

CHALMERS PAK BURCH & ADAMS, LLC
ATTORNEYS AT LAW

RECEIVED

By Office of General Counsel - Policy Division at 11:38 am, May 09, 2016

1300 PENNSYLVANIA AVE NW #190-612
WASHINGTON, DC 20004

5805 STATE BRIDGE RD - #G77
JOHNS CREEK, GEORGIA 30097

PHONE: 202-793-6977
FAX: 678-582-8911
EMAIL: dchalmers@cpblawgroup.com

May 9, 2016

VIA EMAIL (anoti@fec.gov & abell@fec.gov)

Adav Noti
Acting Associate General Counsel
Federal Election Commission
999 E Street N.W.
Washington, DC 20463

RE: Advisory Opinion Request - Huckabee for President, Inc.

Dear Mr. Noti:

This law firm represents Huckabee for President, Inc. (the "Committee"), the authorized principal campaign committee of former Arkansas Governor Mike Huckabee, who was previously a candidate for President of the United States.¹ Pursuant to 52 U.S.C. § 30108(a) and 11 C.F.R. § 112.1, the Committee respectfully requests an advisory opinion confirming that a separate legal defense fund that is established in accordance with the Commission's previous advisory opinions may be used not only to pay the Committee's attorney's fees in defense of a federal copyright infringement lawsuit, but also a portion of the amount that the Committee is obligated to pay the plaintiff in that case as a result of a negotiated settlement agreement. We respectfully request that the FEC address this matter on an expedited basis.

FACTUAL BACKGROUND

On May 2, 2015, Governor Huckabee filed his Form 2 Statement of Candidacy with the Commission in connection with his campaign for President. On May 8, 2015, the Committee filed its Form 1 Statement of Organization as his principal campaign committee. On February 1, 2016, after having competed in a number of state primary elections and caucuses, Governor Huckabee suspended his campaign.

¹ The Committee is incorporated for liability purposes pursuant to 11 C.F.R. § 114.12.

May 9, 2016

Page 2

On November 18, 2015, Rude Music, Inc. filed a copyright infringement lawsuit against the Committee in the United States District Court for the Northern District of Illinois. The complaint alleged that the Committee had violated federal copyright law, in particular 17 U.S.C. § 501, by playing the song “Eye of the Tiger” at a campaign appearance on September 8, 2015. The complaint sought injunctive relief and an award of monetary damages. The Committee has been represented by other counsel in that litigation, and it has incurred costs in the form of attorney’s fees and related expenses. The Committee and the plaintiff have settled this lawsuit for a sum certain, personally guaranteed by Governor Huckabee, with each party bearing their own costs and fees.

In prior advisory opinions, the Commission has determined that a separate legal defense fund may be established to defray a principal campaign committee’s legal costs in defense of civil litigation matters that, such as this one, do not involve alleged violations of the Federal Election Campaign Act of 1971, as amended (the “Act”). The purpose of this advisory opinion request is to obtain confirmation that, under the Act, amounts donated to such a fund could also be used to pay the plaintiff in this case for a portion of the agreed-upon settlement amount. No amounts would be paid from the legal defense fund to the Committee; amounts would instead be paid by the fund directly to the Committee’s attorneys and to the plaintiff in the lawsuit.

QUESTION PRESENTED

1. If a separate legal defense fund is established pursuant to the requirements set out in previous Commission advisory opinions, including AO 2011-01, may such a fund pay the cost of a portion of the settlement of the copyright infringement lawsuit against the Committee?

LEGAL ANALYSIS

In a series of previous advisory opinions, the Commission has confirmed that legal defense funds may be established to cover legal costs incurred by principal campaign committees in defending against lawsuits that do not involve alleged violations of the Act. *See, e.g.*, 2011-01 (Carnahan) (copyright infringement lawsuit); 2003-15 (Majette) (lawsuit challenging open primary election system); 1981-16 (Carter-Mondale) (potential commercial contract litigation); 1981-13 (Moss) (slander); 1980-04 (Carter-Mondale) (alleged violations of the Appropriations Act and Hatch Act, as well as alleged infringements of constitutional rights). In reaching these decisions, the Commission has relied on the fact that the term “contribution” is defined in the Act and in Commission regulations to mean something of value provided “for the purpose of influencing any election for Federal office.” *See* 52 U.S.C. § 30101(8)(A) & 11 C.F.R. § 100.52(a). The Commission has concluded in these advisory opinions that amounts received or disbursed for the purpose of defending against certain types of lawsuits are not “contributions” or “expenditures” under the Act, and thus they are not subject to the Act’s limitations.

May 9, 2016

Page 3

The Commission's reasoning in these opinions applies equally well to monies donated to such a fund for the purpose of covering any settlement of such litigation. As the Commission noted in an advisory opinion that, like this case, involved a copyright infringement lawsuit,

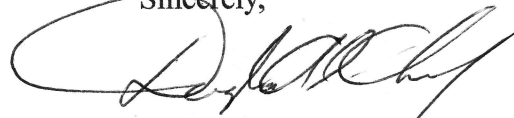
[b]ecause the proposed Fund would be established and administered entirely separately and independently from the Committee, solicitations for the Fund would be conducted separately from any solicitation for the Committee, and all amounts received by the Fund will be held separately from the Committee's funds, no amounts given to the Fund could be used for the purpose of influencing any Federal election. Therefore such receipts and disbursements would not be "contributions" to or "expenditures" by the Fund . . . nor would they be in-kind "contributions" from the Fund to the Committee.

AO 2011-01 (Carnahan).

This reasoning applies equally well to amounts donated for the purpose of paying the cost of a settlement of such litigation. If, as the Commission has repeatedly concluded, monies contributed to such a fund for "legal costs" are not "contributions" under the Act, then there appears to be no legal or theoretical justification for treating those funds differently if they are used to pay for a settlement of such litigation than if they are used to pay for attorney's fees arising from the litigation. Both such costs are "legal costs" incurred by the Committee as a result of litigation which it is forced to defend. In neither case would the funds be used to influence the outcome of a federal election, and thus they would not be "contributions" or "expenditures." Accordingly, nothing in the Act or the Commission's regulations should prohibit the use of such funds to satisfy a portion of the settlement of this federal lawsuit.

We respectfully request that the Commission promptly issue an advisory opinion confirming that this is the case. If you have any questions, feel free to contact the undersigned at 202-793-6977. Thank you for your consideration of this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Douglas Chalmers, Jr.', with a large, stylized initial 'D'.

Douglas Chalmers, Jr.



History:

This message has been forwarded.

Ms. Waldstreicher:

Thank you for your email. By way of response:

(1) It is my understanding that the second paragraph of your email (the one beginning with “The legal defense fund . . .”) is correct. As to your statement that “[n]either Huckabee for President, Inc. nor Gov. Huckabee is establishing the fund,” however, I do wish to emphasize that that would not be a disqualifying factor in any event. I would not want our advisory opinion request to be construed in a manner that suggests that we believe that that would be prohibited.

On this issue, the Commission’s previous advisory opinions do not contain any prohibition on a candidate or campaign committee establishing such a separate fund. To the contrary, previous Commission advisory opinions expressly contemplate involvement by a candidate or candidate campaign committee in the establishment of legal defense funds. See, e.g., AO 2003-15 (Majette) (noting that, in AO 1996-39, the Commission “considered whether a candidate may establish” a legal defense fund in connection with litigation, and concluded that the candidate could do so); AO 1981-16 (Carter/Mondale) (concluding that a candidate’s campaign committee could establish a legal defense fund related to litigation against the committee that did not involve alleged noncompliance with FECA). Indeed, in AO 1993-15 (Tsongas), an opinion that was cited and relied upon by the Commission in AO 2011-01 (Carnahan), the Commission stated this:

"The Commission has also determined that donations and disbursements made for the purpose of defending a Federal officeholder with respect to activities unrelated to compliance with the Act were not contributions or expenditures. See Advisory Opinions 1983-21, 1981-16, 1981-13, and 1979-37. Similarly, the Commission has also determined that money or in-kind donations to a principal campaign committee of a presidential candidate, or a fund established by it, were not contributions if donated for purposes such as defending against violations of the Hatch Act, the Appropriations Act, or constitutional rights, or pursuing commercial litigation such as a contract dispute. See Advisory Opinions 1981-16 and 1980-4." (Emphasis added). This reference to “a fund established by it,” i.e., by the campaign committee, clearly indicates that it is permissible for a campaign committee to establish such a fund for litigation matters.

Moreover, in AO 2011-01 (Carnahan), it was the campaign committee itself that “propose[d] that a separate legal defense fund . . . be established to defray the Committee’s legal costs.” While the committee volunteered that, in that case, no federal candidates or officeholders would be involved in establishing the fund, that was not a requirement given the language in the Commission’s previous advisory opinions.

In short, the Commission’s previous advisory opinions expressly contemplate involvement by campaign committees and candidates in the establishment of such legal defense funds. As such, we would not want our request to be construed to suggest that that is not permissible.

Notwithstanding that, out of an abundance of caution in this case neither Governor Huckabee nor Huckabee for President, Inc. will establish or administer the fund. The fund will be established and administered by others, who will be represented and advised by separate legal counsel.

Solicitations will be conducted separately from any solicitation by the committee, and no monies raised by the legal defense fund will be transferred to the committee.

(2) With respect to your third paragraph, it is my understanding that any legal defense fund established pursuant to the Commission's previous advisory opinions would need to be established as a trust. As I am not establishing or representing the fund in this case, however, I am not able to make any affirmative factual representation on how it will be created and operated. The advisory opinion request that we have submitted on behalf of Huckabee for President, Inc. assumes that such a fund will be administered in a manner consistent with previous advisory opinions, and the request asks whether, if that is the case, the fund could be used to pay a portion of the committee's litigation settlement costs in addition to its attorney's fees.

Thank you for your attention to this matter.

Doug

Douglas Chalmers, Jr.
Managing Member
Chalmers Pak Burch & Adams LLC
1300 Pennsylvania Ave NW #190-612
Washington, DC 20004
Phone: 202-793-6977
Fax: 678-582-8911

This message and any attached materials are intended solely for the use of the intended recipient and may contain information that is privileged, confidential or otherwise exempt from disclosure under applicable law. If the reader of this e-mail is not the intended recipient or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by return email and then delete the original message.

On May 13, 2016, at 10:23 AM, JWaldstreicher@fec.gov wrote:

Dear Mr. Chalmers:

Thank you for speaking with me about your advisory opinion request yesterday. I have set out below my understanding of some of the information that you provided in that conversation. Please confirm the accuracy of these statements or correct them if they are not accurate as written.

The legal defense fund described in the request is in the process of being established and will be used to pay attorneys' fees incurred in defense of the underlying litigation, in addition to its intended use for payment of the settlement amount. Neither Huckabee for President, Inc. nor Gov. Huckabee is establishing the fund.

The legal defense fund will be established as a trust, in accordance with Advisory Opinion 2000-40 (McDermott) and other previous advisory opinions concerning legal defense funds. Similarly, the fund will be administered and donations to the fund will be solicited in accordance with previous advisory opinions concerning legal defense funds.

I would appreciate your response by email. Your response may be considered part of your advisory opinion request; if so, it will be posted as such on the Commission's website.

Joanna Waldstreicher
Office of General Counsel, Policy Division
Federal Election Commission
999 E Street NW
Washington, DC 20463
(202) 694-1650