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BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

OF THE 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/CALIF. REPUBLICAN VICTORY FUND, Respondents.	OAH Case No. 2012101024 FPPC Case No. 10/828 **REPLY BRIEF OF THE ENFORCEMENT DIVISION RE: PROPOSED DECISION OF ADMINISTRATIVE LAW JUDGE JONATHAN LEW**

I. INTRODUCTION

Pursuant to California Code of Regulations, title 2, section 18361.9, the Enforcement Division submitted an opening brief regarding the proposed decision of Administrative Law Judge ("ALJ") Jonathan Lew of the Sacramento Office of Administrative Hearings ("OAH").

Thereafter, Respondents submitted a brief in response to the Enforcement Division's opening brief.

For the reasons discussed below, the Enforcement Division recommends adoption of Judge Lew's proposed decision. In this regard, a proposed form of order is submitted with this brief, which incorporates the limited, minor, technical changes of a clarifying nature that were discussed in the

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Enforcement Division's opening brief. Of note, Respondents' brief raised no objections regarding these changes.

II. DISCUSSION

A. Judge Lew correctly applied the law.

Respondents claim that Judge Lew's decision hinges upon a "direction and control" standard. However, this is an oversimplified mischaracterization of Judge Lew's application of the law.

The actual standard applied by Judge Lew is discussed on page 32 of his decision (Ex. A to the Enforcement Division's opening brief), beginning with paragraph 93, which reads as follows (with emphasis added):

> 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.[1] "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.*)

[1] For a more detailed discussion regarding the law of circumstantial evidence, see Ex. B to the Enforcement Division's opening brief, 24:6-25:6, which is incorporated herein by reference. In considering the circumstantial evidence and inferences arising therefrom, the judge considered evidence that the central committees acted *merely as mechanisms*, evidence that Tom Berryhill *arranged* for his own money to go *through* the central committees to his brother, and evidence that the central committees played *ministerial roles*. That the terms used to describe such evidence do not match the language of the earmarking statute, Section 85704, is immaterial and does *not* mean that the judge applied a subjective or a vague standard. Rather, the judge reasonably *inferred* from such evidence that there was an "agreement" or "condition" within the meaning of the earmarking statute. He was forced to refer to such circumstantial evidence because the defense witnesses chose to testify untruthfully about what really happened (which is discussed in more detail below).

> 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.

The foregoing passage, wherein Judge Lew describes "the standard applied in this case," makes no mention of "direction and control." Instead, the passage focuses on the following considerations:

- earmarking with a "condition" or "agreement" under Section 85704;
- whether the intermediary acted "merely as a mechanism";
- whether the true contributor "arranged" for his money to go "through" the intermediary to a particular candidate;
- looking "past the intermediary's essentially ministerial role to the substance of the transaction"; and
- the fact that it was "understood" by the parties to the "earmarking arrangement" that Tom Berryhill's money was to go to his brother.

This is the correct way of evaluating this case, and Respondents do not appear to object to the foregoing areas of inquiry.[2] Rather, Respondents have attempted to mischaracterize the standard applied by the Judge in this case, claiming that instead of the foregoing considerations, Judge Lew simply applied a "direction and control" standard. However, this is an inaccurate and misleading oversimplification. Three different parts of Judge Lew's decision show that he considered "direction and control" to be a factor—but not the *only* factor in finding that there was a condition or agreement under Section 85704.

First, "direction and control" was a factor because it helped establish that Tom Berryhill was *untruthful* in his testimony. Tom Berryhill claimed that he merely hoped and prayed that the central committees would do the right thing with his money—and he did not influence the central committees in any way. In this regard, the proposed decision politely points out that Tom Berryhill was impeached by

[2] For more information about the Enforcement Division's position with respect to the elements of earmarking and campaign money laundering, please see pages 3 through 24 of Exhibit B to the Enforcement Division's opening brief, which are incorporated herein by reference as if in full.

evidence that he directed and controlled the flow of his own contributions. (See Judge Lew's decision, Ex. A to the Enforcement Division's opening brief, p. 34, top paragraph: "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.") This is a permissible reason to consider "direction and control" because the credibility of a witness always is at issue. (Evid. Code, § 785.)

Second, the proposed decision mentions Tom Berryhill's "direction and control" as one factor among *many* considerations in reaching the conclusion that there was earmarking. This is discussed on page 34 of the decision (Ex. A to the Enforcement Division's opening brief, beginning with the paragraph immediately preceding ¶ 99), which reads as follows (with emphasis added):

> 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.*

The foregoing language shows that along with "direction and control," the judge also considered the fact that Tom Berryhill *arranged* for his money to go *through* the central committees, the fact that the central committees served as mere *mechanisms* and *played essentially ministerial roles*, and the fact that there was an *understanding* between the parties that amounted to a *prohibited agreement or condition under Section 85704* (the earmarking statute).

Also, careful reading of the above passage shows that the judge only appears to mention Tom Berryhill's "direction and control" as a counterpoint to the possibility that the central committees might have wanted to give money to Bill Berryhill anyway. This makes sense because it would be

disingenuous for the central committees to disclaim intermediary status where the funds were under the *direction and control* of Tom Berryhill. The central committees cannot *undo* Tom Berryhill's *direction and control* by claiming that they exercised their own *direction and control*. (See Judge Lew's decision, Ex. A to the Enforcement Division's opening brief, p. 29, ¶ 86: "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." Also, see p. 31, top paragraph: "Once a committee receives an earmarked contribution, it cannot give the contribution to the intended recipient without being an intermediary for the original donor.")

Third, Judge Lew mentions "direction and control" in the context of the appropriateness of the maximum penalty for Tom Berryhill and his committee. This is discussed on page 39 of the decision (Ex. A to the Enforcement Division's opening brief, beginning with the first full paragraph), which reads as follows:

> 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.

The foregoing passage is an abbreviated summary of the judge's prior findings for the purpose of justifying the maximum penalty. While this passage states that Tom Berryhill earmarked his contributions inasmuch as he exercised "direction and control," this does not mean that "direction and control" was the only factor that the judge considered in arriving at this conclusion. As discussed above, the judge also considered the fact that Tom Berryhill *arranged* for his money to go *through* the central

committees, the fact that the central committees served as mere *mechanisms* and *played essentially ministerial roles*, and the fact that there was an *understanding* between the parties that amounted to a *prohibited agreement or condition under Section 85704* (the earmarking statute).

However, even if "direction and control" were the main reason why Judge Lew found a "condition" or "agreement" within the meaning of Section 85704, Respondents would have no cause to complain because they admitted that "direction" is intertwined with the language of Section 85704. (See Respondents' *Corrected* Post Trial Brief, which is attached as Ex. E to Respondents' brief that was filed with the Commission, p. 10, ll. 19-21: "Thus, 'direction' depends upon the language of Gov. Code § 85704 about a condition or agreement. . . .")

Additionally, holding Respondents' to such a standard would not be creating new law. In 2002, the Commission issued an advice letter recognizing that a contributing candidate may not *direct* that the recipient use his contribution for a specific candidate without running into Section 85704's earmarking provisions. (See *Dichiara Advice Letter* (I-02-040), which is Attachment 5 to Exhibit B to the Enforcement Division's opening brief, p. [*4]: "[T]he contributing candidate may not *direct* that the PAC use his or her contribution for a specific candidate. The Act prohibits such earmarking. Section 85704 states that '[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 fully disclosed pursuant to section 84302 [contributions by intermediary or agent].'" Emphasis added.)

Another thing that Respondents argue is that Judge Lew improperly imported the term "understanding," which is not found in Section 85704. (See Respondents' brief, p. 7, bottom paragraph.) This is disingenuous because Respondents admitted to the ALJ that "[t]he crucial issue in the case is whether Tom Berryhill and the two central committees had 'agreements or *understandings*' that Tom's funds would be transferred to Bill." (See Respondents' trial brief, attached as Ex. C to Respondents' brief that was filed with the Commission, p. 1, ll. 22-23. Emphasis added.) Also, all throughout the hearing, Respondents kept a blow-up on an easel, which defined earmarking in terms of a "condition," "*understanding*," or "agreement."

In summary, Judge Lew found that Tom Berryhill "arranged" for his money to go "through" the Stanislaus and San Joaquin County Republican Central Committees to his own brother. The central

committees served as "mechanisms" for this purpose and played "ministerial roles." (See Judge Lew's decision, Ex. A to the Enforcement Division's opening brief, p. 34, first full paragraph.) Making such *arrangements* certainly would fall within any reasonable definition of "direction and control."

Additionally, Judge Lew found that: "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. . . . *The understanding that his contributions were to go to his brother's campaign constituted a prohibited agreement or condition under Government Code section 85704.*" (Ex. A to opening brief, p. 34, ¶ 99. Emphasis added.) This language makes it clear that the judge viewed the above-mentioned *arrangement* between Tom Berryhill and the central committees as amounting to an *understanding*, which the judge found to be an "agreement" or "condition" within the meaning of the earmarking statute, Section 85704. Nothing about this is odd, peculiar or contrary to law.

The real problem Respondents have with Judge Lew is that he did not believe the untruthful defense testimony that he was forced to listen to for almost six days. However, Respondents are couching their arguments in terms of a legal challenge because they understand that a judge's factual findings—which turn upon his assessment of the credibility of witnesses—carry great weight on appeal. This is discussed in more detail below.

B. There is nothing to be gained by re-opening the record and second-guessing the ALJ.

On December 13, 2012, at a regularly held public meeting, the Commission considered whether this case should be heard before the Commission itself (with the assistance of an ALJ) or whether the hearing should be presided over by an ALJ, alone. (This was agenda item 86 for the meeting of Dec. 13, 2012.) The Commission chose the latter course of action, and the Office of Administrative Hearings assigned Judge Lew to hear the case, alone. The end result is that the Commission entrusted the Office of Administrative Hearings to preside over this matter in a *fair* and *neutral* manner and to provide an *unbiased* decision.

Now, Respondents seek to re-open the record, claiming that Judge Lew got the facts wrong and that he should have given more weight to the defense testimony. However, second-guessing the judge—at the request of defense counsel—would defeat the purpose of assigning the matter to a *neutral third party* in the first place.

Additionally, Judge Lew, as the trier-of-fact, was in the best position to observe the demeanor of the witnesses and assess their *lack* of credibility—since he personally watched them testify. (See *Kolender v. San Diego County Civil Service Com.* (2005) 132 Cal.App.4th 1150, 1155: "The hearing officer was in the best position to observe the witnesses' demeanors and assess their credibility.") A cold reading of the transcripts would not provide a similar opportunity for the Commission.

There is no doubt that Judge Lew found the defense testimony to be untruthful in this case. For example, Tom Berryhill denied earmarking and claimed that he only hoped and prayed that the central committees would do the right thing with his money. However, Judge Lew found that Tom Berryhill actually *arranged* for his own money to go *through* the central committees to his brother. (Compare ¶ 65 of Judge Lew's decision with ¶¶ 94-99.) Joan Clendenin, Chair of the Stanislaus County Republican Central Committee, offers another example. When she was questioned about telephone records that reflected that she and Tom Berryhill exchanged numerous text messages around the time of the money laundering in this case, she denied sending or receiving such messages. Clearly, Judge Lew found this to be untruthful because he found that she and Tom Berryhill did in fact exchange multiple text messages on the day that Tom Berryhill mailed his check to her committee. (Compare ¶ 75 of Judge Lew's decision with ¶ 94.)

Since Judge Lew's decision is intertwined with the lack of credibility of the defense witnesses, and since he was in the best position to observe the demeanor of the witnesses and judge their untruthfulness, his findings should not be disturbed.

With respect to the inferences that Judge Lew drew from the evidence, Respondents argue that a different set of inferences should have been drawn. However, there is nothing unreasonable or far-fetched about Judge Lew's decision or the inferences that he drew, and if this case were appealed, the reviewing court would not substitute its judgment for that of the ALJ merely because two or more inferences reasonably could be deduced from the facts. (See *Kolender v. San Diego County Civil Service Com., supra,* 132 Cal.App.4th at pp. 1154-55 [when two or more inferences reasonably can be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trier of fact].) For the record, however, the Enforcement Division maintains that it would be extremely *unreasonable* to infer or deduce Respondents' version of events from the facts. In any case, the judge's

inferences are closely tied to his assessment of the lack of credibility of the witnesses, and the judge should not be second-guessed in this regard.

Respondents request that the Commission carefully review the entire record of the six-day hearing, which consists of thousands of pages of testimony, arguments, briefs, and exhibits. The Commission is not required to do this. Government Code section 11517, subdivisions (c)(2)(A) and (C), allows the Commission to adopt the proposed decision in its entirety—or to make limited, minor, technical changes of a clarifying nature—without re-opening the record. This is the course of action recommended by the Enforcement Division because there is nothing to be gained by re-opening the record—except unnecessary duplication of the work efforts of the ALJ (in whom the Commission placed its trust to preside over the hearing in a fair and neutral manner).

C. This case is not at odds with the Arizona settlement.

Respondents claim that Judge Lew's decision is at odds with the "Arizona" case. It is not.

In the "Arizona" case, initially, there was money transferred from Americans for Job Security (AJS) to the Center to Protect Patients' Rights (CPPR). This transfer was done with transmittal letters and other communications clearly stating that the funds transferred were to be used at the complete discretion of CPPR. In fact, the "hope" referred to by Respondents in this case in "Arizona" was specifically a hope that other funds, not the ones transferred by AJS, would be spent in California. CPPR was specifically targeted to give the funds to because they had the ability to potentially provide other funding. There was absolutely no evidence that AJS had any communications of any kind after the transfer to CPPR about further contributions or about the use of the funds transferred.

Compare that to the facts here. Tom Berryhill talks with Bill Berryhill's campaign staffer about the need to raise money for a television advertisement. A couple days later, Tom holds a fundraiser, stands up, and tells contributors to give to the Stanislaus Central Committee if they want to give to his brother, Bill. Then he proceeds to send two checks, in identical amounts, to two central committees. He communicates with central committee officers and with his brother's campaign staffer about the funds, their transfer, and the logistics of getting the money to his brother. The very next day, checks are written in virtually identical amounts by both central committees to Bill Berryhill. In both instances, a senior member of Tom Berryhill's staff picks up the checks directly from the central committees to bring to

Bill. When one central committee isn't moving fast enough on the check, Bill's staffer contacts Tom, and Tom uses his connections to get the State Republican Party to contact the central committee to get the check moving faster to Bill.

Respondents' counsel, who represented one of the parties in the "Arizona" case should know better than to suggest these facts are the same. This argument is designed to serve as a "red herring" to distract the Commission from the plain truth of this case: Respondents and their witnesses were untruthful in their testimony and there can be no other reasonable interpretation of the facts other than to conclude that campaign money laundering occurred.

III. CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Commission should adopt the proposed decision of the ALJ. In this regard, a proposed form of order is submitted with this brief, which incorporates the limited, minor, technical changes of a clarifying nature that were discussed in the Enforcement Division's opening brief. Of note, Respondents' brief raised no objections regarding these changes.

Dated: 3/13/14

FAIR POLITICAL PRACTICES COMMISSION

By: _____
NEAL P. BUCKNELL
Senior Commission Counsel
Enforcement Division

IN THE MATTER OF BILL BERRYHILL, TOM BERRYHILL, ET AL.
OAH Case No. 2012101024
FPPC Case No. 10/828

PROOF OF SERVICE

I am a citizen of the United States, employed in the City and County of Sacramento, California. I am over the age of eighteen years and not a party to the above-entitled action. My business address is 428 J Street, Suite 620, Sacramento, California. On the date below, I served the following document(s):

1. **REPLY BRIEF OF THE ENFORCEMENT DIVISION RE: PROPOSED DECISION OF ADMINISTRATIVE LAW JUDGE JONATHAN LEW**
2. **PROPOSED DECISION AND ORDER**

MANNER OF SERVICE

By United States Mail. I enclosed the document(s) in a sealed envelope or package addressed to the person(s) at the address(es) listed below and placed the envelope or package for collection and mailing following the ordinary business practices of the Fair Political Practices Commission. I am familiar with these business practices for collection and processing of correspondence for mailing with the United States Postal Service. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident of or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Sacramento, California.

PARTY(IES) SERVED AND ADDRESS:

All Respondents
c/o Mr. Charles Bell, Esq.
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on March 13, 2014, in Sacramento, California.

Signature

Camille Marzion
Printed Name

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