisions (a) and (b), a gift
11 given to a member of an official's immediate family is not a gift to the
12 official, if the official can show that there was no donor intent to make a
13 gift to the official. Factors that may negate a donor's intent to make a gift
14 to a public official include, but are not limited to, the following:

15 (1) Relationship between donor and recipient: The
16 existence of a working or social relationship between the donor and the
17 official's spouse or immediate family member.

18 (2) Nature of the gift: It is clear from the nature of the gift
19 that only the official's immediate family members can use or enjoy direct
20 benefit from the gift.

21 (3) Manner in which the gift is offered or delivered: The
22 gift is offered or delivered to a member of the official's immediate family
23 in a manner, and under such circumstances, that it is clear there is no intent
24 to make a gift to the official. Such circumstances include a gift offered in
25 writing, or delivered by mail or other written communication, to one or
26 more members of the official's immediate family and the name or familial
27 designation (such as "spouse") of the member or members of the
28 immediate family appear on the envelope or in the communication
rendering or offering the gift, and the gift is intended for the family
member's or members' use or enjoyment.

As far as the Disneyland tickets go, Tom Berryhill admitted "getting" those. (Ex. 16, 61:12-14.)

This is inconsistent with any sort of claim that the tickets were a gift straight to his wife from
Disneyland. Plus, Tom Berryhill had a chance to talk about this in his interview, but he simply said the
matter was an oversight. (See Ex. 16, 61:10-62:15.) In any case, subdivision (c) above puts the burden
on Tom Berryhill insofar as his claim goes that the gift was to his wife and not to him. His admitting that
the matter simply was an oversight would seem to end the discussion.

For all of the foregoing reasons, the FPPC has met its burden of proof by a preponderance of the
evidence as to Counts 5 and 11 through 16.

///

1 **III. CONCLUSION**

2 During closing arguments, the FPPC invited Respondents to supplement their brief with any
3 examples they could find where the FPPC has imposed anything significantly less than the maximum
4 fine for money laundering. Respondents offered no such examples.

5 Also, during closing arguments, the FPPC referred to Exhibit 85 which shows what level of fines
6 have been imposed in other cases where there were settlements.

7 Based upon the evidence in this case, the foregoing discussion, the FPPC's opening brief, the
8 briefing in the Accusation, the briefing in the FPPC's prehearing conference statement, and based upon
9 oral argument on the last day of the hearing, the FPPC respectfully requests imposition of:

- 10 > the maximum penalty of \$5,000 per count for counts 1 through 4 and 6 through 10;
11 > a penalty in the range of \$2,000 to \$3,000 per count for counts 5 and 11 through 14; and
12 > a penalty in the amount of \$200 per count for counts 15 and 16.

13 These penalties are consistent with the examples contained in Exhibit 85.

14
15 Dated: 12/23/13

FAIR POLITICAL PRACTICES COMMISSION

16
17
18 BY: 
19 Neal Bucknell, Senior Commission Counsel

ATTACHMENT 1



CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
ADVICE LETTERS

No. A-96-349

1997 Cal. Fair-Pract. LEXIS 322

March 12, 1997

[*1] Mark Krausse
The Doctors' Company
185 Greenwood Road
Post Office Box 2900
Napa, California 944558-0900

Re: Your Request for Advice

Dear Mr. Krausse:

This letter is a response to your request on behalf of The Doctor's Company for advice regarding the provisions of the Political Reform Act (the "Act").

I. FACTS

The Doctors' Company (TDC) is a medical malpractice insurance carrier. DOCPAC is a political action committee (PAC) formed by TDC and comprised of its insureds. DOCPAC currently collects its donations through TDC's regular premium billing process in increments of \$125 per insured. One check is written by the insured which includes both the premium and the DOCPAC donation. The facts presented strongly suggest that TDC is a sponsor of DOCPAC.

TDC desires to convert DOCPAC to a small contributor committee (SCC), as defined in Proposition 208 (Section 85203). TDC tentatively plans to allocate \$50 of each insured's yearly contribution of \$125 to the SCC account. The balance of the yearly contribution would be allocated to an "issues" PAC.

Further facts are stated in the questions posed below.

II. QUESTIONS

(1) Assume that the entire \$125 per insured per year contribution [*2] is initially deposited in the DOCPAC account, and \$75 per insured per year is then transferred from that account to the "issues" PAC account. Assuming further that DOCPAC otherwise qualifies as a SCC, would DOCPAC lose its status as a SCC based on the argument that a contribution of more than \$50 per calendar year has been received from each insured? (Section 85203(b).)

(2) Assume that the entire \$125 per insured per year contribution is initially deposited in a holding account (e.g., the "issues" PAC account or another account controlled by TDC), and \$50 per insured per year is then transferred from that account to the DOCPAC account.

Assuming further that DOCPAC otherwise qualifies as a SCC, would DOCPAC lose its status as a SCC based on the argument that the entity controlling the holding account has contributed more than \$50 per year to DOCPAC? (Section 85203(b).)

III. CONCLUSIONS

Question (1).

If each insured/contributor unambiguously earmarks no more than \$50 of the contribution for the DOCPAC SCC, then the mere fact that the entire \$125 contribution temporarily resides in the DOCPAC account before the \$75 component is transferred [*3] to the other PAC would not deprive DOCPAC of its SCC status (assuming all other conditions for SCC status are satisfied).

However, the transaction costs incurred by TDC in collecting and forwarding the contributions to DOCPAC would constitute an "in-kind" contribution from TDC to DOCPAC, unless DOCPAC reimburses TDC for the transaction costs or TDC is a sponsor of DOCPAC. If TDC is not a sponsor of DOCPAC and if the unreimbursed transaction costs exceed \$50 per year, then DOCPAC would lose its SCC status. (Section 85203(b).)

Question (2).

If each insured/contributor unambiguously earmarks \$50 of the contribution for DOCPAC, then the mere fact that the entire \$125 contribution temporarily resides in the issues PAC's account before the \$50 component is transferred to DOCPAC would not deprive DOCPAC of its SCC status (assuming all other conditions for SCC status are satisfied).

However, the transaction costs incurred by TDC and the other PAC in collecting and forwarding the contributions to DOCPAC would constitute an "in-kind" contribution from TDC and the other PAC to DOCPAC unless DOCPAC reimburses TDC and the other PAC for the transaction costs or TDC and the [*4] other PAC are sponsors of DOCPAC. If either TDC or the other PAC is not a sponsor of DOCPAC and if the unreimbursed transaction costs exceed \$50 per year, then DOCPAC would lose its SCC status. (Section 85203(b).)

IV. ANALYSIS

A. Law.

Under the Act, a person may collect a contribution from a third party on behalf of a committee. (See Section 84302; Regulation 18432.5.) The contribution is considered to be from the third party, not from the intermediary collecting the contribution, if the third party knowingly and unambiguously intends at the time of making the contribution that it is to be eventually deposited with the committee. (Scully Advice Letter, No. I-93-310.) In the vernacular, the third party must " earmark " the contribution for the committee. Thus, if an organization, O, collects a contribution of \$50 from one of its members, M, who intends at the time of making the contribution that it is to be transferred to a

committee, C, then the contribution is considered to be from M to C, not from O to C.

However, the person collecting the contribution(s) on behalf of the committee necessarily incurs costs in processing the transaction. To the extent that the eventual [*5] recipient of the contribution does not reimburse the person for these transaction costs, they represent an "in-kind" contribution from the person to the eventual recipient. Thus, although the \$50 forwarded by O from M to C is not considered to be a contribution from O to C, the costs incurred by O in collecting, processing, and forwarding the money to C constitute a contribution from O to C, unless C adequately compensates O for the transaction costs.

A person who collects contributions on behalf of a committee may be a "sponsor" of the committee. (Section 82048.7; Regulation 18419.) Section 82048.7 provides:

"(a) 'Sponsored committee' means a committee, other than a candidate controlled committee, which has one or more sponsors. Any person, except a candidate or other individual, may sponsor a committee.

(b) A person sponsors a committee if any of the following apply:

(1) The committee receives 80 percent or more of its contributions from the person or its members, officers, employees, or shareholders.

(2) The person collects contributions for the committee by use of payroll deductions or dues from its members, officers, or employees.

(3) The person alone or in combination [*6] with other organizations, provides all or nearly all of the administrative services for the committee.

(4) The person, alone or in combination with other organizations, sets the policies for soliciting contributions or making expenditures of committee funds."

(Section 82048.7.)

The overall consequences of being characterized as a "sponsor" are spelled out in Regulation 18419. In a nutshell, these consequences are three-fold. First, the sponsored committee must include the sponsor's name in its name. Second, the sponsored committee must indicate on its statement of organization (see Section 84101 et seq.) the industry group or affiliation of the sponsor. Third, the sponsor must itself file as a committee (see Section 82013) unless it fits within an exception created by the regulation. (Section 18419(b)(1)-(3).)

A sponsor may avoid being characterized as a committee under the Act, with the consequent reporting requirements, if it satisfies the criteria in Regulation 18419(c). In the context of your question, note in particular subdivision (c)(1). That subdivision states the requirement that a sponsor who wishes to avoid characterization as a committee must refrain from making contributions [*7] or independent expenditures, other than those in support of its sponsored committee, in excess of the thresholds in Section 82013. In other words, payments to the sponsored committee do not count in determining whether the sponsor has met the thresholds specified in Section 82013.

Regulation 18419(c)(1) has long provided that, all other conditions being met, a sponsor's support of its sponsored committee, although otherwise characterizable as a "contribution," does not count toward the section 82013 thresholds. A recent emergency regulation has taken things a step farther. Providing that certain conditions are met, the support that a sponsor provides to its sponsored committee is not characterized as a "contribution" in the first place. Emergency Regulation 18215(c)(16) excludes from the definition of contribution, "A payment by a sponsoring organization for the establishment and administration of a sponsored committee, provided such payments are reported.

Any monetary payment made under this subdivision to the sponsored committee shall be made by separate instrument. A 'sponsoring organization' may be any person (see Gov't Code [sec.] 82047) except a candidate or other individual [*8] (see Gov't Code [sec.] 82048.7). 'Establishment and administration' means the cost of office space, phones, salaries, utilities, supplies, legal and accounting fees, and other expenses incurred in setting up and running a sponsored committee."

Emergency Regulation 18215(c)(16) has been challenged in state court. Although the Commission and staff are confident of its validity, it is nonetheless possible that it may be invalidated by the court. If Emergency Regulation 18215(c)(16) is invalidated, this advice will necessarily be subject to modification.

B. Question (1).

If each insured unambiguously earmarks \$50 of the contribution for the DOCPAC SCC and \$75 of the contribution for the other PAC, then the mere fact that the entire \$125 contribution temporarily resides in the DOCPAC account before the \$75 component is transferred to the other PAC would not deprive DOCPAC of its SCC status (assuming all other conditions for SCC status are satisfied).

This advice applies prospectively only. You may not, on behalf of an insured/contributor, retroactively earmark for DOCPAC a portion of a contribution already made. The earmarking must be a deliberate, voluntary decision [*9] of the contributor at the time the contribution is originally made.

Unless TDC is a sponsor of DOCPAC within the meaning of Section 82048.7, the amount of the transaction costs incurred by TDC in collecting the contributions from its insureds would be a contribution from TDC to DOCPAC. Assuming that these transaction costs attributable to DOCPAC exceed \$50 (which seems likely), then DOCPAC would thereby lose its status as a SCC. (See Section 85203(b).) On the other hand, if TDC is a sponsor of DOCPAC, then this administrative support would be excluded from the definition of contribution by Emergency Regulation 18215(c)(16), and the support provided by TDC would not deprive DOCPAC of its SCC status.

C. Question (2).

If each insured unambiguously earmarks \$50 of the contribution for DOCPAC and \$75 of the contribution for the other PAC, then the mere fact that the entire \$125 contribution temporarily resides in the other PAC's account before the \$50 component is transferred to DOCPAC would not deprive DOCPAC of its SCC status (assuming all other conditions for SCC status are satisfied).

Again, the earmarking may not be retroactive. (See Part IV.B., above.) [*10]

Again, unless TDC is a sponsor of DOCPAC within the meaning of Section 82048.7, the amount of the transaction costs incurred by TDC in collecting the contributions from its insureds would be a contribution from TDC to DOCPAC, unless DOCPAC adequately reimburses TDC.

Assuming that these unreimbursed transaction costs attributable to DOCPAC exceed \$50 (which seems likely), then DOCPAC would thereby lose its status as a SCC. (See Section 85203(b).)

Under the facts posed in question (2), this same reasoning applies to the other PAC. The transaction costs incurred by the other PAC in receiving from TDC and forwarding to DOCPAC the \$50 component would constitute a contribution to DOCPAC to the extent it is not reimbursed by DOCPAC. If the unreimbursed transaction costs exceed \$50, then DOCPAC would lose its SCC status. (Section 85203(b).) On the other hand, if the other PAC is a sponsor of DOCPAC, then this administrative support would be excluded from the definition of contribution by Emergency Regulation 18215(c)(16), and the support would not deprive DOCPAC of its SCC status.

D. Other considerations.

Although you did not refer to it in your advice request, you should [*11] note Section 85311, added to the Act by Proposition 208. Entitled, "Aggregation of Financial Activity," this section provides that all payments made by a person "established, financed, maintained, or controlled by" any other person "shall be considered to be made by a single person." You may wish to consider carefully the implications of Section 85311 upon the relationships and functions intended for TDC, DOCPAC, and the other PAC.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Steven G. Churchwell

General Counsel

By: John Vergelli

Staff Counsel, Legal Division

SGC:JV:ak

ATTACHMENT 2



CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
ADVICE LETTERS

No. A-97-333

1997 Cal. Fair-Pract. LEXIS 290

July 24, 1997

[*1] James Sutton
Nielsen, Merksamer, Parrinello, Mueller & Naylor, LLP
591 Redwood Highway, #4000
Mill Valley, California 94941

Re: Your Request for Advice

Dear Mr. Sutton:

This letter is a response to your request for advice regarding the provisions of the Political Reform Act (the "Act").

QUESTIONS

1. May the California Republican Party ("CRP") accept a contribution that the contributor has indicated it may only use to support Republican candidates for statewide office? Republican candidates for the state Assembly? Republican candidates for the state Senate?
2. Would your answer be different for contributions accepted for the primary or general elections?

CONCLUSIONS

1. No. The CRP may not accept a contribution under the condition that the CRP spend the contribution on any class or category of candidates.
2. No. The CRP may not accept a contribution under the condition that CRP spend the contribution on a particular election.

FACTS

The CRP raises and spends money to support various Republican candidates for state office. The CRP seeks guidance on whether Section 85703 prohibits it from soliciting contributions to support a category of candidates.

ANALYSIS

Section 85703 provides:

"No [*2] person shall make and no person, other than a candidate or the candidate's controlled committee, shall accept any contribution on the condition or with the agreement that it will be contributed to any particular candidate. The expenditure of funds received by a person shall be made at the sole discretion of the recipient person."

While the first sentence arguably proscribes only those contributions earmarked for "any particular candidate," the second sentence of Section 85703 goes further and indicates that the expenditure of funds received by a person shall be made at the sole discretion of the recipient person. If a contribution is accepted under a condition that it be spent on a certain class of candidates or a specific purpose, then the recipient person would not have sole discretion.

Therefore, the CRP may not accept contributions which impose limitations on the expenditures made with that money.

You also seek guidance on whether Section 85703 prohibits the CRP from soliciting contributions to support a category of candidates. If this means you wish to accept contributions under the condition that the CRP may only spend that money on a certain class of candidates, then the answer [*3] is no, you may not "solicit" contributions to support a category of candidates.

The CRP may no more agree or offer a condition ("no person shall accept") than may the contributor ("no person shall make"). The CRP may solicit contributions by noting to the potential contributor the purposes for which the CRP makes expenditures. The statute does not limit the CRP's ability to solicit funds creatively. However, a solicitation may not cross the line into a condition or an agreement on how the contribution will be spent.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Steven G. Churchwell

General Counsel

By: Marte Castaos

Staff Counsel, Legal Division

SGC:MC:jlw

ATTACHMENT 3



CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
ADVICE LETTERS

No. I-97-391

1997 Cal. Fair-Pract. LEXIS 389

September 3, 1997

[*1] Fred Vanderhoof
Republican Central Committee of
Fresno County
P.O. Box 25366
Fresno, California 93729-5366

Re: Your Request for Advice

Dear Mr. Vanderhoof:

This letter is a response to your request for advice regarding the campaign provisions of the Political Reform Act ("Act"). Because your questions are of a general nature, we consider your request to be one for informal assistance.

QUESTIONS

1. May a candidate pay bounty to a county central committee out of campaign funds for the purpose of voter registration? If yes, is the payment considered a contribution to the county central committee and therefore subject to the contribution limits of Proposition 208? May the bounty be targeted to a specific part of the county that lies within the candidate's district?

2. May an individual earmark his/her contribution to the county central committee for voter registration and other party-building activities?

CONCLUSIONS

1. A candidate may use campaign funds to pay bounty to the county central committee for voter registration activities as long as the amount of bounty paid constitutes adequate consideration for the registration services provided by the central committee. If adequate consideration [*2] is provided, the payment for voter registration will not be a contribution to the central committee and, therefore, not subject to the contribution limits. The committee will report the receipt as a miscellaneous increase to cash. The central committee may target a specific part of the county that lies within the candidate's district for voter registration.

2. Individuals may not earmark their contributions to the central committee

for voter registration and other party-building activities.

ANALYSIS

Because the payment of bounty furnishes an incentive to the county central committee to register more voters of the candidate's party, the Commission has determined that a candidate's use of campaign funds to a county central committee as bounty for voter registration expenses is a campaign-related expenditure and a permitted use of campaign funds. (Martin Advice Letter No. A-89-301.)

Section 82015 defines a "contribution":

"'Contribution' means a payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment except to the extent that full and adequate consideration is received unless it is clear from the circumstances that [*3] it is not made for political purposes" (Emphasis added.)

If the voter registration services provided by the county central committee constitute adequate consideration for the amount of bounty paid by the candidate, the central committee will not have received a contribution. Instead, the county central committee will report the amount as a miscellaneous increase to cash on its campaign statement.

Individuals may not earmark contributions to the county central committee for voter registration or other party building activities. The prohibition relating to the earmarking of contributions is contained in Section 85703, which states:

"No person shall make and no person, other than a candidate or the candidate's controlled committee, shall accept any contribution on the condition or with the agreement that it will be contributed to any particular candidate. The expenditure of funds received by a person shall be made at the sole discretion of the recipient person."
(Emphasis added.)

The first sentence of Section 85703 clearly prohibits earmarking contributions to specific candidates. In addition, the second sentence provides that the expenditure of funds received [*4] by a person shall be made at the sole discretion of the recipient person. A contribution accepted under a condition that it be spent for a specific purpose places the recipient in a position of not having sole discretion regarding the expenditure of those funds. (Sutton Advice Letter, No. A-97-333, copy enclosed.)

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Steven G. Churchwell
General Counsel

By: Mary Ann Kvasager
Political Reform Consultant

Enclosure

ATTACHMENT 4



FAIR POLITICAL PRACTICES COMMISSION

November 3, 1997

James R. Sutton
Nielsen, Merksamer, Parrinello, Mueller & Naylor, LLP
591 Redwood Highway, #4000
Mill Valley, California 94941

Re: Your Request for Advice
Our File No. A-97-487

Dear Mr. Sutton:

This letter is in response to your request for advice regarding the provisions of the Political Reform Act (the "Act").¹

QUESTIONS

May the California Republican Party ("CRP"):

- (1) Send a letter soliciting contributions, which will indicate that electing a Republican governor will be the CRP's top priority?
- (2) Hold an event known as "Republican Assembly Victory 1998" to raise funds for targeted state assembly races?

In each case, you will indicate that any checks earmarked for a particular candidate will be returned. You will also state that the CRP retains discretion over all funds it receives.

CONCLUSIONS

Yes. The two fundraising activities you describe would not violate Section 85703, which prohibits the earmarking of contributions made to political committees.

¹ Government Code sections 81000 - 91014. Commission regulations appear at title 2, sections 18109 - 18995, of the California Code of Regulations.

FACTS

The CRP raises and spends money to support various Republican candidates running in California. The CRP would like to send a letter soliciting contributions which indicates that electing a Republican governor will be the CRP's top priority during the 1998 campaign season. The letter would contain a disclaimer that the CRP retains discretion over the use of all funds it receives. In addition, you state that all checks received by the CRP that are earmarked for the gubernatorial or any other particular candidate will be returned to the contributor.

The CRP would also like to hold a fundraising event to raise funds from persons interested in helping the Republican Party regain a majority of the seats in the State Assembly. The event would be called "Republican Assembly Victory 1998" and would feature speeches by several current Republican leaders in the Assembly. The invitation would contain the disclaimer that the CRP retains the discretion over all funds raised by the event, and any checks received in connection with the event that are earmarked for a particular candidate would be returned.

ANALYSIS

Section 85703, added by Proposition 208, provides:

"No person shall make and no person, other than a candidate or the candidate's controlled committee, shall accept any contribution on the condition or with the agreement that it will be contributed to any particular candidate. The expenditure of funds received by a person shall be made at the sole discretion of the recipient person."

In the *Sutton* Advice Letter, No. A-97-333, Commission staff concluded that the CRP may not accept a contribution under the condition that the CRP spend the contribution to support any *class or category* of candidates or any specific candidate. At the same time, we noted that Section 85703 does not limit the CRP's ability to solicit funds creatively, as long as the solicitation does not cross the line into a condition or an agreement on how the contribution will be spent.

In response to the *Sutton* letter, you would like to know where the line between earmarking and creative solicitation is drawn. During our meeting with you and representatives of the California Democratic Party on September 10, 1997, you gave us specific examples of how our previous advice letter to you (A-97-333) was causing fundraising problems for the parties. That letter stated:

"You also seek guidance on whether Section 85703 prohibits the CRP from soliciting contributions to support a category of candidates. If this means you wish to accept contributions under the condition that the CRP may only spend that money on a certain class of candidates, then the answer is no, you may not 'solicit' contributions to support a category of candidates."

The last clause ("you may not ...") is, upon reflection, too sweeping a statement and is hereby modified as stated below.

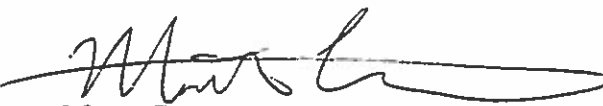
The first sentence of Section 85703 prohibits acceptance of a contribution on the condition or with the agreement that it will be contributed to "any particular candidate." Note that this prohibition can affect the *solicitation* of contributions as well as unilateral *earmarking* by the donor. Thus, a political party may neither solicit contributions for Senator Smith, nor may it accept a check earmarked for her.² On the other hand, a party committee obviously may solicit and accept funds for "Republican candidates running in California." As usual, drawing a proper line between those two extremes is difficult (e.g., a check earmarked for "Senator Smith and Governor Jones" probably would violate the section, while a party solicitation asking for help for Latino candidates vying for open seats in targeted districts of the Legislature probably would not). We prefer to deal with specific situations as they arise. Your request represents a good start in bringing the line into sharper focus. You have indicated that the CRP will return contributions earmarked for a particular candidate and will include a disclaimer that it retains sole discretion over the funds it receives. Under the second sentence of Section 85703, the CRP must go further and *in fact* decide how to expend all contributions that it receives.

If the CRP returns contributions earmarked for any particular candidate or that place a condition on use of the funds that would interfere with the CRP's discretion, the CRP will be in compliance with Section 85703 in engaging in these two fundraising activities.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Steven G. Churchwell
General Counsel


By: Marte Castaños
Staff Counsel, Legal Division

SGC:MC:tls

² Note that Section 85703's prohibition applies to acceptance with an unlawful condition; actual use of the money is irrelevant.

ATTACHMENT 5



CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
ADVICE LETTERS

Our File No. I-02-040

2002 Cal. Fair-Pract. LEXIS 63

February 26, 2002

[*1] Mr. Duane Dichiarra, Post Office Box 1847, Bonita, CA 91908-1847

Re: Your Request for Informal Assistance

Dear Mr. Dichiarra:

This letter is in response to your request for informal assistance regarding the provisions of the Political Reform Act (the "Act"). n1 You are Assemblyman Mark Wyland's campaign consultant and are asking the questions on his behalf.

n1 Government Code sections 81000 - 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations. Because you are requesting general advice rather than providing facts about a specific transaction, we are treating your request as one for informal assistance, indicated by the file number prefix "I." Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Reg. 18239(c)(3), copy enclosed.)

QUESTIONS AND CONCLUSIONS

1. Is it correct that a state candidate may not contribute both \$ 3,000 from his campaign committee and his personal funds to another state candidate committee?

That is correct. Section 85305 provides:

"A candidate for elective state office n2 or committee controlled by that candidate may not [*2] make any contribution to any other candidate for elective state office in excess of the limits set forth in subdivision (a) of Section 85301."

n2 "Elective state office" means the office of Governor, Lieutenant Governor, Attorney General, Insurance Commissioner, Controller, Secretary of State, Treasurer, Superintendent of Public Instruction, Member of the Legislature,

member elected to the Board of Administration of the Public Employees' Retirement System, and member of the State Board of Equalization. (Section 82024.)

Section 85305 incorporates as its monetary limit the \$ 3,000 per election limit set forth in section 85301(a). The \$ 3,000 contribution limit of section 85305 applies uniformly to candidates for all elective state offices (i.e., an Assembly member may only contribute \$ 3,000 per election to a candidate for Governor and vice versa).

In addition, the Act's aggregation provision states that "the contributions of an entity whose contributions are directed and controlled by any individual shall be aggregated with contributions made by that individual and any other entity whose contributions are directed and controlled by the same individual." (Section 85311(b).) Under [*3] this aggregation provision, the contributions made by a candidate's controlled committee are aggregated with contributions made by the candidate. (See Mitchell Advice Letter, No. A-01-210.)

Thus under section 85305, a state candidate may contribute a total of \$ 3,000 per election to another state candidate's committee. The contribution may be from either the candidate's personal funds or the candidate's controlled committee funds. But the candidate is not permitted to make a contribution of \$ 3,000 to another state candidate from both his personal funds and his controlled committee funds, for a total of \$ 6,000.

2. Is it correct that a candidate may contribute either \$ 5,000 of campaign committee funds or \$ 5,000 of personal funds to a PAC which plans to contribute campaign funds directly to a candidate for state office; and that the contributing candidate cannot discuss the beneficiary of PAC distributions with the PAC?

Under Proposition 34, the limit on the amount an individual or entity may contribute to a state PAC (other than a political party committee) is \$ 5,000 per year. Section 85303(a) provides:

"A person may not make to any committee, other than a political party committee, [*4] and a committee other than a political party committee may not accept, any contribution totaling more than five thousand dollars (\$ 5,000) per calendar year for the purpose of making contributions to candidates for elective state office."

As discussed above, contributions made by a candidate's controlled committee are aggregated with contributions made by the candidate. (Section 85311(b).) Thus, a candidate may contribute a total of \$ 5,000 per calendar year from either personal funds or campaign committee funds to a PAC that plans to contribute to state candidates. (However, a candidate may not contribute from both personal funds and campaign committee funds for a total of \$ 10,000.)

Further, the contributing candidate may not direct that the PAC use his or her contribution for a specific candidate. The Act prohibits such earmarking. Section 85704 states that "[a] person may not make any contribution to a committee on the condition or with the agreement that it will be contributed to any particular candidate unless the contribution is fully disclosed pursuant to section 84302 [contributions by intermediary or agent]."

3. Is it correct that an incumbent may contribute or loan unlimited [*5]

amounts of personal money to a PAC which plans to use these funds for independent expenditures for or against candidates for state office (not including the incumbent's opponent); and that the contributing candidate cannot "control" the independent expenditure PAC, but can discuss PAC expenditures with PAC decision makers?

Proposition 34 does not limit the amount of personal funds a candidate may contribute to a PAC that plans to make independent expenditures for or against state candidates. However, Proposition 34 prohibits a controlled committee of a candidate from making independent expenditures or contributing funds to another committee for the purpose of making independent expenditures to support or oppose other candidates. (Section 85501.) And if the contributing candidate acts jointly with the independent expenditure PAC in making expenditures, he will be considered to "control" the committee.

An incumbent making contributions to an independent expenditure committee should be careful not to take actions that result in his controlling the committee under the Act's definition. Section 82016 provides as follows:

"(a) 'Controlled committee' means a committee that is controlled [*6] directly or indirectly by a candidate or state measure proponent or that acts jointly with a candidate, controlled committee, or state measure proponent in connection with the making of expenditures. A candidate or state measure proponent controls a committee if he or she, his or her agent, or any other committee he or she controls has a significant influence on the actions or decisions of the committee.

(b) Notwithstanding subdivision (a), a political party committee, as defined in Section 85205, is not a controlled committee."

The Commission has interpreted the definition of "controlled committee" broadly to include any significant participation by a candidate, his or her agent, or representatives of any other committee he or she controls in the actions of a committee. To determine whether a candidate controls a committee, we look at the degree of the candidate's involvement in the committee's activities. The involvement of a candidate includes the involvement of his or her campaign committee and his or her agents. (Davis Advice Letter, No. I-90-173.)

Section 82016 describes two ways in which a committee is considered a controlled committee. First, the candidate and the committee [*7] may act jointly in making expenditures. Second, if the candidate (or his or her agents) have a significant influence on the actions or decisions of the independent expenditure committee, the candidate will be considered to control it.

Because the statutory definition of controlled committee focuses on the making of expenditures, any significant discussion and participation by the contributing candidate in the PAC's expenditures will raise the question of whether the candidate controls the committee. In addition, developing or implementing strategy with the committee would constitute control. (Madden Advice Letter, No. A-85-197.)

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca

General Counsel

By: Hyla P. Wagner
Legal Division

ATTACHMENT 6



CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
ADVICE LETTERS

Our File No. I-02-338

2002 Cal. Fair-Pract. LEXIS 273

December 24, 2002

[*1] David Bauer, 400 Capitol Mall, Suite 1560, Sacramento, CA 95814

Re: Your Request for Informal Assistance

Dear Mr. Bauer:

This letter is in response to your request for advice on behalf of Friends of David Knowles regarding the campaign provisions of the Political Reform Act (the "Act"). n1 Because the facts you have presented are not sufficient to render formal advice, we are treating your request as one for informal assistance (regulation 18329(b)(2)(B)). n2 Our assistance is based on the facts presented; the Commission does not act as a finder of fact when it provides informal assistance. (In re Oglesby (1975) 1 FPPC Ops. 71.)

QUESTION

May the Friends of David Knowles, a controlled committee of former Assemblyman David Knowles, donate surplus funds to the Republican Party central committee for non-candidate support purposes (such party building), with the understanding that if Mr. Knowles runs for public office in the future, the central committee will return him an equivalent amount from its candidate support funds?

CONCLUSION

No. Providing surplus funds to a central committee [*2] of a political party, with the expectation that the candidate will receive an equivalent amount back from that central committee at a future date in order to support his or her future run for a state or local elective office in California is not a permitted use of surplus funds.

FACTS

You are the treasurer for Friends of David Knowles, the controlled committee of former Assemblyman David Knowles ("Committee"). The Committee has surplus

funds and proposes that the funds be donated to Republican Party central committees for non-candidate support purposes such as party building, with the understanding that if Mr. Knowles runs for public office in the future, the central committees will in turn support him with their candidate support funds. You provide by way of illustration an example whereby the Committee would give \$ 5,000 of its surplus funds to a county Republican central committee for party building purposes, and that committee would later give Mr. Knowles \$ 5,000 from its candidate support funds. However, you have not provided the amount of the funds you propose to contribute to the central committees of a political party.

ANALYSIS

Generally, the Act requires that campaign [*3] funds be used for political, legislative or governmental purposes. (Section 89512.) In addition to this general rule, there are more specific rules governing the use of campaign funds applicable to all committees. (Sections 89510-89518.) When a candidate withdraws from or is defeated in an election, or leaves office, n3 funds left over in his or her campaign committee are characterized as "surplus funds." The use of surplus funds is subject to greater restrictions than the use of campaign funds that are not surplus funds. Insofar as the use of surplus funds to support or oppose candidates for office, sections 89519(b)(4) and (b)(5) provides that surplus funds may be used only to make:

P. . .P

"(4) Contributions to a political party committee, provided the campaign funds are not used to support or oppose candidates for elective office. However, the campaign funds may be used by a political party committee to conduct partisan voter registration, partisan get-out-the-vote activities, and slate mailers as that term is defined in Section 82048.3."

"(5) Contributions to support or oppose any candidate for federal office, any candidate [*4] for elective office in a state other than California, or any ballot measure."

Under these sections, a candidate may not use surplus funds for his or her own campaign, or to support or oppose other candidates, for elective state or local office in California. n4 You propose that the funds provided to the central committees be encumbered with an "understanding" that an equivalent amount of funds be contributed by these central committees to Mr. Knowles should he decide to run for public office at a future date. This understanding essentially "earmarks" the Committee's contribution for use by the recipient central committees to support a future candidate for elective office, namely Mr. Knowles. This purpose is contrary to sections 89519(b)(4) and (b)(5).

In addition, you should be aware that there is a \$ 25,000 limit on contributions to political party committees, when the contributions are for the purpose of the political party's making contributions to support or oppose candidates for elective state office, or making expenditures at the behest of a candidate for elective state office for communicates to party members related to [*5] that candidate's candidacy. (Section 85303(b).) On the other hand, section 85303(d) provides that there are no limits on the amount a candidate for elected state office may transfer to a political party committee, when such amounts are in excess of any amount necessary to defray the candidate's expenses for election-related activities or holding office, provided the transferred contributions are used for purposes consistent with the uses permitted for

surplus funds (section 89519(d)(4)), described above. Since the contribution to the central committees is understood to eventually support your candidacy, these contributions could potentially violate the \$ 25,000 limit at section 85303(b).

n5 Accordingly, your proposed use of these surplus funds is not permitted under the Act.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca

General Counsel

By: Kenneth L. Glick
Counsel, Legal Division

FOOTNOTES:

n1 Government Code sections 81000 - 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

n2 Informal [*6] assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; regulation 18329(c)(3), copy enclosed.) In addition, this letter should not be construed as assistance on any conduct that may have already taken place.

n3 A candidate leaves office when the candidate's term has ended, or he or she resigns. (Gould Advice Letter, No. A-99-241.) A candidate is deemed to be a defeated candidate if he or she loses or withdraws from the election, or opens a committee for the election and decides not to run. (Willet Advice Letter, No. A-96-103.) Funds of a defeated candidate are considered surplus at the end of the post-election period of the election for which the campaign funds were raised. (Fishburn Advice Letter, No. A-01-305.)

n4 Accordingly, we have previously advised that surplus funds may not be used by a candidate to run for future elective office. (Fishburn Advice Letter, No. A-02-271; Ramirez Advice Letter, No. A-02-167.)

[*7]

n5 You have not provided information indicating the individual amounts of these potential contributions, since the example you provide is given only for purposes of illustration.

ATTACHMENT 7



CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
ADVICE LETTERS

Our File No. A-11-102

2011 Cal. Fair-Pract. LEXIS 194

July 20, 2011

[*1] Charles H. Bell, Jr., Bell, McAndrews & Hiltachk, LLP, 455 Capitol Mall, Suite 600, Sacramento, California 95814

Re: Your Request for Advice

Dear Mr. Bell:

This letter responds to your request for advice on behalf of the California Republican Leadership Fund regarding campaign provisions of the Political Reform Act (the "Act"). n1

QUESTIONS

1. Is the joint fundraising arrangement outlined below between participating county central committees and the California Republican Leadership Fund permissible under the Act?

2. If the Commission responds in the affirmative to question 1, will the California Republican Leadership Fund be considered a "recipient committee" as defined in Section 82013(a) and be required to file periodic reports as required by committees under the Act?

3. If the Commission responds in the affirmative to question 1, would money transferred from the California Republican Leadership Fund to participating county central committees be considered a contribution as defined in Section [*2] 82015 from the Fund?

CONCLUSIONS

1. Yes, the joint fundraising arrangement outlined below between participating county central committees and the California Republican Leadership Fund is permissible under the Act for the reasons discussed below.

2. Yes, the California Republican Leadership Fund, a joint fundraising entity benefitting county central committees, is receiving contributions of \$ 1,000 or more for political purposes in California. As such, it will qualify as a political committee under Section 82013(a) and be required to file periodic

reports.

3. No, the money transferred from the California Republican Leadership Fund will not be considered "contributions" from the Fund to participating county central committees. The money transferred from the California Republican Leadership Fund to participating county central committees will be considered contributions from the original donors, delivered via the Fund, a committee acting as an intermediary.

FACTS

The California Republican Leadership Fund has been organized as an unincorporated association and has registered as an Internal Revenue Code section 527 tax exempt entity. The sole purpose of the Fund is to act as a [*3] joint fundraising agent to facilitate donor contributions to participating organizations via a single contribution check. The Fund will distribute to participating organizations their share of the gross amount of contributors' checks, consistent with the Fund's joint fundraising agreement and the specific designation of funds to named participating organizations. These participating organizations will be county central committee organizations. The California Republican Leadership Fund's board does not include any central committee representative or elected officials. The Fund and the central committees will associate together to engage in joint fundraising. Their association is defined by a joint fundraising agreement.

The Fund will operate as an association and will solicit contributions to participating organizations. The Fund will have minimal staff and professional consultant assistance, the costs of which will be shared by participating organizations in accordance with a joint fundraising and operating agreement. The Fund will not make any "expenditures" pursuant to Section 82025 that are not reimbursed fully by the participating organizations.

The Fund will solicit only state [*4] contributions for the participating organizations, which are registered "recipient committees" under Section 82013(a). The Fund will act as an "intermediary" for the contributions it solicits, receives and transmits to participating organizations.

The Fund will accept and deposit contributions it solicits as the joint fundraising agent into its own account. The Fund will remit on a monthly or more frequent basis contributions it has received from solicitations, together with a list of the contributors, contributor information required to be reported by the participating organizations on their state campaign reports, and such additional information required for the participating organizations to accurately, timely and completely report their receipts.

During late contribution periods, the Fund will send to participating central committees notification of contributions it has received for their accounts on a 24-hour basis, and will assist both the participating central committees and the donors to ensure that applicable late contribution reports are prepared and sent to the Secretary of State and applicable county reporting agencies.

The Fund, as an agent for the participating central [*5] committees, will employ fundraising consultants to assist in its fundraising solicitation activities and compliance consultants to maintain records, prepare transmittal information for participating organizations and prepare compliance information for these organizations and for contributors. The Fund will charge participating

organizations for their full, proportionate share of the cost of these fundraising and compliance services, to ensure that the Fund does not make "non-monetary contributions."

Joint fundraising events will be advertised under procedures which notify contributors of specific amounts allocated to each committee for reporting and record-keeping purposes, as outlined in the *Benton Advice Letter*, No. A-98-116.

ANALYSIS

1. *Is the joint fundraising arrangement outlined above between participating county central committees and the California Republican Leadership Fund permissible under the Act?*

We have addressed joint fundraising by party central committees in prior advice. The *Benton Advice Letter*, No. A-98-116, involved four political party committees that wanted to jointly or separately hold a fundraising event for a candidate. That letter concluded [*6] that the Act does not prohibit political party committees from holding a joint fundraiser to raise money for a candidate. It also concluded that nothing in the Act prohibits joint sponsors of a fundraiser from appointing one of the sponsors to be the fiscal agent who would open a separate bank account for the event, receive the gross proceeds of the event, disburse the checks for payment of expenses, and disburse the net proceeds to each of the sponsors as agreed by the sponsors. The letter further found that the Act does not prohibit political party committees from holding a joint fundraiser for dual purposes (such as to operate a party headquarters and to raise funds for specified candidates), and advised that the event should be advertised under procedures which notify contributors of the specific amount allocated to each committee for reporting and recordkeeping purposes. We still agree with the conclusions in the *Benton Advice Letter* regarding joint fundraising and find them applicable to the facts at hand.

Several other letters address joint fundraising benefitting both a committee and a nonprofit organization and specify that when a joint fundraising event is held contributors [*7] should be notified of the specific amount allocated to each entity for reporting and recordkeeping purposes. (See e.g., *Poland Advice Letter*, No. A-01-167, *Caldwell Advice Letter*, No. A-99-252, and *Goodin Advice Letter*, No. A-94-290.)

In addition, Regulation 18534 contemplates a political party committee undertaking joint fundraising for state candidates and other purposes. Under that regulation, a political party committee may receive contributions in excess of the limits that may be split between the committee's all-purpose (candidate) account and its restricted use (non-candidate) account at the time of deposit, with the amount deposited into the all-purpose (candidate) account not to exceed the applicable limits of Section 85303.

Here, the joint fundraising arrangement you described between participating county central committees and the California Republican Leadership Fund is permissible under the Act.

2. *Will the California Republican Leadership Fund be considered a "recipient committee" as defined in Section 82013(a) and be required to file periodic reports as required by committees under the Act?*

The term "committee" includes a person or organization that [*8] receives

contributions totaling \$ 1,000 or more in a calendar year. Section 82013(a) provides:

"Committee" means any person or combination of persons who directly or indirectly does any of the following:

(a) Receives contributions totaling one thousand dollars (\$ 1,000) or more in a calendar year;

(b) Makes independent expenditures totaling one thousand dollars (\$ 1,000) or more in a calendar year; or

(c) Makes contributions totaling ten thousand dollars (\$ 10,000) or more in a calendar year to or at the behest of candidates or committees.

A person or combination of persons that becomes a committee shall retain its status as a committee until such time as that status is terminated pursuant to Section 84214.

The term "contribution" is defined by Section 82015 and Regulation 18215 to include "any payment made for political purposes." (Regulation 18215(a).)

Under Regulation 18215(a), a payment is made for political purposes if it is:

(1) For the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate or candidates, or the qualification or passage of any measure; or

(2) Received by or made at the behest [*9] of the following or any agent thereof:

(A) A candidate;

(B) A controlled committee;

(C) An official committee of a political party, including a state central committee, county central committee, assembly district committee or any subcommittee of such committee; or

(D) An organization formed or existing primarily for political purposes, including, but not limited to a political action committee established by any membership organization, labor union or corporation. (Emphasis added.)

A contribution includes the purchase of tickets for events such as dinners, luncheons, rallies, and similar fundraising events. (Section 82015.)

An organization that qualifies as a recipient committee by raising or spending \$ 1,000 or more for political purposes in a calendar year must file a Statement of Organization, Form 410. The campaign disclosure provisions of the Act require committees to file periodic reports disclosing contributions received and expenditures made. (Sections 84100-84107, 84200-84217.)

Here, the California Republican Leadership Fund, a joint fundraising entity benefitting county central committees and affiliated with a political party,

n2 [*10] is receiving contributions of \$ 1,000 or more for political purposes in California, as stated in Regulation 18215(a)(2)(C). As such, it will qualify as a political committee under Section 82013(a) and be required to file periodic reports. The conclusion that the California Republican Leadership Fund qualifies as a political committee is the most straightforward reading of Section 82013(a) which defines a recipient committee, and Section 82015 and Regulation 18215(a) which define the term contribution. Under the joint fundraising proposal, the California Republican Leadership Fund will be soliciting, receiving, and depositing in its bank account large aggregate contributions from donors, which contributions will be divvied up according to the joint fundraising agreement and distributed to participating central committees. Concluding that the Fund is a committee means the Fund will be filing campaign reports, and that its fundraising and dispersal of funds will be fully transparent. If the Fund is reporting, the public will be able to discern who is contributing large donations to the joint fundraising effort, as well as see the smaller contributions reported on the individual central [*11] committees' reports.

n3

In addition, we agree that the California Republican Leadership Fund will be acting as an "intermediary" in delivering contributions, as discussed below. However, we find that the Fund is a "committee" which is acting as an "intermediary" under the Act, rather than that the Fund is solely an intermediary. A review of advice letters concerning intermediaries did not reveal any other similar situations where an entity such as the Fund was determined to be purely an "intermediary" and not a "committee." An intermediary generally acts on behalf of a contributor in delivering contributions to a committee. Here, the California Republican Leadership Fund is intended to be a longstanding organization of a political party that will solicit, receive, and deposit large aggregate contributions into its account, for distribution to participating central committees. The Fund will employ fundraising consultants to assist in its fundraising solicitation activities and will employ compliance [*12] consultants to maintain records, prepare transmittal information for participating organizations and prepare compliance information for these organizations and for contributors. These are generally activities that a committee undertakes.

The California Republican Leadership Fund would be a state general purpose committee. It does not meet Section 85205's definition of a political party committee.

3. Would money transferred from the California Republican Leadership Fund to participating county central committees be considered a contribution as defined in Section 82015 from the Fund?

The Act provides that one person might act as an intermediary by collecting a contribution for the benefit of another person. (Section 84302; Regulation 18432.5.) The source of the resulting contribution to the second person is the original contributor, not the intermediary. Under the Act, contributions by intermediaries must be fully disclosed as made from the original contributor through the intermediary. Section 84302 states:

No person shall make a contribution on behalf of another, or while acting as the intermediary or agent of another, without disclosing to the recipient of the contribution [*13] both his own full name and street address, occupation, and the name of his employer, if any, or

his principal place of business if he is self-employed, and the full name and street address, occupation, and the name of employer, if any, or principal place of business if self-employed, of the other person. The recipient of the contribution shall include in his campaign statement the full name and street address, occupation, and the name of the employer, if any, or the principal place of business if self-employed, of both the intermediary and the contributor.

Regulation 18432.5 further provides that a person is an intermediary for a contribution (1) if the recipient of the contribution would consider the person to be the contributor without the disclosure of the identity of the true source of the contribution or (2) if the person is an intermediary because under Regulation 18419 they are an intermediate unit of a sponsor that forwards contributions. Regulation 18432.5 states:

(a) For purposes of Government Code Section 84302, a person, as defined in Government Code Section 82047, is an intermediary for a contribution if any of the following applies:

(1) The recipient of the contribution [*14] would consider the person to be the contributor without the disclosure of the identity of the true source of the contribution.

(2) The person is an intermediary pursuant to Regulation 18419.

(b) Any person who qualifies as an intermediary for the making of a contribution shall disclose to the recipient of the contribution both his or her own full name and street address, occupation, and the name of his employer, if any, or his or her principal place of business if he or she is self-employed, and the full name and street address, occupation, and the name of employer, if any, or principal place of business if self-employed, of the contributor.

(c) The recipient of the contribution shall include in his or her campaign statement the name of the intermediary and other information disclosed pursuant to Government Code Section 84302 and subdivision (b) of this section, if the recipient knows or has reason to know that a contribution is made by an intermediary.

We have advised that a person will be considered an intermediary if, at the time of the contribution, the original contributor knowingly and unambiguously earmarked the contribution for deposit with the second person. (See, e.g., [*15] Gray Advice Letter, No. A-03-068.) Section 85704's prohibition on earmarking states that "[a] person may not make any contribution to a committee on the condition or with the agreement that it will be contributed to any particular candidate unless the contribution is fully disclosed pursuant to Section 84302."

Concerning intermediaries, the Mainardi Advice Letter, No. A-10-191, advised that a committee is required to report payments received from ActBlue as contributions received through an intermediary, where ActBlue processes online credit card contributions made to campaign committees, compiles a list of Democratic candidates for whom it will accept contributions, has registered with the Internal Revenue Service as a political organization and has filed campaign statements identifying itself as a general purpose committee.

Here, the sole purpose of the California Republican Leadership Fund is to act as a joint fundraising agent to facilitate donor contributions to participating county central committees via a single contribution check. The Fund will distribute to participating organizations their share of the gross amount of contributors' checks, consistent with the Fund's [*16] joint fundraising agreement and the specific designation of funds to named participating organizations. Joint fundraising events will be advertised under procedures which notify contributors of specific amounts allocated to each committee for reporting and record-keeping purposes.

In this case the Fund will be raising contributions and acting as an intermediary by transmitting them to participating county central committees pursuant to a joint fundraising agreement. The money transferred from the Fund to participating county central committees will not be considered contributions from the Fund but will be considered contributions from the original donors, delivered via the Fund -- a committee acting as an intermediary.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery Morazzini

General Counsel

By: Hyla P. Wagner

Senior Counsel, Legal Division

FOOTNOTES:

n1 The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

[*17]

n2 Section 85205 defines the term "political party committee" as: ". . . the state central committee or county central committee of an organization that meets the requirements for recognition as a political party pursuant to Section 5100 of the Elections Code."

n3 In reasoning that the Fund is a committee, we find it informative to consider the example of joint fundraising activities under federal election law and rules. Under federal law, joint fundraising is fundraising conducted jointly by a political committee and one or more other political committees or unregistered organizations. The participants in joint fundraising activity may include party committees, party organizations not registered as political committees, federal and nonfederal candidate committees, and federal PACs. The

joint fundraising rules require all participants in a joint fundraising effort to: *create or select a political committee to act as the fundraising representative*; agree to a formula for allocating proceeds and expenses; sign a written agreement naming the fundraising representative and stating the allocation formula; establish a separate account for joint fundraising receipts and disbursements; notify the public of the allocation formula when soliciting contributions; screen contributions to make sure they comply with the limits and prohibitions of federal law; and report allocated proceeds and expenses. (11 CFR 102.17.)

[*18]



IN THE MATTER OF BILL BERRYHILL, TOM BERRYHILL, ET AL.
OAH Case No. 2012101024
FPPC Case No. 10/828

PROOF OF SERVICE

I am a citizen of the United States, employed in the City and County of Sacramento, California. I am over the age of eighteen years and not a party to the above-entitled action. My business address is 428 J Street, Suite 620, Sacramento, California. On the date below, I served the following document(s):

1. **CLOSING BRIEF OF THE FAIR POLITICAL PRACTICES COMMISSION (with all attachments and the official transcript of the hearing)**

MANNER OF SERVICE
(Cal. Code Regs., tit. 1, § 1008)

By Email. I sent the document(s) via email to the known email address of Respondents' counsel as follows:

PARTY(IES) SERVED AND ADDRESS:

All Respondents
c/o Mr. Charles Bell, Esq.
Bell, McAndrews & Hiltachk, LLP
cbell@bmhlaw.com

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on 12/23, 2013, in Sacramento, California.


Signature

Neal Bucknell
Printed Name

Before the Fair Political Practices Commission, FPPC Case No. 10/828

PROOF OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of eighteen years, and not a party to the above-entitled action.

My business address is: 428 J Street, Suite 620, Sacramento, CA.

On the below date I served the following document(s):

**OPENING BRIEF OF THE ENFORCEMENT DIVISION OF THE FAIR
POLITICAL PRACTICES COMMISSION RE: PROPOSED DECISION OF
ADMINISTRATIVE LAW JUDGE JONATHAN LEW**

I served the above-listed document(s) as follows:

Personal Service. I personally delivered the above-listed document(s) as follows:

Person served: Respondents Bill Berryhill, Tom Berryhill, Bill Berryhill for Assembly – 2008, Berryhill for Assembly 2008, Stanislaus Republican Central Committee (State Acct.), and San Joaquin County Republican Central Committee/Calif. Republican Victory Fund c/o their attorney, Mr. Charles H. Bell, Jr., Esq.

Place where served: Bell, McAndrews & Hiltachk, LLP
455 Capitol Mall, Suite 600
Sacramento, CA 95814

Date of delivery: 2-13-2014

Time of delivery: 2:10 pm

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: 2/13/2014


(SIGNATURE)

PAUL A. RASEY
(PRINT OR TYPE NAME)

Intentionally left blank