

BEFORE THE
FAIR POLITICAL PRACTICES COMMISSION
STATE OF CALIFORNIA

In the Matter of:

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/CALIFORNIA.
REPUBLICAN VICTORY FUND,

Respondents.

FPPC Case No. 10/828

OAH No. 2012101024

PROPOSED DECISION

This matter was heard before Administrative Law Judge Jonathan Lew, State of California, Office of Administrative Hearings, on November 12 through 22, 2013, in Sacramento, California.

Neal P. Bucknell, Senior Commission Counsel, represented the Fair Political Practices Commission.

Attorneys Charles H. Bell, Jr., and Brian T. Hildreth appeared on behalf of respondents.

Oral and documentary evidence was received, and oral argument was heard on November 22, 2013. The record was held open for receipt of Post-Hearing Briefs. On December 11, 2013, Respondents' Corrected Post Trial Brief was filed and marked as Exhibit W. On December 24, 2013, the Closing Brief of the Fair Political Practices Commission was filed and marked as Exhibit 90. The record was thereafter closed and the matter was submitted for decision on December 24, 2013.

FACTUAL FINDINGS

The Parties and Jurisdiction

1. The Fair Political Practices Commission (FPPC or complainant) is the state agency charged with the duty to administer, implement, and enforce the provisions of the Political Reform Act.¹

2. Respondent Tom Berryhill is currently a California State Senator, representing the 14th Senate District.² In 2008, Tom Berryhill was seeking reelection as the incumbent candidate for the California State Assembly, 25th District. He was reelected. Respondent Berryhill for Assembly 2008 was Tom Berryhill's candidate-controlled committee.³ (Hereafter, "Tom Berryhill for Assembly.")

3. In 2008, respondent Bill Berryhill was a non-incumbent candidate for the California State Assembly, 26th District. He won the election. Respondent Bill Berryhill for Assembly – 2008 was his candidate-controlled committee. (Hereafter, "Bill Berryhill for Assembly.") Tom and Bill Berryhill are brothers.

4. Respondent Stanislaus Republican Central Committee was a political party committee within the meaning of Government Code section 85205⁴ in that it was the Republican central committee for Stanislaus County. (Hereafter, "Stanislaus County Republican Central Committee.")

¹ The Political Reform Act is contained in Government Code sections 81000 through 91014. The regulations of the FPPC are contained in California Code of Regulations, title 2, sections 18110 through 18997.

² The events in this matter occurred in 2008 when Senator Tom Berryhill was an Assembly member. To avoid confusion, subsequent references to Senator Berryhill will be to "Tom Berryhill" with the full understanding that his proper title is "Senator."

³ Government Code section 82016, subdivision (a), provides: "'Controlled committee' means a committee that is controlled directly or indirectly by a candidate or state measure opponent 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."

⁴ Government Code section 85205 provides: "'Political Party Committee' means 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."

5. Respondent San Joaquin County Republican Central Committee/California Republican Victory Fund was a political party committee within the meaning of Government Code section 85205 in that it was the Republican central committee for San Joaquin County. (Hereafter, "San Joaquin County Republican Central Committee.")

6. The FPPC, when it determines there is probable cause for believing that the Political Reform Act has been violated, may hold a hearing to determine whether a violation has occurred. (Gov. Code, § 83116.)

On September 26, 2012, the FPPC issued an Order Finding Probable Cause and to Prepare and Serve an Accusation in this case. The order included a finding that respondents violated the Political Reform Act. The Accusation was prepared and served in accordance with the terms of the order.

Summary of the Case and Contentions

7. Tom Berryhill, who was a candidate for reelection to Assembly District 25 in 2008, made two contributions to the Stanislaus and San Joaquin County Republican Central Committees in the amount of \$20,000 each. Shortly thereafter, the two county central committees contributed similar amounts to Bill Berryhill's 2008 Assembly District 26 campaign. In 2008, an individual wishing to contribute to a candidate for the California State Assembly could not contribute more than \$3,600 per election. However, there was no limit on contributions from a political party committee to that same candidate.

The FPPC alleges that Tom Berryhill made contributions to the two central committees that were "earmarked" for his brother's campaign. It contends that the manner in which Tom Berryhill transferred the monies through the central committees to Bill Berryhill constituted "money laundering." The FPPC notes that this occurs when an individual makes a contribution in the name of another, the central committees in this case, and that such practice is prohibited by the Political Reform Act because it deprives the public of important information about the true source of campaign contributions, and it facilitates the unlawful circumvention of campaign contribution limits.

8. All but two of the remaining Accusation allegations relate to what campaign reports Tom Berryhill, Bill Berryhill and the two central committees should have filed if the FPPC's contentions regarding earmarking of contributions are correct. The 16 specific Accusation Counts are detailed below:

Count 1: Money Laundering

[Tom Berryhill and Tom Berryhill
for Assembly (source of funds)
Stanislaus County Republican
Central Committee (aided and abetted)]

Count 2: Making and Accepting Over-the-Limit Contribution

[Tom Berryhill and Tom Berryhill
for Assembly (source of funds)
Stanislaus County Republican
Central Committee (aided and abetted)]

Count 3: Money Laundering

[Tom Berryhill and Tom Berryhill
for Assembly (source of funds)
San Joaquin County Republican
Central Committee (aided and abetted)]

Count 4: Making and Accepting Over-the-Limit Contribution

[Tom Berryhill and Tom Berryhill
for Assembly (source of funds)
San Joaquin County Republican
Central Committee (aided and abetted)]

Count 5: Making and Accepting Over-the-Limit Contribution – Fund Raiser

[Tom Berryhill and Tom Berryhill
for Assembly (source of funds)
Bill Berryhill and Bill Berryhill for
Assembly (accepted contribution)]

Counts 6 and 7: False Reporting (Late Contribution Report/Semi-Annual
Campaign Statement)

[Bill Berryhill and Bill Berryhill for
Assembly]

Counts 8, 9 and 10: False Reporting (Late Contribution Reports/Semi-Annual
Campaign Statement)

[Tom Berryhill and Tom Berryhill for
Assembly]

Counts 11, 12, 13 and 14: Failure to Report Receipt and Making of In-Kind
Contribution

[Bill Berryhill and Bill Berryhill for
Assembly; Tom Berryhill and Tom
Berryhill for Assembly]

Counts 15 and 16: Failure to Report Receipt of Tickets

[Tom Berryhill]

The FPPC is seeking a monetary penalty against respondents of up to \$5,000 for each violation of the Political Reform Act, as alleged, in an amount not to exceed \$80,000.

9. Respondents contend that the FPPC failed to establish by a preponderance of the evidence that Tom Berryhill “conditioned” or agreed with the Stanislaus and San Joaquin County Republican Central Committees that his contributions to those committees be “earmarked” solely for Bill Berryhill’s campaign. Respondents further contend that both Republican Central Committees exercised their own discretion in making the contributions to Bill Berryhill’s campaign in late October 2008. Respondents believe that the law and the evidence do not prove FPPC’s claim that Tom Berryhill’s fundraiser on October 28, 2008, was a “non-monetary contribution” to Bill Berryhill’s campaign by virtue of a mere exhortation by Tom to his supporters to also help his brother Bill. Finally, Tom Berryhill disputes FPPC’s claims regarding his failure to report certain gift tickets received from the Walt Disney Company and the Pechanga Band of Luiseno Indians.

Overview of Law

Political Reform Act of 1974

10. When the Political Reform Act (Act) was approved by initiative measure in June 4, 1974, findings and declarations in support of the measure included the following:

- (a) State and local government should serve the needs and respond to the wishes of all citizens equally, without regard to their wealth;
- (b) Public officials, whether elected or appointed, should perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them;
- (c) Costs of conducting election campaigns have increased greatly in recent years, and candidates have been forced to finance their campaigns by seeking large contributions from lobbyists and organizations who thereby gain disproportionate influence over governmental decisions;
- (d) The influence of large campaign contributors is increased because existing laws for disclosure of campaign receipts and expenditures have proved to be inadequate;
- [¶] ... [¶]
- (h) Previous laws regulating political practices have suffered from inadequate enforcement by state and local authorities.

(Gov. Code, § 81001.)

11. To address these findings and declarations the Act purposed, among other matters, that “[r]eceipts and expenditures in election campaigns should be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited.” (Gov. Code, § 81002, subd. (a).) Although a major impetus for the Act was a preoccupation with influence of private campaign contributions on elections, it “undeniably was intended to deal comprehensively with influence of money, *all money*, on electoral and governmental processes.” (*Fair Political Practices Commission v. Suitt* (1979) 90 Cal.App.3d 125, 132. Italics in original.) To accomplish this purpose the Act requires “all candidates and committees supporting or opposing candidates and ballot measures to file periodic campaign disclosure statements. The act requires records to be kept (§ 84100), prohibits anonymous and cash contributions (§§ 84300, 84304), and regulates payments by agents and intermediaries (§§ 84302, 84303).” (*Id.* at p. 129.) As such, the Act prohibits money laundering, over-the-limit contributions, false reporting, and non-reporting. And notwithstanding the general rule of strict construction of statutes imposing penalties, the Act is to be liberally construed to accomplish its purposes and in order to fully protect the public interest. (Gov. Code, § 81003. See also *Community Cause v. Boatwright* (1981) 124 Cal.App.3d 888, 899.)

As the Act’s provisions regarding reporting of contributions, limitations on contributions and identification of the true source of contributions are implicated in this case, each is discussed in order below.

Reporting of Campaign Contributions

12. The Act defines “contribution” as “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 surrounding circumstances that it is not made for political purposes.” (Gov. Code, § 82015, subd. (a).) The most common type of contribution results in the payment of money to a candidate or committee. However, “the term ‘contribution’ includes not only cash and cash-equivalent contributions but also nonmonetary or ‘in-kind’ contributions of goods and services.” (*Fair Political Practices Commission v. Suitt, supra*, 90 Cal.App.3d at p. 129.)

At the core of the Act’s campaign reporting system is the requirement that a recipient committee file semi-annual campaign statements each year no later than July 31 for the period ending June 30, and no later than January 31 for the period ending December 31. (Gov. Code, § 84200, subd. (a).) A recipient committee is defined as a person or combination of persons who directly or indirectly “receives contributions totaling one thousand dollars (\$1,000) or more in a calendar year.” (Gov. Code, § 82013, subd. (b).) A recipient committee becomes a “controlled committee” when a candidate or his or her agent, or any other committee he or she controls has a significant influence on the actions or decisions of the committee. (Gov. Code, § 82016, subd. (a).)

13. The campaign statements must be filed in more than one place. Thus, Government Code section 84215 requires members of the legislature, candidates for such offices, their controlled committees, and committees formed or existing primarily to support

or oppose such candidates or officeholders to file campaign statements with: 1) the California Secretary of State; 2) the elections official of the county in which they are domiciled; and 3) the elections official of the county where the largest number of registered voters in the districts are affected. (Hereafter, the "Filing Officers.")

14. Government Code section 84211 sets forth the information that must be included in the campaign statement. This includes reporting of the total amount of contributions received during the period covered by the campaign statement and the total cumulative amount of contributions received. (Gov. Code, § 84211, subd. (a).) It also requires reporting of the total amount of contributions received during the period covered by the campaign statement from persons who have given a cumulative amount of \$100 or more, along with certain identifying information⁵ for such persons. (Gov. Code, § 84211, subds. (c) and (f).)

On the expenditure side, the Act requires reporting of "[t]he total amount of expenditures [including contributions] made during the period covered by the campaign statement and the total cumulative amount of expenditures made." (Gov. Code, § 84211, subd. (b).) It also requires reporting of the total amount of expenditures, including contributions, made during the period covered by the campaign statement to persons who have received \$100 or more. (Gov. Code, § 84211, subd. (i).) The campaign statement must include certain identifying information for each person to whom an expenditure of \$100 or more has been made during the period covered by the statement. (Gov. Code, § 84211, subd. (k).)

15. Each candidate or committee that makes or receives a late contribution must file a late contribution report with each Filing Officer within 24 hours of making or receiving the contribution. (Gov. Code, § 84203, subds. (a) and (b).) A "late contribution" is defined as a contribution aggregating \$1,000 or more that is made or received by a candidate or his controlled committee before an election, but after the closing date of the last pre-election campaign statement that was required to be filed by the committee before the election. (Gov. Code, § 82036.) This period of time before the election is referred to as the late contribution reporting period. In connection with the general election that was held on November 4, 2008, the late contribution reporting period was October 19 through November 3, 2008.

In the case of a late contribution that is an in-kind or non-monetary contribution, the normal 24-hour reporting deadline is extended to 48 hours, but only with respect to reporting

⁵ Such identifying information includes the person's full name, his or her street address, his or her occupation, the name of his or her employer, or if self-employed, the name of the business.

receipt of the contribution; reporting the *making* of such a contribution is subject to the normal 24-hour deadline. (Gov. Code, § 84203.3, subd. (b).)⁶

16. The above reporting requirements further the Act's purpose and objective that contributions and expenditures in campaigns "be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited." (Gov. Code, § 81002, subd. (a).)

Limitation on Contributions

17. The Act imposes campaign contribution limits with respect to the making and receiving of certain contributions. These limits are adjusted periodically,⁷ and different limits apply depending upon who is contributing and who is receiving. Thus, an individual currently wishing to contribute to a candidate for elective state office, other than a candidate for statewide elective office, cannot contribute more than \$3,000 per election. And a candidate for elective state office, other than a candidate for statewide elective office, cannot currently accept more than \$3,000 from such person. (Gov. Code, § 85301, subd. (a).) In connection with the November 4, 2008 election, an individual wishing to contribute to a candidate for California State Assembly could not contribute more than \$3,600 per election.

18. An individual currently may not make a contribution to a political party committee, and a political party committee may not accept, any contribution totaling more than \$25,000 per calendar year for the purpose of making contributions for the support or defeat of candidates for elective state office. (Gov. Code, § 85303, subd. (b).) At the time of the November 4, 2008 election, there was a calendar year limit of \$30,200 with respect to how much an individual could contribute to political party committees. Individuals could still exceed these contribution limits as long as the excess was not used by the committee to support/oppose candidates for elective state office. (Gov. Code, § 85303, subd. (c).)

19. A candidate for elective state office or a committee controlled by that candidate may not make any contribution to any other candidate for elective state office in excess of the \$3,000 limit set forth in Government Code section 85301, subdivision (a).

⁶ For purposes of calculating the 24 or 48-hour deadline, an in-kind or non-monetary contribution is "made" by the contributor, and "received" by the candidate or committee, on the earlier of the following dates: (a) the date that funds are expended by the contributor in connection with the making of the in-kind/non-monetary contribution; or (b) the date that the candidate or committee, or the agent of the candidate or committee, obtains possession or control of the goods or services, or the date that the candidate or committee otherwise receives the benefit of the expenditure. (Cal. Code Regs., tit. 2, § 18421.1, subd. (f).)

⁷ Under Government Code section 83124, the FPPC shall adjust the contribution limitations set forth in sections 85301, 85302, 85303 and 85400 in January of every odd-numbered year to reflect changes in the Consumer Price Index.

20. There are no limits on contributions from a political party committee, such as a county central committee, to candidates for elective state office. This is by design. In 2000, California voters adopted Proposition 34 to replace an earlier campaign reform measure. Proposition 34 favored contributions to political parties and authorized them to contribute or spend unlimited amounts of contributions they receive from donors to support candidates for state elective office.

Respondents explained that there are fundamentally differing policy views about the role political parties should play in our campaign finance system, and the constitutional justification for regulating campaign contributions to and by political parties to candidates. One view is that political parties are too closely linked to candidates they support, and therefore stricter regulation of political party finance prevents corruption or its appearance associated with candidates and officeholders, under the broad constitutional scheme outlined in the seminal Supreme Court campaign finance decision, *Buckley v. Valeo* (1976) 424 U.S. 1, affirming much of the Federal Election Campaign Act of 1971. Under this approach, contributions to and by political parties can be regulated just as much as contributions made directly to candidates. (See *Federal Election Commission v. Colorado Republican Federal Campaign Committee* (2001) 533 U.S. 431 [affirming the Federal Election Campaign Act limits on coordinated expenditures by political parties to support party-nominated candidates]; *McConnell v. Federal Election Commission* (2003) 540 U.S. 93 [affirming most of the Bi-Partisan Campaign Reform Act of 2002 (“McCain-Feingold”), Public Law 1007-15, 107 Cong., 2nd sess. (March 27, 2002)].)

A second view is that a political campaign finance system that is political party-centered, rather than candidate centered, is better from a freedom of speech and anti-corruption standpoint.⁸ Adopting a more party-centered system would in theory increase electoral competitiveness by affording political parties the opportunity to provide greater support to challenger candidates against incumbents, would increase information to voters, and would make candidates and political parties more accountable to the electorate. Respondents note that by enacting Proposition 34 in 2000, California has essentially adopted this second view about political parties.

21. As noted, Proposition 34 favors contributions to political parties and authorizes them to contribute or spend unlimited amounts of contributions they receive from donors to support candidates for state elective office. In section 1 of Proposition 34, the voters found and declared:

⁸ See, Peter J. Wallison and Joel M. Gora, *Better Parties, Better Government: A Realistic Program for Campaign Finance Reform*, American Enterprise Institute Press (2009). Wallison and Gora contend that the existing campaign finance reform scheme, although advertised as the best prescription for combatting political/campaign finance corruption, has served primarily to protect incumbent officeholders and consequently has reduced competitiveness in elections.

(1) Monetary contributions to political campaigns are a legitimate form of participation in the American political process, but large contributions may corrupt or appear to corrupt candidates for elective office.

[¶] ... [¶]

(3) Political parties play an important role in the American political process and help insulate candidates from the political corrupting influence of large contributions.

22. Proposition 34 was enacted to accomplish a number of purposes including: “to *strengthen* the role of political parties in financing political campaigns by means of reasonable limits on contributions to political party committees and by limiting restrictions on contributions to, and expenditures on behalf of, party candidates, to a full, complete, and timely disclosure to the public.” (Italics added. Proposition 34, section 1(b)(7).) In short, Proposition 34 provided more favorable contribution limits to political parties to support state candidates than for any other type of political committee or political candidate. And Proposition 34 specifically authorized political party committees to make unlimited contributions to support candidates for state elective office provided there is timely disclosure to the public. Thus, the Act excludes political party committees from contribution limits wherever they are imposed.⁹

23. County central committees are bona fide entities that have specific responsibilities to elect party candidates for state office. California political parties are the primary organizations that promote the election of candidates affiliated with those parties. They have played this role since they were organized in California and their core function is support of their nominees. California political parties include the state central committee and subordinate county central committees. (Elec. Code, § 7250 et seq.) County central committees have specific rights recognized by the campaign finance laws. (Gov. Code, §§ 85205, 85301, 85303 and 85400.) They also have First Amendment speech and associational rights. (See *Eu v. San Francisco Demo. Cent. Comm.* (1989) 514 U.S. 190; *Wilson v. San Luis Obispo Dem. Cen. Comm.* (2009) 175 Cal.App.4th 489, 497.)

The above matters must be considered when evaluating circumstances where an individual has already made the maximum allowable individual contribution to a candidate

⁹ The Act makes reference to political party committees being excluded from contribution limits in three places: 1) specific exclusions of political parties from the contribution limits to candidates found in Government Code sections 85301, subdivisions (a), (b) and (c), and 85303, subdivision (a); 2) the absence of any direct statutory limitation on contributions by political party committees to candidates for elective state office in Government Code sections 85301, 85303 or any other provision of chapter 5 of Division 9; and 3) the specific exclusion of political party campaign expenditures from the spending limits of Government Code section 85400, subdivision (d).

under Government Code section 85301, subdivision (a), and then goes on to make a contribution to a county central committee that subsequently makes a donation to the same candidate. An individual has the right to make a contribution up to \$25,000 to a political party committee “for the purpose of making contributions for the support or defeat of candidates for elective state office.” (Gov. Code, § 85303, subd. (b).) In the absence of earmarking, an individual’s right to contribute up to \$25,000 to a political party committee is not qualified, adjusted or reduced by the amount of any contribution the individual may already have made directly to the candidate. The political party committee is presumed to independently make contributions to a candidate. It does so as a separate entity. In the absence of evidence that an individual initially made a contribution to the committee “on the condition or with the agreement” that it would be contributed to a particular candidate, the \$25,000 limitation on contribution applies. (Gov. Code, § 85704.) Even where an individual is a “maxed out” donor to a particular candidate, he or she is not precluded from making a separate contribution to a political party committee with the hope that this same candidate will ultimately benefit. This is consistent with a plain reading of Government Code section 85303. It is also consistent with the strengthened role of political parties in financing political campaigns contemplated by Proposition 34 and its amendments to the Act.

The \$3,000 limitation on individual contributions to candidates is surely designed to temper the influence individuals may have on the election outcome or on the candidates themselves. FPPC contends that a maxed out individual donor really has no business donating to a political party committee if he or she hopes or reasonably believes such donation will ultimately benefit the candidate. It believes such practice would contravene the \$3,000 individual limitation. But this ignores the Act’s other protections which guard against earmarking and improper control/influence on a committee. In short, one may make an individual contribution up to \$3,000 to a candidate. And one may contribute an additional \$25,000 to a political party committee in hopes that the committee will also support that particular candidate. But one may not earmark or otherwise “launder” such contribution through a committee by a condition or an agreement that a particular candidate will receive the contribution. This is the primary issue in this case, and the Act’s provisions in regard to both earmarking and laundering are discussed below.

Identification of True Source

24. Government Code section 84301 provides: “No contribution shall be made, directly or indirectly, by any person in a name other than the name by which such person is identified for legal purposes.” Campaign “money laundering” occurs when an individual makes a contribution in the name of another. It is prohibited because it deprives the public of important information about the true source of campaign contributions and it facilitates the unlawful circumvention of campaign contribution limits. (Gov. Code, § 81002, subd. (a).) Where the source of funds is intentionally masked by channeling funds through an intermediary, the intermediary is sometimes referred to as a “straw man.”¹⁰ Thus

¹⁰ Dictionary.com defines “straw man” to mean “a person whose importance or function is only nominal, as to cover another’s activities; front.”

Government Code 84302 requires disclosure of both the intermediary and the contributor in such cases, and provides as follows:

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 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.

For purposes of Government Code section 84302, a person (or committee) is an intermediary for a contribution if “[t]he 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.” (Cal. Code. Regs., tit. 2, § 18432.5, subd. (a).)

25. The case of *United States v. O’Donnell* (9th Cir. 2010) 608 F.3d 546 is instructive. The defendant-appellee in *O’Donnell* contributed \$26,000 to the Edwards for President Campaign through 13 individuals – primarily employees of his law firm as well as some of his relatives. The federal laundering statute prohibited one from making a contribution in the name of another person or “knowingly permit his name to be used to effect such a contribution.” (2 U.S.C. § 441f.) The court determined that the contributions were actually made by the defendant and that the individual intermediaries acted at his direction and knowingly permitted their names to be used to effect such contribution. In reaching its conclusion the court explained:

In a straw donor situation, the person who actually transmits the money acts merely as a mechanism, whereas it is the original source who has made the gift by arranging for his money to finance the donation. To identify the individual who has made the contribution, we must look past the intermediary’s essentially ministerial role to the substance of the 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.

(*Id.* at. p. 550.)

26. The earmarking of campaign contributions to a county central committee was strictly prohibited under the Act's former section 85703, repealed in 2000, and which provided:

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.

Under current law, this outright prohibition has been lifted in favor of a statutory scheme that now allows earmarking where there is full disclosure to the public that the original contributor is the true donor and that the committee is an intermediary. Accordingly, Government Code section 85404, which replaced former section 85703, provides: "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 disclosed pursuant to Section 84302.*" (Italics supplied.) Government Code section 84302 now requires full disclosure of the intermediary relationship and identification of the original contributor as the true source of funds.

27. The parties urge various and different construction of the above statutes as applied to the facts of this case. The FPPC, consistent with a liberal construction of what constitutes earmarking under the Act, gives broad interpretation to the phrase "on the condition or with the agreement." Respondents favor a much narrower interpretation. Fuller consideration of the parties' views is deferred to the discussion portion of this decision, and the parties' positions are only briefly summarized below.

28. The FPPC contends that any "agreement" about the money going to a particular candidate is sufficient, regardless of whether the earmarking "agreement" is oral, written, direct, indirect (through messengers/representatives), explicit or implicit. It notes that "even a wink and a nod" are sufficient. The FPPC believes a "condition" merely connotes that the donor intends for the money to go to a particular candidate and that the committee is made aware of this fact. It is essentially an expression of donor intent, and it is not required that the "condition" rise to the level of an "agreement." The FPPC also contends that a condition may be imposed by the committee, and that such "condition" will become an "agreement" if the donor gives the money to the committee with knowledge of the "condition." Thus, FPPC believes that when a central committee, which is not subject to the same contribution limits as individuals, makes it known that any funds received will go to Candidate A, the committee becomes a funnel for maxed out contributors to Candidate A. The FPPC notes that an "understanding" is encompassed by section 85704's reference to "condition" and "agreement" and that this understanding essentially earmarks the committee's contribution for a particular candidate. Importantly, the FPPC contends that a violation of the statute occurs when the intermediary committee *accepts* the earmarked contribution, and that it cannot use as a defense that it expended funds at its "sole discretion."

The FPPC believes that the committee must return earmarked funds to the donor if the committee wishes to retain its sole discretion.

29. Respondents contend that central committees have specific rights recognized by the campaign finance laws, including First Amendment speech and associational rights. And that Proposition 34 provided more favorable contribution limits to political parties, including the right to make unlimited contributions to candidates for state elective office, such as State Assembly member. Respondents interpret *O'Donnell* and comparable federal statutes as guarding against contributions that are “directed” by a person through an intermediary. While the term “directing” is not defined in statute, respondents note that it connotes that the person directing the action has the authority, control or influence to do so. Respondents disagree with FPPC’s interpretation of when a section 85704 violation occurs. For example, respondents reject a liberal construction of the Act which would find that earmarking occurred when a donor made a contribution to a committee when the donor knew that the committee indicated it would support a specific candidate. Respondents note that when a committee targets races and candidates it intends to support, the effect is not an “offer” that can be accepted by a donor. This is because the committee retains the discretion on how to use or not use the funds, and it can always “change its mind.”

Respondents believe that evidence of a “condition” or “agreement” must be based upon explicit communications between the parties, and not based upon more abstract theories of what may constitute an understanding under the law. Finally, respondents believe that actions taken by a committee in its sole discretion are relevant in determining whether earmarking has occurred, or whether a committee acted as an intermediary.

Behesting Theory

30. The above matters look largely to donor intent and actions. One may also look to the recipient to determine whether a contribution has been made. The Act provides that a “contribution” includes a “payment made at the behest of a candidate.” (Gov. Code, § 82015, subd. (b)(2).) “Made at the behest of” includes contributions that are made “in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express, prior consent of, the true recipient.” (Cal. Code. Regs., tit. 2, § 18225.7, subd. (a).) Thus, FPPC contends that even if earmarking is not found in this case, contributions made by Tom Berryhill at the “behest” of Bill Berryhill or his staff are “presumed to be made at the behest of the candidate or committee,” particularly if the contribution was made based upon information about Bill Berryhill’s “campaign needs or plans.” (See Cal. Code. Regs., tit. 2, § 18225.7, subd. (c)(1).) If such behesting occurred, FPPC contends the contributions from Tom Berryhill to the two county central committees must be reported as a contribution from him to Bill Berryhill’s campaign. In the alternative, FPPC believes that behesting theory supports the essentially “ministerial role” played by the two central committees where the candidate ended up receiving contributions through indirect transfers at the candidate’s “behest.” FPPC contends that under either a behesting or a money laundering theory, respondents failed to report the contributions made by Tom Berryhill to Bill Berryhill’s campaign.

Respondents contend that FPPC's behest theory is wrong as a matter of longstanding FPPC interpretation and its own regulations. Respondents point to specific FPPC regulations providing that contributions made at the behest of a candidate for a different candidate or to a committee not controlled by the behesting candidate are not considered as contributions to the behesting candidate. (See Cal. Code. Regs., tit. 2, § 18215, subd. (d).) Respondents note that political party committees are specifically excluded from the definition of "controlled committee" and that to have done otherwise would have had the perverse and unintended effect of making contributions to the central committees subject to the candidate's contribution limits.¹¹ Both parties cite provisions of FPPC regulations defining "at the behest." (Cal. Code. Regs., tit. 2, § 18225.7.) Respondents believe there is no evidence in the record that Tom Berryhill's activities, either his monetary contributions to the county central committees or his exhortation to others at a fundraising event to support Bill Berryhill, were made at the "behest" of Bill Berryhill as the regulations define that term.

Accusation Findings

The applicable law having been summarized above, factual findings on the Accusation are set forth below.

The Campaign – Through October 23, 2008

31. In 2008, Bill Berryhill was the Republican candidate for the open seat for Assembly District 26. His opponent was Democratic candidate John Eisenhut. Voter registration for this district went initially from favoring Republicans to favoring Democrats. An October 20, 2008 report of registration for District 26, for example, indicated Democratic registration at 41.90 percent, and Republican at 39.59 percent, a difference of only 2.31 percentage points.

Bill Berryhill contributed substantial funds to his own campaign. He was considered a strong candidate with good name recognition. His father was elected to the State Senate in 1969, and served as the Secretary of Agriculture under former Governor George Deukmejian. His brother was the incumbent candidate for the Assembly District 25 seat. Theirs was a four-generation family with strong ties to the Central Valley community. Bill Berryhill's campaign went well initially and candidate John Eisenhut was not perceived as a threat until the very last month of the campaign.

32. In October 2008, the Democrats directed anywhere from \$500,000 to one million dollars into John Eisenhut's campaign, a very substantial amount in a Central Valley election campaign. It was also a presidential election year and Bill Berryhill and others described an Obama "tidal wave" of support for Democratic candidates. Bill Berryhill's campaign was "hammered" with multiple daily mailers, mostly negative, and the polling data

¹¹ Government Code section 82016, subdivision (b) provides: "Notwithstanding subdivision (a), a political party committee, as defined in Section 85205, is not a controlled committee."

indicated that it had become a very tight race entering the last weeks of the campaign. The same polling data indicated that Bill Berryhill's name recognition was not as high as had been hoped.

33. By the end of October 2008, Bill Berryhill and those working on his campaign became very concerned about his election prospects and agreed there was an urgent need to raise funds to counter the Democratic infusion of dollars. They formulated a plan to expend between \$87,000 and \$100,000 for a commercial television campaign against John Eisenhut that was to be aired over the final week of the campaign. They required additional funds to do so.

The campaign was now considered to be a very tight race. Respondents believed there would be high Democratic voter turnout for Presidential candidate Barrack Obama. The Assembly District 26 race became a high priority seat, and the campaign became a "targeted" race. This recognized that in an election year, monies were better spent by political parties where they had the best chance of either holding (protecting) or picking up new seats. Elections are very expensive, and by targeting close races political parties expected to gain the most for each dollar spent.

34. Bill Berryhill described the 2008 election as the number two or three targeted race out of five target assembly races that year. Mike Villines, the Assembly Republican Leader in 2008, testified at hearing. In his position Mr. Villines provided leadership for the California Republican Party, the Republican Caucus and the Republican state central committee. Mr. Villines confirmed that the Assembly District 26 race was initially considered a safe seat. As polling data changed, and with the infusion of Democratic funds for John Eisenhut, Mr. Villines explained that it became a targeted race. Mr. Villines had the ability to recommend to the Republican Central Committee that it contribute monies to certain races. He did so in this case and the California Republican Party contributed \$50,000 to Bill Berryhill's campaign at that time.¹² The California Republican Party further communicated target race information, including information about Bill Berryhill's targeted race, to the county central committees. Mr. Villines averred that California Republican Caucus and Party strategies and race information were both transparent and communicated statewide.

35. Tom Berryhill has also been a member of the Republican Caucus and was part of Mr. Villines's leadership team. Mr. Villines described Tom Berryhill as one of the most important Republican fundraisers and party leaders. The two have worked together in past years raising and directing monies to Republican candidates and causes. In 2008, Tom Berryhill made the maximum individual contribution to Bill Berryhill's campaign.

On or about October 23, 2008, Mr. Villines called Tom Berryhill with a plan to raise \$100,000 for Bill Berryhill's campaign to pay for a television commercial.

¹² On October 30 and 31, 2008, the California Republican Party made two separate contributions to Bill Berryhill in the amounts of \$25,000 each, for a total of \$50,000.

Ringling the Bell – October 26, 2008

36. Carlton Fogliani was Bill Berryhill's campaign consultant in 2008. He had previously served as a campaign consultant to Tom Berryhill in 2006. Landon Whitney was Bill Berryhill's campaign manager. In mid to late October 2008, Mr. Fogliani developed the concept to air a television ad for Bill Berryhill. With the approval of Bill Berryhill, he arranged and produced a television spot for approximately \$87,000. Mr. Fogliani believed it was an important component of any campaign, particularly in the last week of the campaign. Mr. Fogliani did not have a fundraising role, but he was aware of how much funds were available for the campaign. He was also owed monies, noting that at one point he was "probably down \$100,000" and concerned about being repaid.

Mr. Fogliani was interviewed by FPPC staff on April 29, 2010, and deposed on July 26, 2013. He described a conversation that he had with Tom Berryhill on October 26, 2008. Mr. Fogliani expressed his concern to Tom Berryhill that they were "spending a lot of money" on Bill Berryhill's campaign, that money was owed to him, and that they needed more money. Mr. Fogliani characterized the nature of this conversation as "ringing the bell." This was not at all unusual for him to do as a campaign consultant. Mr. Fogliani stated to Tom Berryhill that "my ass is hanging in the wind" and that he was "doing a lot of product and I need to be, you know, paid for it." Tom Berryhill told Mr. Fogliani that "we'll see what we can do." Mr. Fogliani had also received earlier assurances from Bill Berryhill and Landon Whitney that the money would be there.

Fundraiser – October 28, 2008

37. On October 28, 2008, Tom Berryhill held a fundraiser. It was for his own reelection campaign for the California State Assembly, 25th District. His was considered a routine reelection and there was no urgent need for funding. Diane Stone Gilbert specializes in political fundraising and she organized the event. She charged 10 percent of gross receipts for her services in organizing such events. It was held at the Modesto home of Matt and Barbara Bruno. Ms. Gilbert testified at hearing. The fundraiser was organized and advertised as being for Tom Berryhill's reelection. Invitations were sent out in September 2008, and approximately 100 to 120 guests attended the event. Bill Berryhill was also present.

38. During the fundraiser Tom Berryhill addressed his guests. Bill Berryhill was with him. Tom Berryhill introduced his brother and told the guests that it was "real important that Bill win this race." He reminded everyone that Bill Berryhill's race was going to be close and that it was important that they got out the vote. Tom Berryhill's purpose was to "fire people up to walk the precincts." Tom Berryhill also encouraged his guests to "stay involved in Bill's campaign so we could get him across the finish line." He directed them to support Bill Berryhill financially by making contributions to the Stanislaus County Republican Central Committee.

Jim DeMartini was the Vice Chair of the Stanislaus County Republican Central Committee at that time. He was present at the October 28, 2008 fundraiser. He testified at hearing. Mr. DeMartini recalls Tom Berryhill getting up and addressing the guests at the fundraiser.

39. Approximately \$56,675 was raised at the October 28, 2008 fundraiser. On January 4, 2009, Ms. Gilbert submitted an invoice to Tom Berryhill for Assembly for \$5,550 as her consultant fee for this event. She averred that the fundraising event was solely for Tom Berryhill, and was neither intended to be, nor converted into one for Bill Berryhill. She viewed her client to be Tom Berryhill. As a result of this fundraiser, Ms. Gilbert received checks made out to Tom Berryhill's reelection committee. She received no checks made out to Bill Berryhill. She received no checks made out to either the Stanislaus or San Joaquin County Republican Central Committees. She did not consider the fundraiser to be an in-kind contribution to Bill Berryhill. She denied providing any goods or services to Bill Berryhill in connection with the fundraiser.

40. With regard to the above-described fundraiser, Tom Berryhill and Tom Berryhill for Assembly did not report the making of an in-kind contribution to Bill Berryhill, and Bill Berryhill and Bill Berryhill for Assembly did not report the receipt of an in-kind contribution, on either their semi-annual campaign statements or on their late contribution reports.

October 29, 2008

41. Joan Clendenin was the Chair, and Gary McKinsey was the Treasurer of the Stanislaus County Republican Central Committee. On October 29, 2008, Tom Berryhill exchanged a combined eight text messages with Joan Clendenin (5) and Gary McKinsey (3). On that same date, Tom Berryhill for Assembly issued a \$20,000 check to the Stanislaus County Republican Central Committee. It was sent by overnight mail and received the next day.

42. On the evening of October 29, 2008, Tom Berryhill and Carl Fogliani exchanged a series of five email and text messages. At 8:28 p.m., Mr. Fogliani sent Tom Berryhill an email with the subject line "call me." Tom Berryhill sent two text messages to Mr. Fogliani at 8:38 p.m. and at 9:04 p.m.

43. At 9:44 p.m., Tom Berryhill emailed Mr. Fogliani: "Think I can get mony [sic] earlier. Tom. Late morning."

At 9:45 p.m., Mr. Fogliani replied: "Even better."

October 30, 2008 – Stanislaus Central Committee

44. On October 30, 2008, Gary McKinsey went to the post office and picked up the mail, which included the \$20,000 check from Tom Berryhill. Mr. McKinsey called Joan Clendenin and told her about the check. She told him that the check needed to be deposited

in the bank that same day. She also requested that he prepare and issue a \$20,000 check to Bill Berryhill. Mr. McKinsey offered to deliver the check, and she promised to call him again later and let him know what to do. Mr. McKinsey photocopied and then deposited the check from Tom Berryhill. He carried with him the separate check made out to Bill Berryhill. Bank records indicate that the committee did not have sufficient funds to make its contribution to Bill Berryhill without the money that was received from Tom Berryhill's committee.

45. Mr. McKinsey left the bank and walked back to his car. Approximately one block from the bank he was approached by Bob Phelan, Tom Berryhill's District Office Manager. Mr. Phelan knew that Mr. McKinsey had a check for Bill Berryhill. He asked Mr. McKinsey if he had a check for Bill Berryhill. Rather than wait for further instructions from Joan Clendenin, Mr. McKinsey gave Mr. Phelan the \$20,000 check and returned to the office. He assumed that Mr. Phelan was there on behalf of Bill Berryhill. There was no evidence regarding whether Mr. Phelan was working on personal time or loaned out to Bill Berryhill at the time of this transaction.

October 30, 2008 – San Joaquin Central Committee

46. On October 30, 2008, Tom Berryhill for Assembly issued a \$20,000 check to the San Joaquin County Republican Central Committee. Dale Fritchen was the Chair, and Louis Lemos was the Treasurer of the San Joaquin County Republican Central Committee. A series of email exchanges at that time indicates that the San Joaquin County Republican Central Committee was trying to quickly receive the \$20,000 contribution from Tom Berryhill to the committee, and to just as quickly transmit that amount to Bill Berryhill. Kelly Lawler was a consultant to the San Joaquin County Republican Central Committee. At 12:46 p.m., Mr. Lemos emailed Kelly Lawler and asked her whether the committee could receive and send funds via wire. Mr. Fritchen was waiting on the phone during this exchange. He acknowledged that these communications were related to the \$20,000 Berryhill contribution.

47. The \$20,000 was not wired to the committee. At 3:19 p.m., Dale Fritchen emailed Louis Lemos that he had picked up the \$20,000 check. He also indicated: "Let's give 21K to Bill Berryhill. They are willing to take a check. I met with Bill and they are desperate for money to put out a commercial campaign that they are already committed for. The polls show he is going to win, but it is going to be close."

48. By the end of the day, the committee had yet to deliver any money to Bill Berryhill. Bill Berryhill's campaign manager, Landon Whitney, contacted Dale Fritchen at 4:54 p.m.

49. Bank records indicate that the committee did not have sufficient funds to make its contribution to Bill Berryhill without the money that was received from Tom Berryhill's committee.

October 31, 2008 – San Joaquin Central Committee

50. On the morning of October 31, 2008, at 9:33 a.m., Carl Fogliani and Dale Fritchen spoke by telephone. Mr. Fritchen testified that there was some urgency expressed about getting the money to Bill Berryhill's campaign, presumably to meet a television deadline. He also believed there may have been worry that the committee would run out of funds and Bill Berryhill's campaign would not receive as much if the money was not received sooner. ["I think that they were worried that tomorrow or next week there would be less money and less money available to them. So they wanted it quick."]

51. Carl Fogliani subsequently called Tom Berryhill at 9:34 a.m. They spoke for six minutes.

52. At 9:49 a.m., Chuck Hahn sent an email to Dale Fritchen and Louis Lemos stating: "Carl (berryhill) really needs the check from you all – asap." Chuck Hahn was a member of the San Joaquin County Republican Central Committee. Mr. Hahn was also a California Republican party representative who worked with Mike Villines and apparently wielded some influence within the party.

53. At 10:13 a.m., Carl Fogliani sent an email to Tom Berryhill providing him all information needed to wire funds to the Bill Berryhill for Assembly bank account with Farmers & Merchants Bank.

At 10:21 a.m., Louis Lemos sent an email to Chuck Hahn and Dale Fritchen stating: "The check is written and Dale is looking into depositing the check directly into Bill Berryhill's account The check will be sent FedEx overnight Saturday delivery (cost about \$50) if the bank deposit option does not work."

54. Chuck Hahn forwarded the 10:21 a.m. email to Carl Fogliani. Carl Fogliani sent Chuck Hahn an email with the wire fund information he had earlier sent to Tom Berryhill. Chuck Hahn emailed back: "i am not the middle man – send to louis and dale."

At 11:10 a.m., Louis Lemos emailed Chuck Hahn: "Dale just left my office to make a deposit and deliver the Berryhill check."

55. The above sequence of events fairly demonstrates that it took but a single telephone call from Carl Fogliani to Tom Berryhill to get a California Republican Party (CRP) representative (Chuck Hahn) to tell the San Joaquin County Republican Central Committee to send the money to Bill Berryhill "asap."

56. At 12:23 p.m., Carl Fogliani and Landon Whitney received an email from Jason Clendenen, a bookkeeper with Clendenin, Bird & Co.,¹³ which provided the current

¹³ Clendenin, Bird & Company, P.C., was the Berryhill family and campaign accounting firm. The Chairman of the Stanislaus County Republican Central Committee,

status of funds received. The subject line was "Berryhill Wire Transfers." As of that time, Bill Berryhill's campaign had received two¹⁴ \$20,000 contributions from the Stanislaus County Republican Central Committee, a \$25,000 contribution from the CRP, and a second \$25,000 contribution from the CRP that was in the process of being wired to the committee.

57. At 12:25 p.m., Carl Fogliani sent an email reply stating: "Laura Ortega is delivering almost 30K in a matter of moments. Let me know when she arrives and the status after that ... Thanks." Laura Ortega was Tom Berryhill's Chief of Staff at that time.

Having previously accounted for the two \$20,000 contributions from the Stanislaus County Republican Central Committee and the \$50,000 wire transfers from the CRP, the approximately \$30,000 that was delivered by Laura Ortega must have included the \$21,000 from the San Joaquin County Republican Central Committee per Dale Fritchen's direction.

58. At 2:18 p.m., Carl Fogliani sent Tom Berryhill an email with the subject line: "Find any new dough?"

Campaign Records

59. On October 31, 2008, Bill Berryhill, by and through his controlled committee, Bill Berryhill for Assembly, filed a late contribution report with the Secretary of State which indicated that separate contributions in the amount of \$20,000 each were received from the Stanislaus and the San Joaquin Republican Central Committees.

On February 3, 2009, Bill Berryhill, by and through his controlled committee, Bill Berryhill for Assembly, filed a semi-annual campaign contribution report with the Secretary of State which indicated that separate contributions in the amount of \$20,000 each were received from the Stanislaus and San Joaquin County Republican Central Committees.

60. On October 29, 2008, Tom Berryhill, by and through his controlled committee, Tom Berryhill for Assembly, filed a late contribution report with the Secretary of State which indicated that a \$20,000 contribution was made to the Stanislaus County Republican Central Committee.

On October 30, 2008, Tom Berryhill, by and through his controlled committee, Tom Berryhill for Assembly, filed a late contribution report with the Secretary of State which indicated that a \$20,000 contribution was made to the San Joaquin County Republican Central Committee.

Joan Clendenin, is married to the founding partner of this firm. Jason Clendenen was a firm employee/bookkeeper. He spells his name differently.

¹⁴ The Stanislaus County Republican Central Committee also received \$20,000 from the Chukchansi Indians on October 31, 2008. The committee immediately wired the same amount to Bill Berryhill.

61. On February 3, 2009, Tom Berryhill, by and through his controlled committee, Tom Berryhill for Assembly, filed a semi-annual campaign contribution report with the Secretary of State which indicated that separate contributions in the amount of \$20,000 each were made to the Stanislaus and San Joaquin County Republican Central Committees.

Testimony of Tom Berryhill

62. Tom Berryhill has been a major supporter of and contributor to the Republican Party and its candidates over the years. He has regularly given the maximum individual contribution to numerous candidates. For example, between March 17 and October 24, 2008, he gave the maximum \$3,600 contribution on 19 different occasions to State Assembly and Senate races. He gave the maximum \$30,200 contribution to the California Republican Party or Leadership Fund on four occasions since May 2007. He has given \$20,000 to the Stanislaus County Republican Central Committee on four occasions since October 2008. In 2008, in addition to contributing \$20,000 each to the Stanislaus and San Joaquin County Republican Central Committees, he contributed \$30,000 to the Republican Party of Yolo County.

Tom Berryhill recalled being a “maxed out” individual contributor in 2008, for both the primary and general elections. In 2012, he was a maxed out individual contributor to all targeted races identified by the CRP and Caucus.

63. In 2008, Tom Berryhill understood that Bill Berryhill’s campaign was a “watch race.” He helped his brother raise funds by making call on his behalf, just as he had done for many other candidates, and as he believed was expected of him as a member of the Republican leadership team. When the Democrats poured money into Bill Berryhill’s opponent’s campaign late in the election cycle, “every red flag went up” and it became a “high priority” seat. Tom Berryhill identified only two other targeted CRP races at that time: the separate state senate races by Republican candidates Tony Strickland and Greg Aghazarian. He supported both candidates.

Tom Berryhill understands that the Republican Party state and county central committees are independent and that their leadership teams are responsible for deciding how and where to disburse contributions received. He understands that earmarking contributions to central committees is against the law. He denies that any earmarking occurred in this case.

64. Tom Berryhill noted that near the end of the 2008 election cycle, Bill Berryhill’s race was the “only game in town” and that he hoped that monies contributed to the Stanislaus and San Joaquin County Central Committees would go to Bill Berryhill’s campaign. At the same time, Tom Berryhill understood that there was no guarantee that the central committees would disburse funds to any given candidate. He merely hoped, given the information that the county central committees had before them, that they would make the “right decision.” Tom Berryhill noted their reputation for being “good central committees” and knew the people involved on the Stanislaus County Republican Central Committee particularly well. [“We trusted them to do the right thing with the money.”] Tom Berryhill preferred giving money to the county central committees over the CRP state central committee because the latter retained 10 percent of all contributions, and he did not agree with some of the past CRP expenditures on candidates “who got waxed.” He believed the “counties did a better job giving money to the candidates that needed it.”

65. Tom Berryhill denied having any discussions with Dale Fritchen about any contributions to the San Joaquin County Republican Central Committee being passed through to Bill Berryhill. He also denied having any such discussions with James DeMartini or Joan Clendenin regarding the Stanislaus County Republican Central Committee. He explained that there were only so many hot races (Greg Aghazarian, Bill Berryhill and Tony Strickland) and that he “hoped and prayed” that the committees would use the money well.

66. Tom Berryhill has held dozens of political fundraisers over the years, both in Sacramento and in his assembly and senate districts. He described the October 28, 2008 fundraiser as both typical and successful. Over a hundred guests attended. He acknowledged introducing his brother and asking the guests to support him. Tom Berryhill told his audience that if they were maxed out there were still other avenues through which to give and he made specific reference to the Stanislaus County Republican Central Committee. Tom Berryhill averred that he never implied that by so doing any money given to the committee would then be passed through to Bill Berryhill. He understood that it was difficult to raise money for Bill Berryhill if everyone was maxed out. By asking guests to give money to the central committee he was again hoping that the central committee would “do the right thing.”

Tom Berryhill noted that his actions were no different than what he has done for dozens of other candidates. He simply encouraged everyone to help Bill Berryhill in any way that they could, and to make out checks out to him or to the central committee.

Testimony of Bill Berryhill

67. Bill Berryhill’s 2008 Assembly District 26 campaign became a target race in October 2008. Until the last month he believed he was in good shape. He believes the Democrats poured close to one million dollars into his opponent’s campaign. Suddenly, households in his district were receiving five Democratic mailers per day, compared to his one. Bill Berryhill met with CRP leadership, including Mike Villines, over the last four to six weeks of his campaign. There were five target races at that time and everyone was “ringing the bell” for money. Prior to the infusion of Democratic money, Bill Berryhill expected to raise his own money and he did not ask the CRP or its leadership for money. This changed and he rang the bell a “little bit” to answer the “Democratic blitz.”

Bill Berryhill did not have direct discussions with the Stanislaus or San Joaquin County Republican Central Committees during which he asked them for money for his campaign. He did attend committee candidate forums where he spoke. He knew Dale Fritchen, Jim DeMartini and Joan Clendenin, on either a personal level or from common political circles.

68. This was Bill Berryhill’s first major campaign. He had previously served on a school board. He retained Carl Fogliani as his campaign consultant to handle strategy, polling, budget, campaign mailers, and television buys. He did not authorize Mr. Fogliani to raise funds for him, but acknowledged that Mr. Fogliani helped him raise money. He retained Landon Whitney to be his campaign manager and handler at most events.

Bill Berryhill is not a micromanager and he did not become involved in campaign minutia. He viewed his role largely as appearing at campaign breakfast, lunch and dinner events – and speaking to various groups. He relied upon Carl Fogliani and others to run the campaign details. Thus, he was not even aware that his campaign was going on television until the day before this occurred. Bill Berryhill's wife told him about the television commercial, after she had spoken to Carl Fogliani's wife. Bill Berryhill noted that Carl Fogliani had "implied approval" to produce a television spot and that he had given him a green light to do so. However, he characterized the ad as a "nasty spoof" of which he was not proud.

69. Consistent with his reliance upon others to run his campaign, Bill Berryhill had no discussions with central committee members in which he asked for money. He asked no donors to contribute monies to the central committees. Bill Berryhill was unaware of any conversations Carl Fogliani had with others, including with central committee members or with his brother. Bill Berryhill did not ask Tom Berryhill to give money to the Stanislaus or San Joaquin County Republican Central Committees. Bill Berryhill had no knowledge of his brother's contributions to the two central committees at that time. He was unaware of his brother having had any discussions with the two central committees. He never asked or solicited his brother to give money to his campaign through the two central committees. He had no idea that the two central committees were even contributing money to his campaign. He became aware of the monies only after the fact. Bill Berryhill noted that the only money he expected to receive was from the CRP, based upon his earlier discussions with Mike Villines. He denied ever speaking with his brother about receiving large sums of money from him. He characterized past discussions with Tom Berryhill as "brotherly advice" and the two having conversations "as any brothers do." He understood that his brother would unofficially serve as an advisor to and fundraiser for him, but believed this was no different than what Tom Berryhill did for other candidates around the state.

70. Bill Berryhill attended his brother's October 28, 2008 fundraiser. He viewed it as Tom Berryhill's fundraiser. Bill Berryhill is sure that his brother made a pitch to support him, but he recalls no details of what was said. Bill Berryhill does not recall receiving any contributions from attendees at that event. He noted that the event or attendees were outside his district. Jim DeMartini was present at the fundraiser. Bill Berryhill denied asking him for money from the Stanislaus County Republican Central Committee.

Bill Berryhill knows Diane Gilbert and he had used her services as a fundraiser during his own primary election campaign. It was his plan to spend up to \$100,000 of his own money for his election, the maximum one can donate to oneself. He denied ever speaking to Tom Berryhill about receiving money from him money via the two central committees. He explained that doing so would have been illegal.

Testimony of Joan Clendenin

71. Ms. Clendenin served as Chair of the Stanislaus County Republican Central Committee from January 2007 through December 2008. She indicated that she made the decision to issue the \$20,000 check to Bill Berryhill.

The purpose and duties of the Stanislaus County Republican Central Committee include support for California Republican nominees for partisan office and to “contribute funds, leadership, manpower and prestige to their campaigns to the extent of the Committee’s ability.” (Committee Bylaws, Article II, subd. (B).) The Committee Bylaws provide for an executive committee which “shall have the authority to expend the funds of the Committee in its ordinary operation.” Distribution of funds to candidates is specifically excluded from such expenditure authority.¹⁵ In the event that approval of the executive committee is “not convenient or in the opinion of the Chairman immediate action is warranted for any reason, the Chairman is authorized to undertake such action of all ordinary matters so designated and to present these at the next regularly scheduled meeting of the Executive Committee.” (Committee Bylaws, Article V, subd. (F).) Ms. Clendenin interpreted these provisions as providing her with the authority, when immediate action was required, to make contributions to candidates without first obtaining the consent or a vote from the executive committee. She explained that it was the charge of the Committee to expend funds to elect Republican candidates and as Chair she could make decisions related to distribution of funds to candidates. She would then convey her decision to the executive committee at its next meeting through the treasurer’s report. Committee checks must be co-signed and only certain officers were authorized to sign checks. However, Ms. Clendenin signed checks in advance so that only a single signature was required. She noted that all the above practices were the way Committee business was done in 2008.

72. Ms. Clendenin averred that the whole Committee understood the intent to give money to Bill Berryhill. The only question was when and what amount, a decision to be made by Ms. Clendenin. She noted that it was probable that she and Vice Chair Jim DeMartini had a conversation about contributing to Bill Berryhill well in advance of the Committee’s actual contribution. However, she denied having conversations with any individuals making contributions to the Committee about where they wanted the money to go. [“As a rule, you just don’t do it.”] She specifically denied having any conversation with Tom Berryhill regarding how his contribution to the Committee would be spent. There was no condition or agreement that it would be given to Bill Berryhill.

73. Ms. Clendenin was aware by the end of October 2008 that Bill Berryhill was in a tight race. She believes she spoke with his campaign manager, Landon Whitney, who frequently came into the office. She saw television commercials for John Eisenhut and she was aware that there had been none for Bill Berryhill. She recalls being told that Bill Berryhill’s campaign was either raising money for a commercial, or did not have funds for one. She understood that Bill Berryhill was now in a targeted race, that the election was a week ahead and that mailers and television time required advance payments by the candidates.

Ms. Clendenin also had past history in mind. She is personal friends with the wives of Tom and Bill Berryhill. She was aware that Tom and Bill Berryhill’s father, Clare

¹⁵ See “Executive Committee” contained in Article V, subdivision (F) of the Committee Bylaws.

Berryhill, lost an election in 1989 when there was a similar last-minute advertising blitz by his opponent. She also noted that Tom Berryhill faced a similar situation in 1996 when he lost an Assembly race by less than 100 votes, and that he ended the campaign without spending \$70,000 he had in the bank.

74. Having considered the above matters, Ms. Clendenin was determined to give as much as the Committee could to Bill Berryhill to keep that Assembly seat in Republican hands. She instructed the Committee's treasurer, Gary McKinsey, "Whatever we can give, give." She explained to Mr. McKinsey that: "Bill is our candidate. It's a targeted race. We have a job to support our candidate in any way we can." She did not consult with other executive committee members, reasoning that the Committee "knew it would eventually be giving contributions to Bill. You just do it."

Ms. Clendenin made the decision to issue the \$20,000 check to Bill Berryhill based upon the amount of money that was then available in the Committee's checking account. She averred that she initially had no knowledge that the \$20,000 contribution came from Tom Berryhill.

75. Ms. Clendenin has little or no recall of the events of October 29 and 30, 2008. She noted that she had a Blackberry and that she did not send or receive text messages. She may have traded voice messages, but denies having any conversation with Tom Berryhill about contributions to the Committee. She noted that over the years she has had many conversations with Tom and Bill Berryhill and their spouses. They discussed "lots of things, not necessarily about contributions."

Ms. Clendenin averred that she does not know how it came about that Robert Phalen was on hand to receive the \$20,000 check from Gary McKinsey on October 30, 2008. She noted that most conversations she has had with Mr. Phalen were about political strategy, not money.

76. On October 31, 2008, the Committee wired \$20,000 to Bill Berryhill after it had received a check in that amount from the Chukchansi Indians. Ms. Clendenin does not recall how the routing information was obtained to wire monies to Bill Berryhill. She does not believe that she obtained that information from Tom Berryhill.

Testimony of Dale Fritchen

77. Dale Fritchen chaired the San Joaquin County Republican Central Committee in 2008. He was delegated authority from its executive committee to make last minute contributions for the Committee. The Committee trusted his judgment and he was given discretion to distribute monies to candidates in targeted races. Targeted races were determined by executive committee members or designated by others such as the CRP. It was a fluid concept inasmuch as polling data was dynamic. The Committee and Dale Fritchen identified Bill Berryhill's campaign as a targeted race. Mr. Fritchen was aware that Bill Berryhill was involved in a tight race, that money was needed for a television commercial and that he needed money "real quick."

Mr. Fritchen made the decision to contribute money to Bill Berryhill's campaign. He was not sure when he made the decision, but had earlier indicated that it was probably a day or two before the check was written. He did not know how the \$21,000 amount was determined. He believes it was based upon the amount of funds on hand. He recognized that candidate recipients were anxious to receive monies quickly because the Committee's available funds fluctuated. The final weeks leading up to the 2008 election were a busy time and Mr. Fritchen received calls from dozens of people seeking funds. Carl Fogliani may have been one of them. He has little or no recall of the email exchanges on October 31, 2008. He does not recall giving a check to Laura Ortega, Tom Berryhill's Chief of Staff.

78. The Committee gave a \$21,000 contribution to Bill Berryhill's campaign. It was included in the \$34,665 that was deposited into his account on October 31, 2008. Dale Fritchen denies having any communications with Tom Berryhill or anyone else that suggested an understanding that his contribution to the Committee was to go to Bill Berryhill. Mr. Fritchen acknowledged there was no secret who the Committee was supporting, or what the targeted races were. He indicated that he would be public about who the Committee was supporting. Nevertheless, in this case he is adamant that there was no express condition or agreement with Tom Berryhill or his agents relating to the Committee's decision to support Bill Berryhill. He indicated that no one told him "here is a check, and this is what we want you to do with it."

Mr. Fritchen feels strongly about this, stating he is not a "puppet." He noted that he would not sacrifice his time to be on a central committee only to have someone else tell him what to do, and that he is offended by any suggestion otherwise. He was given the discretion to distribute Committee monies to targeted races and he believes that is all he did in this case. That the full executive committee did not participate in the decision was not a concern to him because they trusted his judgment, his actions were open and he was required to report to them later.

Other Matters – Unreported Gifts

79. Accusation Counts 15 and 16 allege that Tom Berryhill failed to report receipt of certain gifts (Disneyland Park and Keith Urban Concert tickets) on his 2008 annual statement of economic interests by the March 1, 2009 deadline.

On December 16, 2009, the FPPC sent a letter to Tom Berryhill advising him that he had failed to disclose certain gifts that were given to him by a lobbyist. The gift items included Disneyland park-hopper tickets valued at \$282 from the Walt Disney Company; and a Keith Urban concert ticket valued at \$59.50 from the Pechanga Band of Luiseno Mission Indians.

80. By letter to the FPPC dated January 18, 2010, Tom Berryhill provided the following explanation for the Disneyland park-hopper tickets:

This gift was requested and received by my wife and reported as such by the Walt Disney Company. I was not in attendance and did not benefit from this gift. While it is my understanding that gifts received by family are not required to be reported by me if I was not present, I am attaching an amendment to my form 700.

81. On January 19, 2010, Tom Berryhill filed an Amendment (Schedule D) to his 2008 annual statement of economic interests. He disclosed the gift tickets from the Walt Disney Company and the Pechanga Band of Luiseno Mission Indians.

82. The FPPC interviewed Tom Berryhill on June 6, 2012. At that time he described his failure to disclose these gifts as an oversight on his part.

83. With regard to the Keith Urban concert ticket, Tom Berryhill noted that the FPPC commissioners had admonished the FPPC enforcement staff in 2011 that seeking enforcement fines against candidates and officeholders was not appropriate because of the Pechanga tribe's failure to notify the recipients of the gift amounts. Apparently the Pechanga Band admitted its misstep, and was fined for failing to provide gift notices to affected public officials.

Discussion

Money Laundering Allegations

84. The Act provides that “[n]o contribution shall be made, directly or indirectly, by any person in a name other than the name by which such person is identified for legal purposes.” (Gov. Code, § 84301.) Contributions made in the name of another are prohibited because they deprive the public of important information about the true source of campaign contributions and it facilitates the unlawful circumvention of campaign contribution limits. (Gov. Code, § 81002, subd. (a).) Campaign “money laundering” occurs where the source of funds is intentionally masked by channeling funds through an intermediary, and thus Government Code 84302 requires disclosure of both the intermediary and the contributor in such cases.

For the reasons set forth below, the FPPC established that the two contributions made by Tom Berryhill to the Stanislaus and San Joaquin County Republican Central Committees were “earmarked” for Bill Berryhill. Because these contributions were not properly disclosed under section 84302, campaign money laundering occurred.

85. Preliminarily, earmarking occurs when a contribution to a committee is made “on the condition or with the agreement that it will be contributed” to a particular candidate. (Gov. Code, § 85704.) Reserving for the moment discussion of what conditions, agreements

or understandings were present in this case, the matter of the independent discretion exercised by the committees is first addressed.

Respondents made a strong case that the two committees made their own independent decisions to contribute funds to Bill Berryhill's campaign. His was a targeted race, and perhaps the only remaining target race in need of help during the final week leading up to the election. The two committees had previously contributed substantial amounts to other targeted races before the late-October advertising blitz from Bill Berryhill's Democratic opponent, John Eisenhut. The CRP identified Bill Berryhill's campaign as a targeted race and contributed \$50,000 on October 30 and 31, 2008, the very same time that the two county committees made contributions to him. There was no secret, on the state or county level, that Bill Berryhill was involved in a tight race. His opponent received a staggering infusion of funds at that time. Bill Berryhill's campaign was in desperate need of monies to purchase campaign mailers and commercial television time to counter his opponent's attack. He was the local candidate and the reasonable and smart decision for both committees was to send money his way. This is what they did and it was no surprise that they did so. In this context, the question remains whether earmarking could only occur if the central committees failed to exercise their discretion in making their contribution decisions. The short answer is no.

86. Respondents contend that to have reached an agreement with Tom Berryhill, the committees would have had to surrender their discretion to Tom Berryhill as to how they might use his funds. And that as long as the committees made their own independent decision in this case, and retained the right to "change their mind," no understanding was reached between the parties. The FPPC contends otherwise, noting that when a committee receives a contribution that has been earmarked for a particular candidate, the committee cannot "un-earmark" the contribution by claiming that the committee exercised its own discretion, direction or control. The FPPC is correct and this stands to reason. There has never been an option for a committee to accept an earmarked contribution, convey it to the intended candidate, and somehow not be an intermediary by claiming independent exercise of discretion, direction or control. If this was an acceptable defense, it would create a huge loophole, effectively thwarting any enforcement of the earmarking statutes.

In raising the committees' decisional autonomy and independent exercise of discretion as a defense, respondents rely upon the Act's former section 85703. In addition to prohibiting the making and accepting of any contribution on the condition or with the agreement that it would be given to a particular candidate, former section 85703 provided: "The expenditure of funds received by a person shall be made at the sole discretion of the recipient person." Respondents read this sentence to mean that where a committee ["recipient person"] expends funds in its "sole discretion" this operates as a defense against earmarking.

87. Respondent's interpretation of former section 85703 is incorrect. The old statute's first sentence is an outright prohibition against earmarking funds to go to a

particular candidate.¹⁶ The second sentence did not undo this prohibition. The FPPC has previously interpreted this second sentence to actually expand the prohibition.¹⁷ Thus, 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 funds, and a committee must return the earmarked funds to the donor if the committee wishes to retain its sole discretion.¹⁸

The new statute no longer contains the second sentence about “sole discretion.” This is because earmarking is now allowed if it is accompanied by full disclosure as to the identities of both the intermediary and the true contributor. The “sole discretion” language is no longer necessary because it would conflict with the new policy of allowing earmarking so long as there is full disclosure of both the intermediary and the true contributor.

88. The new statute recognizes that transparency will address any concern that the public will view the intermediary as the true contributor, or that the true contributor will remain unknown. Section 85704 now prohibits earmarking unless the identity of the intermediary and the true contributor are disclosed pursuant to Government Code section 84302. This reference to section 84302 does not mean that full disclosure is required only if the committee is an intermediary. Rather, the full disclosure is required *because* the committee is an intermediary by virtue of accepting an earmarked contribution and conveying it to the intended candidate. By requiring full disclosure of the intermediary relationship, section 85704 addresses all of the above concerns that give reason to disfavor earmarking transactions.

89. To summarize, the “sole discretion” exercised by the committees does not operate as a defense to earmarking under Government Code section 85704, where there is otherwise evidence that a contribution was made on the condition or with the agreement that it would be contributed to a particular candidate. Sections 85704 and 84302 are best viewed as comprising a statutory scheme that puts the regulated community on notice that the original donor is the true contributor in any earmarking transaction, and the committee is just

¹⁶ The first sentence of former Government Code section 85703 reads: “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.”

¹⁷ *Sutton Advice Letter* (A-97-333), p. 2: “While the first sentence arguably proscribes only those contributions earmarked for ‘any particular candidate,’ the second sentence of Section 85703 goes further...” FPPC advice letters are issued pursuant to Government Code section 83114, subdivision (b), and California Code of Regulations, title 2, section 18329. The advice of the FPPC as an agency empowered by the Legislature to interpret and enforce the Act is entitled to weight. (*People v. Thrasher* (2009) 176 Cal.App.4th 1302, 1308-10.)

¹⁸ See *Vanderhoof Advice Letter* (I-97-391), p. 4.

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

Condition, Agreement or Understanding

90. As earlier noted, the parties urge very different interpretations of the Act's language "on the condition or with the agreement."

The FPPC believes any "agreement" about the money going to a particular candidate is sufficient, regardless of whether the earmarking "agreement" is explicit or implicit. It believes a "condition" merely connotes that the donor intends for the money to go to a particular candidate and that the committee is made aware of this fact. It is essentially an expression of donor intent. The FPPC also contends that a condition may be imposed by the committee, and that such "condition" will become an "agreement" if the donor gives the money to the committee with knowledge of the "condition." Thus, where a central committee makes it known that any funds received will go to a particular candidate the FPPC believes the committee becomes a funnel for maxed out contributors to that candidate. It notes that an "understanding" is encompassed by section 85704's reference to "condition" and "agreement" and that this understanding essentially earmarks the committee's contribution for a particular candidate.

91. Respondents remind that Proposition 34 provided more favorable contribution limits to political parties, including the right to make unlimited contributions to candidates for state elective office. Respondents interpret *O'Donnell* and comparable federal statutes as guarding against contributions that are "directed" by a person through an intermediary. Respondents believe any violation requires that the person directing the action has the authority, control or influence to do so. Respondents reject any liberal construction of the Act which would find that earmarking occurred when a donor made a contribution to a committee when the donor knew that the committee indicated it would support a specific candidate. Respondents note that when a committee targets races and candidates it intends to support, the effect is not an "offer" that can be accepted by a donor. This is because the committee retains the discretion on how to use or not use the funds, and it can always "change its mind."

92. Respondents' more narrow construction of an agreement, condition or understanding is persuasive and consistent with a plain reading of the Act. It is also consistent with the Proposition 34 amendments to the Act that were intended to strengthen the role of political parties in financing campaigns, including the right of a political party to make unlimited contributions to a candidate.

It is understood that the Act is to be liberally construed to accomplish its purposes and in order to fully protect the public interest. (Gov. Code, § 81003.) However, the FPPC's more liberal construction of the section 85704 language creates a climate where donors making contributions to party committees would do so at their peril. For example, the FPPC believes earmarking would occur whenever a donor makes a contribution to a committee when the committee has previously indicated they would support a particular candidate or

candidates, even if there was no “condition” placed on the donation by the donor and there was no “agreement” between the donor and the recipient committee. The FPPC would find an agreement in this case by characterizing the committee’s communication as an “offer” which is “accepted” when the donation is made, thereby creating an agreement. The FPPC would find such agreement in the absence of any communication between the parties.

The FPPC is mistaken. A committee should not be prevented from communicating to the public, and therefore potential donors and supporters, the essential political information about whom it may support, what it considers target races and other basic campaign information since every committee would then be concerned about becoming a potential “straw man” and every donor to the committee would be concerned about being prosecuted for campaign money laundering. A committee retains its discretion to change its mind. And, in the absence of any prohibited condition or agreement between the parties, a donor cannot fairly be prosecuted for using the committee to circumvent individual campaign limits when the committee subsequently makes a contribution to a candidate for whom the donor is individually maxed out.

93. Respondents urge application of an objective standard, one informed by section 85704 and requiring that a “condition” or “agreement” be more explicit or clearly inferred from the evidence presented. Such is the standard applied in this case. That is not to say that findings may only be supported by direct evidence of party communications relating to the existence or nonexistence of a condition, agreement or understanding. Inferences may also be drawn from circumstantial evidence. “An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action.” (Evid. Code, § 600, subd. (b).) Thus, if the evidence demonstrates that a committee acted “merely as a mechanism” and it was the original source who arranged for money to go through the committee to a particular candidate, then the contribution must be attributed to the original source. (*United States v. O'Donnell, supra*, 608 F.3d at p. 550.) As the Ninth Circuit Court of Appeals explained in straw donor situations, in order to identify the true donor, “we must look past the intermediary’s essentially ministerial role to the substance of the transaction.” (*Ibid.*)

Here, the substance of the transaction is best gleaned by considering both the communications and the actions of the parties and their representatives. And having thus considered the record in this case, it was established by a preponderance of the evidence that there was an earmarking arrangement. It was understood by all that the contributions from Tom Berryhill to the two county central committees were to go to Bill Berryhill’s campaign.

94. Had Tom Berryhill only hoped and prayed that the two county central committees would “do the right thing” with his contributions he would not run afoul of the Act’s provisions. He did more. He was a maxed out individual donor. When pressed on October 26, 2008, by Carl Fogliani for funds to support his brother’s campaign he promised to see what he could do. He was aware of the campaign’s urgent need to raise substantial funds to air a television commercial. On October 29, one day after raising in excess of \$50,000 at his own fundraiser, he exchanged a combined eight text messages with the chair and vice chair of the Stanislaus County Republican Central Committee, and he arranged for a

\$20,000 check to be sent overnight to this committee. Importantly, that same evening, Tom Berryhill sent Carl Fogliani an email advising him: "Think I can get mony [sic] earlier. Tom. Late morning." He could only have been referring to the monies he was overnighting to the Committee. Mr. Fogliani responded, "Even better."

The Stanislaus County Central Committee received the \$20,000 check on October 30, 2008. Ms. Clendenin appeared to have been expecting the check as she told Gary McKinsey that he needed to deposit the check that very day and to issue a Committee check in that same amount to Bill Berryhill. She promised to call Mr. McKinsey later with instructions on how to get the check to Bill Berryhill's campaign. The call became unnecessary. Tom Berryhill's District Office Manager, Bob Phelan, was made aware that Mr. McKinsey had been to the bank to deposit the 20,000 check from Tom Berryhill's committee, and that he had the \$20,000 check for Bill Berryhill on his person. Mr. Phelan met Mr. McKinsey as he was returning to his car from the bank, identified himself and took possession of the check.

95. The above sequence of events demonstrates more than Tom Berryhill's "hope" that the Stanislaus County Republican Central Committee would do the right thing with his contribution. Tom Berryhill's October 29, 2008 email to Carl Fogliani indicated that he ["I"] could get the money to Bill Berryhill's campaign earlier. This email was sent even before the Committee had received the \$20,000. This is not language one expects from one "hoping" that the central committee would contribute money to Bill Berryhill. Rather, Tom Berryhill knew where the money was going and the email's focus related solely to the timing ["earlier"]. The fact that Tom Berryhill's District Office Manager was aware of and took possession of the \$20,000 check for Bill Berryhill the next day further supports an earmarking scheme. It does appear that Tom Berryhill, as the original source, arranged for the money to go through the Stanislaus County Republican Central Committee to Bill Berryhill. The Committee served "merely as a mechanism" for this purpose and essentially played a ministerial role. (*United States v. O'Donnell, supra*, 608 F.3d at p. 550.)

96. The same was also true of the San Joaquin County Republican Central Committee. Tom Berryhill for Assembly issued a \$20,000 check to the Committee on October 30, 2008. It was received later that afternoon. On October 31, 2008, urgency was expressed about getting the Committee's contribution to Bill Berryhill sooner. Carl Fogliani spoke with Tom Berryhill at 9:34 a.m. for six minutes. At 9:49 a.m., nine minutes after their conversation concluded, an email from Chuck Hahn, a CRP official, was received by the Committee chair and treasurer urging them to move quickly in sending the check to Bill Berryhill. Carl Fogliani sent an email to Tom Berryhill containing wire information needed to send the funds directly to Bill Berryhill's account. The Committee ultimately delivered the monies by check, not wire. At or around 12:25 p.m. the Committee's contribution was delivered to Bill Berryhill's campaign. Laura Ortega, Tom Berryhill's Chief of Staff, delivered the check.

97. At 2:18 p.m., Carl Fogliani emailed Tom Berryhill, "Find any new dough?"

98. The reasonable inference to be gleaned from the above matters is that Tom Berryhill was the true source of the funds received by Bill Berryhill from the San Joaquin

County Republican Central Committee. Tom Berryhill acted directly or indirectly to have his contribution move quickly through the San Joaquin County Republican Central Committee to his brother's campaign. The October 30, 2008, 2:18 p.m. email from Carl Fogliani confirms that Bill Berryhill's campaign consultant viewed the contributions from the two county central committees as being from Tom Berryhill. The reasonable inference from Carl Fogliani's statement ["Find any new dough?"] is that the monies were from Tom Berryhill. In addition, the timing and manner of the CRP official's intervention following the six-minute telephone call between Carl Fogliani and Tom Berryhill strongly suggests that Tom Berryhill used his connections to move matters along. Carl Fogliani sent wire information needed by the Committee to Tom Berryhill. And Tom Berryhill's Chief of Staff ultimately delivered the Committee's check to Bill Berryhill's campaign. These matters all point to Tom Berryhill being far more than a passive contributor to the Committee, hoping that it would support Bill Berryhill. He exercised a degree of direction and control over the flow of his contributions through the county central committees to Bill Berryhill's campaign.

For these reasons it was established that Tom Berryhill, as the original source, arranged for the money to go through the Stanislaus and San Joaquin County Republican Central Committees to Bill Berryhill. Both county central committees served as a mechanism for this purpose and both played essentially ministerial roles.

99. Tom Berryhill's two contributions to the county central committees were made with the clear understanding that the monies would be contributed to Bill Berryhill. The understanding or agreement was tacit. Given these circumstances it matters not that the committees may have decided on their own to make the contributions to Bill Berryhill, and in the same amounts. Once Tom Berryhill exercised the direction and control over the funds that he did, his contributions became earmarked. The understanding that his contributions were to go to his brother's campaign constituted a prohibited agreement or condition under Government Code section 85704.¹⁹

Failure to Report

100. Government Code section 85704 prohibits earmarking unless the identity of the intermediary and the true contributor are disclosed pursuant to Government Code section 84302. In this case, Tom Berryhill and his candidate committee failed to disclose the contributions to Bill Berryhill on their late contribution/semi-annual campaign statements. Similarly, Bill Berryhill and his candidate committee failed to report the receipt of these

¹⁹ As earlier noted, the FPPC contends that even if earmarking was not found, contributions made by Tom Berryhill at the "behest" of Bill Berryhill or his staff are presumed to be made at his request, and that if such behesting occurred, the contributions from Tom Berryhill to the two county central committees must be reported. Having found that earmarking did occur, it is unnecessary to consider this alternative behesting theory. The earmarked contributions were required to be reported.

contributions from Tom Berryhill and his candidate committee on their late contribution/semi-annual campaign statements.

Over-the-Limit Contributions

101. Tom Berryhill was a maxed out donor at the time that he made the two earmarked contributions to the county central committees. By making these two contributions he exceeded the then \$3,600 individual limit on contributions to a candidate for state elective office.

Fundraiser Allegations

102. The FPPC contends that by holding the October 28, 2008 fundraiser, Tom Berryhill and Tom Berryhill for Assembly unlawfully circumvented the campaign contribution limit for contributions to a candidate by paying an in-kind contribution in excess of \$5,000 toward the cost of organizing and holding the fundraising event. The FPPC suggests that Tom Berryhill's fundraiser "wound up being for the benefit of his brother." It believes that the evidence demonstrated that even before the fundraiser, Tom Berryhill decided to make the "main thrust" of the fundraiser about raising money for Bill Berryhill. This was not the case. Tom Berryhill had acknowledged to the FPPC that calls were made in advance of the fundraiser where donors were told that if they had extra money, they could "max out to Bill or give it to the Central Committee." However, such statements alone did not change the nature of the fundraising event into one for Bill Berryhill.

103. Diane Gilbert was persuasive that the fundraising event was solely for Tom Berryhill. Invitations to this event were for a Tom Berryhill fundraiser. Checks were made out to Tom Berryhill's reelection committee. No checks were received that were made out to Bill Berryhill or to either of the two county central committees. Ms. Gilbert noted that the fundraising event was solely for Tom Berryhill, and was neither intended to be, nor converted into one for Bill Berryhill. There was no evidence that any monies were raised for Bill Berryhill at this event. The fact that Tom Berryhill made a later decision to expend monies raised from this fundraiser to support Bill Berryhill's campaign is not relevant in determining whether the fundraiser was an in-kind contribution to Bill Berryhill.

The FPPC focused largely on Tom Berryhill's pitch to his guests that they support his brother's campaign or contribute to the county central committee. The vice chair of the Stanislaus County Republican Central Committee was in attendance when this plea was made. Regardless, this pitch did not change Tom Berryhill's fundraiser into one for his brother. It is a common practice to recognize and to give a plug for other candidates present at such events.²⁰ Tom Berryhill's pitch for his brother's campaign did not somehow

²⁰ Perhaps for this reason, FPPC regulations recognize that when candidates express support for other candidates, any resulting contributions should not be viewed as being made to the behesting candidate. Thus, although there was no evidence of contributions being made to Bill Berryhill at the fundraiser, the regulations provide that contributions "made at the behest of a candidate for a different candidate or to a committee not controlled by the

transmute the approximately \$5,000 cost of the event into an in-kind contribution to Bill Berryhill's campaign. There was no evidence that a single contributor gave money to Bill Berryhill or to the Stanislaus County Republican Central Committee in response to Tom Berryhill's exhortation to support Bill Berryhill. For all these reasons, the October 28, 2008 fundraiser was not reportable as a non-monetary contribution to Bill Berryhill's campaign.

Gift Allegations

104. The FPPC alleges that Tom Berryhill failed to report receipt of certain gifts (Disneyland Park and Keith Urban Concert tickets) on his 2008 annual statement of economic interests by the March 1, 2009 deadline.

As indicated in his January 18, 2010 letter to the FPPC, the Disneyland park-hopper tickets were requested and received by Tom Berryhill's wife. He was not in attendance at the event. It was his understanding that gifts received by family members were not required to be reported by him if he was not present. Nevertheless, he filed an amended form 700. Later when he was interviewed by the FPPC on June 6, 2012, he characterized his initial failure to disclose the Disneyland tickets as an "oversight."

105. In 2008, the regulation governing gifts to an official's family members provided that such may or may not be reportable depending upon the circumstances.²¹ Thus,

behesting candidate is not a contribution to the behesting candidate." (See Cal. Code. Regs., tit. 2, § 18215, subd. (d).) In addition, an expenditure is not made at the behest of a candidate or committee merely when the expenditure "is made at the request or suggestion of the candidate or committee for the benefit of another candidate or committee." (Cal. Code. Regs., tit. 2, § 18225.7, subd. (d)(7).) Thus, when Tom Berryhill requested that his guests support his brother, any resulting contribution would not have been considered as made to Tom Berryhill.

²¹ Former California Code of Regulations, title 2, section 18944, subdivision (b), adopted in 1994 and repealed January 11, 2011, provided as follows:

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

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

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

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

if a gift was offered to a member of the official's immediate family in a manner such that it was "clear that there is no intent to make a gift to the official" and the gift was "intended for the family member's or members' use or enjoyment" it would not be reportable. (See former Cal. Code. Regs., tit. 2, § 18944, subd. (c).) In this case, it does appear that Tom Berryhill's failure to report the Disneyland tickets was based upon his good faith belief that the gift was made to his spouse. He explained this to the FPPC on January 18, 2010, approximately one month after the FPPC first alerted him to this matter. He filed an amended form 700. His characterization of his actions as an "oversight" was made four years later. Under these circumstances, no penalty should be assessed for his initial failure to disclose the gift to his spouse.

106. With regard to the non-reporting of the Keith Urban concert ticket valued at \$59.50, Tom Berryhill was verbally invited to this event by a representative of the Pechanga Band. The invitation did not go through his staff, which normally handles invitations. Respondents note that this particular allegation is inappropriate in view of the FPPC Commissioners' earlier statements to its enforcement staff about seeking enforcement fines against candidates and officeholders where the Pechanga tribe failed to notify the recipients of the gift amounts. The Pechanga Band admitted its misstep, and was fined for failing to provide gift notices to affected public officials.²² The FPPC's comments were considered in determining that no fine should be assessed against Tom Berryhill for failing to report receipt of the concert ticket.

Penalty

107. One is liable for violating the Act, for purposely or negligently causing another to violate the Act, or for aiding and abetting another in violating the Act. (Gov. Code, § 83116.5.) Where two or more parties are responsible for violation of the Act, they are jointly and severally liable. (Gov. Code, § 91006.) Each violation of the Act is punishable by imposition of a monetary penalty of up to \$5,000 per violation. (Gov. Code, § 83116, subd. (c).)

²² In February 2010, the following FPPC Commissioners' comments were made about the Proposed Consent Calendar in approving stipulations regarding similar charges involving gift violations by the Pechanga Band of Luiseno Mission Indians and legislators:

Commissioners Hodson, Garrett and Montgomery echoed Chairman Johnson's positive comments to staff, but expressed policy concerns with how the gift reporting violation cases involving members of the Legislature and their aides had been handled. They thought that, in general, persons with first-time violations and failing to report only one gift, with no prior history of any violations, should have received only warning letters, not stipulations with \$200 fines, but that they would approve these items since the respondents had signed the stipulations and paid the fines.

108. The FPPC has requested the maximum penalty of \$5,000 per count for Accusation counts 1 through 4, and 6 through 10; a penalty in the range of \$2,000 to \$3,000 per count for counts 5, and 11 through 14; and a penalty in the amount of \$200 per count for counts 15 and 16.

In this case, the FPPC has prevailed in establishing cause to assess penalties against respondents for counts 1 through 4, and related counts 6 through 10. It did not establish cause to assess penalties for counts 5, and 11 through 14. Nor should any penalties be assessed for violations of counts 15 and 16.

109. FPPC regulations set forth factors that are to be considered in finding violations of the Act. Thus, California Code of Regulations, title 2, section 18361.5, subdivision (d), provides as follows:

(d) Factors to be Considered by the Commission. In framing a proposed order following a finding of a violation pursuant to Government Code section 83116, the Commission and the administrative law judge shall consider all the surrounding circumstances including but not limited to:

(1) The seriousness of the violation;

(2) The presence or absence of any intention to conceal, deceive or mislead;

(3) Whether the violation was deliberate, negligent or inadvertent;

(4) Whether the violator demonstrated good faith by consulting the Commission staff or any other government agency in a manner not constituting a complete defense under Government Code section 83114(b);

(5) Whether the violation was isolated or part of a pattern and whether the violator has a prior record of violations of the Political Reform Act or similar laws; and

(6) Whether the violator, upon learning of a reporting violation, voluntarily filed amendments to provide full disclosure.

110. Tom Berryhill and Tom Berryhill for Assembly. Tom Berryhill and Tom Berryhill for Assembly made separate \$20,000 contributions to the Stanislaus and San Joaquin County Republican Central Committees with the purpose and understanding that the

contributions were to go to Bill Berryhill's campaign. Tom Berryhill was a maxed out individual contributor and he could not otherwise make direct contributions to his brother's campaign. He failed to disclose these contributions in required late contribution reports and semi-annual campaign statements filed with the Secretary of State. No amendments were filed to provide full disclosure.

The violations were serious and deliberate. By their nature, the violations involved an intention to conceal, deceive or mislead. Tom Berryhill and Tom Berryhill for Assembly did not consult the FPPC staff or any other government agency at the time the contributions were made. There were separate violations involving two county central committees. Tom Berryhill earmarked his contributions to the two central committees inasmuch as he exercised a degree of direction and control over the flow of the contributions through the central committees to Bill Berryhill's campaign. The two committees served as a mechanism for this purpose and played essentially ministerial roles.

For all the above reasons, and having considered the record as a whole, the \$5,000 maximum penalty imposed by the FPPC is appropriate for each violation of counts 1, 2, 3, 4, 8, 9 and 10 by Tom Berryhill and Tom Berryhill for Assembly.

111. Bill Berryhill and Bill Berryhill for Assembly. Bill Berryhill testified persuasively that he was not party to discussions with the two county central committees about the \$20,000 contributions, and that he had little involvement with the fundraising details of his campaign. This was his first major campaign. He did not involve himself in campaign "minutia" and relied upon his campaign manager and Mr. Fogliani to run the campaign. The explicit acts of an agent may be attributable to the agent's principals where the agent had apparent authority to act as an agent. Here, an agency relationship existed between Mr. Fogliani and both Bill Berryhill and Bill Berryhill for Assembly. The degree to which Bill Berryhill was unaware of the earmarking scheme should be factored, however, into the amount of penalty assessed against him and his committee.

Carl Fogliani worked directly with Tom Berryhill to have the contributions flow to Bill Berryhill's campaign. The violations were serious and deliberate. There was an intention to conceal, deceive or mislead the true source of the contributions. Bill Berryhill and Bill Berryhill for Assembly did not disclose these contributions in required late contribution reports and semi-annual campaign statements filed with the Secretary of State. No amendments were filed to provide full disclosure. Bill Berryhill and Bill Berryhill for Assembly did not consult the FPPC staff or any other government agency at the time the contributions were received. There were separate violations involving two county central committees. Nevertheless, Bill Berryhill's penalty should be reduced by half. There was no evidence of any intention on Bill Berryhill's part to conceal, deceive or mislead. His violation is based upon agency theory, and at most his actions were negligent or inadvertent.

For the above reasons, and having considered the record as a whole, a \$2,500 penalty should be imposed by the FPPC for each violation of counts 2, 4, 6 and 7 by Bill Berryhill and Bill Berryhill for Assembly.

112. Stanislaus County Republican Central Committee. The Stanislaus County Republican Central Committee aided and abetted the above matters by allowing itself to be used as a conduit for the \$20,000 contribution, and by acting as if it were the true source of the contribution to Bill Berryhill's campaign from Tom Berryhill. As an intermediary for the contribution, it was a "straw man" for purposes of allowing funds in excess of the individual contribution limit to be transferred from Tom Berryhill to Bill Berryhill. By so doing it aided and abetted the making and accepting of over-the-limit contributions from Tom Berryhill to Bill Berryhill's campaign.

The violations were serious and deliberate. The Stanislaus County Republican Central Committee understood that the contributions were to go from Tom Berryhill to Bill Berryhill's campaign. It allowed itself to be used for this purpose. By aiding and abetting the making and accepting of an over-the-limit contribution, the violation involved an intention to conceal, deceive or mislead. The Stanislaus County Republican Central Committee did not consult the FPPC staff or any other government agency at the time the contributions were made. There was evidence that this county central committee engaged in similar conduct on at least one other occasion. The central committee allowed itself to serve as a mechanism for transfer of funds between the two Berryhill campaigns, and played an essentially ministerial role.

For all the above reasons, and having considered the record as a whole, the \$5,000 maximum penalty imposed by the FPPC is appropriate for each violation of counts 1 and 2 by the Stanislaus County Republican Central Committee.

113. San Joaquin County Republican Central Committee. Similarly, the San Joaquin County Republican Central Committee aided and abetted the above matters by allowing itself to be used as a conduit for the \$20,000 contribution, and by acting as if it were the true source of the contribution to Bill Berryhill's campaign from Tom Berryhill. As an intermediary for the contribution, it was a "straw man" for purposes of allowing funds in excess of the individual contribution limit to be transferred from Tom Berryhill to Bill Berryhill. By so doing it aided and abetted the making and accepting of over-the-limit contributions from Tom Berryhill to Bill Berryhill's campaign.

The violations were serious and deliberate. The San Joaquin County Republican Central Committee understood that the contributions were to go from Tom Berryhill to Bill Berryhill's campaign. It allowed itself to be used for this purpose. By aiding and abetting the making and accepting of an over-the-limit contribution, the violation involved an intention to conceal, deceive or mislead. The San Joaquin County Republican Central Committee did not consult the FPPC staff or any other government agency at the time the contributions were made. The central committee allowed itself to serve as a mechanism for transfer of funds between the two Berryhill campaigns, and played an essentially ministerial role.

For these reasons, and having considered the record as a whole, the \$5,000 maximum penalty imposed by the FPPC is appropriate for each violation of counts 3 and 4 by the San Joaquin County Republican Central Committee.

LEGAL CONCLUSIONS

1. The FPPC may impose a monetary penalty of up to \$5,000 for each violation of the Act. (Gov. Code, § 83116, subd. (c).) One is liable for violating the Act, for purposely or negligently causing another to violate the Act, or for aiding and abetting another in violating the Act. (Gov. Code, § 83116.5.) Where two or more parties are responsible for violation of the Act, they are jointly and severally liable. (Gov. Code, § 91006.)

2. Count 1: Money Laundering – Section 84301. Government Code section 84301 provides: “No contribution shall be made, directly or indirectly, by any person in a name other than the name by which such person is identified for legal purposes.” Cause exists for imposing a monetary penalty for violation of section 84301, by reason of the matters set forth in Findings 24 through 29, 41 through 45, and 84 through 99.

The matters set forth in Findings 110 and 112 were considered in finding that a \$5,000 penalty should be assessed jointly against respondents Tom Berryhill, Tom Berryhill for Assembly, and the Stanislaus County Republican Central Committee for this violation.

3. Count 2: Making and Accepting Over-the-limit Contribution – Sections 85301 and 85305. Government Code section 85301, subdivision (a), provides:

A person, other than a small contributor committee or political party committee, may not make to any candidate for elective state office other than a candidate for statewide elective office, and a candidate for elective state office other than a candidate for statewide elective office may not accept from a person, any contribution totaling more than three thousand dollars (\$3,000) per election.

In connection with the November 4, 2008 election, an individual wishing to contribute to a candidate for State Assembly could not contribute more than \$3,600 per election. Government Code section 85305 further provides that a candidate for elective state office may not make any contribution to any other candidate for elective state office in excess of these same limits.

4. Cause exists for imposing a monetary penalty for violation of sections 85301 and 85305, by reason of the matters set forth in Findings 17 through 23, 41 through 45, 84 through 99, and 101.

The matters set forth in Findings 110, 111 and 112 were considered in finding that a \$5,000 penalty should be assessed jointly against respondents Tom Berryhill, Tom Berryhill for Assembly, and the Stanislaus County Republican Central Committee for this violation. Bill Berryhill and Bill Berryhill for Assembly should be assessed a \$2,500 penalty for this violation.

5. Count 3: Money Laundering – Section 84301. Cause exists for imposing a monetary penalty for violation of section 84301, by reason of the matters set forth in Findings 24 through 29, 41 through 58, and 84 through 99.

The matters set forth in Findings 110 and 113 were considered in finding that a \$5,000 penalty should be assessed jointly against respondents Tom Berryhill, Tom Berryhill for Assembly, and the San Joaquin County Republican Central Committee for this violation.

6. Count 4: Making and Accepting Over-the-limit Contribution – Sections 85301 and 85305. Cause exists for imposing a monetary penalty for violation of sections 85301 and 85305, by reason of the matters set forth in Findings 17 through 23, 41 through 58, 84 through 99, and 101.

The matters set forth in Findings 110, 111 and 113 were considered in finding that a \$5,000 penalty should be assessed jointly against respondents Tom Berryhill, Tom Berryhill for Assembly, and the San Joaquin County Republican Central Committee for this violation. Bill Berryhill and Bill Berryhill for Assembly should be assessed a \$2,500 penalty for this violation.

7. Count 5: Making and Accepting Over-the-limit In-kind Contribution in the Form of a Fundraiser. No cause exists for imposing a monetary penalty for violation of sections 85301, 83124 and 85305, by reason of the matters set forth in Findings 37 through 40, 102 and 103.

8. Count 6: False Reporting (Late Contribution Report Filed 10/31/08) – Section 84203, subdivision (a). Each candidate or committee that makes or receives a late contribution must file a late contribution report with each Filing Officer within 24 hours of making or receiving the contribution. (Gov. Code, § 84203, subd. (a).) Cause exists for imposing a monetary penalty for violation of section 84203, by reason of the matters set forth in Findings 12 through 16, 59 through 61, and 100. Bill Berryhill and Bill Berryhill for Assembly should be assessed a \$2,500 penalty for this violation.

9. Count 7: False Reporting (Semi-annual Campaign Statement Filed 2/3/09 – Section 84211. Government Code section 84211 sets forth information that must be included in semi-annual campaign statements required to be filed by candidates. Cause exists for imposing a monetary penalty for violation of section 84211, by reason of the matters set forth in Findings 12 through 16, 59 through 61, and 100. Bill Berryhill and Bill Berryhill for Assembly should be assessed a \$2,500 penalty for this violation.

10. Count 8: False Reporting (Late Contribution Report Filed 10/29/08) – Section 84203, subdivision (a). Cause exists for imposing a monetary penalty for violation of section 84203, by reason of the matters set forth in Findings 12 through 16, 59 through 61, and 100. Tom Berryhill and Tom Berryhill for Assembly should be assessed a \$5,000 penalty for this violation in connection with the Stanislaus County Republican Central Committee.

11. Count 9: False Reporting (Late Contribution Report Filed 10/30/08) – Section 84203, subdivision (a). Cause exists for imposing a monetary penalty for violation of section 84203, by reason of the matters set forth in Findings 12 through 16, 59 through 61, and 100. Tom Berryhill and Tom Berryhill for Assembly should be assessed a \$5,000 penalty for this violation in connection with the San Joaquin County Republican Central Committee.

12. Count 10: False Reporting (Semi-annual Campaign Statement Filed 2/3/09 – Section 84211. Cause exists for imposing a monetary penalty for violation of section 84211, by reason of the matters set forth in Findings 12 through 16, 59 through 61, and 100. Tom Berryhill and Tom Berryhill for Assembly should be assessed a \$5,000 penalty for this violation.

13. Count 11: Failure to Report Receipt of In-kind Contribution on Late Contribution Report. No cause exists for imposing a monetary penalty against Bill Berryhill and Bill Berryhill for Assembly for violation of sections 84203 and 84203.3, by reason of the matters set forth in Findings 37 through 40, 102 and 103.

14. Count 12: Failure to Report Receipt of In-kind Contribution on Semi-annual Campaign Statement. No cause exists for imposing a monetary penalty for violation of section 84211, by reason of the matters set forth in Findings 37 through 40, 102 and 103.

15. Count 13: Failure to Report Making of In-kind Contribution on Late Contribution Report. No cause exists for imposing a monetary penalty against Tom Berryhill and Tom Berryhill for Assembly for violation of section 84203, by reason of the matters set forth in Findings 37 through 40, 102 and 103.

16. Count 14: Failure to Report Making of In-kind Contribution on Late Contribution Report. No cause exists for imposing a monetary penalty against Tom Berryhill and Tom Berryhill for Assembly for violation of section 84211, by reason of the matters set forth in Findings 37 through 40, 102 and 103.

17. Count 15: Failure to Report Receipt of Disney Gift on Statement of Economic Interests. No cause exists for imposing a monetary penalty against Tom Berryhill for violation of sections 87203, 87207 and related regulations, by reason of the matters set forth in Findings 79 through 83, 104 and 105.

18. Count 16: Failure to Report Receipt of Concert Ticket on Statement of Economic Interests. No cause exists for imposing a monetary penalty against Tom Berryhill for violation of sections 87203, 87207 and related regulations, by reason of the matters set forth in Findings 79 through 83, and 106.

19. The parties are, to varying degrees, jointly and severally liable for the violations of Accusation Counts 1 through 4, and 6 through 10. (See Gov. Code, § 91006.) In this regard, Tom Berryhill and Tom Berryhill for Assembly are liable up to \$35,000 for seven violations of the Act. Bill Berryhill and Bill Berryhill for Assembly are liable up to

\$10,000 for four violations of the Act. The San Joaquin and Stanislaus County Republican Central Committees are liable up to \$10,000 each for two violations of the Act.

20. Accusation Counts 5, 11 through 16 should be dismissed.

ORDER


1. Accusation Counts 5, 11 through 16 are DISMISSED.

2. Accusation Counts 1 through 4, and 6 through 10 are SUSTAINED.

3. Per the Legal Conclusions, total liability for violations of the Act is assessed at \$40,000. The monetary penalty shall not exceed this amount. Accounting for joint and several liability respondents are each liable, and shall pay monetary penalties to the Fair Political Practices Commission up to the following amounts:

- a. Tom Berryhill and Tom Berryhill for Assembly are liable up to \$35,000 each.
- b. Bill Berryhill and Bill Berryhill for Assembly are liable up to \$10,000 each.
- c. The Stanislaus County Republican Central Committee is liable up to \$10,000.
- d. The San Joaquin County Republican Central Committee is liable up to \$10,000.

DATED: January 31, 2014



JONATHAN LEW
Administrative Law Judge
Office of Administrative Hearings

PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. My business address is Fair Political Practices Commission, 428 J Street, Suite 620, Sacramento, CA 95814. On the date below, I served the following document:

PROPOSED DECISION OF ADMINISTRATIVE LAW JUDGE

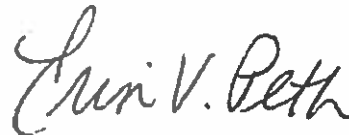
Based on an agreement of the parties to accept electronic service, I caused the documents to be sent to the persons at the electronic service addresses listed below. I did not receive, within a reasonable time after transmission, any electronic message or other indication that the transmission was unsuccessful.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this document is executed at Sacramento, California, on February 3, 2014.



Erin V. Peth
Executive Director
Fair Political Practices Commission

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