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July 23, 2012

VIA FEDERAL EXPRESS & FAX

Frankie D. Hampton
Federal Election Commission
Complaints Examination & Legal Administration
999 E Street, NW
Washington, D.C. 20463

RE: 15-Day Response to MUR 6598

Dear Mr. Hampton,

My firm represents Andrei for Arizona (FEC Committee No. C00511900, the "Committee") in connection with the campaign finance complaint filed by Sharon Thomas on June 22, 2012 (MUR 6598, the "Complaint"). This letter represents the Committee's 15-day response pursuant to 11 C.F.R. § 111.6(a), and explains why the Federal Election Commission (the "Commission") should take no action on the Complaint. The Complaint, this response, and any action taken thereon are confidential pursuant to 2 U.S.C. § 437g(a)(4)(B), (12)(A).

Factual Background¹

The facts underlying the Complaint are as follows: In late 2011, Andrei Cherny was privately testing the waters for a congressional run in Arizona Congressional District 9 (the "District"). Like most individuals who seriously consider congressional campaigns, Mr. Cherny volunteered a considerable amount of his personal time, at his personal residence and elsewhere, during the testing-the-waters phase of his campaign.

To help him evaluate the viability of his candidacy, Mr. Cherny personally commissioned an autodialer poll in December 2011 to test the strength of three potential Democratic candidates

¹ This statement of facts is supported by the attached verification by Seth Scott, the Treasurer for the Committee.

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in the District. The cost of the Poll was approximately \$3,000, and Mr. Cherny paid for the Poll with his personal funds. The Poll was completed on or about December 21, 2011, and the results of the Poll were transmitted to Mr. Cherny at his personal residence. Mr. Cherny first reviewed the results of the Poll in his personal residence that same day.

On February 3, 2012, the Committee filed a statement of organization with the Commission. On April 15, 2012, the Committee filed its first quarterly report, and disclosed more than \$430,000 in contributions. In preparing and filing its first quarterly report, the Committee inadvertently failed to disclose Mr. Cherny's personal expenditure for the Poll. At some point in the next 48 hours, the Committee will file an amended first quarterly report to disclose Mr. Cherny's expenditure in connection with the Poll.

The Complaint alleges that, because the Committee's first quarterly report did not disclose Mr. Cherny's expenditures in connection with the Poll, the Commission must investigate and take remedial action against the Committee and its Treasurer.

Legal Argument

There are two reasons why the Commission should take no action on the Complaint:

1. Mr. Cherny's personal expenditure in connection with the Poll was not a "contribution" within the meaning of the Federal Election Campaign Act and Commission regulations ("FECA").
2. The Commission does not have a constitutional or practical interest in investigating or bringing enforcement action based on the Complaint because:
 - a. Mr. Cherny's personal expenditure on the Poll, as a matter of law, could not have given rise to corruption or appearance of corruption;
 - b. the value of the Poll was immaterial in the context of the campaign; and
 - c. the Committee and its Treasurer will file an amended report in the next 48 hours to disclose fully the Poll and Mr. Cherny's expenditure in connection therewith.

1. The Money Spent on the Poll Was Not a "Contribution."

Mr. Cherny's personal expenditure in connection with the Poll was not a "contribution" within the meaning of FECA. Under the regulations promulgated by the Commission:

No contribution results where an individual, in the course of volunteering personal services on his or her residential premises to any candidate . . . provides the use of his or her real or personal property to such candidate for candidate-related activity

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11 C.F.R. § 100.75.

In this case, Mr. Cherny volunteered his own "personal services" during the testing-the-waters phase of the campaign. Because Mr. Cherny had commissioned the Poll with his personal funds, the results of the Poll were Mr. Cherny's "personal property." Mr. Cherny reviewed the results of the Poll from his own "residential premises"—so Mr. Cherny's provision of the Poll results to the campaign was exempt under Section 100.75 from the definition of "contribution" under FECA.

Because Mr. Cherny's personal expenditure on the Poll was not a contribution within the meaning of FECA, the Committee and its Treasurer were not required to disclose the expenditure in the first quarterly report. *See id.* § 104.3(a)(2) (requiring the disclosure of "contributions").

2. *The Commission Has No Interest in Investigating or Bringing Enforcement Action Based on the Complaint.*

Even if funding for the Poll was a contribution within the meaning of FECA, and should have been disclosed in the Committee's first quarterly report, the Commission has no constitutional or practical interest in further investigating the Complaint or bringing enforcement action based on the Complaint.

a. *The Poll Did Not Give Rise to Corruption or the Appearance of Corruption.*

Campaign finance laws exist to prevent corruption and the appearance of corruption. *See generally Buckley v. Valeo*, 424 U.S. 1 (1976). Limitations on personal expenditures by a candidate do not limit corruption or the appearance of corruption. *Id.* at 51-54. Rather, personal funding by a candidate increases the candidate's independence and reduces the likelihood of corruption or the appearance of corruption; restrictions on personal funding by a candidate therefore exceed the constitutional authority of Congress and the Commission to promulgate and enforce campaign finance regulations. *Id.*

Because the candidate personally funded the Poll, which as a matter of law could not have given rise to corruption or the appearance of corruption, any further investigation or any remedial action would be unnecessary and inappropriate, and would not further the constitutionally valid objectives of FECA and the Commission.

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b. The Cost of the Poll Was Immaterial to the Finances of the Committee.

In its first quarterly report, the Committee reported more than \$430,000 in contributions. The cost of the Poll therefore represented less than 1% of the Committee's contributions to date. The inadvertent failure to disclose such a small item does not represent a material omission or misstatement, and does not justify investigation or remedial action.

c. The Committee Is Filing an Amended First Quarterly Report.


Even if the cost of the Poll was a "contribution" within the meaning of FECA, and should have been disclosed in the Committee's first quarterly report, the failure to disclose the expenditure was harmless because within the next 48 hours the Committee will file an amended report that fully discloses the expenditure and adequately remedies any harm from the original oversight. For the avoidance of doubt, the Committee and its Treasurer do not believe FECA required disclosure of the expenditure in the first quarterly report, but will amend the report in an abundance of caution, in order to eliminate any possible criticism of their disclosure practices to date.

Conclusion

In this context, the Commission should take no further action on the Complaint. Mr. Cherny's expenditure on the Poll was not a "contribution" within the meaning of FECA, did not give rise to corruption or the appearance of corruption, was immaterial to the Committee's finances, and in any event has been fully disclosed to the Commission and the public in an amended report. Any further investigation or remedial action would unnecessarily consume the scarce resources of the Commission and the Committee, without furthering the goals of FECA or the Commission.

If we can be of any further assistance in your evaluation of the Complaint, please do not hesitate to contact us.

Sincerely,
SNELL & WILMER L.L.P.



Adam Lang

Cc: Seth Scott, Treasurer
Jeff S. Jordan, Supervisory Attorney

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