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By Overnight Delivery

May 11, 1998

Secretary of the Commission
Federal Election Commission
999 "E" Street
Washington, DC 20463

Re: MURs 4389/4652
Orange County Democratic Central Committee and Zeke
Hernandez, as Treasurer

Dear Commissioners:

This letter brief is submitted on behalf of the Orange County Democratic Central Committee ("OCDCC" or "Committee") in response to the General Counsel's Brief in support of its recommendation for a finding of probable cause in the above-entitled matter. Although the OCDCC does not have sufficient resources to retain an attorney to represent it in this matter, our firm (which had previously represented the Committee in investigating this matter) has voluntarily agreed to prepare and file the following response on its behalf. The Committee respectfully submits that there is no factual or legal basis for finding that any violations were committed by the Orange County Democratic Central Committee in connection with this matter.

On August 7, 1997, the Committee and its then-treasurer, Edward Haskett, submitted a 10-page letter brief responding to the Office of General Counsel's Factual and Legal Analysis in support of that office's recommendation to find reason to believe that the Committee had violated the Act in connection with this matter. We are attaching a copy of that letter and wish to incorporate it into this response, as well, so as not to needlessly repeat what was said there. Given the resource constraints faced by the Committee, we only respond in this letter to the additional points raised in the General Counsel's most recent brief.

The Committee continues to believe, and fervently to contend, that it would be completely unjustified and improper to charge it with a violation of the Act owing to actions taken solely by Mr. Toledano — actions taken by Mr. Toledano not only in explicit contravention of the Committee's by-laws and without its knowledge or approval, but actions taken by Mr. Toledano with an intent actively to conceal what he did from the Committee.

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The Committee is the victim in this matter, not the perpetrator of any violation; Mr. Toledano literally stole the use of the Committee's name for his own, self-interested purposes. To hold the Committee responsible for Mr. Toledano's actions under these circumstances is without legal precedent and is manifestly unfair. The Committee was powerless to prevent Mr. Toledano's appropriation of its name, and the Committee has engaged in no conduct that warrants the imposition of a fine either as punishment for any wrongful activities on its part or as a deterrent to prevent future wrongful conduct of a similar nature.

I. THE GENERAL COUNSEL'S BRIEF CONTINUES TO MISSTATE THE
PERTINENT FACTS RELATING TO THIS MATTER

In our previous submission to the Office of General Counsel, we pointed out a number of material errors in its account of the underlying facts in this matter. Many of those errors, and yet additional mistakes, continue to be found in the Statement of the Case in the General Counsel's latest brief. These errors severely undermine the propriety of the Commission's legal analysis and conclusion regarding its recommendation of probable cause.

Most distressingly, the General Counsel apparently continues to base its recommendations almost entirely on Mr. Toledano's self-serving and demonstrably false version of what transpired.¹ Indeed, it appears that in the almost a year it has had to conduct an investigation into this matter, the General Counsel's office has performed absolutely no independent investigation into any of the underlying facts, but has simply taken the word of Mr. Toledano and Ms. La Prade — the two principal co-conspirators — at face value.

Thus, for example, the General Counsel continues to assert that "sometime in February 1996, Debra LaPrade called the Democratic Committee and spoke with James Toledano about making a contribution." (General Counsel's Brief ("GCB"), p. 2.) The General Counsel then relies upon this alleged fact (i.e., that Ms. LaPrade called Mr. Toledano at the Party headquarters) to support its conclusion that Mr. Toledano was acting within the authority granted to him to accept and expend money in the name of the Democratic Party. (*Id.*, p. 9.) The Committee denies Ms.

¹As we pointed out in our earlier letter, Mr. Toledano's version of what happened has conveniently changed from time-to-time, as new evidence has been uncovered refuting his initial claims. Nothing Mr. Toledano claims, in his self-serving effort to evade liability for his actions, should be believed, and it is outrageous that the General Counsel bases its analysis almost entirely on Mr. Toledano's version of events.

LaPrade's claim that she contacted Mr. Toledano at the Party's headquarters. Did the General Counsel conduct any investigation to see whether Ms. LaPrade was telling the truth? Would it not be a simple matter to request (or subpoena) her telephone records to see whether they show a telephone call being made to OCDCC headquarters or, as we believe, instead show calls made to Mr. Toledano's office? If the latter, doesn't that confirm that Ms. LaPrade's testimony is not to be believed (beyond her inherently incredible claim that she, an Arizona resident, just wanted to give money to the Orange County Democratic Party — in a primary election, no less — to use as it best saw fit, without regard to the fact that her brother was a candidate in that election).

The General Counsel's Brief is rife with similarly false assertions of "fact" — all of which come solely from the self-serving claims of Mr. Toledano. For the record, each of the following material alleged "facts" is false:

- ♦ Mr. Toledano has not, to the Committee's knowledge, "received other contributions to the Democratic Committee at his law office during his tenure as Chairman of the Committee." (GCB, p. 2.) The Committee's records do not show a single contribution ever being received by Mr. Toledano at his law office. We would like to be informed of any examples of such contributions that Mr. Toledano may have given the General Counsel's office; if he did not give any such examples, why is the General Counsel prepared to accept this claim without such evidence?
- ♦ The LaPrade's check was not deposited into "an account at a bank where the Democratic Committee had banked at an earlier time." (*Ibid.*) To the contrary, as we explained in our previous letter objecting to this mischaracterization, Mr. Toledano appears to have gone out of his way to deposit the check into a bank and branch where the Committee did not have any existing or prior accounts. We suspect, from the address of the bank branch, that this was the bank at which Mr. Toledano had his own personal or business accounts, which may explain why the bank apparently permitted him to open an account in the Committee's name without the necessary authorization.
- ♦ Information provided to the Committee indicates that Mr. Toledano did not "receive[Ms. LaPrade's] contribution check at his law office" (*ibid.*), as Toledano now claims. As we previously informed the General Counsel, we have been told by a reliable source that the check was overnighted to Mr. Prince's father, Harvey Prince, and was hand-delivered by Harvey Prince to Mr. Toledano. There may be documentation of the overnight delivery from Federal Express or some other service, and we suggest that the Commission contact Ann

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Greenfield, Mr. Prince's former campaign manager, who we understand has first-hand knowledge of these arrangements (and was so upset by them that she temporarily resigned from her position). Did the General Counsel make any inquiry of Ms. Greenfield? And if her account shows the LaPrade's and Toledano's accounts to be false, should not the entirety of their testimony be disbelieved?

- ♦ Mr. Toledano did not "[use] vendor lists which he kept at home and had compiled in his capacity as Chariman of the Committee, to select the vendors used in connection with the mailer." (*Id.*, p. 3.) The Committee had never previously used any of these vendors. In fact, during the course of the Committee's investigation into this matter, Mr. Toledano told me that he had not been happy with the printer that the Committee had used for some previous mailers/invitations and had gotten the name of Susan Davis Graphic Services (the vendor that he ended up using) either from the Prince campaign or from his own unsuccessful candidacies for state office.
- ♦ It is not true that the "use of the [Committee's] bulk mail number and account was routinely allowed by the Committee." (*Ibid.*) Did Mr. Toledano provide any support for this self-serving assertion? Did the General Counsel check the Postal Service records?
- ♦ The OCDCC's executive committee was not "divided, dysfunctional, ineffective, and obstructive," nor was its treasurer "unreliable." (*Id.*, at p. 4.) Why does the General Counsel's office include these kind of unsupported, scandalous assertions in its brief? Likewise, did the General Counsel receive any confirmation or supporting evidence for Mr. Toledano's self-serving claims that "the Democratic Committee consistently ignored its by-laws" and "has a history of electing rich chairmen [presumably, excluding himself, since he has claimed to be too poor to reimburse the Committee for any of its expenses in this matter] and essentially letting them do what they want." The Committee emphatically denies these claims. It is expected, one supposes, that Mr. Toledano would make such claims upon being caught violating those very by-laws, but it is incredible that the General Counsel would simply accept them as true! The General Counsel should at least have contacted previous Committee Chairs to see whether they would confirm Mr. Toledano's characterization of the executive committee or of their own authority. We are confident that they would not.
- ♦ It is not true that the Committee's Chairman from 1991-93 raised over \$450,000 for the party and "allocated the money

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as he saw fit", or that "others had done the same as far back as the 1960s." (*Ibid.*) Again, did Mr. Toledano provide any evidence supporting his claims? Did the General Counsel conduct any independent investigation to confirm the truth of these assertions? In fact, the earlier Chairman referred to by Mr. Toledano conducted himself in full conformity with the Committee's by-laws, never took unilateral action on behalf of the Committee, and received the executive committee's express authorization for all expenditures made on behalf of the Committee.

◆ Perhaps most outrageously, it is utterly false for the General Counsel to state that "the Democratic Committee has apparently conceded that Mr. Toledano was acting within the scope of his authority" (*Id.*, p. 8.) It borders on bad faith for the General Counsel to inform this Commission that the Committee has conceded that Mr. Toledano was acting with the scope of his authority. The Committee spent ten pages explicitly refuting any suggestion that Mr. Toledano was acting with the scope of his authority. The Committee was hardly "silen[t]" on this point!

In case the General Counsel somehow missed it, the Committee's previous submission pointed out that its by-laws expressly *prohibit* the Chairman or anyone else from depositing Committee funds into a new bank account or from expending those funds on their own. Article VII, Section 2.A declares: "All funds obtained in the name of the County Committee . . . shall be deposited by the Treasurer in the general fund account or in appropriately designated accounts authorized by the EC [Executive Committee]." Similarly, Article VII, Section 3.A states: "Expenditures shall be made from County Committee funds as provided for by the authorized budget or by specific authorizations of the EC or the County Committee." Thus, contrary to the claim made by the General Counsel's office, Mr. Toledano could not engage in such activities under any circumstances. The Executive Committee could have specifically authorized him to engage in a particular activity, but in the absence of such authorization — which even Mr. Toledano never claimed to possess — he could not engage in the activities he undertook.

As noted above, these factual misstatements are critical to the analysis and conclusions reached by the General Counsel in this case. It is beyond the Committee's comprehension that the General Counsel would — apparently without a stitch of confirming evidence — simply take as true Mr. Toledano's self-serving characterization of the scope of his own authority. It is particularly outrageous that the General Counsel would take Mr. Toledano's statements at face value when he has been shown to

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have lied about these events in the past. If Mr. Toledano truly believed that he had the authority to act on behalf of the Committee in this matter, why did he admittedly go to such great lengths to hide his actions from the Committee?² Mr. Toledano's and the General Counsel's characterization of these events is simply not plausible.

II. THE GENERAL COUNSEL'S BRIEF MISSTATES THE APPLICABLE LAW ON "APPARENT AUTHORITY" AND MISCHARACTERIZES PRIOR COMMISSION PRECEDENT

Compounding the General Counsel's Brief's misstatement of the material facts is its mischaracterization of the applicable law and Commission precedent. The General Counsel's brief alternately indicates that Mr. Toledano possessed express, implied, or apparent authority to make the expenditures for the Prince mailer on behalf of the Committee. Neither conclusion is supportable under existing legal principles.

Mr. Toledano certainly did not possess express authority for his activities in this regard. The Committee's by-laws (which, mysteriously, are nowhere cited in the General Counsel's brief) make this clear; in addition to the provisions quoted above, Article V, Section 1, sets forth the duties of the Chairman, and the authority to make expenditures on behalf of campaigns and candidates is not among the specified duties. Indeed, even Mr. Toledano himself seems to concede that he did not possess express authority to do what he did in the Committee's name, because he argues, essentially, that it was okay for him to disregard the by-laws, not that the by-laws (or any other Committee action) authorized him to do what he did.

Nor can the General Counsel's suggestion that Mr. Toledano acted with implied authority be supported by the facts or case law. The General Counsel cites Mr. Toledano's statements that he believed he possessed the requisite authority (GCB, pp. 7-8), but what else would one expect someone in Mr. Toledano's position to say? More importantly, that is not the test of whether someone possesses implied authority. Rather, the law requires not only that the "agent" believe he has the authority to act on behalf of the principal, but that "the belief was engendered by conduct of the principal. To hold otherwise would give any agent, not the authority, but the naked power to bind his principal to any

²The General Counsel notes that Mr. Toledano "stated that he feared disclosure of the LaPrade's contribution and his plans for the mailer would have ruined the opportunity to produce and distribute it." (GCB, p. 4.) What does that mean? That Mr. Toledano knew the expenditure was illegal and that someone might have objected to it on that ground?

contract within the general scope of his duties, however fantastic or detrimental to the principal's interest such contract might be." (*South Sacramento Drayage Co. v. Campbell Soup Co.* (1963) 220 Cal.App.2d 851.) Here, as discussed above and in the Committee's prior submission, there is nothing that the Committee did to give Mr. Toledano the reasonable belief that he possessed the authority to undertake these activities on their behalf. To the contrary, aside from Mr. Toledano's post-hoc self-serving statements, all of the evidence indicates that he knew full well that he did not possess such authority, and that he tried to hide his activities from the Committee for that very reason.

Finally, there is no basis for concluding that Mr. Toledano possessed *apparent* authority to engage in the activities he did on behalf of the Committee. Again, the General Counsel's brief misstates the law: It is not enough that Mr. Toledano led third parties to believe that he possessed authority to act on behalf of the Committee; the Committee itself must take some action to lead innocent third parties to believe that is the case. Indeed, it is well-established that the representations or actions of the purported agent cannot create the "apparent authority" to act on behalf of the principal. (See generally OCDCC's August 7, 1998, Letter Brief, pp. 6-8.) The General Counsel's brief fails to point to a single action or communication of the Committee indicating that Mr. Toledano had the authority unilaterally to receive, deposit, and expend contributions in connection with Mr. Prince's campaign.³

The Commission's precedents are in no way inconsistent with these applicable legal principles, and they do not support the General Counsel's conclusion in this case. The Committee has no quarrel with the General Counsel's statement that a committee may be held liable for the acts of its agents, even when the agent acted negligently, and contrary to express instructions. But that simply begs the question of when, and whether, a particular individual is in fact an "agent" of the committee. In all of the precedents cited by the General Counsel, the individuals who were responsible for violating the act were concededly agents of the

³All that the General Counsel's brief can muster in support of this conclusion are the unsupported assertions that "Mr. Toledano's duties, as Chairman, certainly included the advancement of the party's interest through the promotion of its candidates (GCB, pp. 8-9) and "Mr. Toledano certainly acted within the scope of his authority by accepting money to promote the Committee's candidates" (*id.*, p. 10). Conspicuously lacking from the General Counsel's brief is any evidence to support these conclusionary statements, other than Mr. Toledano's self-serving claims. In truth, the evidence is all to the contrary.

committees they represented: In MUR 2602, "Mr. O'Neill was acting on behalf of the Committee as assistant treasurer and finance chairman" (MUR 2602, p. 14); in MUR 3585, "Mr. Rizzo had authority to approve payment vouchers and write checks on the Committee's accounts. According to the Committee, he was authorized to function as the Committee's chief fundraiser, and was paid a consulting fee. It appears that he was publicly known as the Committee's Finance Chairman during this period." (MUR 3585, p. 4.)⁴ And in AO 1992-29, the Commission expressly observed, apparently without dispute, that "[i]t appears from your explanation that the committee employee who had neglected to deposit the checks was also your agent" (AO 1992-29, p. 2.) It is unremarkable, then, that in these instances the actions of the agents would be imputed to the principal (i.e., the committee). In each instance, the agents were explicitly authorized (and in most instances, specifically employed⁵) to undertake the activities they engaged in on behalf of their committees. That is simply not the case here.

Indeed, if the Commission precedents cited by the General Counsel have any application to this case, it lies in the failure of the Commission in MUR 2602 to charge those individuals whose names were mis-appropriated without their knowledge by Mr. O'Neill with any violation of the Act. (MUR 2602, pp. 23-24.) That is the most direct analogy to what happened here: Just as Mr. O'Neill used these five individuals' names without their knowledge or approval to attribute contributions to them that were actually made by him alone, Mr. Toledano here used the Orange County Democratic Central Committee's name without its knowledge or approval to attribute to it a mailer that was actually made and distributed by him alone. And just as the Commission found it inappropriate to charge those individuals with any violation of the Act in MUR 2602, so, too, is it inappropriate to charge the Committee with any violation here.

In sum, the Committee implores the Commission to consider the implications of the General Counsel's recommendation. If a violation was committed here, it was committed by Mr. Toledano: There is no dispute that he acted alone, without the knowledge of the Committee; there is no reason why he cannot and should not be held accountable by the Commission for his actions. But to hold the Committee responsible — when there is absolutely nothing it could possibly have done to prevent Mr. Toledano from doing what

⁴Even then, the Commission noted that "we do not address any potential violations by the Committee in this report."

⁵Mr. Toledano was not an employee of the Committee, which maintains no paid staff at all, but utilizes the services of volunteers.

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he did — would be a miscarriage of justice and an abuse of the Commission's authority.

Sincerely,



Fredric D. Woocher

Enc.

cc: Office of the General Counsel (3 copies)
Jeanne Costales, Chair, OCDCC

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