

JUN 19 2008

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 5965

DATE COMPLAINT FILED: January 22, 2008

DATE OF NOTIFICATIONS: January 28, 2008

LAST RESPONSE RECEIVED: February 12, 2008

DATE ACTIVATED: March 20, 2008

EXPIRATION OF STATUTE OF LIMITATIONS:
December 24, 2012

COMPLAINANT:

Jack L. Richardson, IV

RESPONDENTS:

Gregory E. Fischer
Fischer for U.S. Senate and Ruth Payne,
in her official capacity as treasurer
Dant Clayton Corporation

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 431(2)
2 U.S.C. § 434(b)
2 U.S.C. § 441b(a)
11 C.F.R. § 100.94
11 C.F.R. § 101.2
11 C.F.R. § 101.3
11 C.F.R. § 104.3
11 C.F.R. § 114.9(2)

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

Gregory E. Fisher, the Chief Executive Officer of Dant Clayton Corporation ("Dant Clayton"), declared his intention to run in Kentucky's 2008 Democratic primary for a United States Senate seat on his campaign website on January 16, 2008. A complaint dated the same day alleges that Dant Clayton made, and Fischer accepted, impermissible corporate in-kind contributions during December 2007 in the form of corporate resources utilized in connection

1 with Fischer's Senate race, specifically the use by Fischer of his corporate e-mail account to seek
2 finance staff should he decide to run, and the inclusion in an attachment to his e-mail of the
3 corporate e-mail address of a Dant Clayton employee for receipt of resumes from persons
4 interested in applying. The complaint also states that Fischer's limited liability company,
5 Iceberg Ventures, LLC ("Iceberg Ventures"), had previously paid for and registered several
6 website domain names used in connection with his Senate candidacy, which might require
7 Fischer's campaign to report in-kind contributions from Iceberg Ventures.

8 As discussed in more detail below, we recommend that the Commission find no reason to
9 believe that Dant Clayton Corporation made, and Gregory E. Fischer, and Fischer for U.S.
10 Senate and Ruth Payne, in her official capacity as treasurer, accepted, prohibited corporate
11 contributions in violation of 2 U.S.C. § 441b(a). We also recommend that the Commission
12 dismiss the allegation that Fischer for U.S. Senate and Ruth Payne, in her official capacity as
13 treasurer, failed to report in-kind contributions from Iceberg Ventures in violation of 2 U.S.C.
14 § 434(b).

15 **II. FACTUAL AND LEGAL ANALYSIS**

16 **A. Factual Summary**

17 The complaint is based on two blog website reports, which are attached thereto; one of
18 the reports contains a copy of an e-mail and job description that Fischer sent from his Dant
19 Clayton corporate e-mail account on December 24, 2007, addressed to "undisclosed recipients."
20 In the e-mail, Fischer states "[w]hile I have not made a final decision re the US Senate run, we
21 are preparing for a possible announcement in January." Fischer further states that since
22 "[f]undraising is one of the first activities to kick into gear," paid finance staff and a Finance
23 Director are needed. He asks the e-mail recipients to think about persons who might qualify and

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1 attaches to his e-mail a job description for the positions.¹ The attachment concludes: "To apply,
2 e-mail cover letter and resume to: csadler@dantclayton.com." It appears that Cindy Sadler, a
3 Dant Clayton employee, is the "csadler" referenced in the e-mail attachment. See
4 <http://center.spoke.com/info/p9IbWzr/CindySadler>

5 The complaint also states, based on an attached blog website report, that Fischer's limited
6 liability company, Iceberg Ventures, is the owner of several internet domain names connected
7 with his Senate candidacy. The blog website report states, "[u]tilizing his LLC to do work for
8 his campaign is fine, as long as it is reported to the FEC s an in-kind contribution that does not
9 exceed \$1,000." Available at www.pageonekentucky.com. We have been able to confirm that
10 Iceberg Ventures, which is not incorporated, registered the domain name www.gregfischer.com,
11 used by Fischer's campaign, with www.godaddy.com. According to godaddy's website, its
12 registration fee for .com domain names recently has been discounted from \$9.99 to \$6.85 per
13 year. See http://www.godaddy.com/gdshop/compare/gdcompare_domain.asp?isc=goxt1003b
14 (May 19, 2008).

15 In their joint response to the complaint, Fischer and his authorized committee, Fischer for
16 U.S. Senate and Ruth Payne, in her official capacity as treasurer ("the Committee"), and in its
17 separate response, Dant Clayton, ask the Commission to dismiss the complaint. They do not
18 deny the alleged e-mail activity, but maintain that it did not constitute an in-kind corporate
19 contribution. Fischer and the Committee do not address the registration of domain names by
20 Iceberg Ventures.

¹ The attached job description is headed "DEMOCRATIC CAMPAIGN STAFF NEEDED," subheaded "HIRING FINANCE STAFF IN CAMPAIGN TO BRING FRESH IDEAS TO THE US SENATE," and states that the responsibilities include "[t]raveling and working directly with the Candidate and Friends of the Candidate."

B. Legal Analysis

1. Corporate Contributions

The complaint alleges that Dant Clayton made, and the Fischer Committee accepted, corporate contributions through the use of corporate resources in connection with Fischer's Senate candidacy. The complaint focuses specifically on Fischer's use of the corporate e-mail system to send a campaign-related e-mail, and the inclusion in an attachment to his e-mail of the corporate e-mail address of a Dant Clayton employee to be used as the contact point for responses to his e-mail.

Dant Clayton's response and the Fischer/Committee joint response both assert that because Fischer was not yet a "candidate" within the meaning of 2 U.S.C. § 431(2) when the activity took place, the ban on corporate contributions was not applicable.² In their responses, Respondents further maintain that even if Fischer was a "candidate" at the relevant time, to the extent volunteers used corporate resources in performing the alleged activities, the use was "occasional, isolated, or incidental," and thus, pursuant to 11 C.F.R. § 114.9(a), Dant Clayton made no corporate contributions. Specifically, Dant Clayton's response states that if its volunteer employees "used corporate resources, it is Dant Clayton's belief that the use of those resources was 'occasional, isolated or incidental' within the meaning of 11 C.F.R. § 114.9(a) and would not be a contribution." Dant Clayton response at 1-2. Similarly, the Fischer/Committee response states that "the exception for the 'occasional, isolated, or incidental' use of corporate

² Whether Fischer was a candidate or not at the time of the activities in question, he was not permitted to accept corporate contributions even though he had not yet become a "candidate." Sections 101.2 and 101.3 of the Commission's regulations provide that when an individual becomes a candidate, all funds received or payments made in connection with his or her campaign prior to becoming a candidate are considered contributions or expenditures under the Act and must be disclosed in the first report filed by the candidate's authorized committee. Because funds or payments made in connection with a pre-candidacy campaign may later be subject to federal restrictions and reporting requirements, they must be federally compliant. See also 11 C.F.R. §§ 100.72(a) and 100.31.

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resources by volunteers would apply to a volunteer's receipt of resumes and other work performed by Dant Clayton employees voluntarily and on their own time." Fischer/Committee Response at 2.

The Act prohibits corporations from making contributions or expenditures from their general treasury funds in connection with any election of any candidate for Federal office. Contributions include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). The Act defines expenditures as "any purchase, payment distribution, loan, advance, deposit, or gift of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i). The term "anything of value" includes all "in-kind contributions." 11 C.F.R. § 100.7(a)(1)(iii)(A). See 2 U.S.C. § 441b(b)(2).

While a campaign's use of corporate resources may be deemed to be an in-kind contribution and, thus, an illegal corporate contribution in violation of 2 U.S.C. § 441b, section 114.9(a)(2) of the Commission's regulations contains a safe harbor that describes certain uses of corporate facilities to be "occasional, isolated, or incidental," and, if qualifying as such, not prohibited corporate contributions. Individual volunteer activity that does not exceed one hour per week or four hours per month, regardless of whether the activity is undertaken during or after normal working hours, as well as voluntary individual Internet activities, as set forth in 11 C.F.R. § 100.94, fall within the safe harbor, provided that the activity does not prevent an individual from completing the normal amount of his or her compensated work, does not increase the overhead or operating costs of the corporation, and is not performed under coercion. See

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1 11 C.F.R. § 114.9(a)(2)(ii). *See also Explanation and Justification for Internet Communications,*
2 71 Fed. Reg. 18589, 18611 (April 12, 2006) ("E&J").

3 Section 100.94, referenced in this safe harbor provision, exempts individual volunteer
4 Internet activity, whether independent or in coordination with a candidate, from the definition of
5 "contribution." The exemption applies to an individual's uncompensated personal services
6 related to Internet activities, which includes sending or forwarding messages, providing a
7 hyperlink or other direct access to another person's website, paying a nominal fee for the use of
8 another person's website, and any other form of communication distributed over the Internet.
9 The exemption also covers an individual's uncompensated use of equipment or services,
10 including computers, software, domain names, and any other technology that is used to provide
11 access to or use of the Internet, regardless of who owns the equipment and services.

12 Based on the available information, it appears that the activities in issue fall within the
13 scope of the safe harbor provision. The complaint offers no indication that Fischer did anything
14 but use his company's e-mail account on behalf of his campaign (and he did so at 12:52 A.M. on
15 December 24, 2007, which means that he likely wrote and sent it on his own time, not Dant
16 Clayton's), and ask individuals interested in joining the campaign to send resumes to another
17 Dant Clayton employee's e-mail address. These activities are encompassed in section
18 114.9(a)(2)'s safe harbor provision. *See E&J at 18596* ("there is virtually no cost associated with
19 sending e-mail communications, even thousands of e-mails to thousands of recipients...."). Nor
20 does the complaint provide any indication that Dant Clayton employees, including Ms. Sadler,
21 engaged in activities on behalf of Fischer's campaign that were outside of section 114.9(a)(2)'s
22 safe harbor provision. Thus, the use of Dant Clayton's corporate resources does not constitute an
23 in-kind corporate contribution. Therefore, we recommend that the Commission find there is no

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reason to believe that Dant Clayton Corporation, Gregory E. Fischer, or Fischer for U.S. Senate and Ruth Payne, in her official capacity as treasurer, violated 2 U.S.C. § 441b(a).

2. In-Kind Contributions from Iceberg Ventures

The complaint also alleges that the Committee may have been required to report the costs incurred by Fischer's limited liability company, Iceberg Ventures, for registering eight domain names in anticipation of a possible Senate run, one of which was used as the official campaign website. Fischer and the Committee did not respond to this allegation.

Authorized committees are required to report and identify each person who makes a contribution or expenditure with an aggregate value in excess of \$200 within an election cycle, as well as to report unitemized contributions and operating expenditures. 2 U.S.C. § 434(b), 11 C.F.R. § 104.3. In-kind contributions are reported as both receipts and expenditures. 11 C.F.R. § 104.13. However, because the current annual cost of registering the domain names is under \$10.00, even if the campaign utilized all eight domain names allegedly registered to Iceberg Ventures, it appears likely that the aggregate cost for the eight registered domain names would be below the \$200 level for itemized in-kind contributions or expenditures, and therefore, too low to justify using the Commission's limited resources to investigate whether they were included in the unitemized receipts and operating expenditures on the Committee's detailed summary page, or to otherwise pursue the matter.

Therefore, we recommend that the Commission dismiss the portion of the complaint alleging that Fischer for U.S. Senate and Ruth Payne, in her official capacity as treasurer, may have violated 2 U.S.C. § 434(b) by failing to report in-kind contributions from Iceberg Ventures, LLC, and close the file as to all respondents. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

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III. **RECOMMENDATIONS**

1. Find no reason to believe that Dant Clayton Corporation, Gregory E. Fischer, and Fischer for U.S. Senate and Ruth Payne, in her official capacity as treasurer, violated 2 U.S.C. § 441b(a).
2. Dismiss the allegation that Fischer for U.S. Senate and Ruth Payne, in her official capacity as treasurer, may have violated 2 U.S.C. § 434(b) by failing to report in-kind contributions from Iceberg Ventures, LLC.
3. Approve the attached Factual and Legal Analyses.
4. Close the file.
5. Approve the appropriate letters.

Thomasenia P. Duncan
General Counsel

Ann Marie Terzaken
Associate General Counsel for Enforcement

6-18-08
Date

BY:

KHE Guil
Kathleen M. Guith
Acting Deputy Associate General Counsel
for Enforcement

Susan L. Lebeaux
Susan L. Lebeaux
Assistant General Counsel

Ruth Heilizer / by SKI
Ruth Heilizer
Attorney