FAIR POLITICAL PRACTICES COMMISSION
STATE OF CALIFORNIA

In the Matter of BILL BERRYHILL, TOM BERRYHILL, BILL BERRYHILL FOR ASSEMBLY – 2008, BERRYHILLL FOR ASSEMBLY 2008, STANISLAUS REPUBLICAN CENTRAL COMMITTEE (STATE ACCT.), and SAN JOAQUIN COUNTY REPUBLICAN CENTRAL COMMITTEE/CALIF. REPUBLICAN VICTORY FUND Respondents.	FPPC No.: 10/828 OAH No. 2012101024

RESPONDENTS' BRIEF

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I. INTRODUCTION:

Respondents respectfully request the Commission reject Administrative Law Judge, Jonathan Lew's, Proposed Decision finding that Respondents committed violations of the Political Reform Act, as charged in Counts 1, 2, 3, 4, 8, 9 and 10 against Tom Berryhill and Tom Berryhill for Assembly; Counts 2, 4, 6 and 7 against Bill Berryhill and Bill Berryhill for Assembly; Counts 1 and 2 against the Stanislaus County Republican Central Committee; and Counts 3 and 4 against the San Joaquin County Republican Central Committee. Respondents also request the Commission accept Judge Lew's findings that there was no violation by Tom Berryhill or Tom Berryhill for Assembly as to Counts 11-16.

Respondents' request is based on the grounds that:

1. The Proposed Decision applied a legal standard not set forth in the Political Reform Act, and misinterpreted the statute that *does* apply, to find that Respondents had violated the "earmarking" provisions of the Act; and,

2. The Proposed Decision could not have found, and cannot find "earmarking" had occurred if he the correct legal standard had been applied.

This case involves the most important provision of the Political Reform Act, the prohibition of contributions made in the name of another without disclosure, legally known as "earmarking." The case is not a "garden variety earmarking" case. Rather it involves the application of the statute to activity of political parties which are favored under Proposition 34. There is no precedent other than some FPPC advice letters interpreting prior law (law that the Proposed Decision says in another context cannot be relied upon) that in any event do not define "earmarking." The FPPC with the important exception of the largest case settlement in its history just one month before the administrative hearing in this matter, had not litigated, regulated or issued any previous opinions or guidance on the law in this area. In fact, the Administrative Law Judge, while discussing and purporting to apply the applicable law, applied a standard used in a federal case involving "garden variety earmarking" – an admitted employer making contributions through his employees without disclosure of the true source of the contributions.

A. THE ARIZONA CASE APPLIED A DIFFERENT STANDARD OF EARMARKING

Just a few months ago in mid- October 2013, the FPPC settled the largest case in its history against Arizonans for Responsible Leadership ("ARL") and Center to Protect Patients' Rights ("CPPR"), a $16 million case. The Commission's settlement agreement included, in its findings, a recitation that the money had been provided by a third group, Americans for Job Security ("AJS"), which was not charged, and did not participate in the settlement of the case. (See **Exhibit A** attached hereto.)

The Stipulation approved by the Commission recited that "[a] decision was made by AJS to contribute the remaining funds, and any other funds that were received, to CPPR, a 501c4, with social views similar to AJS. *The funds were explicitly provided with no specific direction as to how they would be used, and could be used for any purpose by CPPR.*" (Stip. 9: 1-4). The Stipulation continued, "In making each of these contributions, *AJS hoped, but did not require, that CPPR*, which shared the same social views as AJS, *would assist with the efforts to defeat Proposition 30, and with efforts to pass Proposition 32. These actions would also be consistent with California law.*" (Stip. 9: 10-12). (Emphases added.)

The FPPC's press release announcing the settlement noted, at page 2, "AJS' transfer of funds to CPPR were not subject to disclosure, *as its contributions were not earmarked for any specific purpose, as is required for disclosure under current law.*" (See **Exhibit B** attached hereto.) (Emphasis added.)

Scarcely one month later, in November 2013, the Enforcement Division held an administrative hearing against Respondents in the present matter. The Division took a different approach to the law in this administrative hearing case than it stated in settlement of the biggest case in FPPC history a month earlier. There is substantial doubt about why the Enforcement Division would contend in settling the ARL case that "hope" and "no specific direction" or "no specific purpose" were insufficient to conclude that AJS had "earmarked" its contributions to CPPR, and that AJS had acted in accordance with current law, whereas when Tom Berryhill acknowledged that he "hoped," but did not specifically direct or specify a purpose for his contributions of $40,000 to two central committees, that earmarking had occurred. (See R.T., dated 11/14/13, pp. 55-56, 58-59, 60-61, 63-64, 66, 94-95.)[1]

Respondents show at pp. 4-9 herein why the Proposed Decision uses the wrong legal standard for "earmarking." Respondents show at pp. 9-16 herein why the Proposed Decision's use of the wrong legal standard resulted in a misapplication of facts to support its erroneous legal theory, and why "Hope + the facts as interpreted through this incorrect legal standard ≠ Agreement." That is why this case is indistinguishable legally from the ARL Arizona case settlement that exonerated AJS from an "earmarking" claim.

B. THE COMMISSION INDEPENDENTLY REVIEWS OAH DECISIONS

The Commission independently reviews a Proposed Decision's legal conclusions, and can independently review the ALJ's application of law, if it was incorrect, to the Proposed Decision's factual findings.

[1] References to the Reporter's Transcript of the administrative hearing testimony are referred to as R.T., (Reporter's Transcript), by date (e.g., 11/12/13 was the transcript of hearing on November 12, 2013) and by page number: line number (if appropriate). References to hearing exhibits are by source (FPPC or Resp.), and exhibit number or letter.

C. THE COMMISSION SHOULD NOT MAKE NEW LAW IN ENFORCEMENT CASES

The Commission should not make new law or new interpretations of existing law through the enforcement process. The proposed decision does this, and for that reason should be rejected by the Commission. Alternatively, the Commission could return the matter with instructions to the Administrative Law Judge to reconsider or correct the conclusions of law and factual findings that were based upon an erroneous interpretation or application of the law.

Respondents request that the Commissioners, in deciding this case of first impression, and in considering whether to accept or reject the Proposed Decision, carefully review the law, the record evidence, and the full oral arguments and briefs in this matter.[2]

II. ARGUMENT:

A. THE PROPOSED DECISION APPLIES AN ERRONEOUS LEGAL STANDARD

1) The Proposed Decision Applies an Erroneous "Direction and Control" Standard, Not the Legal Standard for Earmarking in Government Code Section 85704

In this case, the Enforcement Division argued, among other things, that a "direction and control" standard used in a federal court case (interpreting the Federal Election Campaign Act) also would be the test applicable to interpret what constitutes "earmarking" under the Political Reform Act. The Division could not prove there was an actual "condition" or "agreement," and thus urged Judge Lew to adopt this "direction and control" standard (or several other possible theories that the Judge rejected as too subjective). The Division proposed the "direction and control" standard in spite of the fact the Legislature fashioned a different standard in Proposition 34 of "condition or agreement" for earmarking, and in the very same Proposition, used the term "direction and control" only in another, different statute that has nothing to do with defining "earmarking."

The Proposed Decision utilized the standards set forth in *People v. O'Donnell* (9th Cir. 2010) 608 F.3d 546; a criminal case that was advanced by the Enforcement Division in its Opening Trial Brief and did not involve the Political Reform Act, that a finding of illegal earmarking can be based upon the true donor's exercise of "direction and control" over the contributors' decisions. (Proposed Decision, p. 12, ¶ 25.) However, "direction and control" is not the standard used in Government Code section 85704, which the decision concluded was the

[2] Respondents have attached to this Reply Brief their Trial Brief dated 11/7/13 (See **Exhibit C** attached hereto); R.T., of administrative hearing testimony, 11/22/13 (See **Exhibit D** attached hereto); and Respondents' *Corrected* Post Trial Brief (See **Exhibit E** attached hereto.) We request the Executive Director provide any additional transcripts of testimony in the case and any exhibits entered into the record for review.

appropriate standard to apply in the case. (Proposed Decision, p. 13, ¶ 26; p. 28, ¶ 85.) The Legislature knew how to apply the term "direction and control" as a legal standard, and did not use that term in defining the factors involved in "earmarking." In fact, when the Legislature drafted and submitted Proposition 34 to the voters for their approval in November 2000, that measure contained two proposed statutes, Government Code § 85704 which is applicable here and uses the term "condition or agreement" as the standard for whether a contribution is earmarked, and Government Code § 85311, which uses the standard of "direction and control" in determining when two or more donors are affiliated for purposes of contribution limits and reporting of contributions. (See Text of Government Code §§ 85704 and 85311, attached hereto as **Exhibit F.**)[3]

California courts have long held that such an approach violates settled rules of statutory construction. "It is a settled rule of statutory construction that where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative intent existed with reference to the different statutes." (*People v. Norwood* (1972) 26 Cal.App.3d 148, 156, cited in *In re Jennings*, 34 Cal. 4th 254, 273 (2004.)

This mischaracterization of the legal standard, and violation of the Judge's own injunction about the importance of applying "objective standards" is clearly on display in the key, concluding paragraph of the section on earmarking on page 34, at paragraph 99:

> 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 § 85704.
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> (Emphasis added.)

[3] Moreover, use of a "direction and control" standard in the earmarking context also bumps up against Government Code § 82016, which in defining the term "candidate controlled committee" at subdivision (b) expressly states that political party committees are not "candidate-controlled." This exception in section 82016 recognizes the fundamental relationship of candidates for state and local elective offices with their political parties, including county central committees. This was and is particularly the case with candidates and officeholders of state legislative offices which were prior to Proposition 14 (2010) known as partisan elective offices. Under the California Elections Code, such candidates and officeholders are ex officio members of the county central committees. Tom Berryhill was an *ex officio* member of the Stanislaus County Republican Central Committee; Bill Berryhill was a member of both Stanislaus and San Joaquin.

While the Proposed Decision purports to apply the "condition or agreement" standard of Government Code § 85704 in some places, it concedes that such an agreement was "tacit" – not explicit. In fact, it is nothing more than the inapplicable "direction and control" standard all dressed up. (See the use of the "direction and control" standard at Proposed Decision, p. 30, ¶¶ 86, 87; p. 33, ¶ 95; and p. 34, ¶¶ 98-99.)

There are important differences between Proposition 34's adoption of a "direction and control" standard for aggregation of contributions in Section 85311, and its employment of the terms "condition or agreement" in Section 85704. In a 2001 advice letter, the Commission staff explained:

> Section 85311(d) expressly provides that contributions will not be aggregated when the subject entities "act independently in their decisions to make contributions. Again, as we understand your account of the facts ...aggregation of [the requester's] contributions with those of the other organizations is not required under subdivision (d).
>
> The conclusion that the language of the statute does not require aggregation under the circumstances you describe is further supported by the Commission's longstanding position on aggregation of contributions, as developed in *In re Lumsdon*, 2 FPPC Ops. 140 (1976), and *In re Kahn*, 2 FPPC Ops. 151 (1976). Both opinions emphasize that contributions should not be aggregated if the persons making the contributions reached their decisions independently. The language of Section 85311 is in all material respects identical to the language of former Regulation 18215.1, expressly intended to "codify" the Commission's stance in *Lumsdon* and *Kahn*. Our reading of Section 85311 is fully consistent with these two opinions."

(*FPPC Adv. to Kathryn Donovan*, WL 1262271, 3 (2001)

Equally important, application of the "direction and control" standard violates the Proposed Decision's own injunction that a "narrow construction of an agreement, condition or understanding is ... consistent with a plain reading of the [Political Reform] Act" (Proposed Decision, p. 31, ¶ 92), and that an "objective standard" be applied requiring that "a 'condition' or 'agreement' be more explicit or clearly inferred from the evidence." (Proposed Decision, p. 32, ¶ 93.) The Proposed Decision then goes back to the "direction and control" standard at the end of paragraph 93, and the court even imports the language "understanding," a term not actually used in the statute, to adopt the very subjective standard ("it was understood by all that the contributions were to go to Bill Berryhill's campaign.")

The problem with the "direction and control" standard, or the use of the term "understanding" in any sense other than an objective, explicit "condition or agreement" – beyond the fact these are not the legal standards in the Act -- is their *utter subjectivity*. If the Commission approves the Proposed Decision's legal conclusions and application of the law to the facts, there will be great confusion about the application of the earmarking standards in the future, not only to political party committees but others. While the Proposed Decision acknowledges the important role Proposition 34 gave political parties and party county central committees in the State's campaign finance scheme, this decision will have profound ramifications for political parties' exercise of their statutory rights under the Act and their rights of speech and association under the Constitution. The decision will also have profound impacts on the interaction of candidates with political parties. State law provides that candidates can participate in, and interact with, their political party organizations at the state and county levels without limitation on the rights of candidates or political parties by such participation and interaction. Vaguely applied standards do not clarify the rules of participation, and will, like overbroad laws themselves, require actors to "'steer far wider of the unlawful zone'...than if the boundaries of the forbidden areas were clearly marked" to assure they do not risk the peril of violating the law.[4] This manifestly demonstrates why the Commission's enforcement process should not be used to make new law.

The Act's legal standards should be applied, and the facts reasonably applied, consistent with the applicable law. In this case, they were not.

2) The Proposed Decision Misreads the Impact of the Proposition 34 Amendment Adopting Government Code § 85704 and Repealing in Part Former Government Code § 85703

The decision also misreads the enacting language of Government Code § 85704, and the repeal of the language of former section 85703, in relation to Government Code § 84302. In fact, when Proposition 34 repealed the last sentence of the old section 85703, and adopted the first sentence of section 85703 as new section 85704 in 2000, the People made no fundamental change to the operation of the "earmarking" prohibition/intermediary disclosure rules.

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[4] "In such circumstances, vague laws may not only 'trap the innocent by not providing fair warning' or foster 'arbitrary and discriminatory application' but also operate to inhibit protected expression by inducing 'citizens to 'steer far wider of the unlawful zone ' . . . than if the boundaries of the forbidden areas were clearly marked.' " *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972), quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964), quoting (1958). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963)." (*Buckley v. Valeo* (1976) 424 U.S. 1, 41 at fn. 48.)

The earmarking violation (characterized as "laundering" [not a legal term of art] by the Commission in its pleadings, and in the Proposed Decision) is a "death penalty offense" under the Act, indeed, the most serious offense in the campaign provisions of the Act. The peril a totally subjective decision and standard poses to the exercise of First Amendment freedoms is obvious.

The Proposed Decision, in doing so, mischaracterizes Respondents' arguments in regard to the repealed language about sole discretion in former section 85703. Respondents did not argue that the sole discretion standard should be applied as a matter of law. Rather, Respondents argued the committees' exercise of their own discretion to make campaign contribution decisions, and specifically their decisions to make campaign contributions to Bill Berryhill with funds they received from Tom Berryhill's committee, was strong evidence to support the unanimous denials of all key actors in the case, that Tom Berryhill had conditioned his contributions to the two committees, or had any agreement with them, and that they would use those funds to contribute to Bill Berryhill.

The Proposed Decision also reflects a misreading of the body of Political Reform Act statutes related to earmarking and reporting of earmarked contributions, and the effect of the Government Code § 85704 amendment in 2000. First, Government Code § 85704 did not change anything about the operation and effect of the two statutes (sections 84301 and 84302) that were in the original 1974 Political Reform Act; a statement in the second sentence of paragraph 87 of the Proposed Decision at p. 30 is *flatly wrong*. Government Code § 84302 has required the disclosure of the intermediary of a contribution since 1974, and works together with Government Code § 84301, the statute formally charged in Counts 1-10 of the Commission's Complaint against the Respondents in this matter, to prohibit the making of a contribution in the name of another (section 84301) without disclosure under section 84302.

Proposition 208, enacted in 1996, added Government Code § 85703, which specifically prohibited earmarking of contributions by "condition or agreement," and contained a second sentence that made clear that a contribution made in the sole discretion of the contributor was not earmarked. Proposition 34 repealed section 85703, but reenacted it in substantially the same form, except it added a cross reference to section 84302, and deleted the "sole discretion" language in the second sentence of former section 85703. The effect of this change was to tie together section 85704 with the pre-existing "anti-earmarking" statutes, §§ 84301 and 84302.

The deletion of the "sole discretion" standard in former section 85703 (when new section 85704 was enacted) did not change the operative requirement that to establish earmarking, the donor must condition or the donor and the intermediary must have an agreement, that the donor's funds be transferred or contributed to the ultimate recipient. The exercise of independent discretion, if established as it was here (as acknowledged by the Proposed Decision itself), is strong evidence that there was no such condition or agreement, hence, no earmarking.

3) As a Result of the Legal Errors Discussed Above, the Proposed Decision Misapplies the Law to Disregard what it Characterizes as "A Strong Case that the Two Central Committees Made Their Own Independent Decisions to Contribute to Bill Berryhill."

Even though Respondents did not argue that "sole discretion" was the applicable standard, they did argue (and the evidence supports it) the central committees made their own decisions to support Bill Berryhill with available funds in the last few days of the 2008 campaign, and that there was no "condition or agreement" between Tom Berryhill and the two committees for earmarking; evidence of the committees' exercise of independent decision making rebuts any claim that Tom Berryhill (and the two committees) engaged in an earmarking scheme.

As noted above, the Proposed Decision characterizes section 85704 as having effectively eliminated "sole discretion" as a factor in interpreting the earmarking rule (Proposed Decision, p. 86, ¶ 86 – pp. 30-31, ¶ 89), and utilizes that essentially to deny that the committees' independent decisions to support Bill with available funds, what the decision characterizes as "a strong case that the two central committees made their own independent decisions to contribute funds to Bill Berryhill's campaign." (Proposed Decision, p. 29, ¶ 85), were the crucial facts in the case.

In this regard, the Proposed Decision sets up a "straw argument" that is at the center of its mischaracterization. The straw argument is: "[T]he question remains whether earmarking could only occur if the central committees failed to exercise their discretion in making their contribution decisions. The answer is no." This language is in the concluding sentences of paragraph 85 at p. 29, and follows this language that is very favorable to Respondents' position:

> In this context ['the strong case that the two committees made their own independent decisions"] ..."Bill Berryhill's committee was in desperate need of money to purchase campaign mailers and commercial television to counter his opponent's attack. He was the local candidate and *the reasonable and smart decision for both committees was to send money his way. This is what they did and it was no surprise that they did so.*"
>
> (Emphasis added.)

The Respondents' position was, and is, that Government Code § 85704 requires (for a finding of "earmarking" to be made) that the administrative judge (and this Commission) must find that there was either: (1) a "condition" placed by the donor and accepted by the committee that receives the donor's contribution, or (2) an "agreement" between them, that the contribution would be made to a candidate by the intermediary. Whether or not the term "sole discretion" had been eliminated from section 85704 (as enacted), when Proposition 34 repealed former section 85703, the evidence was unrebutted, and the Proposed Decision acknowledges this evidence as

"strong," that *the two central committees made their own independent decisions to contribute funds to Bill Berryhill, and they had every reason to make the decisions they made.*

The Proposed Decision then mischaracterizes the Respondents' position in paragraph 86, at p. 29, and this mischaracterization uses another "straw argument" to do so. Although the Proposed Decision makes no finding that Tom Berryhill imposed any condition on the use of his contributions, it implies there was such a condition imposed by him. The Proposed Decision states however that if Berryhill had conditioned the use of his contributions, the committees' mere "right to change their minds" would not suffice. However, neither the central committee leaders who testified nor any other witness testified that they received an earmarked contribution but instead decided to change their minds and make their own decisions. As noted above, the Proposed Decision makes no finding whatsoever that Berryhill imposed such a condition.

Respondents' *did not make the legal argument* that a contribution is not earmarked if a committees retains "the right to change their mind" in the face of receipt of a clearly earmarked contribution. Respondents contended that: (1) there was no evidence that Tom Berryhill had earmarked contributions, and (2) that the two central committees did, in fact, make their own independent contribution decisions. The record is clear that: (1) there is no documentary evidence of earmarking by Tom, and (2) all testimonial evidence on the subject (Joan Clendenin and Jim DeMartini for Stanislaus, Dale Fritchen and Louis Lemos for San Joaquin, and Tom Berryhill and Bill Berryhill) strongly denied that there was no discussion or communication among them, or in Louis Lemos' and Bill Berryhill's case, they were not aware of any such discussion or communication that Tom's contributions were conditioned or earmarked for Bill, or that there was any agreement between the two committees and Tom.

Finally, the Proposed Decision, while acknowledging that the Respondents made a "strong case" that the central committees made their own independent decisions to contribute the only funds they had on hand to Bill Berryhill, nonetheless concludes that the central committees were "straw donors" and performed essentially a "ministerial role" in what the Proposed Decision concludes was an earmarking scheme. The Proposed Decision, as noted below, uses evidence of communications by persons who were not in "privity" to condition or consummate an earmarking "agreement" to conclude that from the actions of these actors, the central committees and Tom Berryhill did so.

B. THE PROPOSED DECISION'S FACTUAL FINDINGS WERE FLAWED BY THE DECISION'S ERRONEOUS LEGAL STANDARDS

1) The Factual Findings Related to Earmarking Do Not Support the Conclusion That Tom Berryhill Conditioned, or Had Agreements With the Two Central Committees to Earmark His Contributions to Them

The Proposed Decision that Tom Berryhill "directed and controlled" the two central committee's contributions to Bill Berryhill rests on four key facts or inferences from those facts. None of them has to do with Tom Berryhill "conditioning" or "agreeing" with the central committees about the use of his funds to support Bill Berryhill.

As a preface to this discussion, the Proposed Decision did not find that Tom Berryhill imposed any "condition" on his contributions to the two central committees. Therefore, the Proposed Decision's conclusion must apply to the term "agreement" as used in section 85704.

The Enforcement Division may argue that this case, as summarized in the Proposed Decision, is distinguishable from the Arizona settlement because the judge found that Tom Berryhill did more than "hope" that his money would be used to support Bill's campaign. (Proposed Decision, p. 32, ¶ 94.) The case comes down to "How to solve the following equation: 'Hope + X = Agreement'?" Respondents demonstrated above that the Proposed Decision's legal conclusion is that "X" equals "direction and control" but that "direction and control" is not the standard of section 85704 but rather of a standard not found in the Political Reform Act for "earmarking." The Proposed Decision then finds four facts that it concludes constitute "direction and control." The fundamental problem with this equation is that the four facts the Proposed Decision cites, if substituted in the equation for "direction and control," do not establish an "agreement."

The Proposed Decision describes this "agreement" as tacit. However, none of the facts the Decision cites for the conclusion that the "agreement" was tacit supports that conclusion. Specifically:

1. The number and timing of Tom Berryhill's text messages with the chair and treasurer of the Stanislaus committee on the day he cut a contribution check to that committee is not evidence of the nature or content of the communications or of a tacit agreement. It is *not* reasonable to infer anything about their content;

2. The fact Tom Berryhill knew Bill Berryhill might get funds the next day, as his email to Carl Fogliani states, is *not* evidence of any agreement with Stanislaus to earmark his contribution to Stanislaus;

3. The fact that Tom Berryhill's legislative staffers acting on personal time may have ferried central committee contributions to Bill Berryhill after they had been cut is *not*

evidence of any agreement between Tom and the two central committees to earmark his contributions for Bill; and

4. The fact that Tom Berryhill was copied on emails sent by Bill's campaign consultant, or a California Republican Party consultant who was also a member of the San Joaquin central committee, is *not* evidence of any agreement between Tom Berryhill and that committee.

a. Facts Related to the First Inference

The Proposed Decision notes that Tom "exchanged" text messages eight times on October 29, 2008, five times with Joan Clendenin, Stanislaus central committee chairman, and three times with Gary McKinsey, the Stanislaus central committee treasurer. (Proposed Decision, p. 18, ¶ 42.) Although the content of the communications, even if they were made and received, is unknown, the Proposed Decision infers that the content of these discussions was about earmarking. However, the actual testimony casts serious doubt on that speculative inference. Joan Clendenin testified that she didn't have or use text messaging, so although the content of any text messages, and whether she received and read them is unknown. Tom Berryhill could not recall having text messaged to or from Joan Clendenin or Gary McKinsey, and denied that he would have talked about earmarking with Clendenin or anyone (R.T., 11/14/13, p. 70-71, 80); he specifically denied he had given any direction to Stanislaus to contribute his funds to Bill Berryhill (R.T., 11/14/13, pp. 70-71); Clendenin also denied that she had any talk about earmarking with Berryhill (R.T., 11/19/13, pp. 71-73, 80, 89, 91-92). As noted above, the only testimony presented by the Enforcement Division supports the fact of Tom's knowledge about Stanislaus' likelihood of supporting Bill which he stated publicly the day before he wrote any contribution, October 28, 2008. Moreover, both Tom Berryhill and Clendenin both testified the most likely subject of any communication would have been a "head's up" from Tom that a check was on the way, of a logistical nature, because by October 28, 2008, Tom already had decided to contribute to the central committee. (R.T., 11/14/13, pp. 79-81.) Thus, it is not likely that any communication was about earmarking, which all the witnessed denied.

b. Facts Related to the Second Inference

The Proposed Decision relies heavily on an opaque email exchange between Carl Fogliani, Bill Berryhill's consultant, and Tom. On October 29, 2008 at 8:28 p.m., Fogliani asks Tom Berryhill, about the status of fundraising. Tom replies at 9:44 p.m., "Think I can get mony[sic] earlier. Tom. Late morning." (FPPC Exh. 1.2, p. 3 of 8; Proposed Decision, p. 33, ¶ 94.) The finding concludes, "He could only be referring to the monies he was overnighting to the committee."

Tom Berryhill and Carl Fogliani's testimony do not support the Proposed Decision's finding that this was "the only conclusion" to be drawn from this brief email. The testimony is unrebutted that Tom was aware of the option of contributing funds to central committees that

could support Bill. (R.T.,, 11/14/13, p. 78.) Tom testified that he urged[5] attendees at his October 28, 2008, fundraising event that had maxed out to Bill's committee to give to the Stanislaus central committee (R.T.,, 11/14/13, pp. 64-65, 68; Proposed Decision, p. 17, ¶ 38). That is consistent either with Tom's understanding that the Stanislaus Central Committee already had decided to support Bill (as Joan Clendenin and Jim DeMartini testified) or as Tom testified, that he hoped they would do so as "Bill's race was the only game in town." (R.T., 11/14/13, p. 57[6]; Proposed Decision, p. 22, ¶ 64.) Tom Berryhill's testimony was that given the time of this email exchange, and that he had already authorized his committee to write a check to the Stanislaus central committee. In fact, although the FPPC in questioning Stanislaus treasurer Gary McKinsey (R.T., 11/12/13, pp. 70-71) and Joan Clendenin (R.T.,, 11/19/13, pp. 63-64) concedes the Tom Berryhill check was cut, and reported, on October 29, 2008, the FPPC did not emphasize the email from its own exhibit that clearly suggests that Tom Berryhill's bookkeeper/ treasurer *had already written the Tom Berryhill check, during business hours (to enable the treasurer to have cut the check, filed an FPPC-required Late Contribution Report, and mailed the check to the Stanislaus committee) well before* the October 29, 2008 email communication at 11:02 am (FPPC Exh. 1.2., p. 2 of 8, line 38 ["Email between bookkeepers asking how to write a check out to Stanislaus County Republican Central Committee for Tom Berryhill"]. That this check would have been written and put in the mail is also consistent with the fact that the Stanislaus committee treasurer Gary McKinsey testified that he received and deposited this check on the following day, October 30, 2008. (R.T.,, 11/12/13, pp. 70-71). Thus, Tom Berryhill testified that the Tom Berryhill-Fogliani email exchange most likely was logistical or simply to convey information to Fogliani, who had been "ringing the bell" to get money for Bill's television purchase. (R.T.,, 11/14/13, pp. 80-83). The proposed Decision's conclusion was not the only, or even the most likely conclusion, to reach about the meaning of Tom' Berryhill's opaque email.

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[5] The Proposed Decision also misstates Tom's testimony: He "urged" but did not "direct" them to give, as the Proposed Decision states at p. 17, ¶ 38. (R.T., 11/14/13, pp. 64-65, 68).

[6] This reference was in context of Respondents' counsel's questions about the California Republican Party and county central committees' contributions to target race candidates:

"Q Were there other targets, both in the State Senate and State Assembly, that the leadership had identified to your knowledge?

"A Yeah, there was. [He identifies two other legislative race candidates, Tony Strickland and Greg Agazarian].

"Q So you said you understood that earmarking, as described in this, conditioning or reaching an agreement with the donor about where contributions would be given to a third party, was prohibited. What was your understanding of the role that Central Committees had in making their own decisions about spending money?

"A Well, yeah. That's a good question. *When you get down to the end of these campaigns, and everything starts kind of --the dust starts to settle a little bit, it was -- Bill was kind of the only game in town.* So we were hoping, certainly hoping, that the money that we sent towards those Central Committees would go to Bill. Now, there was (sic) no guarantees that it was going to go to Bill. And in cases, both then and more recently, sometimes -- sometimes they go to whoever. There is no guarantee that those monies are going to go to any given candidate.

"Q Now, you have said that you did not condition or have an agreement with the two Central Committees here with respect to contributions that you made to them in late October 2008; is
that correct?

"A Absolutely. That's correct." (Emphases added.)

c. Facts Related to the Third Inference

The Proposed Decision relies on two facts that provide *no evidence* of a "condition" or "agreement" for earmarking. Nor does such evidence tend to show direction and control by Tom over the central committees' contribution decisions, even if that were the applicable standard. One, that on October 29, 2008, Tom Berryhill's district representative Bob Phelan, who was also a member of the Stanislaus central committee's Executive Committee in 2008 (FPPC Exh. 1.3) and who Joan Clendenin's testified she did not discuss the committee's contribution decisions (R.T.,, 11/19/13, pp. 40-41), met Gary McKinsey, Stanislaus committee treasurer, on his lunch hour and picked up the check he had just cut for Bill Berryhill. McKinsey testified that Phelan said he was there to pick up the check for Bill Berryhill, not Tom, and indicated the check transfer occurred during the his lunch hour, speculating that Phelan may have been on his lunch hour break also. Phelan did not identify himself as Tom's representative, and McKinsey stated he would not have given the check to someone who hadn't identified as Bill's representative. (R.T.,11/13/13, pp. 77-79, 81.) Two, that Laura Ortega, Tom's chief of staff, picked up the San Joaquin central committee's check for Bill Berryhill on October 31, 2008 at 12:35 pm and delivered it to Bill's treasurer in Modesto. (FPPC Exh. 1.2, p. 7 of 8, email of Fogliani to Bill Berryhill's treasurer of October 31, 2008.) The only testimony on this subject was Tom Berryhill's, and he testified that it was common practice for Capitol staffers to take vacation time to work on campaigns during the last weeks before an election, and that Laura wasn't working on his campaign, in a safe district with only nominal opposition. (R.T., 11/14/13, pp. 87-89). Even if Tom Berryhill "controlled" his own legislative staff members' activities whether on vacation or at lunch, assuming *arguendo* that "direction and control" were the applicable legal standard, these facts are not evidence that he "controlled" the *central committees' contribution decisions*.

d. Facts Related to the Fourth Inference

The Proposed Decision at p. 20, ¶ 55, makes a completely unsupported assertion that doesn't bear on any condition or agreement regarding earmarking or even on the erroneous "direction and control" standard. This paragraph follows paragraphs 50-54, which recite a seemingly unrelated set of communications, all having to do with San Joaquin central committee getting a check for Bill Berryhill that Committee Chairman, Dale Fritchen, had decided that San Joaquin would contribute. The conclusion of the paragraph does not even follow from the description of the sequence of events. All of the communications appear to concern logistics, not decision making. Even the Proposed Decision's "direction and control" standard does not clarify who directed and controlled whom to do what.

C. THE MOST REASONABLE CONCLUSION WAS THERE WAS NO AGREEMENT FOR EARMARKING

While the foregoing demonstrates that it was unreasonable for the Proposed Decision to reach an inference of an agreement from facts that do not logically relate to any agreement, based on communications between persons who were not in privity to enter into any agreement, it is reasonable to infer that there was no agreement from:

1) The undisputed, unanimous testimony of all witnesses who would have had percipient knowledge of such an agreement, unless the trier of fact concluded they were all lying. The trier of fact reached no such conclusion.

2) The lack of any specific communication between Tom Berryhill and the Stanislaus central committee leadership that reflects an agreement. The trier of fact acknowledged by silence this was true.

3) The lack of any specific communication between Tom Berryhill and the San Joaquin central committee leadership that reflects an agreement. The trier of fact acknowledged by silence that this was true.

D. THE PROPOSED DECISION MENTIONS BUT GIVES SHORT SHRIFT TO THE WEIGHT OF TESTIMONIAL EVIDENCE

The most important evidence the Proposed Decision downplays is *there was absolutely no documentary or witness testimony* showing that (1) Tom Berryhill and the two central committees had even communicated about an earmarking scheme, or (2) that Tom actually "directed or controlled" those committees' decisions. Moreover, all the key players (Tom Berryhill, Joan Clendenin, Dale Fritchen, and Jim De Martini) *testified unequivocally to the contrary* – they had never engaged in earmarking, because it was against the law. Even the supporting witnesses on that subject (Louis Lemos, Nancy Cochran, Bill Berryhill, and Carl Fogliani) denied these things occurred.

The Proposed Decision gives short shrift to Dale Fritchen 's testimony and email that makes clear he had the decision making authority for the San Joaquin central committee and made the decision to give to Bill's committee with available funds himself. Fritchen testified that he had never met Tom Berryhill until the hearing in November 2013, and had never discussed anything about Tom's contribution with him, or anyone on his behalf. Fritchen also testified that he had been given authority (by his central committee's executive committee) to make contribution decisions based upon recommendations of the California Republican Party, and the Assembly Republican Caucus, as to the Republican target candidates with funding needs. (FPPC Exh. 10, pp. 4, 7, 9-10; R.T., 11/12/13, pp. 49-52). Furthermore, he testified that the California Republican Party had recommended that San Joaquin contribute to Bill Berryhill, a fact that is

consistent with the testimony of Mike Villines, (then Assembly Republican Leader and responsible for electing Republican candidates for State Assembly.) (R.T., 11/14/13, pp. 178-182.)

Finally, the Proposed Decision never addresses, or dismisses, four important background facts in this case that made the committees' decisions reasonable under the facts and circumstances, and which undercut the notion that the committees were "straw donors".

First, the election calendar is significant. All the evidence in the case concerned activity on four days from Tuesday, October 28 to Friday, October 31, 2008. Election Day fell on Tuesday, November 4, 2008. It is generally understood that mail must be at the post office not later than Thursday before an election and television and postage cannot be paid on credit. Moreover, banks do not do same day wire transfers after 2 pm on weekdays, and don't do wire transfers at all on weekends. The backdrop to the case, and the communications, has to do with time, and time was of the essence for contributions to be made to Bill Berryhill and by Bill in turn to pay television stations and the postmaster. (Joan Clendenin Testimony, R.T., 11/19/13, pp. 66, 100.) Not surprisingly, the actors in this play all were trying to help facilitate getting their contributions made and funds expended within a very compressed three day window. Time also compresses the focus on guilt by association and the opportunity to make unwarranted inferences based upon timing.

Second, the Proposed Decision does not discuss, at all, the most significant element of Joan Clendenin's testimony, which provided both confirmation, (and a rationale) for Stanislaus' independent decision to use Tom Berryhill's funds to support Bill Berryhill. (R.T., 11/19/13, pp. 50-52, 60.) Joan Clendenin testified she had witnessed two Berryhills lose close races due to their inability to raise and/or spend, money for last minute political advertising.[7] Joan Clendenin concluded from conversations with one of Bill Berryhill's campaign aides, and without any conversation with Tom Berryhill or Carl Fogliani, that he had cut a television spot but didn't have the funds at the time to pay for running the commercial. She stated that she made the decision to contribute Stanislaus' funds to Bill's campaign to avoid a third repeat of that outcome. (*Id.*)

Third, the Proposed Decision mentions that Dale Fritchen made the San Joaquin decision to spend funds to support Bill Berryhill, but fails to note that his personal authority to make spending decisions for the San Joaquin committee was circumscribed by its Executive Committee to allow contributions to California Republican Party-identified target candidates, and his communication was with the California Republican Party staff in Sacramento, confirming that Bill Berryhill was a target candidate in need of funds. (R.T., 11/12/13, pp. 86:11-13.)

[7] Clendenin testified that Tom's and Bill's father, Claire Berryhill, lost a close Congressional race in the 1980s for lack of funds to buy last minute counter-advertising, and Tom lost a close Assembly race in 1996 (by 100 votes) when he failed to spend about $60,000 he had on hand at the close of the campaign. (R.T., 11/19/13, pp. 95-97).

Fourth was the availability of limited funds to spend in a very limited time. Before the Democratic Party dumped the $1 million into Bill Berryhill's opponent's campaign, and the mailboxes became crowded with anti-Berryhill mailers, Stanislaus had already expended what funds it had earlier in October on other California Republican Party-identified targets. Similarly, San Joaquin Central Committee also had expended funds, on an in-out basis, to support other California Republican Party-identified target candidates. All Central Committee witnesses testified that they were determined to spend every unearmarked dollar they had by election day, as soon as it was available, and without regard to source. They viewed that as a "fiduciary duty" to the candidates who were their party's nominees. (R.T., 11/12/13, p. 73:16.)

III. CONCLUSION

For the foregoing reasons, the Proposed Decision applies the wrong legal standard for "earmarking," disregarding the statutory language of Government Code § 85704, applying a standard of "direction and control" that is not found in that statute but is used in Government Code § 85311 in which that term is used in a totally different context.

As a result of this application of the wrong legal standard, the Proposed Decision misapplied the facts adduced at trial and reached a decision that, but for the misapplication of the legal standard to the facts, it could not have otherwise reached.

The Proposed Decision is a also inconsistent with the FPPC's position in settlement of the largest case in its history, the Arizona case, only one month earlier, in which the Stipulation and FPPC Press Release exonerated Americans for Job Security (AJS) of any liability for "earmarking" on the grounds that "hope" plus common perspective or understanding was insufficient factually and legally.

Adoption of the standard set forth in the Proposed Decision would create an impossibly subjective rule for "earmarking," which will leave potential donors and recipients to guess at what facts would put them in jeopardy of violating the Political Reform Act's most important provisions. Such violations are a virtual death penalty offense. Such subjective standards present constitutional vagueness and overbreadth problems as outlined above.

For these reasons, the Proposed Decision should be rejected.

Dated: February 27, 2014.

Respectfully Submitted,

BELL, McANDREWS & HILTACHK, LLP

By: _____

Charles H. Bell, Jr.
Brian T. Hildreth

Counsel for Respondents

PROOF OF SERVICE

In the Accusation Against: *Berryhill for Assembly 2008, et al.*
FPPC No. 10/828
OAH No. 201201024

1. I am over the age of 18 and not a party to this cause. I am employed in the county where the mailing occurred. The following facts are within my first-hand and personal knowledge and if called as a witness, I could and would testify thereto.

2. My business address is 455 Capitol Mall, Suite 600, Sacramento, CA 95814.

3. I served the foregoing document entitled **RESPONDENTS' BRIEF** on each person named below by enclosing a true copy in an envelope addressed as shown in Item 5 and by:

a. depositing the sealed envelope with the United States Postal Service with the postage fully prepaid.
b. placing the sealed envelope with postage prepaid for collection and mailing on the date and at the place shown in Item 4 following our ordinary business practices. I am readily familiar with this business practice for collecting and processing correspondence for mailing. In 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 the place shown in Item 4.
c. transmitting via facsimile to the number(s) during regular business hours.
d. x personally serving.
e. transmitting by email to the offices of the addressee(s) following ordinary business practices during ordinary business hours.
f. causing to be deposited in a sealed envelope with FedEx Overnight Mail.
g. causing to be hand-delivered via a professional courier service.

4. Date of Deposit: February 27, 2014
Place of Deposit: Sacramento, CA 95814

5. Name and address of each person served:

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Fair Political Pracitices Commission
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Sacramento, CA 95814

Gary Winuk
Neil Bucknell
Enforcement Division
Fair Political Practices Commision
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Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 27, 2014, at Sacramento, California.

SUSAN HEU

EXHIBIT A

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

FAIR POLITICAL PRACTICES COMMISSION, a state agency, Plaintiff, v.	Case No. STIPULATION FOR ENTRY OF JUDGMENT

THE CENTER TO PROTECT PATIENTS RIGHTS and AMERICANS FOR RESPONSIBLE LEADERSHIP

Defendants.

(IN FAVOR OF PLAINTIFF AGAINST DEFENDANTS)

UNLIMITED CIVIL ACTION

Plaintiff Fair Political Practices Commission ("FPPC" or the "Commission"), a state agency, by its attorneys, and Defendants the Center to Protect Patient's Rights ("CPPR") and Americans for Responsible Leadership ("ARL") (collectively "Defendants"), by their attorneys, enter into this Stipulation to resolve all factual and legal issues pertaining to the Complaint for civil penalties filed herewith.

It is stipulated by and between the parties as follows:

Solely for the purposes of this action, that the Complaint on file in this action was properly filed and jurisdiction of the subject matter and of the parties to this action, and venue, are properly in the Sacramento Superior Court. Any defects in the Complaint are expressly waived solely for the purposes of this action.

Defendants understand, and hereby knowingly and voluntarily waive, any and all procedural rights that they could have exercised in this action if this Stipulation had not been entered into, including, but not limited to, their right to civil discovery, to appear personally at any civil trial held in this matter, to confront and cross-examine witnesses, and to have the trial presided over by an impartial judge, and heard and decided by a jury.

STIPULATED STATEMENT OF LAW AND FACTS

1. THE PARTIES AND BACKGROUND INFORMATION

Fair Political Practices Commission

The FPPC is a state agency created by the Political Reform Act of 1974 (the "Act"). (Government Code sections 81000–91014).

Plaintiff FPPC has primary responsibility for the impartial and effective administration and implementation of the Act. (Government Code section 83111). Pursuant to Government Code section 91001, subdivision (b), Plaintiff FPPC is the civil prosecutor for matters involving state candidates, state committees, and state election campaigns, and is authorized to maintain this action under Government Code sections 91001, subdivision (b), 91004, 91005, and 91005.5. The FPPC has concluded after a thorough investigation that *all* actions undertaken by Defendants, and their Directors, Officers, employees, and agents in relation to the conduct described in the Complaint were neither knowing nor willful within the meaning of Government Code section 91000(a).

Attorney General of California

The Attorney General for the State of California is a State Constitutional officer whose duties include serving as the chief law enforcement officer for the State and also as civil counsel to California State agencies and commissions. Government Code Section 83117 provides that, upon request of the FPPC, the Attorney General shall provide legal advice and representation to the Commission. The FPPC requested such advice and representation from the Attorney General in this matter.

Defendant Center to Protect Patient Rights

Defendant CPPR is a bona fide non-profit corporation organized in 2009 and recognized by the IRS as a tax exempt organization under Internal Revenue Code, section 501(c)(4). CPPR is located in Phoenix, Arizona. Prior to the events which are

the subject of this Complaint, CPPR had not made any contributions or expenditures in California.

Defendant Americans for Responsible Leadership

Defendant ARL is a bona fide non-profit corporation organized in 2011 and has applied for recognition as a tax exempt organization under Internal Revenue Code section 501(c)(4). ARL is located in Phoenix, Arizona. Prior to the events which are the subject of this Complaint, ARL had not made any contributions or expenditures in California.

2. SUMMARY OF THE LAW

Campaign Reporting Requirements

An express purpose of the Act, as set forth in Government Code section 81002, subdivision (a), is to ensure that the contributions and expenditures affecting election campaigns are fully and truthfully disclosed to the public, so that voters may be better informed, and so that improper practices may be inhibited. In furtherance of this purpose of disclosure, the Act sets forth a comprehensive campaign reporting system. (Government Code section 84200, *et seq.*).

Civil Liability

Government Code section 91004 provides that any person who negligently or intentionally violates any of the reporting requirements of the Act shall be liable in a civil action for an amount up to the amount(s) not properly reported. Persons who violate Government Code section 84301 and 84302 are liable in a civil action brought pursuant to Government Code section 91004.

Disclosure Requirements

Section 81002, subdivision (a) of the Act provides that "receipts and expenditures in election campaigns shall be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited." Timely and truthful disclosure of the source of campaign contributions is an essential part of the Act's mandate.

Government Code section 84301 provides that no contribution shall be made by any person in a name other than the name by which such person is identified for legal purposes.

Government Code section 84302 provides that no person shall make a contribution on behalf of another, or while acting as the intermediary or agent of another, without disclosing both the name of the intermediary and the contributor. 2 California Code of Regulations section 18432.5 states that a person is an intermediary for a contribution if the recipient of the contribution "would consider the person to be the contributor without the disclosure of the identity of the true source of the contribution."

Government Code section 84302 provides that the recipient of the contribution shall include in his campaign statement the full name and street address, occupation, and the name of the employer, if any, of both the intermediary and the contributor.

A campaign committee is required to disclose the date and amount of any contribution as well as the identity of any person or entity making a contribution to the committee. (Government Code section 84211). A "contribution" is defined by the Act as "any payment made for political purposes for which full and adequate consideration is not made to the donor." (2 California Code of Regulations section 18215).

The FPPC has enacted by regulation special rules for "contributions" made by non-profit organizations. (2 California Code of Regulations sections 18215(b)(1) and 18412). Regulation 18412 was promulgated by the Commission in May of 2012, and provides for certain presumptions regarding the source of non-profit "contributions" as follows:

> (a) Application. This regulation establishes rules governing organizations that are formed and operate as tax exempt organizations under Internal Revenue Code Sections 501(c)(3), 501(c)(4), 501(c)(5), and 501(c)(6), as well as federal or out-of-state political organizations, which make contributions or independent expenditures totaling $1,000 or more from their general treasuries to support or oppose a candidate or ballot measure in California, and report the sources of the funds used to make those contributions or independent expenditures as required by Regulation 18215(b)(1).
>
> (b) If a donor to such an organization requests or knows that the payment will be used by the organization to make a contribution or an independent expenditure to support or oppose a candidate or ballot measure in California, the full amount of the donor's payment shall be disclosed by the organization as a contribution. For purposes of this regulation, a donor "knows" that a payment will be used to make a contribution or an independent expenditure if a donor makes a payment in response to a message or a solicitation indicating the organization's intent to make a contribution or independent expenditure. An organization that solicits and receives contributions totaling $1,000 or more becomes a committee pursuant to Section 82013(a).

Campaign Disclosure

An express purpose of the Act, as set forth in Government Code section 81002, subdivision (a), is to ensure that the contributions and expenditures affecting election campaigns are fully and truthfully disclosed to the public, so that voters may be better informed, and so that improper practices may be inhibited.

In furtherance of this purpose of disclosure, the Act requires candidates, their controlled committees, and the treasurers of those committees, to file periodic campaign statements and reports, disclosing their financial activities. (Government Code section 84200, *et seq.*).

Government Code section 82013, subdivision (a) provides that any person or combination of persons who directly or indirectly receives $1,000 or more in a calendar year is a "committee." This type of committee is commonly referred to as a "recipient committee" under the Act.

To further ensure that the express purposes of the Act are achieved, Government Code section 84211 prescribes the contents of campaign statements. Government Code section 84211, subdivisions (c) and (i), requires each campaign statement to contain information regarding the total amount of contributions received during the period covered by the campaign statement from persons who have given a cumulative amount of $100 or more, and information regarding the total amount of expenditures made during the period covered by the campaign statement to persons who have received $100 or more.

Government Code section 84211, subdivision (f) requires detailed information for contributions of $100 or more. It provides that if the cumulative amount of contributions received from a person is $100 or more, and a contribution has been received from that person during the period covered by the campaign statement, the statement must disclose identifying information about the contributor, the date and amount of each contribution received from the contributor during the reporting period, and the cumulative amount of the contributor's contributions.

3. CIVIL LIABILITY PROVISIONS

Government Code section 91004 provides that any person who intentionally or negligently violates any of the reporting requirements of the Act shall be liable in a civil action in an amount up to the amount(s) not properly reported. Persons who violate Government Code section 84301 and 84302 are liable in a civil action brought pursuant to Government Code section 91004.

4. SUMMARY OF FACTS

In November 2012, a statewide general election was held in California. Propositions 30 and 32 were on the statewide election ballot. The FPPC, during the course of its review, has determined that both Propositions saw well-funded ballot measure committees opposed to and supportive of their passage created with the California Secretary of State so that they could receive contributions and make expenditures for or in opposition to these measures. One such committee, opposed to one of the ballot measures, was registered with the Secretary of State under the name Small Business Action Committee PAC ("SBAC-PAC"). Other entities planned to engage in issue advocacy on the issues raised by Propositions 30 and 32, which is differentiated under California law from campaign activity.

California law, under the Political Reform Act (Government Code section 81000, *et seq.*), requires any person (defined to include individuals, entities, and corporations under Government Code section 82047) who receives $1,000 or more in contributions or makes $1,000 or more in expenditures to expressly advocate for the passage or defeat of a ballot measure to form a campaign committee and disclose their campaign

activity. The term "express advocacy" has been defined under regulations promulgated by the FPPC to exclude communication which, when considering their timing and tenor, are not for the purpose of attempting to influence the action of the voters.

The FPPC has learned that in the spring of 2012, a California-based political consultant and fundraiser embarked on a campaign to raise funds to oppose Propositions 30 and support Proposition 32. After consultation with attorneys, the consultant began raising funds for express advocacy to be given to either the ballot measure committees against Proposition 30 and for Proposition 32, or to SBAC-PAC. He also began raising funds for issue advocacy to be given to Americans for Job Security ("AJS"), a 501(c)(4) non-profit corporation registered in Virginia. The solicitation to contributors gave donors the option, consistent with California law, to either have their contributions reported in campaign disclosure forms by contributing to SBAC-PAC or the ballot measure committees for express advocacy, or not to have their contributions disclosed by donating to AJS for issue advocacy.

By October 2012, $29 million from 150 donors had been raised by AJS for issue advocacy. AJS and the staff of the FPPC have determined that the donors' names are not subject to disclosure under California law. In September 2012, with the election for the Propositions less than 60 days away and, after consultation with their attorneys, AJS determined that the remaining funds would no longer be spent on issue advocacy. This was due to their interpretation of a FPPC regulation defining express advocacy, which provides that proximity to the election day is one of the factors to be examined when determining whether the tenor and timing of a communication makes it "express advocacy," even without words such as "Vote No on Proposition 30."

A decision was made by AJS to contribute the remaining funds, and any other funds that were received, to CPPR, a 501(c)(4) with social views similar to those held by AJS. The funds were explicitly provided with no specific direction as to how they would be used, and could be used for any purpose by CPPR. The funds were provided in three payments, as funds came in from donors: $4,050,000 on September 10, 2012; $14,000,000 on October 11, 2012; and $6,500,000 on October 19, 2012. These transfers were all consistent with California law and not subject to disclosure.

In making each of the contributions, AJS hoped, but did not require, that CPPR, which shared the same social views of AJS, would assist with the efforts to defeat Proposition 30, , and with efforts to pass Proposition 32. These actions would also be consistent with California law. CPPR contributed approximately $7,000,000 to AFF on September 11, 2012, of which AFF contributed $4,080,000 to a new California committee, California Future Fund for Free Markets ("CFF"). CPPR did not solicit any contributions from donors for political purposes in California and communicated with its attorneys during this time period. AFF and CFF shared CPPR's social views. CPPR, which had never previously made contributions in California, inadvertently, or at worst negligently, did not report CPPR as a contributor to AFF although the Commission would have advised CPPR to do so had inquiry then been made of the FPPC. AFF and CFF filed disclosure statements for the contributions in a timely manner disclosing AFF as the source of the contribution to CFF, but did not disclose CPPR's contribution.

On October 12, 2012, CPPR contributed $13 million to ARL, and on October 15, 2012, it contributed an additional $5 million to ARL, recommending to ARL that once the funds were received, ARL should use the funds to support common social interests, including support for SBAC-PAC. CPPR did not solicit funds for political purposes in California during this time period, and from the instance of the AFF donation to the

making of the SBAC-PAC donation, CPPR's donors did not know or have reason to know that their donations, or funds with which their donations were or would be commingled, would be used to make contributions or expenditures in California. On October 15, 2012, ARL transferred $11 million to SBAC-PAC, disclosing itself as the source of the funding. SBAC-PAC should have been informed by CPPR and ARL that CPPR had just made a contribution to ARL which shared its social views. CPPR should have disclosed itself to SBAC as the source of this contribution. The failure to disclose was inadvertent, or at worst negligent, and due to CPPR's lack of experience with California campaign disclosure law and its lack of knowledge that the Commission staff was available to respond to questions concerning reporting requirements on request by donors and recipients of contributions. During this time period ARL and CPPR communicated with counsel, and acted in good faith.

On October 25, 2012, the FPPC received a complaint that the source of the $11 million contribution to SBAC-PAC was not properly disclosed. The FPPC opened a discretionary audit to verify that the contribution had been properly reported, but ARL asserted the audit was illegal and violative of the First Amendment and the Due Process Clause, among other things, and accordingly declined to produce the requested records. The FPPC and the California Attorney General's office filed suit in Sacramento Superior Court to compel production of the records. The issue was litigated, but prior to final judgment, the FPPC and the Attorney General reached a settlement with ARL on Monday, November 5, 2012. Pursuant to this settlement agreement, with no admission of liability to do so, ARL disclosed additional information regarding the SBAC-PAC

donation and CPPR disclosed AJS as its donor. ARL and CPPR made this information public prior to Election Day—Tuesday November 6, 2012.

In general, failure to disclose the true source of contributors deprives the public of important knowledge about who is funding campaigns and how it impacts the campaign messages they receive.

FIRST CAUSE OF ACTION

(ONE VIOLATION—MAKING OF CONTRIBUTION WITHOUT DISCLOSING NAME OF CONTRIBUTOR)

Section 81002, subdivision (a) of the Act provides that "receipts and expenditures in election campaigns shall be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited." Timely and truthful disclosure of the source of campaign contributions is an essential part of the Act's mandate.

Government Code section 84301 provides that no contribution shall be made by any person in a name other than the name by which such person is identified for legal purposes.

Government Code section 84302 provides that no person shall make a contribution on behalf of another, or while acting as the intermediary or agent of another, without disclosing both the name of the intermediary and the contributor. 2 California Code of Regulations section 18432.5 states that a person is an intermediary for a contribution if the recipient of the contribution "would consider the person to be the contributor without the disclosure of the identity of the true source of the contribution."

Government Code section 84302 provides that the recipient of the contribution shall include in his campaign statement the full name and street address, occupation, and the name of the employer, if any, of both the intermediary and the contributor.

A campaign committee is required to disclose the date and amount of any contribution as well as the identity of any person or entity making a contribution to the committee. (Government Code section 84211). A "contribution" is defined by the Act as "any payment made for political purposes for which full and adequate consideration is not made to the donor." (2 California Code of Regulations section 18215).

The FPPC has enacted by regulation special rules for "contributions" made by non-profit organizations. (2 California Code of Regulations sections 18215(b)(1) and 18412). Regulation 18412 was promulgated by the Commission in May of 2012, and provides for certain presumptions regarding the source of non-profit "contributions" as follows:

> (a) Application. This regulation establishes rules governing organizations that are formed and operate as tax exempt organizations under Internal Revenue Code Sections 501(c)(3), 501(c)(4), 501(c)(5), and 501(c)(6), as well as federal or out-of-state political organizations, which make contributions or independent expenditures totaling $1,000 or more from their general treasuries to support or oppose a candidate or ballot measure in California, and report the sources of the funds used to make those contributions or independent expenditures as required by Regulation 18215(b)(1).
>
> (b) If a donor to such an organization requests or knows that the payment will be used by the organization to make a contribution or an independent expenditure to support or oppose a candidate or ballot measure in California, the full amount of the donor's payment shall be disclosed by the organization as a contribution. For purposes of this regulation, a donor "knows" that a payment will be used to make a contribution or an independent expenditure if a

> donor makes a payment in response to a message or a solicitation indicating the organization's intent to make a contribution or independent expenditure. An organization that solicits and receives contributions totaling $1,000 or more becomes a committee pursuant to Section 82013(a).

On or about October 15, 2012, Defendant CPPR made a contribution to SBAC-PAC, a California campaign recipient committee through its contribution to Defendant ARL, without either Defendant disclosing to SBAC-PAC that CPPR was the initial source of the contribution, thereby depriving SBAC-PAC of the opportunity to make a more complete disclosure and the public of the knowledge of the initial source of the contribution in violation of Government Code sections 84301 and 84302. CPPR and ARL's decisions relating to disclosure were either inadvertent, or at worst, negligent. After diligent inquiry, the FPPC has concluded that these actions were neither knowingly nor willfully made under Government Code sections 84301, 84302 or 91000(a).

SECOND CAUSE OF ACTION

(ONE VIOLATION—MAKING OF CONTRIBUTION WITHOUT DISCLOSING NAME OF CONTRIBUTOR)

Section 81002, subdivision (a) of the Act provides that "receipts and expenditures in election campaigns shall be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited." Timely and truthful disclosure of the source of campaign contributions is an essential part of the Act's mandate.

Government Code section 84301 provides that no contribution shall be made by any person in a name other than the name by which such person is identified for legal purposes.

Government Code section 84302 provides that no person shall make a contribution on behalf of another, or while acting as the intermediary or agent of another, without disclosing both the name of the intermediary and the contributor. 2 California Code of Regulations section 18432.5 states that a person is an intermediary for a contribution if the recipient of the contribution "would consider the person to be the contributor without the disclosure of the identity of the true source of the contribution."

Government Code section 84302 provides that the recipient of the contribution shall include in his campaign statement the full name and street address, occupation, and the name of the employer, if any, of both the intermediary and the contributor.

A campaign committee is required to disclose the date and amount of any contribution as well as the identity of any person or entity making a contribution to the committee. (Government Code section 84211). A "contribution" is defined by the Act as "any payment made for political purposes for which full and adequate consideration is not made to the donor." (2 California Code of Regulations section 18215).

The FPPC has enacted by regulation special rules for "contributions" made by non-profit organizations. (2 California Code of Regulations sections 18215(b)(1) and 18412). Regulation 18412 was promulgated by the Commission in May of 2012, and provides for certain presumptions regarding the source of non-profit "contributions" as follows:

> (a) Application. This regulation establishes rules governing organizations that are formed and operate as tax exempt organizations under Internal Revenue Code Sections 501(c)(3), 501(c)(4), 501(c)(5), and 501(c)(6), as well as federal or out-of-state political organizations, which make contributions or independent expenditures totaling $1,000 or more from their general treasuries to support or oppose a candidate or ballot measure in California, and report the

sources of the funds used to make those contributions or independent expenditures as required by Regulation 18215(b)(1).

(b) If a donor to such an organization requests or knows that the payment will be used by the organization to make a contribution or an independent expenditure to support or oppose a candidate or ballot measure in California, the full amount of the donor's payment shall be disclosed by the organization as a contribution. For purposes of this regulation, a donor "knows" that a payment will be used to make a contribution or an independent expenditure if a donor makes a payment in response to a message or a solicitation indicating the organization's intent to make a contribution or independent expenditure. An organization that solicits and receives contributions totaling $1,000 or more becomes a committee pursuant to Section 82013(a).

On or about September 11, 2012, Defendant CPPR made a contribution to CFF by first making a contribution to AFF, which then contributed to CFF without disclosing that CPPR had just made the contribution to AFF, thereby depriving the public of the knowledge of the initial source of the contribution in violation of Government Code Sections 84301 and 84302. CPPR and AFF's decisions relating to disclosure were either inadvertent, or at worst negligent. After diligent inquiry, the FPPC has concluded that these actions were neither knowingly nor willfully made under Government Code sections 84301, 84302 or 91000(a).

ENTRY OF JUDGMENT AND RELEASE

For the stated violations of the Political Reform Act, Plaintiff FPPC and all Defendants stipulate that a final judgment be issued and entered in the form of the order attached hereto and made a part hereof as Exhibit "A," in favor of Plaintiff FPPC, and against all Defendants, as follows: In the amount of $500,000 against Defendants CPPR and ARL, for the first cause of action, as set forth in the Complaint; in the amount

of $500,000 against Defendant CPPR and for the second cause of action, as set forth in the Complaint, for a total civil penalty of $1,000,000. Payment of this amount shall be made by cashier's check, payable to the "General Fund of the State of California," upon the execution and filing of this stipulation.

The parties shall each bear their own attorney's fees and costs.

It is further stipulated by and between the parties as follows:

(A) Defendant CPPR will file a major donor statement (Form 461) showing a contribution to CFF and to SBAC-PAC as set forth herein. The FPPC agrees, that as part of the consideration for this stipulation, CPPR: (i) is not and will not be required to file as a committee under Government Code section 84200 (a)–(b); (ii) is not and will not be required to file a Form 450; and (iii) is not and will not be required to disclose any of its donors as part of these disclosures;

(B) The FPPC agrees, as part of the consideration for this Stipulation, and as an integral part of this dispute resolution process, that the above disclosures, when filed, represents full compliance with all applicable statutes and regulations and that it will not dispute the validity of the disclosure or cause CPPR the further expense of an audit.

(C) The FPPC agrees, as part of the consideration for this Stipulation, and as an integral part of this dispute resolution process, that the Letter sent by ARL to SBAC-PAC on November 5, 2012, disclosing that ARL acted as an intermediary for the SBAC-PAC contribution, represents full compliance with all applicable statutes and regulations and that it will not dispute the validity of the disclosure or cause ARL the further expense of an audit.

(D) Upon execution of this Stipulation, and in return for the valuable consideration herein, the FPPC releases, waives, and abandons any and all administrative claims, civil claims, and any other claims it may have within its jurisdiction against the Defendants, including, but not limited to, those stated in the instant action filed by Plaintiff in the Superior Court of the State of California and any alleged violations arising from any other transactions that occurred during the 2012 election season, any and all events which in any way arise out of the implementation and/or execution of the Stipulation, and any and all other claims it may have within its jurisdiction, including those against Defendants' current and former Directors, Officers, employees, and agents including, but not limited to, those which arise out the operative facts of the instant action filed by Plaintiff in the Superior Court of the State of California, any alleged violations arising from any other transactions that occurred during the 2012 election season, and any and all events which in any way arise out of the implementation and/or execution of the Stipulation. And the FPPC unconditionally releases and forever discharges both as to Defendants, and Defendants' current and former Directors, Officers, employees, and agents, any and all known and unknown claims, demands, actions, causes of action, and any injuries or damages that now exist or that may arise in the future based upon or arising out of, in whole or in part, omissions, acts, or events occurring prior to the Parties' execution of this Settlement Agreement including, without limitation: (1) any and all claims pertaining to any alleged violation of the Act, including, but not limited to, those stated in the instant action filed by Plaintiff in the Superior Court of the State of California, any alleged violations arising from any other transactions that occurred during the 2012 election season, any and all

events which in any way arise out of the implementation and/or execution of the Stipulation; (2) for damages of any nature, whether past, present, or future, including compensatory, general, special, or punitive; and (3) for costs, fees, or other expenses, including attorneys' fees, incurred regarding those matters released herein.

The FPPC expressly acknowledges, agrees, and covenants, that this release shall extend to all claims, whether or not known or suspected by the FPPC prior to the execution of this release, and the FPPC agrees that this release shall constitute a waiver of each and every one of the provisions of Civil Code, Section 1542, and any similar law of any state or territory of the United States. **Section 1542** provides that: **"A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."**

The final judgment may be signed by any judge of the Superior Court of the State of California, in and for the County of Sacramento, and entered by any clerk upon application of any party without notice.

CONCLUSION

As the result of the aforementioned actions, the parties agree that Judgment shall be entered against Defendants, and in favor of Plaintiff Fair Political Practices Commission, as provided by this Stipulation.

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IT IS SO STIPULATED:

Dated: 10/23/13

Malcolm Segal, on behalf of Center to Protect Patient Rights, Defendant

Dated: 10/23/13

Thad Davis, on behalf of Americans for Responsible Leadership, Defendant

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Dated: 10/24/13

By: _____
Gary Winuk, FPPC Chief of Enforcement
Attorney for Plaintiff FPPC

Dated: 10-24-13

_____
Douglas Woods, Senior Assistant Attorney General
Attorney for Plaintiff FPPC

EXHIBIT B

STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
428 J Street • Suite 620 • Sacramento, CA 95814-2329
(916) 322-5660 • Fax (916) 322-0886

FOR IMMEDIATE RELEASE
October 24, 2013

FOR FURTHER INFORMATION CONTACT
Gary Winuk, FPPC
(916) 322-8029

FPPC Announces Record Settlement in $11 Million Arizona Contribution Case

Sacramento – The FPPC and California Attorney General today announced a record civil settlement against the Center to Protect Patient Rights (CPPR) and Americans for Responsible Leadership (ARL), two nonprofits operated as part of the "Koch Brothers' Network" of dark money political nonprofit corporations. The settlement requires CPPR and ARL to pay $1 million to the State General Fund for their failure to disclose two dark money independent expenditure contributions in the 2012 election to oppose Proposition 30 and support Proposition 32.

"This case highlights the nationwide scourge of dark money nonprofit networks hiding the identities of their contributors," said FPPC Chair Ann Ravel. "The FPPC is aggressively litigating to get disclosure and working on laws and regulations to put a stop to these practices in California."

The case was initiated after the FPPC and Attorney General filed suit against ARL prior to the November 2012 election to provide records to ensure the source of an $11 million contribution from ARL, an Arizona nonprofit with no history of political activity in California, was properly disclosed to California voters. The day before the election, ARL disclosed that Americans for Job Security (AJS) and CPPR were the source and intermediary, respectively, of the $11 million contribution to the Small Business Action Committee (SBAC), a California independent expenditure committee.

This resulted in a joint investigation by the FPPC and the Attorney General's office that revealed that CPPR, the key nonprofit in the Koch Brothers' dark money network of nonprofit corporations, was actually the source of two major contributions that were not properly reported. The first was a $4.08 million contribution to the California Future Fund (CFF), made through the American Future Fund (AFF) as an intermediary on September 11, 2012. The second was the $11 million contribution made to SBAC through ARL as an intermediary on October 15, 2012.

California law also requires disgorgement of both the $11 million contribution to SBAC and its Principal Officer, Joel Fox, and the $4.08 million contribution to CFF and its Principal Officer, Barbara Smeltzer. A letter was sent by the FPPC today notifying both parties that this disgorgement is required.

Funds were initially raised by AJS in conjunction with its political consultant, Tony Russo, to purchase issue advertisements related to Propositions 30 and 32. Under current law, contributions made for issue ads, those that do not expressly advertise for or against a ballot measure, are not disclosable to the public. Additionally, AJS' transfer of funds to CPPR were not subject to disclosure, as the contributions were not earmarked for any specific purpose, as is required for disclosure under current law. As a result, ARL's disclosure of AJS as the source of the contribution prior to the election was erroneous.

xxx

EXHIBIT C

Charles H. Bell, Jr. (SBN 060553)
Brian T. Hildreth (SBN 214131)
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455 Capitol Mall, Suite 600
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Attorneys for Respondents,
TOM BERRYHILL, BERRYHILL FOR ASSEMBLY 2008,
STANISLAUS REPUBLICAN CENTRAL COMMITTEE (STATE ACCT),
And SAN JOAQUIN COUNTY REPUBLICAN CENTRAL COMMITTEE/
CALIF. REPUBLICAN VICTORY FUND

BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

STATE OF CALIFORNIA

In the Matter of BILL BERRYHILL, TOM BERRYHILL, BILL BERRYHILL FOR ASSEMBLY – 2008, BERRYHILLL FOR ASSEMBLY 2008, STANISLAUS REPUBLICAN CENTRAL COMMITTEE (STATE ACCT.), and SAN JOAQUIN COUNTY REPUBLICAN CENTRAL COMMITTEE/CALIF. REPUBLICAN VICTORY FUND Respondents.	OAH No. 201201024 FPPC No.: 10/828 **RESPONDENTS' TRIAL BRIEF** Administrative Hearing Date: November 12-22, 2013 Time: 9:00 a.m. Place: Office of Administrative Hearings 2349 Gateway Oaks Drive, Suite 200 Sacramento, CA

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I. INTRODUCTION

Tom Berryhill, who was a candidate for re-election to Assembly District 25 in 2008, made two contributions to two Republican county central committees in the amount of $20,000 each, shortly before those central committees contributed similar amounts to Bill Berryhill's 2008 Assembly District 26 campaign. The FPPC alleges from these facts that Tom Berryhill made contributions to the two central committees that were "earmarked" for his brother's campaign. Because one state candidate can only give another state candidate for Assembly just a little more than $3,000 per election, the FPPC alleges also that, what it (inaptly) characterizes as "laundering" (a term not used in the Political Reform Act) also resulted in Tom Berryhill making excessive contributions to Bill's campaign. All but two of the other allegations relate to what campaign reports Tom Berryhill, Bill Berryhill and the two central committees should have filed if the FPPC's allegations are correct. The evidence to be presented at trial (summarized below) will refute all these allegations, and the ALJ should dismiss each and every one of them.

This brief summarizes: (1) what is "earmarking" under the Political Reform Act and why there was no "earmarking" of contributions in this case; and (2) the facts that will be adduced at trial as to why the two central committees made their own decisions to use their campaign funds to support Bill Berryhill and did so in a completely lawful manner.

A. THE LAW: WHAT IS EARMARKING OF CONTRIBUTIONS AND WHY THERE WAS NO EARMARKING OF CONTRIBUTIONS

The crucial legal 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. To reach such an "agreement or understanding," the central committees would have surrendered their complete discretion to Tom as to how to they would use Tom's funds. The FPPC has presented no direct evidence of, and Tom Berryhill and the leaders of the two central committees have consistently denied, and will strongly deny at the hearing, there were any such "agreements

or understandings." The central committee leaders will assert vigorously that they made their own contribution decisions and did not yield their discretion to decide when and how to use their funds on hand, and that they had good reasons to contribute to Bill Berryhill whose district included both Stanislaus and San Joaquin counties, was a target race and whose election victory was in great peril at the time the committees made their contributions to him.

The Political Reform Act, as written and interpreted, clearly defines what an "earmarked" contribution is. Government Code, § 85704 provides:

> 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.

Further, former Government Code, § 85703, which was enacted in 1996 and repealed in 2000 by Proposition 34, provided:

> No person shall make and no person, other than a candidate or the candidate's controlled committee, shall accept any contribution on the condition or with the agreement that it will be contributed to any particular candidate. *The expenditure of funds received by a person shall be made at the sole discretion of the recipient person.*
>
> (Emphasis added.)

Thus, the essential aspects of "earmarking" are the conditioning of a contribution made by the donor to its recipient on that recipient's contributing the funds to a particular candidate, or the agreement or understanding between the donor and the recipient about the recipient contributing the funds to a particular candidate. That is the specific language of current Gov. Code, section 85704. Former Gov. Code, section 85703 stated that same proposition in a different way: if the recipient of the contribution makes a contribution decision in its sole discretion, there is no condition or agreement between the original donor and that recipient.

The available testimony and evidence in this case will demonstrate that: (1) Tom Berryhill did not condition his contributions to the Stanislaus and San Joaquin committees that

they be contributed by those committees to Bill Berryhill's committee; (2) There were no agreements or understandings between Tom Berryhill and the two committees that Tom's contributions to them be contributed to Bill Berryhill's committee; and (3) The Stanislaus and San Joaquin committees made their own decisions to contribute funds to Bill Berryhill's committee, with knowledge that they had the full discretion to do so.

B. THE LAW: PROPOSITION 34 AND THE ROLE OF POLITICAL PARTIES

Proposition 34, adopted by the voters to replace an earlier campaign reform measure, favored political parties over all other contributors to campaigns, and specifically allowed any person (including a candidate) to contribute up to $30,200 to each county central committee (as a political party committee) each year, and further authorized each political party committee to contribute or spend an unlimited amount of such funds to or on behalf of any of its nominee candidates for state elective office. Looked at separately, Tom Berryhill made lawful contributions to the two county central committees in late 2008, and these central committees made lawful contributions to Bill Berryhill's committee.

California political parties are the primary organizations that promote the election of candidates affiliated with those parties, and have played this role since they were organized in California. Support of their nominees is their core function. California political parties include the state central committee and subordinate county central committees or district central committees. (See generally, Division 7 of the California Elections Code,, commencing with Elec. Code, § 7250 *et seq.*)

The Republican Party's state central committee is known as the California Republican Party, and it is governed by its own bylaws and generally by the provisions of Chapters 1-3 of Part 3 of Division 7 of the Elections Code, Sections 7250- 7354. Section 7353 provides that the state central committee shall conduct party campaigns for the party and on behalf of the

candidates of the party. County central committees, such as the Stanislaus and San Joaquin County Republican Central Committees, are governed by their bylaws and by Part 4 of Division 7 of the Elections Code, Sections 7400-7470. Section 7440 provides that "a [central] committee shall have charge of the party campaign under general direction of the state central committee. ..."

Until 2010, when California implemented the "Top Two Primary" system formally known as the "voter nominated primary," Californians selected their nominees for partisan offices such as the State Assembly by partisan primary, in which registered voters of a political party chose their nominees for the general elections. In 2008, Bill Berryhill was nominated by Republican voters in San Joaquin and Stanislaus counties as their nominee for the 26th Assembly District. As such, Bill Berryhill was the nominee the San Joaquin and Stanislaus County Republican Central Committees were tasked by law to support for election, and Bill Berryhill also became an "ex officio member" of both these central committees. (Elec. Code, § 7404.) Tom Berryhill, as the incumbent Assemblyman for the 25th Assembly District and also the elected party nominee for re-election to that post, was also an "ex officio member" of the Stanislaus County Republican Central Committee and other county committees that were part of his Assembly District.

Political parties operate under the campaign finance laws of the federal government and the State of California with respect to participation in federal, state and local campaigns. Federal campaign activity is conducted pursuant to the provisions of the Federal Election Campaign Act of 1971, as amended, Title 2, U.S. Code, Section 431, *et seq*. State and local campaign activity is conducted pursuant to the provisions of the California Political Reform Act, Title 9 of the California Government Code, Section 81000, *et seq*.

Political parties and their members' constitutional rights of speech and association are protected by the First and Fourteenth Amendments to the U.S. Constitution. (See, e.g., *Eu v. San Francisco Demo. Cent. Comm.* (1989) 514 U.S. 190; *Wilson v. San Luis Obispo Dem. Cent.*

Comm, 175 Cal.App.4th 489, 497 (D.C.A. 2, 2009).)

C. PROPOSITION 34 AUTHORIZES POLITICAL PARTIES TO ACCEPT AND USE UNEARMARKED CONTRIBUTIONS TO SUPPORT STATE CANDIDATES

Proposition 34, enacted by California voters in 2000, governs many of the issues of this case. Proposition 34 promotes contributions to political parties[1] and allows political parties to contribute or spend unlimited amounts of contributions from donors to support candidates for state elective offices. In Proposition 34, section 1, the voters found and declared that:

> (1) Monetary contributions to political campaigns are a legitimate form of participation in the American political process, but large contributions may corrupt or appear to corrupt candidates for elective office.
>
> ***
>
> (3) *Political parties play an important role in the American political process and help insulate candidates from the potential corrupting influence of large contributions.*
>
> ***
>
> (b) The people enact the Campaign Contribution and Voluntary Expenditure Limits Without Taxpayer Financing Amendments to the Political Reform Act of 1974 to accomplish all of the following purposes:
>
> (1) To ensure that individuals and interest groups in our society have a fair and equitable opportunity to participate in the elective and governmental processes.
>
> (2) To minimize the potentially corrupting influence and appearance of corruption caused by large contributions by providing reasonable contribution and voluntary expenditure limits.
>
> (3) To reduce the influence of large contributors with an interest in matters before state government by prohibiting lobbyist contributions.
>
> (4) To provide voluntary expenditure limits so that candidates and officeholders can spend a lesser proportion of their time on fundraising and a greater proportion of their time conducting public policy.
>
> ***
>
> (7) To strengthen the role of political parties in financing political campaigns by means of reasonable limits on contributions to political party committees and by limiting restrictions on contributions to, and expenditures on behalf of, party candidates, to a full, complete, and timely disclosure to the public.
>
> (Emphasis added.)

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[1] Gov. Code, § 85205 defines a political party committee as follows:
"'Political party committee' means the state central committee or county central committee of an organization that meets the requirements for recognition as a political party pursuant to Section 5100 of the Elections Code,."

D. POLITICAL PARTIES' CONTRIBUTION LIMITS

Proposition 34 provided more favorable contribution limits to political parties for use to support state candidates than for any other type of committee or candidate. Donors may contribute up to $34,000 per person per year to each political party committee (the amount currently adjusted for inflation) (Gov. Code, § 85303(b).) The political party can use such funds to make unlimited contributions to candidates for elective state office, such as State Assemblymember. The right of a political party to make unlimited contributions to a candidate for elective state office (mentioned in the italicized portion of section 1 of Proposition 34 quoted just above) is found in the specific exclusions of political parties from the contribution limits to candidates found in Gov. Code, §§ 85301(a), 85301(b), 85301(c) and 85303(a), as well as the absence of any direct statutory limitation on contributions by political party committees to candidates for elective state office in sections 85301,[2] 85303[3] or any other provision of chapter 5 of Division 9, and the specific exclusion of political party campaign expenditures from the

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[2] Gov. Code, § 85301: (a) A person, other than a small contributor committee or *political party committee*, may not make to any candidate for elective state office other than a candidate for statewide elective office, and a candidate for elective state office other than a candidate for statewide elective office may not accept from a person, any contribution totaling more than three thousand dollars ($3,000) per election. (b) Except to a candidate for Governor, a person, other than a small contributor committee or *political party committee*, may not make to any candidate for statewide elective office, and except a candidate for Governor, a candidate for statewide elective office may not accept from a person other than a small contributor committee or a political party committee, any contribution totaling more than five thousand dollars ($5,000) per election. (c) A person, other than a small contributor committee or political party committee, may not make to any candidate for Governor, and a candidate for governor may not accept from any person other than a small contributor committee or political party committee, any contribution totaling more than twenty thousand dollars ($20,000) per election. (d) The provisions of this section do not apply to a candidate's contributions of his or her personal funds to his or her own campaign.

[3] Gov. Code, § 85303: (a) A person may not make to any committee, *other than a political party committee*, and a committee other than a political party committee may not accept, any contribution totaling more than five thousand dollars ($5,000) per calendar year for the purpose of making contributions to candidates for elective state office.
(b) A person may not make to any political party committee, and a political party committee may not accept, any contribution totaling more than twenty-five thousand dollars ($25,000) per calendar year for the purpose of making contributions for the support or defeat of candidates for elective state office. Notwithstanding Section 85312, this limit applies to contributions made to a political party used for the purpose of making expenditures at the behest of a candidate for elective state office for communications to party members related to the candidate's candidacy for elective state office. (c) Except as provided in Section 85310, nothing in this chapter shall limit a person's contributions to a committee or political party committee provided the contributions are used for purposes other than making contributions to candidates for elective state office.

spending limits of Gov. Code, § 85400, found in subdivs. (d) of section 85400.[4]

II. THE FACTS WILL NOT SUPPORT THE COMMISSION'S ALLEGATIONS ABOUT EARMARKING

A. THE SAN JOAQUIN COUNTY CENTRAL COMMITTEE'S CONTRIBUTIONS

San Joaquin County's 2008 central committee chairman and its 2008 and current treasurer and secretary will testify that that central committee had delegated the decision to make last minute contribution decisions to their chairman, Dale Fritchen, and directed him to contribute to "target candidates identified by the California Republican Party," and Mr. Fritchen will testify (and support with a contemporaneous email) that he was asked by the California Republican Party to spend funds to support Bill Berryhill and Gary Jeandron (a candidate in another Assembly race in the Palm Springs area). Committee records also show that the San Joaquin County committee supported other candidates, including Tony Strickland, who was a Senate candidate in a competitive or "target" race in Ventura County.

B. THE STANISLAUS COUNTY CENTRAL COMMITTEE'S CONTRIBUTIONS

Stanislaus County's leaders will testify that their central committee had left the decision to make contributions at the end of the election to its chairperson, Joan Clendenin. Ms. Clendenin will testify that she made the decision to contribute to Bill Berryhill's campaign based upon

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[4] Gov. Code, § 85400: (a) A candidate for elective state office, other than the Board of Administration of the Public Employees' Retirement System, who voluntarily accepts expenditure limits may not make campaign expenditures in excess of the following: (1) For an Assembly candidate, four hundred thousand dollars ($400,000) in the primary or special primary election and seven hundred thousand dollars ($700,000) in the general or special general election. (2) For a Senate candidate, six hundred thousand dollars ($600,000) in the primary or special primary election and nine hundred thousand dollars ($900,000) in the general or special general election. (3) For a candidate for the State Board of Equalization, one million dollars ($1,000,000) in the primary election and one million five hundred thousand dollars ($1,500,000) in the general election. (4) For a statewide candidate other than a candidate for Governor or the State Board of Equalization, four million dollars ($4,000,000) in the primary election and six million dollars ($6,000,000) in the general election. (5) For a candidate for Governor, six million dollars ($6,000,000) in the primary election and ten million dollars ($10,000,000) in the general election.
***
(b) For purposes of this section, "campaign expenditures" has the same meaning as "election-related activities" as defined in clauses (i) to (vi), inclusive, and clause (viii) of subparagraph (C) of paragraph (2) of subdivision (b) of Section 82015. *(c) A campaign expenditure made by a political party on behalf of a candidate may not be attributed to the limitations on campaign expenditures set forth in this section.*

telephone calling results from phone calls conducted by the committee that showed Bill Berryhill not to be known very well by Republican voters they were calling and her previous experience when Bill Berryhill's father, former legislator Clare Berryhill, faced a similar last-minute advertising blitz and was unable to muster the campaign funds to respond to it, causing his election defeat. Clendenin determined to contribute funds the committee had to Bill Berryhill to avoid the repeat of the earlier defeat.

C. BILL BERRYHILL'S RACE WAS A CALIFORNIA REPUBLICAN PARTY TARGET RACE

Bill Berryhill, Mike Villines (who was the Assembly Republican Leader responsible to raise funds to elect all Republican Assembly candidates), and the leaders of the two central committees will also testify that Bill's race was a "target race," *i.e.*, one which both major political parties were likely to contest because of the narrow voter registration margins between the two parties in AD 26. However, the strong motivator for them was the fact that the California Democratic Party, and its allies, had poured between $750,000 and $1 million into Berryhill's opponent's campaign in the final two weeks, and the money was used to launch a heavy barrage of negative advertising against Berryhill. Further, in the last weeks of the 2008 campaign, it appeared that the impending Obama landslide in California would carry other down-ticket Democrats in state legislative and Congressional races to victory. The FPPC will attempt to dispute that the Bill Berryhill race was a "target," but the witnesses will testify that targeting is a fluid concept not wholly within the control of one party (a race might be viewed as up for grabs early or become up for grabs late in the campaign due to multiple factors) and largely subjective, and the testimony will make clear that Republicans considered Bill's race to be a "target," and the Democrats clearly considered it worth a late investment of about $750,000 in Bill's opponent, Jon Eisenhut.

The evidence will show that the California Republican Party contributed $50,000 to Bill

Berryhill's campaign on October 30 and 31, 2008, and that Mr. Fritchen on behalf of San Joaquin County was influenced by the California Republican Party's request that San Joaquin contribute funds it had to Bill Berryhill and acted on that request, not any agreement or understanding with Tom Berryhill. Ms. Clendenin's decision to contribute to Bill Berryhill was influenced by her own alarm at Bill Berryhill's relatively weak standing among likely Republican voters from whom he would need to attract votes and a desire to avoid the election defeat Bill's father, Clare Berryhill had suffered some years earlier when he wasn't able to muster sufficient resources to respond to his opponent's negative advertising blitz.

D. THE FPPC HAS NO EVIDENCE OR ADMISSIONS OF EARMARKING

The FPPC has no direct evidence or admissions of earmarking (*i.e.*, of any "agreements or understandings" between Tom Berryhill and the two central committees to which he contributed that his money was earmarked for Bill's campaign) and will ask the court to rely solely upon inferences from a timeline of phone calls and emails between various individuals involved in this case.

Moreover, none of the trial witnesses deposition testimony, or their trial testimony, gives the FPPC's case assistance, because all of them have truthfully denied that they participated in, or had any knowledge of, any "earmarking scheme" as alleged by the FPPC. Therefore, the FPPC will rely exclusively upon a timeline it produced from telephone records and emails of a number of persons, some of whom will not testify at trial, to ask the ALJ to infer that "earmarking" should be found where there is no direct evidence of it from this evidence of a series of communications. There is actually no substance to the communications, and the "timeline" simply stands for evidence that many of the people involved, who were involved in conducting these local campaigns, were talking to one another. Communication in the course of conducting campaigns is not unusual and certainly not illegal behavior.

The FPPC will also ask the ALJ to infer from the timing of the contributions, the relationship between brothers Tom and Bill, and/or agency, that "earmarking" occurred notwithstanding unanimous direct testimony that will be offered to the contrary. Of course, plausible inferences to the contrary abound:

1. **Timing:**

There is no "blackout period" or "timeout period" within which a contribution cannot be made before an election. Moreover, campaign committees try very hard to spend their funds before an election on voter communications since spending it afterward could not affect the election, and at the last minute of a campaign, there isn't much time to hold money.

Both central committees received significant monetary contributions from other sources on or around the days which Tom Berryhill also contributed funds to the central committees. The sources of these other contributors to the central committees (which include Blue Shield of California; Mike Villines for Assembly 2008; San Francisco Bar Pilots PAC; California Hospital Association PAC; San Joaquin Valley Leadership PAC; San Manuel Band of Mission Indians; and the California Mortgage Association PAC) are as likely the source of funds of the central committees' contributions to Bill Berryhill as the funds contributed by Tom Berryhill. Importantly, the FPPC has not charged any of these other contributors to the central committees in this matter (or any related matter) with violations of the Political Reform Act.

2. **Family Relationship:**

No law prohibits family members of a state candidate from contributing to political party committees even with knowledge that such party committees have targeted a nominee candidate for support and are likely to use the family members' funds to support the donors' relative. Separate persons, including spouses, are considered separate contributors under the Act. (Gov. Code, §§ 82047 [definition of "person" includes "individuals"]; 85301 ["a person

may contribute"], 85302, 85303.) Tom Berryhill acknowledges that he was his brother's key adviser and helped raise money for him, but he also will testify that he understood the law about earmarking, the role of political party committees, and what he and they could do. Finally, even if Tom Berryhill contributed to a central committee with knowledge that the central committee might help his brother's campaign, that does not amount to "earmarking," which requires a specific agreement or understanding between contributor and recipient that the contributor's money will be given to a third party.

3. Agency:

The FPPC has made and is unlikely to present any credible evidence that any other person acted as an agent in Tom's stead or that of the two central committees in any alleged "agreement or understanding" that might constitute "earmarking." While explicit acts of an "agent" might be attributable to one of the agent's principals if he or she had apparent authority to act as an agent, the FPPC has not asserted agency with respect to any particular individual. "Agency" is defined as the express or apparent authority of an individual to act on behalf of a principal and bind the principal by words or actions. (Black's Law Dictionary, 7th Ed., p. 62). There is absolutely no evidence that any person other than Tom Berryhill and the principals of the two central committees were responsible for their contributions and the decisions to make them. When the principals credibly deny that anyone else was their "agent" in the transactions, the FPPC cannot impute agency to another person and meet its burden of persuasion and proof in this matter. In the absence of any concrete evidence of express earmarking by a recognized agent of the principals involved, implied earmarking cannot be inferred.

Even if the court is permitted to reach such inferences, it would be unreasonable to do so; the FPPC has no evidence of the content of such communications that warrants any inference of earmarking.

E. THE COMMITTEES MADE THEIR OWN DECISIONS USING THEIR CHOSEN PROCEDURES

The FPPC will try to undermine the two central committee's assertions that they made their own contribution decisions in several ways: (1) by questioning whether the decisions comported with the committee's bylaws, and (2) by testimony of at least one individual who was formerly a treasurer of the San Joaquin central committee that when he was treasurer, the committee didn't use the same decision-making procedure as the committee leadership used in late 2008 in making the contributions to Bill Berryhill.

These points will be irrelevant to what the committee's practice in 2008 was, and are also irrelevant to the question whether there was any "agreement or understanding" between Tom Berryhill and the two central committees concerning "earmarking" which has been discussed above.

Joan Clendenin, the Chairman of the Stanislaus central committee for the 2007-2008 cycle, and Jim DeMartini, who was Vice Chairman of the committee during that cycle (having been Chairman prior to that cycle and again from 2009 to the present) will testify that they had authority to make contribution decisions to support Bill Berryhill with the contributions in question.

Dale Fritchen, the Chairman of the San Joaquin central committee for the 2007-2008 cycle, Louis Lemos, its treasurer, and Nancy Cochran, its longtime secretary, will testify that the Central Committee had authorized its Executive Committee and Chairman to make last –minute contribution decisions in 2008. Dale Fritchen will testify that he made the decision to contribute the committee's campaign funds to Bill Berryhill, after consulting with the California Republican Party staff about Berryhill's need.

III. OTHER ISSUES

A. UNREPORTED GIFTS

Count 15 alleges a failure to timely report a gift of a ticket(s) from Disneyland. However, the Respondent made clear in his letter of January 18, 2010 to the FPPC Enforcement Division that the gifts were erroneously reported by the Walt Disney Company as made to him, when they were made to one of his staff members and the Respondent's wife. (See Letter from Tom Berryhill to Gary Winuk, dated January 18, 2010, attached to Tom Berryhill Declaration.) Because the gift was not made to the Respondent, the claim of failure to timely report the gift is meritless and should be dismissed.

Count 16 concerns non-reporting of a gift from the Pechanga Band of Luiseno Indians. The circumstances concerning this matter are partially a public record. The Respondent was verbally invited to the event directly by a representative of the Pechanga Band, and the matter did not go through his staff that normally handles invitations. Moreover, the Pechanga Band has admitted, and actually has been fined, for failure to provide gift notices to affected public officials. Finally, this charge is totally inappropriate in light of the Commissioners' statement about the charging of gift violations with respect to similar enforcement actions in February 2010. The gift maker had acknowledged failing to notify the recipients, and the Commissioners, while approving stipulations that had already been entered with defendant legislators, made the following comments (reproduced as part of the whole minutes of that discussion):

> PROPOSED CONSENT CALENDAR - ITEMS 2 THROUGH 63
>
> Chairman Johnson announced that more than 60 Enforcement matters were on the consent calendar, and he congratulated the Enforcement Division staff for their hard work over the past several months in bringing the cases to resolution. He advised that, at some point, he intended to schedule a hearing to give the Commissioners an opportunity to gain a clearer understanding of how the Enforcement Division operates, how they prioritize their cases, and how they exercise their prosecutorial discretion. This had been done in the past, but he thought it would be worthwhile since the majority of the commissioners are relatively new to the Commission.
>
> The Chairman reported that 41 stipulations on the consent calendar were the result of a proactive investigation by staff, which involved a number of lawful gifts received by members of the Legislature and their aides, but which they failed to report. He commended the speed with which staff reached settlements in these

cases, and thought it was important to note that the individuals agreeing to the stipulations did not hesitate to correct the record by filing amended statements. Moreover, each paid what he or she and our staff agreed to as appropriate penalties. He said he intended to vote for each of these items with the exception of Item 50, which he wanted to remove from the consent calendar, and asked staff to seek a higher penalty as it appeared to him that the Pechanga Band of Luiseño Mission Indians failed to appropriately notify a number of individuals that they had made a reportable gift to them. While the individuals had a nondelegable duty to report the gifts that they received, it would seem that the Respondent committed multiple violations and the penalty suggested was proportionately low.

Chairman Johnson asked if the Commissioners had any comments or wanted any other items removed from the consent calendar.

Commissioners Hodson, Garrett and Montgomery echoed Chairman Johnson's positive comments to staff, but expressed policy concerns with how the gift reporting violation cases involving members of the Legislature and their aides had been handled. They thought that, in general, persons with first-time violations and failing to report only one gift, with no prior history of any violations, should have received only warning letters, not stipulations with $200 fines, but that they would approve these items since the respondents had signed the stipulations and paid the fines.

(Emphasis added.)

The charge in Count 16 falls squarely within the grounds the commissioners directed the Enforcement staff not to charge a fine for the Pechanga gift matters. For these reasons, Count 16 should be dismissed.

B. TOM BERRYHILL'S OCTOBER 28, 2008 FUNDRAISER

With respect to the FPPC's claim that Tom Berryhill's October 28, 2008 fundraiser was reportable as a non-monetary contribution to Bill Berryhill's campaign because Tom Berryhill in introducing his brother at the event exhorted the attendees to support his brother; there is absolutely no basis for this charge. First, as the fundraiser Diane Stone Gilbert will testify and the documentary evidence make clear, the fundraiser in question was a fundraiser for Tom Berryhill's Assembly committee. The invitations were for a Tom Berryhill fundraiser; the receipts were for Tom Berryhill's committee; and the Commission has produced no evidence that a single dollar was raised for Bill Berryhill's committee at the event. The Commission's sole basis for this count was a statement made by Tom Berryhill in his FPPC interview that he may have made an oral request to the attendees to support his brother's campaign. Such a request clearly comes within

the "volunteer personal services" exemption from the definition of "contribution." (Gov. Code, § 82015.)

Moreover, the Commission will not be able to produce a single instance in which the Commission has brought or succeeded in making any enforcement claim based upon the attribution of a contribution by a candidate for whom an event was advertised and held being to have made a non-monetary contribution to another candidate on the basis of a single oral exhortation to support that candidate made at the first candidate's fundraising event. Likewise, the Commission has produced no evidence that a single contributor gave money to the Stanislaus County central committee in response to the oral exhortation that was earmarked or used for contributions from that central committee to Bill Berryhill's campaign.

IV. CONCLUSION

The law and evidence to be presented will fall far short of preponderance of the evidence standard the Fair Political Practices Commission is required to establish to show that Tom Berryhill had "agreements or understandings" with the San Joaquin and Stanislaus County Republican Central Committees that his contributions to those committees were "earmarked" for Bill Berryhill's campaign. The evidence will not support any FPPC claim that the two central committees failed to exercise their own discretion in making contributions to Bill Berryhill's campaign in late October 2008. The FPPC cannot sustain the claims of each and all of the counts alleging "earmarked" contributions (including the allegations based on the "earmarking" claim that the central committees failed to disclose Tom Berryhill's committee as the "true source" of their contributions to Bill Berryhill) because there is no evidence, let alone preponderant evidence, to support these claims.

The law and evidence will not sustain the FPPC's claim that the Tom Berryhill fundraiser on October 28, 2008 was a non-monetary contribution to Bill Berryhill's campaign by virtue of a

The law and evidence will not sustain the FPPC's claim that the Tom Berryhill fundraiser on October 28, 2008 was a non-monetary contribution to Bill Berryhill's campaign by virtue of a mere exhortation by Tom Berryhill to his supporters to also help Bill Berryhill.

Finally, the law and evidence will not sustain the FPPC's claim that Tom Berryhill's initial failure to report gifts from Disneyland or the Pechanga Band of Luiseno Indians violated the gift disclosure laws. The claim with respect to the latter, the Pechanga gift, is also foreclosed by the FPPC Commissioners' actions in 2011 directing the FPPC Enforcement staff not to bring claims against other legislators concerning the Pechanga gifts, which the donor had failed to disclose.

If the court does not agree with the Respondent Tom Berryhill that such a finding is foreclosed, the court should recommend the minimum penalty ($200) the FPPC's Enforcement Division sought and obtained against dozens of legislators similarly situated in 2011.

Dated: November 7, 2013.

Respectfully Submitted,

BELL, McANDREWS & HILTACHK, LLP

By: _____
Charles H. Bell, Jr.

Attorneys for Respondents BILL BERRYHILL, TOM BERRYHILL, BILL BERRYHILL FOR ASSEMBLY – 2008, BERRYHILLL FOR ASSEMBLY 2008, STANISLAUS REPUBLICAN CENTRAL COMMITTEE (STATE ACCT.), and SAN JOAQUIN COUNTY REPUBLICAN CENTRAL COMMITTEE/CALIF. REPUBLICAN VICTORY FUND

PROOF OF SERVICE

In the Accusation Against: *Berryhill for Assembly 2008, et al.*
FPPC No. 10/828
OAH No. 201201024

1. I am over the age of 18 and not a party to this cause. I am employed in the county where the mailing occurred. The following facts are within my first-hand and personal knowledge and if called as a witness, I could and would testify thereto.

2. My business address is 455 Capitol Mall, Suite 600, Sacramento, CA 95814.

I served the foregoing document entitled **RESPONDENTS' TRIAL BRIEF** on each person named below by enclosing a true copy in an envelope addressed as shown in Item 5 and by:

a. depositing the sealed envelope with the United States Postal Service with the postage fully prepaid.
b. placing the sealed envelope with postage prepaid for collection and mailing on the date and at the place shown in Item 4 following our ordinary business practices. I am readily familiar with this business practice for collecting and processing correspondence for mailing. In 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 the place shown in Item 4.
c. transmitting via facsimile to the number(s) during regular business hours.
d. personally serving.
e. x transmitting by email to the offices of the addressee(s) following ordinary business practices during ordinary business hours.
f. causing to be deposited in a sealed envelope with FedEx Overnight Mail.
g. causing to be hand-delivered via a professional courier service.

5. Name and address of each person served:

Karen Brandt
Presiding Administrative Law Judge
Office of Administrative Hearings
2349 Gateway Oaks, Suite 200
Sacramento, CA 95833
Telephone: (916) 263-0550
Facsimile: (916) 263-0545

Via email at: sacfilings@dgs.ca.gov

Neil Bucknell, Counsel
Enforcement Division
Fair Political Practices Commission
428 J Street, Suite 620
Sacramento, CA 95814

Via email at: NBucknell@fppc.ca.gov

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 7, 2013, at Sacramento, California.

CORIANNE DURKEE

EXHIBIT D

ADMINISTRATIVE HEARING

BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

STATE OF CALIFORNIA

--oOo--

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/California Republican Victory Fund,	)	OAH No. 2012101024
	)	
Respondents.	)	

OFFICE OF ADMINISTRATIVE HEARINGS

2349 Gateway Oaks Drive, Suite 200

Sacramento, California

Friday, November 22, 2013

10:30 a.m.

REPORTED BY: JAN BENEDETTI-WEISBERG, CSR No. 4643

DIAMOND COURT REPORTERS
1107 2nd St., Suite 210
Sacramento, CA 95814
916-498-9288

I would like to take a ten-minute recess and then we will go on from there. Off the record.

(Recess taken.)

ADMINISTRATIVE LAW JUDGE LEW: Let's go back on the record.

Mr. Bell making the argument?

MR. BELL: Yes.

ADMINISTRATIVE LAW JUDGE LEW: You may proceed.

MR. BELL: Thank you. First, I would like to thank you for giving us the courtesy of presenting this case in front of you and taking the time and accommodating our schedules when we had breaks in availability of witnesses. We will be doing a brief, as we have discussed, in writing to discuss these issues in more detail.

And I would also like to compliment Mr. Bucknell and Mr. Rasey for their cooperation in this matter and their professionalism.

Usually cases like this don't come to the hearing judges because there is direct evidence of some activity, and that certainly conduces to settlement of the cases at an earlier stage before the FPPC. But not in this case. And the reason for that is that there is no direct evidence of the serious charges that they have brought against all of my clients.

Earmarking -- they use the term "money laundering" which I will say parenthetically is nowhere in the statute, but

it's a pejorative term they use quite loosely, frankly because it's something that gets a lot of press attention.

I think we have been fairly careful here to use the term "earmarking" or "contribution in the name of another." And we think that that's really the appropriate way to refer to this case in a non-inflammatory way.

However, we have been quite cooperative in allowing them to put virtually all of the evidence, even press articles in, that they had to present because we are not afraid of the facts here and believe that fundamentally this case is a burden of proof case, and they have not met their burden of proof.

First, I would like to dispose of two of the FPPC's theories about this case. The first is the behest theory and the second is the straw donor theory. The behest theory, the Court scratched its head about a little in the opening, as I recall, and we scratched our head about it, as well. It wasn't really explained in the opening brief that was filed, and really not satisfactorily in our view in Mr. Bucknell's opening statement.

But the theory of it was that Tom Berryhill's contributions to Stanislaus and San Joaquin Central Committees were actually -- should have been attributed to him because they were made at the behest of his brother Bill Berryhill. And this is just wrong on both the law and the facts.

On the law of contributions made to a Central Committee

at the behest of -- or maybe it's easier to think of that as behesting, as sort of solicited by a candidate or not deemed to be a contribution directly to the behesting candidate from the person who gave them. The FPPC's own regulation 18215(d), which I would like to -- Mr. Hildreth is going to supply you with a copy of. We will refer to it further in our brief. I supplied it to Mr. Bucknell -- reads:

"Regulation 18215 interprets Government Code 82015, which is the definition of contribution." It's a rather long regulation, the full text of which is attached to the front sheet that I gave you.

What subdivision D says is: "A contribution made at the behest of a candidate for a different candidate or to a committee not controlled by the behesting candidate is not a contribution to the behesting candidate."

In this case, if a contribution had been made at the behest of Bill Berryhill to a Central Committee which is, by definition, not a controlled committee of the candidate, it is not a contribution to the behesting candidate by the maker of the contribution.

So I think that behesting theory is not supported by the law. There are numerous advice letters that also make clear that the behesting theory is not the law. We will provide those and reference them in our closing brief.

But even without the law, there is no factual support

for that theory. There is no evidence that's been presented in this case whatever to support the notion that Bill Berryhill solicited contributions to the Central Committees. He has denied that. The Central Committees denied that. And there is really nothing to refute that.

The only thing the FPPC has even presented on that point is a portion of Mr. Fritchen's e-mail. But it's quite clear, from both Mr. Fritchen's testimony and Mr. Berryhill's testimony, that that reference is rather indefinite, and neither of them recalled having any conversations specifically about contributions being made by Tom Berryhill to the San Joaquin Central Committee. There is absolutely no evidence of Bill Berryhill soliciting any contributions to the Stanislaus Central Committee.

Further, Carl Fogliani, who was Bill's agent, according to his testimony, but not his fundraiser, denied soliciting contributions for the two Central Committees. Both Central Committees denied talking with Fogliani or Berryhill about the contributions. And so there is simply no evidence that's been presented on that point.

On the straw donor theory, the most common example of a straw donor -- and that's really found in the O'Connell case that has been cited, but also numerous FPPC cases involving contributions in the name of another, are examples like an employer goes to his employees and says, Here is some money,

cash or a check. Give that -- write a check or give that money to Candidate A. That is an example of a straw donor. It's the most common one.

But this is different. A political party committee such as Central Committees ongoing candidate support functions have been part of the State election law for well over 50 years. And there has been testimony to that by all of the Central Committees people who were here and testified as to that function of the Central Committees.

Further, the campaign finance role of the Party Committees and their Central Committees and the Political Reform Act have been recognized since Proposition 4 was adopted in 2000. We discussed this in our opening brief, and cited to the preambular language in Prop 34 about the importance of parties, how they are actually mediating influences over the corruption or apparent corruption issue that justifies government regulation in this issue at all.

And really Proposition 34, as we noted, was enacted to promote that mediating role of parties in the entire process. The fact that it is a mediating role does not mean that somehow they are straw donors or in any way are not permitted to engage in law. In fact, the FPPC's prosecution of this case, I submit, is intended to try to fuzz up or muck up that and thwart the operation of Proposition 34. A basketball analogy is to clog the passing lanes. That's exactly what this attempt to

prosecute this case is about in a grander sense, beyond the specific accusations against these candidates.

Finally, Mr. Bucknell misrepresented our statement about and comment on his ministerial role argument. The parties, he says, are playing a ministerial role and not a primary role in this. In our view, ministerial role means they exercise no discretion with respect to the making of contributions. And I think the evidence in this case is quite to the contrary. And I will talk about that in just a minute.

Which gets us to the earmarking theory of this case, which I think is at its center, and why this is a burden of proof case, a burden which they have not met.

First, the FPPC has presented no actual evidence of earmarking. There is absolutely no writing between the parties, Tom Berryhill, the two Central Committees, of earmarking. There is no document that they have produced reflecting a condition or agreement between Tom Berryhill and the two Central Committees.

"Condition" is more than what Mr. Bucknell referred to it. "Condition" means I give you this on the condition that you use it for a particular purpose. There is no evidence of that in this case.

"Agreement" means a meeting of the minds between two parties that something will be done. There is no meeting of the minds between the party that has been produced in evidence in this case.

There is simply no evidence of oral testimony between the parties of earmarking, either in the interviews the FPPC conducted initially, with the FPPC and the Central Committee leadership of both of those Committees alone. And there is certainly none of that in the testimony of the witnesses who appeared here in this case. No testimony before this Court of either condition or agreement with respect to earmarking.

The FPPC's own document, the timeline, reflects nothing that would establish any communication involving earmarking. And I will go into this more. In fact, the FPPC really had no witnesses to present in this case. They interviewed all of our witnesses. And it's obvious from the interviews that they were attempting to get the two Central Committees' leaders, and specifically, Ms. Clendenin, Mr. Fritchen and Mr. DeMartini to admit there was earmarking. They asked Tom Berryhill about earmarking.

At the trial, they attempted to undermine the witnesses' clear testimony that they hadn't engaged in earmarking. And much of Mr. Bucknell's argument today has really focused on the nits he attempted to pick in their testimony. And I will go into that.

I think it's clear the witnesses strongly deny in their testimony before this Court that there was any earmarking.

And of course, the Court is -- has the duty to look at the witnesses and assess, make its own assessment of their

credibility in this case. And we trust that the Court will do that, has done it.

The FPPC asks the Court to draw inferences. But inferences here aren't evidence. And in our view, the FPPC has presented no evidence, let alone preponderant evidence, of the earmarking claims or the other claims that's their FPPC case. Then they haven't met their burden.

Let me start by saying the two most important witnesses in this case were Dale Fritchen and Joan Clendenin. And the Court had the opportunity to hear their testimony and examine their credibility. They were the two Central Committees' Chairmen at the time in 2008. We believe they were strong and credible witnesses.

Now, Ms. Clendenin began her testimony by responding to the FPPC's attorney's question, Do you know why you are here? She said the following: "I am here to correct the FPPC's misunderstanding about what we did in 2008."

Dale Fritchen was described by two witnesses, Ms. Nancy Cochran, who was the Executive Secretary of that Committee, and Mr. Louis Lemos, who was the Treasurer, as a highly respected reputable individual whom the Central Committees have reposed both its authority and its absolute confidence to make decisions about whom the Central Committee's last minute funds should be given to.

Mr. Fritchen's demeanor as a witness was credible and

relaxed and even self-deprecating. For example, he expressed embarrassment, as the Court may recall, about misspelling the word "desperate" in the e-mail that the FPPC was referring him to.

Both Ms. Clendenin and Mr. Fritchen strongly asserted that they made the decisions to contribute Committee funds to Bill Berryhill and never had any conversations with Tom Berryhill about giving the money he had given them on October 30th and 31st, 2008 to Bill Berryhill.

More importantly, they offered convincing reasons why they made the decisions they did. And I will note that in Mr. Bucknell's one hour presentation, I think he devoted about two minutes to their testimony.

Ms. Clendenin recounted the narrow defeat of Bill Berryhill's father Clare Berryhill in 1989 because he didn't have funds to spend on television advertising at the end of his campaign. She also recalled his brother Tom, who is a Respondent in this case, had lost a very narrow election in 1996 when he had something like $70,000 left in the bank at the end of the campaign that he didn't spend on advertising.

And she was very clear in her testimony that she, if she could, would not allow that to happen to Bill Berryhill, if it were possible for her committee to support him.

And so her testimony was that, at the very end, when they had already spent money that they had previously obtained

to support other candidates, and it had become clear at the end of October, 2008, that Bill Berryhill's campaign was going to be a real burner, the Democrats had put $750,000 approximately, and their allies about a million dollars in the last two weeks of the campaign into the Eisenhut race. That it was important that her Committee be able to contribute to support Bill Berryhill if it had the funds to do so.

And her testimony in that regard was that she had asked one of his staff people, Well, Mr. Eisenhut is in the mail and it's gone up on TV. Does Bill Berryhill have any funds to respond to that? And the response that she understood was, Well, he will respond if he has funds, but he doesn't have them now. So her decision was driven by that.

Mr. Fritchen recounted the request for funds that was made to him in his testimony. The FPPC has cited his e-mail to Mr. Lemos, but really ignored the key portion of that e-mail, which said: Let's give Bill Berryhill $21,000. That was in the context of Mr. Fritchen having been given by the Executive Committee of the Central Committee the authority to make that decision. He was discussing it with Mr. Lemos, the Treasurer, who was also on the Executive Committee.

And it's clear, I think, from that part of the transaction, that it was the decision of the Central Committee made by Mr. Fritchen to make that contribution.

Both Clendenin and Fritchen understood they had the

authority and discretion to decide how to use their Committees' funds. And there is more.

The key issue in the case is whether the Central Committees did exercise their discretion to make these contributions. All the credible evidence in this case is that they did. These key facts break the theoretical link to earmarking as defined in Government Code 85704, which is in front of us here and to which Mr. Bucknell also referred today, but to which we referred all the witnesses and asked them for their understanding of it.

The facts break the link of earmarking, your Honor. And once this is established, all the other testimony, including the supporting testimonies of Mr. DeMartini and Tom Berryhill and Mike Villines, Louis Lemos and Ms. Cochran are all supportive, but I would submit of less importance in themselves. But cumulatively, all of this testimony is compelling.

Now, with respect to objective factors -- and the Court had raised some question about that in its statement to Mr. Bucknell and to us about the O'Connell case.

The intentions and exercise of discretion of the two Central Committees are clear from these witnesses' testimony, and they are supported by objective factors. And in our view, that question should be, were the decisions they made reasonable under the circumstances? And in our view, the answer to that is clearly yes.

First, there is no dispute that this was a target race. As Bill Berryhill described it, it was a watched target at the first, because although the registration in the race between Democrats and Republicans was about equal, Mr. Eisenhut, at least up until the mid part of October of 2008, had not raised any money. Mr. Berryhill had put, by his estimate, $400,000 into the race. And the polls looked good for him. The race did not appear to need extraordinary help until very late, indeed after the Central Committees had raised a lot of candidate support money and spent it prior to mid-October on other targeted races not in their areas.

Everyone who testified described also the building Obama wave, if I can use that expression, that threatened all the Republican candidates and became apparent in mid to late October before the election.

As has been stated before, Bill Berryhill's opponent had received an extraordinarily large infusion of money from the California Democratic Party and its allies, and those funds were expended on mostly negative campaign communications about Bill Berryhill, as we, noted about $750,000 in total, about a million dollars, virtually all within the last three weeks prior to the election, to Mr. Eisenhut's campaign.

Joan Clendenin testified the had seen Eisenhut's TV ads and wondered if Bill had the funds to respond. And, as noted, the response she got from the campaign was, If we get the money.

From which she concluded they did not have the money. And that was the correct assessment.

Bill Berryhill and Jim DeMartini said they were receiving five pieces of Eisenhut mail a day in their mailboxes. So it was evident to DeMartini that this money was being used effectively to campaign against Bill Berryhill.

At this point, I think the old maxim, If your baby is crying, feed him, really describes this situation. This was the only local race that was competitive at the time. The two committees had a duty under the election law and also their own self-described duty as leaders of the Republican Party to support Republican candidates. Bill's race was in jeopardy. They had spent lots of money feeding other babies, those targets in Southern California, already. The need to help Bill was clear and obvious. If they had the money, the baby would be fed.

So both Clendenin and Fritchen said this in their own way. That decision, I think, was so elemental, so obvious, it was really the only reasonable decision for them to make. And they made that decision.

Now, I would like to talk a little bit about earmarking. In the campaign law, Thou shalt not earmark is one of the Ten Commandments. Maybe one of the top two or three. I think Mr. Bucknell described the seriousness here. We certainly concur with that. Just as people put their own interpretations

ethically on what the Ten Commandments mean, people involved in politics have their own perspective and language to describe this legal and ethical proscription.

So each of these witnesses expressed what Thou shalt not earmark meant to them. Mr. DeMartini said, You can't talk with the donor about how his money can be used. Bill Berryhill said, You can't even talk about someone else's donation with a potential contributor. Tom Berryhill said, You give the money and you just hope they will use it well or do the right thing. And Joan Clendenin said, You just can't talk about this. And we don't.

Louis Lemos indicated he was thinking about these facts, that they had just received money from Tom Berryhill in the San Joaquin Central Committee. And San Joaquin, through Mr. Fritchen's decision, was going to give money, indeed more than it received from Tom Berryhill, to Bill Berryhill, along with some other candidates, Mr. Jeandron and Proposition 8 ballot proposition.

And he went to his campaign expert consultant about it and agreed to make the contribution disbursement only after he had been told it was okay, as long as the Committee made its own decision.

So he was aware at that time that the Committee had delegated the decision-making authority to Dale Fritchen. Fritchen had asked him to make the contribution. And he knew

and trusted Fritchen to have made the decision in the exercise of the discretion that he and his other Executive Committee members had given him.

However, each of them described their ethical or legal prohibition on earmarking. Their witness testimony is unanimous that Tom Berryhill did not condition his contributions to the two Central Committees or have any agreement with them that they would give their funds received from him to Bill.

What isn't earmarking, we will address that in greater detail in our written brief. But the Court has expressed a concern about some hypothetical situations that might involve or result in earmarking. Your Red Cross example that you used early on is one that doesn't involve earmarking. You couldn't sue the Red Cross to compel them to give the money to someone they said they intended to give it to when they solicited your contribution, if they decided a better use was to be made of that.

Another example is from the Political Reform Act itself, what the FPPC considers a pledge. They define a pledge as an enforceable promise to make a contribution. Now, most pledges in the parlance of politics are really not enforceable promises. They are bare promises. There is no consideration for them.

As Tom Berryhill testified in both his initial FPPC interview and here in court, he can hope and maybe expect under

the circumstances that Central Committees would do the right thing, but he couldn't force them to refund money if they didn't do it. I think that's important.

Can you infer earmarking when the objective evidence is that there was no expressed condition or agreement? We think not. We think not. Because earmarking is one of the top Thou shalt nots. The penalties for violation of it include potential criminal prosecution.

The law really provides an objective standard. Did the relevant parties have an agreement? Did the donor condition the contribution that it could be accepted and used only as conditioned?

And third, did the recipient exercise its discretion? And was that reasonable under the circumstances?

Now, we pointed out in our opening brief that a provision of Proposition 208, which had been enacted in 1996 concerning earmarking, actually had a sentence at the end of it that said: It's not earmarked if the donor or the donor of the contribution to the candidate exercises its discretion. That was actually eliminated from the express language of Prop 208 when Prop 34 was enacted. I am not sure why and there is no specific reason given by the authors of Proposition 34 of which I am aware as to why that was taken out. But I think they may have intended to perhaps to narrow it to take into account what the donor and the entity or committee to whom the donor gave the

money intended at the time, with the condition or agreement.

But I think it is fair to say that the exercise of discretion by the recipient of a contribution as to how it would be used reflects the -- if there was a condition, it was not agreed to. If there was any kind of an agreement proposed, the Committee, in exercising its discretion, did not adhere to that, and it could not be adhered to because of the Thou shalt not that we are talking about here.

This serious prohibition on earmarking which although they have only charged it as a civil offense, could be charged as a criminal offense in an appropriate case and has been in other cases.

ADMINISTRATIVE LAW JUDGE LEW: May I interrupt with you a question? Is this a good time?

MR. BELL: Yes.

ADMINISTRATIVE LAW JUDGE LEW: As you read what is earmarking? In fact, you can earmark as long as you fully disclose it. That's the last part of that sentence.

MR. BELL: That's correct.

ADMINISTRATIVE LAW JUDGE LEW: So if that is the case, you might consider that section to be in the context of a contribution that is well within the limits, say, is it $3,300 back in 2008? Then the question becomes, if you are allowed to, quote, earmark, as long as you disclose up to that sum. If, as the FPPC is saying, they are not going under this section, but a

section that prohibits contributions over a certain level, then is that really the evil that is to be resolved in this case, the fact that this individual had already been maxed out, and was in a way trying to get above that limit. How do you --

MR. BELL: It is clear that a donor can give the maximum amount to a candidate. And if there had been an earmarked contribution, whether disclosed or not, in excess of that limit, it would have been over the limits. There is just no doubt about that. That's the law.

The question is really whether it's earmarked. I think that brings us back to condition or agreement. Is that responsive to your question?

ADMINISTRATIVE LAW JUDGE LEW: Kind of. I think I know the answer to my own question, too, in terms of whether an individual is constrained by that 3,300 limit.

MR. BELL: Yes. There is no doubt that an individual can give money to a political party -- at that time, it was up to $30,200, for the direct support of candidates. In fact, that's what the law provides. And that right is extended not only to all persons. That would include individuals and corporations, labor unions and anyone who is a bona fide person under the statute can give that much to any State political party organization or any County political party organization.

And their specific duty with respect to that money, they can spend it on anything they want. But the specific duty

to which the limits apply is to support candidates for State office, such as Bill Berryhill in this case.

And as I mentioned, it was quite clear from the testimony that the Central Committee leadership understood quite clearly that earmarking, accepting earmarked contributions, passing them through, was not legal.

Now, I would like to comment on the FPPC's Communication Chart. And that's really kind of their whole case. They ask you to draw a lot of inferences from that, we pointed out at the start in our opening brief. And I don't think anything has been added by the FPPC in the course of this hearing to shed any further light on that.

What it shows is a number of recorded conversations or attempted communications. And you recall here that Ms. Clendenin specifically testified that, although the records showed that she had made a text message to Mr. Berryhill on some occasions, she had a telephone device that didn't allow her to do that and she didn't use texting. So there are some foundational problems with some of this.

But with respect to most of those communications, there is absolutely no information other than the inferences that they have tried to put together, like stringing a piece of -- one piece of spaghetti with another one at length to try and reach from the Point A to POINT B that they are trying to make here. And I don't think that accomplishes the objective that they are

seeking from an evidentiary standpoint.

The inference that they are asking you to make that these communications were related to earmarking is critical. The testimony that is extant in this suggests that -- and in fact, the testimony from Tom Berryhill specifically suggests that, and Ms. Clendenin, as well, that these communications likely were about the logistics of making contributions to the Committee, the logistics of the Committee getting contributions that they were making to Bill Berryhill, at a time when they had to move very quickly because, as they testified, television stations don't sell you time on credit and direct mail vendors do not sell you the opportunity to print and publish on credit. You have to have money in the bank.

So the testimony here really does not support the inferences that they are asking you to draw that there was earmarking.

Does it support an inference that they were having communications about politics? Both the Central Committee Chairs, both Mr. Berryhills testified that the Central Committees' roles in campaigns are to support the candidates. And they do that in a variety of ways. They do it by precinct walking. They do it by making telephone calls, arranging for meetings with activists, as well as other things, other than making contributions.

You could make an equal inference from many of these

communications that, at least some of them may have had to do with that at the last minute of the campaign. But I don't believe you can draw a stronger inference from those communications of earmarking in light of the direct testimony of the witnesses that there was no communication between them about a condition or agreement on the making of contributions.

In fact, the FPPC's reference to the Bruno fundraising event, I think has more -- had to do with evidence that, at that time, on the 28th, Tom Berryhill had made a decision to make contributions at least to Stanislaus County Republican Central Committee, if not to the San Joaquin Central Committee. If indeed he did ask donors to support Bill by making direct contributions to him, instead, they could give to the Central Committees. That's evidence that on the 28th -- not on the 29th or the 30th -- he had made a decision to do so, and makes more credible his testimony that the communications that were identified on this chart on the 29th or the 30th or even the 31st related to him had to do with the logistics of getting the contribution made, having the Committees that were recipients of it become aware that the contribution was being made and delivered to them and giving them the opportunity to make their own decisions with how to spend that money and spend it quickly.

And I think that beyond that, the references to this chart are fairly innocuous, but certainly one can infer that, by the 28,th he had actually made that decision.

With respect to the Carl Fogliani communications, it was Mr. Fogliani's very clear testimony, as was Bill Berryhill's, that Fogliani was not a fundraiser for Bill. But both acknowledged that, at that juncture in the campaign, faced with this onslaught of money against them, that not only Bill, but Carl -- but anyone on their side would, quote, ring the bell on every occasion at the end of the campaign about their need to raise campaign funds.

I think the use of the term "ring the bell" is interesting here. Because when we think about that, we almost immediately think about the Salvation Army bell ringers who stand outside of stores and they ring the bell. And I don't know the derivative of that term, but I suspect that it relates to that. And if you have done that or -- I have, certainly. They stand there and they ring the bell, and you pass along. You decide whether you are going to respond or not. And that's your decision. And I think that's a very apt analogy to the situation here.

It was clear that Carl Fogliani was not Tom's agent, but was actually Bill's. Fogliani denied any involvement on behalf of Tom or Bill in any earmarking scheme, as did they, that they were involved in or he was.

Indeed, all of the testimony, Joan Clendenin, Jim DeMartini's, Dale Fritchen's, also denied having any conversations with Carl Fogliani about money, whether on Tom's

or Bill's behalf.

Finally, with respect to Carl Fogliani's testimony, I think the Court should view his testimony as credible. The best evidence of this is, at the end of his interview, the video transcript, the FPPC actually attempted to impeach it, on account of some tweets that he had made expressing his own views about that.

He had some reasons not to be particularly happy about the FPPC that I cannot disclose publicly, but his testimony both in his FPPC initial interview and the video deposition was candid and credible, and it certainly was consistent with those of Tom Berryhill, of Bill Berryhill and the Central Committees.

With respect to Mr. Phelan and Laura Ortega, Mr. Bucknell has tried to show that the involvement of some of Tom Berryhill government staff members in what I would describe as courier activities -- that's all the e-mails suggest -- for the Central Committee points to earmarking. I would submit that it does not point to earmarking at all. There is no inference that reasonably could be drawn from their involvement in it, whatever their -- whatever hat they may have been wearing at the time, to any alleged agreement or condition between Tom Berryhill and the two Central Committees about earmarking.

So there is really no evidence. There is only conjecture about these individuals.

The only evidence really before the Court here is that

Mr. McKinsey recalled that Phelan represented that he was picking up the Stanislaus check for Bill Berryhill. There was testimony that people who are on the staff of the Assembly and the Senate quite commonly at election time take vacation days to work on campaigns. Of course, even on a day when they are working, they can do something during their lunch hour.

The testimony of Mr. McKinsey in that regard was that, at the request of Ms. Clendenin, he expedited depositing the Tom Berryhill check into the Stanislaus account, having previously written a check to Bill Berryhill, which he was going to deliver, when a gentleman he later identified as Mr. Phelan approached him and said, I am here to pick up the Bill Berryhill check. And his testimony was, he would not have given that check to Mr. Phelan unless he had understood that Phelan was there to accept a check on behalf of Bill Berryhill.

And that does not point in any way to Tom Berryhill. And I would submit the evidence on that is not one from which you could draw anything other than an inference that he was acting at that time as an agent for Bill Berryhill.

Similarly, the testimony about Ms. Ortega is that she couriered several checks from San Joaquin to Bill Berryhill's Treasurer. Again, nothing on which you could base an inference reasonably that Tom Berryhill had engaged in any earmarking activity.

So this is just a red herring with respect to those.

I would like to address the Bruno fundraiser because they have charged that resulted in an in kind contribution from Tom Berryhill to Bill Berryhill's Committee. You had an opportunity to hear Diane Stone Gilbert testify. She was Tom's fundraiser. And I think her testimony was completely credible.

She testified the event was planned sometime in early September to late September as a Tom Berryhill fundraiser. She also testified there were no contributions raised at that event for Bill Berryhill. The event was basically planned and executed at a time when, looking at the other testimony in this case, Bill's race was not even under threat. That became apparent in mid-October.

Bill Berryhill testified that, in reviewing the contributions the FPPC identified on Exhibit 1.3, that he couldn't identify a single contribution highlighted by the FPPC that might have come from any individuals or non-party organizations as a result of Tom's Bruno fundraiser.

Tom Berryhill's testimony was he made an oral plea to his donors to contribute to Bill and Central Committees that night. That evidence really doesn't go to whether this should have been reported as an in kind contribution.

And I would point you again to not only the regulation 18215(d) language which I just provided to you and to counsel, but also to our discussion of volunteer personal services in our brief. And essentially, this point is that when an individual

candidate asks someone to support another candidate at his own fundraiser, or even if he were at Bill Berryhill's fundraiser, that does not make a contribution that might be received as a result of that oral plea something that he would have to account for in his own campaign finance and determine -- for example, if he had been at another fundraiser, if he had been at Bill Berryhill's fund raiser and he had gotten up and said, Contribute to Bill. He would not have to disclose and report, potentially be subject to the accusation that he had violated the reporting limit if he had maxed out to Bill already, the gasoline or the use of his vehicle to go to that fundraiser. It's just an implausible theory. There is no support for it.

This was thrown in basically as a kitchen sink charge to up the number of counts when the FPPC decided that it would go to hearing on this matter.

With respect to the Anderson contribution, I would submit the FPPC has not proved earmarking in this case. And it's clear that they dismissed any potential enforcement action against the Stanislaus Central Committee for insufficient evidence in the Anderson case.

If the Court looks at the dismissal letter, in fact, 84301 is not even mentioned. There is no mention in that about a claim of a contribution being made in the other. In fact, the letter suggests that the Central Committee could make that. And I submit that, if that Central Committee decided to make that

contribution at its own discretion, it would be perfectly legal to do so. Whether it was from an appearance standpoint something they should have done is an entirely other matter. But this does not meet any standards that I am aware of for pattern and practice.

If you can't establish the violation that you charging, and you dismiss a case that you are citing as pattern and practice of the violation that you can't prove, it's just -- it's not appropriate and I think not permissible to use that as pattern and practice evidence.

On the Disney gift issue, I would point the Court to the attachment to our Exhibit A, which was the letter from Tom Berryhill to Mr. Winuk at the FPPC in response to his earlier letter in December, in which he states that his wife was separately invited and received a gift from Disneyland. This is not an admission of a violation. But we would concede that he amended his report to include that, and there is a reason -- reasonable reason for that.

First, even if that amount had been added, it was clearly not above the gift limit, so it did not trigger any other violation. And the gift limit violation is more serious than a reporting violation, even if it had been.

The second is that, at the time, the FPPC's own regulations permitted gift givers to separately invite spouses and immediate family members of public officials to events. And

the regulations specifically said that those would not be attributed to the official. If they are not attributable to the official, they are not reportable, at least as gifts by the official on the Statements of Economic Interest.

We cited the FPPC's meeting minutes of February 2010 to show that, at the same time the FPPC had communicated with Tom Berryhill about not only the Disneyland gift but several other items, including the Pechanga gift, that they had also pursued the same issues against a number of other Legislators, negotiated mostly $200 fines against them, brought that to the Commission for approval.

The Commissioners -- I think the minutes fairly reflected a serious concern about it. Not wishing to set aside stipulations the FPPC had already entered into, because they reasonably concluded that the parties stipulating to those violations and paying the minimal fine had actually reached an agreement with the FPPC they didn't want to upset. But they made clear that they didn't like that.

And I think that when you look at the timing of these, the question is really again for this case, why was this brought here? And I would submit it was brought to again throw some kitchen sink charges at Tom Berryhill to buttress their case.

The citation of the FPPC to other subsequent gift violation cases, I think is irrelevant. First, the -- at the time those were negotiated -- and this whole issue was not

brought back before the Commissioners to -- I guess it's maybe fair to question, did the Commissioners remember what they had told the enforcement staff in the February 2010 meeting or had they just passed on? Were they looking at situations where people also had reached agreements? I don't know if those people were represented by counsel or not. That was circumstances in which they agreed to pay a fine.

You know, sometimes it's a lot easier to settle than fight. And we are here because we chose to fight. Because we think these allegations are baseless. They put us to a lot of trouble and expense defending them. Which I think we have shown there is no direct evidence of any earmarking in this case. That's the unanimous testimony of witnesses I think you can determine to be credible.

The evidence that they have is really the kind of chart that we are talking about here from which they ask you to reach a number of inferences that I think are well beyond what reasonably could be inferred in this case, even all stacked together. They don't suggest or permit a reasonable inference in my view of any earmarking. In contradiction to the direct evidence of the witnesses that has been unanimous about their recognition of -- and understanding of the seriousness of earmarking, the Thou shalt not and their attempt to follow the law in this case.

Let me just say at the end, Tom Berryhill made a legal

contribution to each of these Central Committees at the end. It was within the limits. Central Committees exercising their discretion made legal contributions to Bill Berryhill's campaign for reasons that were ultimately quite reasonable, as I have tried to outline here, and which they testified to directly, to aid his campaign at the end when he was in danger. They provided assistance to him to get on television. There is no doubt about that. And these parties believed they were complying fully with the law.

I am pretty sure we wouldn't be here if Tom Berryhill weren't Bill Berryhill's brother. I am pretty sure we wouldn't be here if the compressed timing within which these contributions were made hadn't occurred.

But I think there is ample testimony from all the witnesses that campaigns, at the end of the campaign, require that certainly the Central Committees felt a duty not to have money in their bank account after the election, not to take the risk that they not contribute to a candidate they knew was imperiled, that he might lose the election on account of them holding onto money which they could properly and legally use to support a candidate who was in their jurisdictions, who was their nominee, who they had helped in a myriad of other ways without finance, but by telephone banking, making phone calls, precinct walking and all of the things that the local party committees do with the local activists who are engaged on behalf

of those parties. And that this was a totally appropriate thing.

Should the Committees be subject to a situation where they have to guess whether, because of a familial relationship between a candidate and a donor, they can't give money to them, money they legally would be entitled to give?

Or if at the end of the campaign, when there is no black-out period in the law, prohibiting them from doing so, they cannot give money to a campaign because in hindsight, an administrative agency such as the FPPC might haul them into an extended lengthy administrative enforcement investigation, ultimately prosecution, really chills political speech in, I think, a way the voters, in enacting Proposition 34, intended not to happen; that the voters who enacted the Political Reform Act and the Legislature that amended it a number of times, never intended to happen by imposing any kind of bar on familial contributions or on the time within which candidates can make contributions to Central Committees or Central Committees can make contributions to other candidates.

The law does not try to draw the line where the FPPC through an enforcement proceeding is attempting to do.

Now, we have no problem if the FPPC or someone in the Legislature wants to go to the Legislature and try to change the law. But they shouldn't try to change the law in the course of an enforcement proceeding. And that's why we have contested

this vigorously.

We think that you ought not to find a violation of the earmarking provisions of the statute under 84301. And if you do not find that, then all of these other allegations about failure to report which they have made simply fall by the wayside. Because they are all related to, ultimately bound up in, a finding that earmarking had occurred, which we believe the evidence shows it has not.

I have nothing further.

ADMINISTRATIVE LAW JUDGE LEW: Mr. Bell, thank you very much.

What is your estimate of the time for your reply?

MR. BUCKNELL: Maybe ten minutes your Honor.

ADMINISTRATIVE LAW JUDGE LEW: Please.

MR. BUCKNELL: Thank you, your Honor.

One of the things he talked about was Joan Clendenin. It was really interesting because she could recall things from the '80s and '90s with respect to elections, specific details. And yet when it came down to having her recall her communications with Tom Berryhill in '08, and then the communications and what happened in '09 with Anderson, she was a complete blank slate. She couldn't recall anything. It was very disingenuous of her. She was being dishonest.

Also, with respect to Paragraph 79 of the accusation, we are dealing with witnesses in this case, we don't know what

they were going to say at the hearing. We do know what they tell us. I have to allow some leeway for witnesses changing their stories like we saw happening here.

We saw Jim DeMartini. Sometimes he is a Chairman, sometimes he is not the Chairman.

We saw Gary McKinsey come forward and actually tell us that Bob Phelan picked up the check from him when he was on his way back to the car from the bank. Gary McKinsey didn't tell us that in the investigation because he said he didn't recall. There is things that can happen that I don't know exactly what is going to happen at the hearing.

So when I drafted Paragraph 79 here, your Honor, of the Accusation, I say the Central Committees were not free to decide where to spend Tom Berryhill's money. They already had decided to give it to his brother. And Respondent Tom Berryhill knew this.

What I was trying to get at was that Tom and the Central Committee had some kind of an agreement or an understanding -- and I am not trying to say the Central Committees had already voted to give contribution to Bill, because they hadn't. There is no documentation of any kind of a vote to give a specific contribution to Bill. Nothing like that ever occurred. I am just saying that Tom knew they had already decided to give it to him because he worked it out with them.

And the rest of the paragraph says it's not necessarily

illegal to do that. And it's not. So long as you adhere to the reporting requirements and you, as a Central Committee, file and say, Hey, we are not the true source. We are just an intermediary. Tom Berryhill is the true source. We are the intermediary. And therefore, Tom's lower contribution limit would apply.

But in that case, he didn't want to do that because he was already maxed out. He couldn't contribute more. That was the whole point of the laundering.

With respect to the agency liability that you had mentioned, it is covered in our brief at page 30. But something I would like to point out is, Bill is actually involved in this to a great extent. I mean, he testified that he had no knowledge about the commercial campaign until he found out from his wife. But that was not true. I mean, he was impeached right there on the stand before your eyes by the e-mail from Dale Fritchen where he says: I met with Bill and they are talking about being desperate for money to get out a commercial campaign they were already committed for. So Bill knew specifically about this. He was talking to Dale about the plans. And for him to say he is out of the loop or for Tom to say he is out of the loop, that was just -- those are self-serving statements.

But with respect to agency liability, even if Bill were out of the loop, he should be held responsible for what Carl is

doing, working with Tom, Carl and Tom exchanging those e-mails. Because on page 30 of the brief, talks about respondeat superior. And basically, the test is whether the risk of the act is typical of or broadly incidental to the employer's enterprise. That Yamguchi versus Harnsmut 106 Cal App 4th, 472 at 481 to 482. I mean that's the test.

I mean, it was no secret that Carl's ringing the bell. Bill knew that. So certainly, ringing the bell is going to encompass hitting people up for money. And if you are hitting people up for money and you don't do it in the right way, it's going to be something that falls within what is typical of or broadly incidental to your enterprise. Getting contributions is broadly incidental to getting elected. So that's why we cited that case there.

ADMINISTRATIVE LAW JUDGE LEW: Are there any FPPC cases where you have that situation of finding liability based on the acts of an agent or campaign consultant or something like that, either in appellate case law or --

MR. BUCKNELL: We have one pending right now I am working on. It's just another administrative hearing matter.

So as far as cases that go up on appeal, that kind of thing -- I mean, I am just citing standard rules for respondeat superior and agency liability. Generally, the Act holds the candidate and the Committee responsible.

Most of these violations are directed at the candidate

and the Committee. And if you want to get other people, you have to be careful who you go after, because the Political Reform Act only has so much jurisdiction.

And in my Accusation and in the brief, there is this summary of the law for aiding and abetting. The statute -- if you look at the statute, you will see you can only go after certain people like those who have reporting obligations under the Act or those are who are compensated for services involving the planning, filing, that type of thing. And Carl Fogliani as a campaign consultant would clearly fall within that category. Because he was a consultant. He was paid $60,000 by Bill to run his campaign. And that's why it's reasonable to say that Bill should be responsible for him in terms of agency liability.

Carl is not being named as a Respondent, but technically, that statute describes the type of person that he is. So it's not unreasonable to say, Hey, Mr. Berryhill, under the doctrine of respondeat superior and the case of Yamaguchi v. Harnsmut, you should have known what is going on. It sounds like you did know what's going on. Even if you didn't, you should have been held responsible for Carl because you were in constant contact with him over those four days. There were tons of communications.

He testified on the stand that the reason why he hired Carl was because Carl was somebody he could get access to. He could actually talk to him. He wasn't going to disappear.

So that's kind of where we are coming from on the agency liability. And I will expound upon that in our brief.

I am not sure what counsel was talking about earlier when he was mentioning something about Tom couldn't force the Central Committees to refund the money. But he did make some comment along the lines. It's not a good way to look at 85704. Condition. Doesn't say a guaranteed condition or required condition. There is no way you can enforce it. Even if you had an agreement, you can't force somebody to follow through on it.

What it boils down to for the condition is, like it says in the advice letter that I will provide to you, a knowing and unambiguous statement of your intent that the money should go to a particular candidate. Once the Central Committee knows that, that's condition enough right there. You don't have to hold a gun to their head.

And once they are aware of that condition, I guess the only two options they can do is just to give it back to you, the money has to go back, and/or they can probably spend it on somebody else to avoid an enforcement action in a real world perspective. Right. But if they spend it on the candidate that you said you wanted it to go to, they are basically following through with your condition. And then it becomes a real world enforceable type of violation.

And I know that counsel mentioned something about -- I think it was Prop 208 or something, there is elimination of

The FPPC will also ask the ALJ to infer from the timing of the contributions, the relationship between brothers Tom and Bill, and/or agency, that "earmarking" occurred notwithstanding unanimous direct testimony that will be offered to the contrary. Of course, plausible inferences to the contrary abound:

1. Timing:

There is no "blackout period" or "timeout period" within which a contribution cannot be made before an election. Moreover, campaign committees try very hard to spend their funds before an election on voter communications since spending it afterward could not affect the election, and at the last minute of a campaign, there isn't much time to hold money.

Both central committees received significant monetary contributions from other sources on or around the days which Tom Berryhill also contributed funds to the central committees. The sources of these other contributors to the central committees (which include Blue Shield of California; Mike Villines for Assembly 2008; San Francisco Bar Pilots PAC; California Hospital Association PAC; San Joaquin Valley Leadership PAC; San Manuel Band of Mission Indians; and the California Mortgage Association PAC) are as likely the source of funds of the central committees' contributions to Bill Berryhill as the funds contributed by Tom Berryhill. Importantly, the FPPC has not charged any of these other contributors to the central committees in this matter (or any related matter) with violations of the Political Reform Act.

2. Family Relationship:

No law prohibits family members of a state candidate from contributing to political party committees even with knowledge that such party committees have targeted a nominee candidate for support and are likely to use the family members' funds to support the donors' relative. Separate persons, including spouses, are considered separate contributors under the Act. (Gov. Code, §§ 82047 [definition of "person" includes "individuals"]; 85301 ["a person

may contribute"], 85302, 85303.) Tom Berryhill acknowledges that he was his brother's key adviser and helped raise money for him, but he also will testify that he understood the law about earmarking, the role of political party committees, and what he and they could do. Finally, even if Tom Berryhill contributed to a central committee with knowledge that the central committee might help his brother's campaign, that does not amount to "earmarking," which requires a specific agreement or understanding between contributor and recipient that the contributor's money will be given to a third party.

3. Agency:

The FPPC has made and is unlikely to present any credible evidence that any other person acted as an agent in Tom's stead or that of the two central committees in any alleged "agreement or understanding" that might constitute "earmarking." While explicit acts of an "agent" might be attributable to one of the agent's principals if he or she had apparent authority to act as an agent, the FPPC has not asserted agency with respect to any particular individual. "Agency" is defined as the express or apparent authority of an individual to act on behalf of a principal and bind the principal by words or actions. (Black's Law Dictionary, 7th Ed., p. 62). There is absolutely no evidence that any person other than Tom Berryhill and the principals of the two central committees were responsible for their contributions and the decisions to make them. When the principals credibly deny that anyone else was their "agent" in the transactions, the FPPC cannot impute agency to another person and meet its burden of persuasion and proof in this matter. In the absence of any concrete evidence of express earmarking by a recognized agent of the principals involved, implied earmarking cannot be inferred.

Even if the court is permitted to reach such inferences, it would be unreasonable to do so; the FPPC has no evidence of the content of such communications that warrants any inference of earmarking.

E. THE COMMITTEES MADE THEIR OWN DECISIONS USING THEIR CHOSEN PROCEDURES

The FPPC will try to undermine the two central committee's assertions that they made their own contribution decisions in several ways: (1) by questioning whether the decisions comported with the committee's bylaws, and (2) by testimony of at least one individual who was formerly a treasurer of the San Joaquin central committee that when he was treasurer, the committee didn't use the same decision-making procedure as the committee leadership used in late 2008 in making the contributions to Bill Berryhill.

These points will be irrelevant to what the committee's practice in 2008 was, and are also irrelevant to the question whether there was any "agreement or understanding" between Tom Berryhill and the two central committees concerning "earmarking" which has been discussed above.

Joan Clendenin, the Chairman of the Stanislaus central committee for the 2007-2008 cycle, and Jim DeMartini, who was Vice Chairman of the committee during that cycle (having been Chairman prior to that cycle and again from 2009 to the present) will testify that they had authority to make contribution decisions to support Bill Berryhill with the contributions in question.

Dale Fritchen, the Chairman of the San Joaquin central committee for the 2007-2008 cycle, Louis Lemos, its treasurer, and Nancy Cochran, its longtime secretary, will testify that the Central Committee had authorized its Executive Committee and Chairman to make last –minute contribution decisions in 2008. Dale Fritchen will testify that he made the decision to contribute the committee's campaign funds to Bill Berryhill, after consulting with the California Republican Party staff about Berryhill's need.

III. OTHER ISSUES

A. UNREPORTED GIFTS

Count 15 alleges a failure to timely report a gift of a ticket(s) from Disneyland. However, the Respondent made clear in his letter of January 18, 2010 to the FPPC Enforcement Division that the gifts were erroneously reported by the Walt Disney Company as made to him, when they were made to one of his staff members and the Respondent's wife. (See Letter from Tom Berryhill to Gary Winuk, dated January 18, 2010, attached to Tom Berryhill Declaration.) Because the gift was not made to the Respondent, the claim of failure to timely report the gift is meritless and should be dismissed.

Count 16 concerns non-reporting of a gift from the Pechanga Band of Luiseno Indians. The circumstances concerning this matter are partially a public record. The Respondent was verbally invited to the event directly by a representative of the Pechanga Band, and the matter did not go through his staff that normally handles invitations. Moreover, the Pechanga Band has admitted, and actually has been fined, for failure to provide gift notices to affected public officials. Finally, this charge is totally inappropriate in light of the Commissioners' statement about the charging of gift violations with respect to similar enforcement actions in February 2010. The gift maker had acknowledged failing to notify the recipients, and the Commissioners, while approving stipulations that had already been entered with defendant legislators, made the following comments (reproduced as part of the whole minutes of that discussion):

> PROPOSED CONSENT CALENDAR - ITEMS 2 THROUGH 63
>
> Chairman Johnson announced that more than 60 Enforcement matters were on the consent calendar, and he congratulated the Enforcement Division staff for their hard work over the past several months in bringing the cases to resolution. He advised that, at some point, he intended to schedule a hearing to give the Commissioners an opportunity to gain a clearer understanding of how the Enforcement Division operates, how they prioritize their cases, and how they exercise their prosecutorial discretion. This had been done in the past, but he thought it would be worthwhile since the majority of the commissioners are relatively new to the Commission.
>
> The Chairman reported that 41 stipulations on the consent calendar were the result of a proactive investigation by staff, which involved a number of lawful gifts received by members of the Legislature and their aides, but which they failed to report. He commended the speed with which staff reached settlements in these

cases, and thought it was important to note that the individuals agreeing to the stipulations did not hesitate to correct the record by filing amended statements. Moreover, each paid what he or she and our staff agreed to as appropriate penalties. He said he intended to vote for each of these items with the exception of Item 50, which he wanted to remove from the consent calendar, and asked staff to seek a higher penalty as it appeared to him that the Pechanga Band of Luiseño Mission Indians failed to appropriately notify a number of individuals that they had made a reportable gift to them. While the individuals had a nondelegable duty to report the gifts that they received, it would seem that the Respondent committed multiple violations and the penalty suggested was proportionately low.

Chairman Johnson asked if the Commissioners had any comments or wanted any other items removed from the consent calendar.

Commissioners Hodson, Garrett and Montgomery echoed Chairman Johnson's positive comments to staff, but expressed policy concerns with how the gift reporting violation cases involving members of the Legislature and their aides had been handled. They thought that, in general, persons with first-time violations and failing to report only one gift, with no prior history of any violations, should have received only warning letters, not stipulations with $200 fines, but that they would approve these items since the respondents had signed the stipulations and paid the fines.

(Emphasis added.)

The charge in Count 16 falls squarely within the grounds the commissioners directed the Enforcement staff not to charge a fine for the Pechanga gift matters. For these reasons, Count 16 should be dismissed.

B. TOM BERRYHILL'S OCTOBER 28, 2008 FUNDRAISER

With respect to the FPPC's claim that Tom Berryhill's October 28, 2008 fundraiser was reportable as a non-monetary contribution to Bill Berryhill's campaign because Tom Berryhill in introducing his brother at the event exhorted the attendees to support his brother; there is absolutely no basis for this charge. First, as the fundraiser Diane Stone Gilbert will testify and the documentary evidence make clear, the fundraiser in question was a fundraiser for Tom Berryhill's Assembly committee. The invitations were for a Tom Berryhill fundraiser; the receipts were for Tom Berryhill's committee; and the Commission has produced no evidence that a single dollar was raised for Bill Berryhill's committee at the event. The Commission's sole basis for this count was a statement made by Tom Berryhill in his FPPC interview that he may have made an oral request to the attendees to support his brother's campaign. Such a request clearly comes within

the "volunteer personal services" exemption from the definition of "contribution." (Gov. Code, § 82015.)

Moreover, the Commission will not be able to produce a single instance in which the Commission has brought or succeeded in making any enforcement claim based upon the attribution of a contribution by a candidate for whom an event was advertised and held being to have made a non-monetary contribution to another candidate on the basis of a single oral exhortation to support that candidate made at the first candidate's fundraising event. Likewise, the Commission has produced no evidence that a single contributor gave money to the Stanislaus County central committee in response to the oral exhortation that was earmarked or used for contributions from that central committee to Bill Berryhill's campaign.

IV. CONCLUSION

The law and evidence to be presented will fall far short of preponderance of the evidence standard the Fair Political Practices Commission is required to establish to show that Tom Berryhill had "agreements or understandings" with the San Joaquin and Stanislaus County Republican Central Committees that his contributions to those committees were "earmarked" for Bill Berryhill's campaign. The evidence will not support any FPPC claim that the two central committees failed to exercise their own discretion in making contributions to Bill Berryhill's campaign in late October 2008. The FPPC cannot sustain the claims of each and all of the counts alleging "earmarked" contributions (including the allegations based on the "earmarking" claim that the central committees failed to disclose Tom Berryhill's committee as the "true source" of their contributions to Bill Berryhill) because there is no evidence, let alone preponderant evidence, to support these claims.

The law and evidence will not sustain the FPPC's claim that the Tom Berryhill fundraiser on October 28, 2008 was a non-monetary contribution to Bill Berryhill's campaign by virtue of a

The law and evidence will not sustain the FPPC's claim that the Tom Berryhill fundraiser on October 28, 2008 was a non-monetary contribution to Bill Berryhill's campaign by virtue of a mere exhortation by Tom Berryhill to his supporters to also help Bill Berryhill.

Finally, the law and evidence will not sustain the FPPC's claim that Tom Berryhill's initial failure to report gifts from Disneyland or the Pechanga Band of Luiseno Indians violated the gift disclosure laws. The claim with respect to the latter, the Pechanga gift, is also foreclosed by the FPPC Commissioners' actions in 2011 directing the FPPC Enforcement staff not to bring claims against other legislators concerning the Pechanga gifts, which the donor had failed to disclose.

If the court does not agree with the Respondent Tom Berryhill that such a finding is foreclosed, the court should recommend the minimum penalty ($200) the FPPC's Enforcement Division sought and obtained against dozens of legislators similarly situated in 2011.

Dated: November 7, 2013.

Respectfully Submitted,

BELL, McANDREWS & HILTACHK, LLP

By: _____
Charles H. Bell, Jr.

Attorneys for Respondents BILL BERRYHILL, TOM BERRYHILL, BILL BERRYHILL FOR ASSEMBLY – 2008, BERRYHILLL FOR ASSEMBLY 2008, STANISLAUS REPUBLICAN CENTRAL COMMITTEE (STATE ACCT.), and SAN JOAQUIN COUNTY REPUBLICAN CENTRAL COMMITTEE/CALIF. REPUBLICAN VICTORY FUND

PROOF OF SERVICE

In the Accusation Against: *Berryhill for Assembly 2008, et al.*
FPPC No. 10/828
OAH No. 201201024

1. I am over the age of 18 and not a party to this cause. I am employed in the county where the mailing occurred. The following facts are within my first-hand and personal knowledge and if called as a witness, I could and would testify thereto.

2. My business address is 455 Capitol Mall, Suite 600, Sacramento, CA 95814.

I served the foregoing document entitled **RESPONDENTS' TRIAL BRIEF** on each person named below by enclosing a true copy in an envelope addressed as shown in Item 5 and by:

a. depositing the sealed envelope with the United States Postal Service with the postage fully prepaid.
b. placing the sealed envelope with postage prepaid for collection and mailing on the date and at the place shown in Item 4 following our ordinary business practices. I am readily familiar with this business practice for collecting and processing correspondence for mailing. In 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 the place shown in Item 4.
c. transmitting via facsimile to the number(s) during regular business hours.
d. personally serving.
e. x transmitting by email to the offices of the addressee(s) following ordinary business practices during ordinary business hours.
f. causing to be deposited in a sealed envelope with FedEx Overnight Mail.
g. causing to be hand-delivered via a professional courier service.

5. Name and address of each person served:

Karen Brandt
Presiding Administrative Law Judge
Office of Administrative Hearings
2349 Gateway Oaks, Suite 200
Sacramento, CA 95833
Telephone: (916) 263-0550
Facsimile: (916) 263-0545

Via email at: sacfilings@dgs.ca.gov

Neil Bucknell, Counsel
Enforcement Division
Fair Political Practices Commission
428 J Street, Suite 620
Sacramento, CA 95814

Via email at: NBucknell@fppc.ca.gov

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 7, 2013, at Sacramento, California.

CORIANNE DURKEE

r

EXHIBIT D

ADMINISTRATIVE HEARING

BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

STATE OF CALIFORNIA

--oOo--

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/California Republican Victory Fund,	)	OAH No. 2012101024
	)	
Respondents.	)	
	)	

OFFICE OF ADMINISTRATIVE HEARINGS

2349 Gateway Oaks Drive, Suite 200

Sacramento, California

Friday, November 22, 2013

10:30 a.m.

REPORTED BY: JAN BENEDETTI-WEISBERG, CSR No. 4643

DIAMOND COURT REPORTERS
1107 2nd St., Suite 210
Sacramento, CA 95814
916-498-9288

I would like to take a ten-minute recess and then we will go on from there. Off the record.

(Recess taken.)

ADMINISTRATIVE LAW JUDGE LEW: Let's go back on the record.

Mr. Bell making the argument?

MR. BELL: Yes.

ADMINISTRATIVE LAW JUDGE LEW: You may proceed.

MR. BELL: Thank you. First, I would like to thank you for giving us the courtesy of presenting this case in front of you and taking the time and accommodating our schedules when we had breaks in availability of witnesses. We will be doing a brief, as we have discussed, in writing to discuss these issues in more detail.

And I would also like to compliment Mr. Bucknell and Mr. Rasey for their cooperation in this matter and their professionalism.

Usually cases like this don't come to the hearing judges because there is direct evidence of some activity, and that certainly conduces to settlement of the cases at an earlier stage before the FPPC. But not in this case. And the reason for that is that there is no direct evidence of the serious charges that they have brought against all of my clients.

Earmarking -- they use the term "money laundering" which I will say parenthetically is nowhere in the statute, but

it's a pejorative term they use quite loosely, frankly because it's something that gets a lot of press attention.

I think we have been fairly careful here to use the term "earmarking" or "contribution in the name of another." And we think that that's really the appropriate way to refer to this case in a non-inflammatory way.

However, we have been quite cooperative in allowing them to put virtually all of the evidence, even press articles in, that they had to present because we are not afraid of the facts here and believe that fundamentally this case is a burden of proof case, and they have not met their burden of proof.

First, I would like to dispose of two of the FPPC's theories about this case. The first is the behest theory and the second is the straw donor theory. The behest theory, the Court scratched its head about a little in the opening, as I recall, and we scratched our head about it, as well. It wasn't really explained in the opening brief that was filed, and really not satisfactorily in our view in Mr. Bucknell's opening statement.

But the theory of it was that Tom Berryhill's contributions to Stanislaus and San Joaquin Central Committees were actually -- should have been attributed to him because they were made at the behest of his brother Bill Berryhill. And this is just wrong on both the law and the facts.

On the law of contributions made to a Central Committee

at the behest of -- or maybe it's easier to think of that as behesting, as sort of solicited by a candidate or not deemed to be a contribution directly to the behesting candidate from the person who gave them. The FPPC's own regulation 18215(d), which I would like to -- Mr. Hildreth is going to supply you with a copy of. We will refer to it further in our brief. I supplied it to Mr. Bucknell -- reads:

"Regulation 18215 interprets Government Code 82015, which is the definition of contribution." It's a rather long regulation, the full text of which is attached to the front sheet that I gave you.

What subdivision D says is: "A contribution made at the behest of a candidate for a different candidate or to a committee not controlled by the behesting candidate is not a contribution to the behesting candidate."

In this case, if a contribution had been made at the behest of Bill Berryhill to a Central Committee which is, by definition, not a controlled committee of the candidate, it is not a contribution to the behesting candidate by the maker of the contribution.

So I think that behesting theory is not supported by the law. There are numerous advice letters that also make clear that the behesting theory is not the law. We will provide those and reference them in our closing brief.

But even without the law, there is no factual support

for that theory. There is no evidence that's been presented in this case whatever to support the notion that Bill Berryhill solicited contributions to the Central Committees. He has denied that. The Central Committees denied that. And there is really nothing to refute that.

The only thing the FPPC has even presented on that point is a portion of Mr. Fritchen's e-mail. But it's quite clear, from both Mr. Fritchen's testimony and Mr. Berryhill's testimony, that that reference is rather indefinite, and neither of them recalled having any conversations specifically about contributions being made by Tom Berryhill to the San Joaquin Central Committee. There is absolutely no evidence of Bill Berryhill soliciting any contributions to the Stanislaus Central Committee.

Further, Carl Fogliani, who was Bill's agent, according to his testimony, but not his fundraiser, denied soliciting contributions for the two Central Committees. Both Central Committees denied talking with Fogliani or Berryhill about the contributions. And so there is simply no evidence that's been presented on that point.

On the straw donor theory, the most common example of a straw donor -- and that's really found in the O'Connell case that has been cited, but also numerous FPPC cases involving contributions in the name of another, are examples like an employer goes to his employees and says, Here is some money,

cash or a check. Give that -- write a check or give that money to Candidate A. That is an example of a straw donor. It's the most common one.

But this is different. A political party committee such as Central Committees ongoing candidate support functions have been part of the State election law for well over 50 years. And there has been testimony to that by all of the Central Committees people who were here and testified as to that function of the Central Committees.

Further, the campaign finance role of the Party Committees and their Central Committees and the Political Reform Act have been recognized since Proposition 4 was adopted in 2000. We discussed this in our opening brief, and cited to the preambular language in Prop 34 about the importance of parties, how they are actually mediating influences over the corruption or apparent corruption issue that justifies government regulation in this issue at all.

And really Proposition 34, as we noted, was enacted to promote that mediating role of parties in the entire process. The fact that it is a mediating role does not mean that somehow they are straw donors or in any way are not permitted to engage in law. In fact, the FPPC's prosecution of this case, I submit, is intended to try to fuzz up or muck up that and thwart the operation of Proposition 34. A basketball analogy is to clog the passing lanes. That's exactly what this attempt to

prosecute this case is about in a grander sense, beyond the specific accusations against these candidates.

Finally, Mr. Bucknell misrepresented our statement about and comment on his ministerial role argument. The parties, he says, are playing a ministerial role and not a primary role in this. In our view, ministerial role means they exercise no discretion with respect to the making of contributions. And I think the evidence in this case is quite to the contrary. And I will talk about that in just a minute.

Which gets us to the earmarking theory of this case, which I think is at its center, and why this is a burden of proof case, a burden which they have not met.

First, the FPPC has presented no actual evidence of earmarking. There is absolutely no writing between the parties, Tom Berryhill, the two Central Committees, of earmarking. There is no document that they have produced reflecting a condition or agreement between Tom Berryhill and the two Central Committees.

"Condition" is more than what Mr. Bucknell referred to it. "Condition" means I give you this on the condition that you use it for a particular purpose. There is no evidence of that in this case.

"Agreement" means a meeting of the minds between two parties that something will be done. There is no meeting of the minds between the party that has been produced in evidence in this case.

There is simply no evidence of oral testimony between the parties of earmarking, either in the interviews the FPPC conducted initially, with the FPPC and the Central Committee leadership of both of those Committees alone. And there is certainly none of that in the testimony of the witnesses who appeared here in this case. No testimony before this Court of either condition or agreement with respect to earmarking.

The FPPC's own document, the timeline, reflects nothing that would establish any communication involving earmarking. And I will go into this more. In fact, the FPPC really had no witnesses to present in this case. They interviewed all of our witnesses. And it's obvious from the interviews that they were attempting to get the two Central Committees' leaders, and specifically, Ms. Clendenin, Mr. Fritchen and Mr. DeMartini to admit there was earmarking. They asked Tom Berryhill about earmarking.

At the trial, they attempted to undermine the witnesses' clear testimony that they hadn't engaged in earmarking. And much of Mr. Bucknell's argument today has really focused on the nits he attempted to pick in their testimony. And I will go into that.

I think it's clear the witnesses strongly deny in their testimony before this Court that there was any earmarking.

And of course, the Court is -- has the duty to look at the witnesses and assess, make its own assessment of their

credibility in this case. And we trust that the Court will do that, has done it.

The FPPC asks the Court to draw inferences. But inferences here aren't evidence. And in our view, the FPPC has presented no evidence, let alone preponderant evidence, of the earmarking claims or the other claims that's their FPPC case. Then they haven't met their burden.

Let me start by saying the two most important witnesses in this case were Dale Fritchen and Joan Clendenin. And the Court had the opportunity to hear their testimony and examine their credibility. They were the two Central Committees' Chairmen at the time in 2008. We believe they were strong and credible witnesses.

Now, Ms. Clendenin began her testimony by responding to the FPPC's attorney's question, Do you know why you are here? She said the following: "I am here to correct the FPPC's misunderstanding about what we did in 2008."

Dale Fritchen was described by two witnesses, Ms. Nancy Cochran, who was the Executive Secretary of that Committee, and Mr. Louis Lemos, who was the Treasurer, as a highly respected reputable individual whom the Central Committees have reposed both its authority and its absolute confidence to make decisions about whom the Central Committee's last minute funds should be given to.

Mr. Fritchen's demeanor as a witness was credible and

relaxed and even self-deprecating. For example, he expressed embarrassment, as the Court may recall, about misspelling the word "desperate" in the e-mail that the FPPC was referring him to.

Both Ms. Clendenin and Mr. Fritchen strongly asserted that they made the decisions to contribute Committee funds to Bill Berryhill and never had any conversations with Tom Berryhill about giving the money he had given them on October 30th and 31st, 2008 to Bill Berryhill.

More importantly, they offered convincing reasons why they made the decisions they did. And I will note that in Mr. Bucknell's one hour presentation, I think he devoted about two minutes to their testimony.

Ms. Clendenin recounted the narrow defeat of Bill Berryhill's father Clare Berryhill in 1989 because he didn't have funds to spend on television advertising at the end of his campaign. She also recalled his brother Tom, who is a Respondent in this case, had lost a very narrow election in 1996 when he had something like $70,000 left in the bank at the end of the campaign that he didn't spend on advertising.

And she was very clear in her testimony that she, if she could, would not allow that to happen to Bill Berryhill, if it were possible for her committee to support him.

And so her testimony was that, at the very end, when they had already spent money that they had previously obtained

to support other candidates, and it had become clear at the end of October, 2008, that Bill Berryhill's campaign was going to be a real burner, the Democrats had put $750,000 approximately, and their allies about a million dollars in the last two weeks of the campaign into the Eisenhut race. That it was important that her Committee be able to contribute to support Bill Berryhill if it had the funds to do so.

And her testimony in that regard was that she had asked one of his staff people, Well, Mr. Eisenhut is in the mail and it's gone up on TV. Does Bill Berryhill have any funds to respond to that? And the response that she understood was, Well, he will respond if he has funds, but he doesn't have them now. So her decision was driven by that.

Mr. Fritchen recounted the request for funds that was made to him in his testimony. The FPPC has cited his e-mail to Mr. Lemos, but really ignored the key portion of that e-mail, which said: Let's give Bill Berryhill $21,000. That was in the context of Mr. Fritchen having been given by the Executive Committee of the Central Committee the authority to make that decision. He was discussing it with Mr. Lemos, the Treasurer, who was also on the Executive Committee.

And it's clear, I think, from that part of the transaction, that it was the decision of the Central Committee made by Mr. Fritchen to make that contribution.

Both Clendenin and Fritchen understood they had the

authority and discretion to decide how to use their Committees' funds. And there is more.

The key issue in the case is whether the Central Committees did exercise their discretion to make these contributions. All the credible evidence in this case is that they did. These key facts break the theoretical link to earmarking as defined in Government Code 85704, which is in front of us here and to which Mr. Bucknell also referred today, but to which we referred all the witnesses and asked them for their understanding of it.

The facts break the link of earmarking, your Honor. And once this is established, all the other testimony, including the supporting testimonies of Mr. DeMartini and Tom Berryhill and Mike Villines, Louis Lemos and Ms. Cochran are all supportive, but I would submit of less importance in themselves. But cumulatively, all of this testimony is compelling.

Now, with respect to objective factors -- and the Court had raised some question about that in its statement to Mr. Bucknell and to us about the O'Connell case.

The intentions and exercise of discretion of the two Central Committees are clear from these witnesses' testimony, and they are supported by objective factors. And in our view, that question should be, were the decisions they made reasonable under the circumstances? And in our view, the answer to that is clearly yes.

First, there is no dispute that this was a target race. As Bill Berryhill described it, it was a watched target at the first, because although the registration in the race between Democrats and Republicans was about equal, Mr. Eisenhut, at least up until the mid part of October of 2008, had not raised any money. Mr. Berryhill had put, by his estimate, $400,000 into the race. And the polls looked good for him. The race did not appear to need extraordinary help until very late, indeed after the Central Committees had raised a lot of candidate support money and spent it prior to mid-October on other targeted races not in their areas.

Everyone who testified described also the building Obama wave, if I can use that expression, that threatened all the Republican candidates and became apparent in mid to late October before the election.

As has been stated before, Bill Berryhill's opponent had received an extraordinarily large infusion of money from the California Democratic Party and its allies, and those funds were expended on mostly negative campaign communications about Bill Berryhill, as we, noted about $750,000 in total, about a million dollars, virtually all within the last three weeks prior to the election, to Mr. Eisenhut's campaign.

Joan Clendenin testified the had seen Eisenhut's TV ads and wondered if Bill had the funds to respond. And, as noted, the response she got from the campaign was, If we get the money.

From which she concluded they did not have the money. And that was the correct assessment.

Bill Berryhill and Jim DeMartini said they were receiving five pieces of Eisenhut mail a day in their mailboxes. So it was evident to DeMartini that this money was being used effectively to campaign against Bill Berryhill.

At this point, I think the old maxim, If your baby is crying, feed him, really describes this situation. This was the only local race that was competitive at the time. The two committees had a duty under the election law and also their own self-described duty as leaders of the Republican Party to support Republican candidates. Bill's race was in jeopardy. They had spent lots of money feeding other babies, those targets in Southern California, already. The need to help Bill was clear and obvious. If they had the money, the baby would be fed.

So both Clendenin and Fritchen said this in their own way. That decision, I think, was so elemental, so obvious, it was really the only reasonable decision for them to make. And they made that decision.

Now, I would like to talk a little bit about earmarking. In the campaign law, Thou shalt not earmark is one of the Ten Commandments. Maybe one of the top two or three. I think Mr. Bucknell described the seriousness here. We certainly concur with that. Just as people put their own interpretations

ethically on what the Ten Commandments mean, people involved in politics have their own perspective and language to describe this legal and ethical proscription.

So each of these witnesses expressed what Thou shalt not earmark meant to them. Mr. DeMartini said, You can't talk with the donor about how his money can be used. Bill Berryhill said, You can't even talk about someone else's donation with a potential contributor. Tom Berryhill said, You give the money and you just hope they will use it well or do the right thing. And Joan Clendenin said, You just can't talk about this. And we don't.

Louis Lemos indicated he was thinking about these facts, that they had just received money from Tom Berryhill in the San Joaquin Central Committee. And San Joaquin, through Mr. Fritchen's decision, was going to give money, indeed more than it received from Tom Berryhill, to Bill Berryhill, along with some other candidates, Mr. Jeandron and Proposition 8 ballot proposition.

And he went to his campaign expert consultant about it and agreed to make the contribution disbursement only after he had been told it was okay, as long as the Committee made its own decision.

So he was aware at that time that the Committee had delegated the decision-making authority to Dale Fritchen. Fritchen had asked him to make the contribution. And he knew

and trusted Fritchen to have made the decision in the exercise of the discretion that he and his other Executive Committee members had given him.

However, each of them described their ethical or legal prohibition on earmarking. Their witness testimony is unanimous that Tom Berryhill did not condition his contributions to the two Central Committees or have any agreement with them that they would give their funds received from him to Bill.

What isn't earmarking, we will address that in greater detail in our written brief. But the Court has expressed a concern about some hypothetical situations that might involve or result in earmarking. Your Red Cross example that you used early on is one that doesn't involve earmarking. You couldn't sue the Red Cross to compel them to give the money to someone they said they intended to give it to when they solicited your contribution, if they decided a better use was to be made of that.

Another example is from the Political Reform Act itself, what the FPPC considers a pledge. They define a pledge as an enforceable promise to make a contribution. Now, most pledges in the parlance of politics are really not enforceable promises. They are bare promises. There is no consideration for them.

As Tom Berryhill testified in both his initial FPPC interview and here in court, he can hope and maybe expect under

the circumstances that Central Committees would do the right thing, but he couldn't force them to refund money if they didn't do it. I think that's important.

Can you infer earmarking when the objective evidence is that there was no expressed condition or agreement? We think not. We think not. Because earmarking is one of the top Thou shalt nots. The penalties for violation of it include potential criminal prosecution.

The law really provides an objective standard. Did the relevant parties have an agreement? Did the donor condition the contribution that it could be accepted and used only as conditioned?

And third, did the recipient exercise its discretion? And was that reasonable under the circumstances?

Now, we pointed out in our opening brief that a provision of Proposition 208, which had been enacted in 1996 concerning earmarking, actually had a sentence at the end of it that said: It's not earmarked if the donor or the donor of the contribution to the candidate exercises its discretion. That was actually eliminated from the express language of Prop 208 when Prop 34 was enacted. I am not sure why and there is no specific reason given by the authors of Proposition 34 of which I am aware as to why that was taken out. But I think they may have intended to perhaps to narrow it to take into account what the donor and the entity or committee to whom the donor gave the

money intended at the time, with the condition or agreement.

But I think it is fair to say that the exercise of discretion by the recipient of a contribution as to how it would be used reflects the -- if there was a condition, it was not agreed to. If there was any kind of an agreement proposed, the Committee, in exercising its discretion, did not adhere to that, and it could not be adhered to because of the Thou shalt not that we are talking about here.

This serious prohibition on earmarking which although they have only charged it as a civil offense, could be charged as a criminal offense in an appropriate case and has been in other cases.

ADMINISTRATIVE LAW JUDGE LEW: May I interrupt with you a question? Is this a good time?

MR. BELL: Yes.

ADMINISTRATIVE LAW JUDGE LEW: As you read what is earmarking? In fact, you can earmark as long as you fully disclose it. That's the last part of that sentence.

MR. BELL: That's correct.

ADMINISTRATIVE LAW JUDGE LEW: So if that is the case, you might consider that section to be in the context of a contribution that is well within the limits, say, is it $3,300 back in 2008? Then the question becomes, if you are allowed to, quote, earmark, as long as you disclose up to that sum. If, as the FPPC is saying, they are not going under this section, but a

section that prohibits contributions over a certain level, then is that really the evil that is to be resolved in this case, the fact that this individual had already been maxed out, and was in a way trying to get above that limit. How do you --

MR. BELL: It is clear that a donor can give the maximum amount to a candidate. And if there had been an earmarked contribution, whether disclosed or not, in excess of that limit, it would have been over the limits. There is just no doubt about that. That's the law.

The question is really whether it's earmarked. I think that brings us back to condition or agreement. Is that responsive to your question?

ADMINISTRATIVE LAW JUDGE LEW: Kind of. I think I know the answer to my own question, too, in terms of whether an individual is constrained by that 3,300 limit.

MR. BELL: Yes. There is no doubt that an individual can give money to a political party -- at that time, it was up to $30,200, for the direct support of candidates. In fact, that's what the law provides. And that right is extended not only to all persons. That would include individuals and corporations, labor unions and anyone who is a bona fide person under the statute can give that much to any State political party organization or any County political party organization.

And their specific duty with respect to that money, they can spend it on anything they want. But the specific duty

to which the limits apply is to support candidates for State office, such as Bill Berryhill in this case.

And as I mentioned, it was quite clear from the testimony that the Central Committee leadership understood quite clearly that earmarking, accepting earmarked contributions, passing them through, was not legal.

Now, I would like to comment on the FPPC's Communication Chart. And that's really kind of their whole case. They ask you to draw a lot of inferences from that, we pointed out at the start in our opening brief. And I don't think anything has been added by the FPPC in the course of this hearing to shed any further light on that.

What it shows is a number of recorded conversations or attempted communications. And you recall here that Ms. Clendenin specifically testified that, although the records showed that she had made a text message to Mr. Berryhill on some occasions, she had a telephone device that didn't allow her to do that and she didn't use texting. So there are some foundational problems with some of this.

But with respect to most of those communications, there is absolutely no information other than the inferences that they have tried to put together, like stringing a piece of -- one piece of spaghetti with another one at length to try and reach from the Point A to POINT B that they are trying to make here. And I don't think that accomplishes the objective that they are

seeking from an evidentiary standpoint.

The inference that they are asking you to make that these communications were related to earmarking is critical. The testimony that is extant in this suggests that -- and in fact, the testimony from Tom Berryhill specifically suggests that, and Ms. Clendenin, as well, that these communications likely were about the logistics of making contributions to the Committee, the logistics of the Committee getting contributions that they were making to Bill Berryhill, at a time when they had to move very quickly because, as they testified, television stations don't sell you time on credit and direct mail vendors do not sell you the opportunity to print and publish on credit. You have to have money in the bank.

So the testimony here really does not support the inferences that they are asking you to draw that there was earmarking.

Does it support an inference that they were having communications about politics? Both the Central Committee Chairs, both Mr. Berryhills testified that the Central Committees' roles in campaigns are to support the candidates. And they do that in a variety of ways. They do it by precinct walking. They do it by making telephone calls, arranging for meetings with activists, as well as other things, other than making contributions.

You could make an equal inference from many of these

communications that, at least some of them may have had to do with that at the last minute of the campaign. But I don't believe you can draw a stronger inference from those communications of earmarking in light of the direct testimony of the witnesses that there was no communication between them about a condition or agreement on the making of contributions.

In fact, the FPPC's reference to the Bruno fundraising event, I think has more -- had to do with evidence that, at that time, on the 28th, Tom Berryhill had made a decision to make contributions at least to Stanislaus County Republican Central Committee, if not to the San Joaquin Central Committee. If indeed he did ask donors to support Bill by making direct contributions to him, instead, they could give to the Central Committees. That's evidence that on the 28th -- not on the 29th or the 30th -- he had made a decision to do so, and makes more credible his testimony that the communications that were identified on this chart on the 29th or the 30th or even the 31st related to him had to do with the logistics of getting the contribution made, having the Committees that were recipients of it become aware that the contribution was being made and delivered to them and giving them the opportunity to make their own decisions with how to spend that money and spend it quickly.

And I think that beyond that, the references to this chart are fairly innocuous, but certainly one can infer that, by the 28,th he had actually made that decision.

With respect to the Carl Fogliani communications, it was Mr. Fogliani's very clear testimony, as was Bill Berryhill's, that Fogliani was not a fundraiser for Bill. But both acknowledged that, at that juncture in the campaign, faced with this onslaught of money against them, that not only Bill, but Carl -- but anyone on their side would, quote, ring the bell on every occasion at the end of the campaign about their need to raise campaign funds.

I think the use of the term "ring the bell" is interesting here. Because when we think about that, we almost immediately think about the Salvation Army bell ringers who stand outside of stores and they ring the bell. And I don't know the derivative of that term, but I suspect that it relates to that. And if you have done that or -- I have, certainly. They stand there and they ring the bell, and you pass along. You decide whether you are going to respond or not. And that's your decision. And I think that's a very apt analogy to the situation here.

It was clear that Carl Fogliani was not Tom's agent, but was actually Bill's. Fogliani denied any involvement on behalf of Tom or Bill in any earmarking scheme, as did they, that they were involved in or he was.

Indeed, all of the testimony, Joan Clendenin, Jim DeMartini's, Dale Fritchen's, also denied having any conversations with Carl Fogliani about money, whether on Tom's

or Bill's behalf.

Finally, with respect to Carl Fogliani's testimony, I think the Court should view his testimony as credible. The best evidence of this is, at the end of his interview, the video transcript, the FPPC actually attempted to impeach it, on account of some tweets that he had made expressing his own views about that.

He had some reasons not to be particularly happy about the FPPC that I cannot disclose publicly, but his testimony both in his FPPC initial interview and the video deposition was candid and credible, and it certainly was consistent with those of Tom Berryhill, of Bill Berryhill and the Central Committees.

With respect to Mr. Phelan and Laura Ortega, Mr. Bucknell has tried to show that the involvement of some of Tom Berryhill government staff members in what I would describe as courier activities -- that's all the e-mails suggest -- for the Central Committee points to earmarking. I would submit that it does not point to earmarking at all. There is no inference that reasonably could be drawn from their involvement in it, whatever their -- whatever hat they may have been wearing at the time, to any alleged agreement or condition between Tom Berryhill and the two Central Committees about earmarking.

So there is really no evidence. There is only conjecture about these individuals.

The only evidence really before the Court here is that

Mr. McKinsey recalled that Phelan represented that he was picking up the Stanislaus check for Bill Berryhill. There was testimony that people who are on the staff of the Assembly and the Senate quite commonly at election time take vacation days to work on campaigns. Of course, even on a day when they are working, they can do something during their lunch hour.

The testimony of Mr. McKinsey in that regard was that, at the request of Ms. Clendenin, he expedited depositing the Tom Berryhill check into the Stanislaus account, having previously written a check to Bill Berryhill, which he was going to deliver, when a gentleman he later identified as Mr. Phelan approached him and said, I am here to pick up the Bill Berryhill check. And his testimony was, he would not have given that check to Mr. Phelan unless he had understood that Phelan was there to accept a check on behalf of Bill Berryhill.

And that does not point in any way to Tom Berryhill. And I would submit the evidence on that is not one from which you could draw anything other than an inference that he was acting at that time as an agent for Bill Berryhill.

Similarly, the testimony about Ms. Ortega is that she couriered several checks from San Joaquin to Bill Berryhill's Treasurer. Again, nothing on which you could base an inference reasonably that Tom Berryhill had engaged in any earmarking activity.

So this is just a red herring with respect to those.

I would like to address the Bruno fundraiser because they have charged that resulted in an in kind contribution from Tom Berryhill to Bill Berryhill's Committee. You had an opportunity to hear Diane Stone Gilbert testify. She was Tom's fundraiser. And I think her testimony was completely credible.

She testified the event was planned sometime in early September to late September as a Tom Berryhill fundraiser. She also testified there were no contributions raised at that event for Bill Berryhill. The event was basically planned and executed at a time when, looking at the other testimony in this case, Bill's race was not even under threat. That became apparent in mid-October.

Bill Berryhill testified that, in reviewing the contributions the FPPC identified on Exhibit 1.3, that he couldn't identify a single contribution highlighted by the FPPC that might have come from any individuals or non-party organizations as a result of Tom's Bruno fundraiser.

Tom Berryhill's testimony was he made an oral plea to his donors to contribute to Bill and Central Committees that night. That evidence really doesn't go to whether this should have been reported as an in kind contribution.

And I would point you again to not only the regulation 18215(d) language which I just provided to you and to counsel, but also to our discussion of volunteer personal services in our brief. And essentially, this point is that when an individual

candidate asks someone to support another candidate at his own fundraiser, or even if he were at Bill Berryhill's fundraiser, that does not make a contribution that might be received as a result of that oral plea something that he would have to account for in his own campaign finance and determine -- for example, if he had been at another fundraiser, if he had been at Bill Berryhill's fund raiser and he had gotten up and said, Contribute to Bill. He would not have to disclose and report, potentially be subject to the accusation that he had violated the reporting limit if he had maxed out to Bill already, the gasoline or the use of his vehicle to go to that fundraiser. It's just an implausible theory. There is no support for it.

This was thrown in basically as a kitchen sink charge to up the number of counts when the FPPC decided that it would go to hearing on this matter.

With respect to the Anderson contribution, I would submit the FPPC has not proved earmarking in this case. And it's clear that they dismissed any potential enforcement action against the Stanislaus Central Committee for insufficient evidence in the Anderson case.

If the Court looks at the dismissal letter, in fact, 84301 is not even mentioned. There is no mention in that about a claim of a contribution being made in the other. In fact, the letter suggests that the Central Committee could make that. And I submit that, if that Central Committee decided to make that

contribution at its own discretion, it would be perfectly legal to do so. Whether it was from an appearance standpoint something they should have done is an entirely other matter. But this does not meet any standards that I am aware of for pattern and practice.

If you can't establish the violation that you charging, and you dismiss a case that you are citing as pattern and practice of the violation that you can't prove, it's just -- it's not appropriate and I think not permissible to use that as pattern and practice evidence.

On the Disney gift issue, I would point the Court to the attachment to our Exhibit A, which was the letter from Tom Berryhill to Mr. Winuk at the FPPC in response to his earlier letter in December, in which he states that his wife was separately invited and received a gift from Disneyland. This is not an admission of a violation. But we would concede that he amended his report to include that, and there is a reason -- reasonable reason for that.

First, even if that amount had been added, it was clearly not above the gift limit, so it did not trigger any other violation. And the gift limit violation is more serious than a reporting violation, even if it had been.

The second is that, at the time, the FPPC's own regulations permitted gift givers to separately invite spouses and immediate family members of public officials to events. And

the regulations specifically said that those would not be attributed to the official. If they are not attributable to the official, they are not reportable, at least as gifts by the official on the Statements of Economic Interest.

We cited the FPPC's meeting minutes of February 2010 to show that, at the same time the FPPC had communicated with Tom Berryhill about not only the Disneyland gift but several other items, including the Pechanga gift, that they had also pursued the same issues against a number of other Legislators, negotiated mostly $200 fines against them, brought that to the Commission for approval.

The Commissioners -- I think the minutes fairly reflected a serious concern about it. Not wishing to set aside stipulations the FPPC had already entered into, because they reasonably concluded that the parties stipulating to those violations and paying the minimal fine had actually reached an agreement with the FPPC they didn't want to upset. But they made clear that they didn't like that.

And I think that when you look at the timing of these, the question is really again for this case, why was this brought here? And I would submit it was brought to again throw some kitchen sink charges at Tom Berryhill to buttress their case.

The citation of the FPPC to other subsequent gift violation cases, I think is irrelevant. First, the -- at the time those were negotiated -- and this whole issue was not

brought back before the Commissioners to -- I guess it's maybe fair to question, did the Commissioners remember what they had told the enforcement staff in the February 2010 meeting or had they just passed on? Were they looking at situations where people also had reached agreements? I don't know if those people were represented by counsel or not. That was circumstances in which they agreed to pay a fine.

You know, sometimes it's a lot easier to settle than fight. And we are here because we chose to fight. Because we think these allegations are baseless. They put us to a lot of trouble and expense defending them. Which I think we have shown there is no direct evidence of any earmarking in this case. That's the unanimous testimony of witnesses I think you can determine to be credible.

The evidence that they have is really the kind of chart that we are talking about here from which they ask you to reach a number of inferences that I think are well beyond what reasonably could be inferred in this case, even all stacked together. They don't suggest or permit a reasonable inference in my view of any earmarking. In contradiction to the direct evidence of the witnesses that has been unanimous about their recognition of -- and understanding of the seriousness of earmarking, the Thou shalt not and their attempt to follow the law in this case.

Let me just say at the end, Tom Berryhill made a legal

contribution to each of these Central Committees at the end. It was within the limits. Central Committees exercising their discretion made legal contributions to Bill Berryhill's campaign for reasons that were ultimately quite reasonable, as I have tried to outline here, and which they testified to directly, to aid his campaign at the end when he was in danger. They provided assistance to him to get on television. There is no doubt about that. And these parties believed they were complying fully with the law.

I am pretty sure we wouldn't be here if Tom Berryhill weren't Bill Berryhill's brother. I am pretty sure we wouldn't be here if the compressed timing within which these contributions were made hadn't occurred.

But I think there is ample testimony from all the witnesses that campaigns, at the end of the campaign, require that certainly the Central Committees felt a duty not to have money in their bank account after the election, not to take the risk that they not contribute to a candidate they knew was imperiled, that he might lose the election on account of them holding onto money which they could properly and legally use to support a candidate who was in their jurisdictions, who was their nominee, who they had helped in a myriad of other ways without finance, but by telephone banking, making phone calls, precinct walking and all of the things that the local party committees do with the local activists who are engaged on behalf

of those parties. And that this was a totally appropriate thing.

Should the Committees be subject to a situation where they have to guess whether, because of a familial relationship between a candidate and a donor, they can't give money to them, money they legally would be entitled to give?

Or if at the end of the campaign, when there is no black-out period in the law, prohibiting them from doing so, they cannot give money to a campaign because in hindsight, an administrative agency such as the FPPC might haul them into an extended lengthy administrative enforcement investigation, ultimately prosecution, really chills political speech in, I think, a way the voters, in enacting Proposition 34, intended not to happen; that the voters who enacted the Political Reform Act and the Legislature that amended it a number of times, never intended to happen by imposing any kind of bar on familial contributions or on the time within which candidates can make contributions to Central Committees or Central Committees can make contributions to other candidates.

The law does not try to draw the line where the FPPC through an enforcement proceeding is attempting to do.

Now, we have no problem if the FPPC or someone in the Legislature wants to go to the Legislature and try to change the law. But they shouldn't try to change the law in the course of an enforcement proceeding. And that's why we have contested

this vigorously.

We think that you ought not to find a violation of the earmarking provisions of the statute under 84301. And if you do not find that, then all of these other allegations about failure to report which they have made simply fall by the wayside. Because they are all related to, ultimately bound up in, a finding that earmarking had occurred, which we believe the evidence shows it has not.

I have nothing further.

ADMINISTRATIVE LAW JUDGE LEW: Mr. Bell, thank you very much.

What is your estimate of the time for your reply?

MR. BUCKNELL: Maybe ten minutes your Honor.

ADMINISTRATIVE LAW JUDGE LEW: Please.

MR. BUCKNELL: Thank you, your Honor.

One of the things he talked about was Joan Clendenin. It was really interesting because she could recall things from the '80s and '90s with respect to elections, specific details. And yet when it came down to having her recall her communications with Tom Berryhill in '08, and then the communications and what happened in '09 with Anderson, she was a complete blank slate. She couldn't recall anything. It was very disingenuous of her. She was being dishonest.

Also, with respect to Paragraph 79 of the accusation, we are dealing with witnesses in this case, we don't know what

they were going to say at the hearing. We do know what they tell us. I have to allow some leeway for witnesses changing their stories like we saw happening here.

We saw Jim DeMartini. Sometimes he is a Chairman, sometimes he is not the Chairman.

We saw Gary McKinsey come forward and actually tell us that Bob Phelan picked up the check from him when he was on his way back to the car from the bank. Gary McKinsey didn't tell us that in the investigation because he said he didn't recall. There is things that can happen that I don't know exactly what is going to happen at the hearing.

So when I drafted Paragraph 79 here, your Honor, of the Accusation, I say the Central Committees were not free to decide where to spend Tom Berryhill's money. They already had decided to give it to his brother. And Respondent Tom Berryhill knew this.

What I was trying to get at was that Tom and the Central Committee had some kind of an agreement or an understanding -- and I am not trying to say the Central Committees had already voted to give contribution to Bill, because they hadn't. There is no documentation of any kind of a vote to give a specific contribution to Bill. Nothing like that ever occurred. I am just saying that Tom knew they had already decided to give it to him because he worked it out with them.

And the rest of the paragraph says it's not necessarily

illegal to do that. And it's not. So long as you adhere to the reporting requirements and you, as a Central Committee, file and say, Hey, we are not the true source. We are just an intermediary. Tom Berryhill is the true source. We are the intermediary. And therefore, Tom's lower contribution limit would apply.

But in that case, he didn't want to do that because he was already maxed out. He couldn't contribute more. That was the whole point of the laundering.

With respect to the agency liability that you had mentioned, it is covered in our brief at page 30. But something I would like to point out is, Bill is actually involved in this to a great extent. I mean, he testified that he had no knowledge about the commercial campaign until he found out from his wife. But that was not true. I mean, he was impeached right there on the stand before your eyes by the e-mail from Dale Fritchen where he says: I met with Bill and they are talking about being desperate for money to get out a commercial campaign they were already committed for. So Bill knew specifically about this. He was talking to Dale about the plans. And for him to say he is out of the loop or for Tom to say he is out of the loop, that was just -- those are self-serving statements.

But with respect to agency liability, even if Bill were out of the loop, he should be held responsible for what Carl is

doing, working with Tom, Carl and Tom exchanging those e-mails. Because on page 30 of the brief, talks about respondeat superior. And basically, the test is whether the risk of the act is typical of or broadly incidental to the employer's enterprise. That Yamguchi versus Harnsmut 106 Cal App 4th, 472 at 481 to 482. I mean that's the test.

I mean, it was no secret that Carl's ringing the bell. Bill knew that. So certainly, ringing the bell is going to encompass hitting people up for money. And if you are hitting people up for money and you don't do it in the right way, it's going to be something that falls within what is typical of or broadly incidental to your enterprise. Getting contributions is broadly incidental to getting elected. So that's why we cited that case there.

ADMINISTRATIVE LAW JUDGE LEW: Are there any FPPC cases where you have that situation of finding liability based on the acts of an agent or campaign consultant or something like that, either in appellate case law or --

MR. BUCKNELL: We have one pending right now I am working on. It's just another administrative hearing matter.

So as far as cases that go up on appeal, that kind of thing -- I mean, I am just citing standard rules for respondeat superior and agency liability. Generally, the Act holds the candidate and the Committee responsible.

Most of these violations are directed at the candidate

and the Committee. And if you want to get other people, you have to be careful who you go after, because the Political Reform Act only has so much jurisdiction.

And in my Accusation and in the brief, there is this summary of the law for aiding and abetting. The statute -- if you look at the statute, you will see you can only go after certain people like those who have reporting obligations under the Act or those are who are compensated for services involving the planning, filing, that type of thing. And Carl Fogliani as a campaign consultant would clearly fall within that category. Because he was a consultant. He was paid $60,000 by Bill to run his campaign. And that's why it's reasonable to say that Bill should be responsible for him in terms of agency liability.

Carl is not being named as a Respondent, but technically, that statute describes the type of person that he is. So it's not unreasonable to say, Hey, Mr. Berryhill, under the doctrine of respondeat superior and the case of Yamaguchi v. Harnsmut, you should have known what is going on. It sounds like you did know what's going on. Even if you didn't, you should have been held responsible for Carl because you were in constant contact with him over those four days. There were tons of communications.

He testified on the stand that the reason why he hired Carl was because Carl was somebody he could get access to. He could actually talk to him. He wasn't going to disappear.

So that's kind of where we are coming from on the agency liability. And I will expound upon that in our brief.

I am not sure what counsel was talking about earlier when he was mentioning something about Tom couldn't force the Central Committees to refund the money. But he did make some comment along the lines. It's not a good way to look at 85704. Condition. Doesn't say a guaranteed condition or required condition. There is no way you can enforce it. Even if you had an agreement, you can't force somebody to follow through on it.

What it boils down to for the condition is, like it says in the advice letter that I will provide to you, a knowing and unambiguous statement of your intent that the money should go to a particular candidate. Once the Central Committee knows that, that's condition enough right there. You don't have to hold a gun to their head.

And once they are aware of that condition, I guess the only two options they can do is just to give it back to you, the money has to go back, and/or they can probably spend it on somebody else to avoid an enforcement action in a real world perspective. Right. But if they spend it on the candidate that you said you wanted it to go to, they are basically following through with your condition. And then it becomes a real world enforceable type of violation.

And I know that counsel mentioned something about -- I think it was Prop 208 or something, there is elimination of

discretion as a defense. He has been around a lot longer than I have. I trust him on that. What he says sounds like that was a defense at one time, like, Hey, this has been earmarked, but we are still going to use our discretion. We are going to vote on it. We will document it. And we are still going to spend it the same way they wanted it to go. It sounds like it was removed.

If it was removed, it was removed for a good reason, because 85704 clearly would prohibit something like that. Once you have got it, that's the violation. A person may not make a contribution to a committee on the condition or with the agreement that it will be contributed -- it doesn't say that it will -- and that it subsequently contributed to.

The violation technically would occur right then when you give the money to the intermediary. Real world perspective, you are not going to prosecute a case unless they follow through with it.

Also, I do think that the interpretation they are trying to foist upon you with respect to condition is very strict and very narrow. Because we talked about before, the Political Reform Act is supposed to be liberally construed, your Honor.

Another thing that counsel has done is for the divide and conquer all of our different pieces of evidence. I understand the reasoning behind that. They will say the

Communications Chart -- they will have arguments. I disagree with the arguments. The important thing to remember is that each one of these pieces of evidence is just one piece of a 24-piece puzzle. We have 20 of the 24 pieces.

There are so many other factors in addition to the Communications Chart, which, by itself, is a great piece of evidence showing what is going on here. I mean, you have the e-mails on the eve of the laundering, in addition to the phone calls and texts. You have the proximity in time. You have the relationships between the parties, the brother-brother relationship.

I mean, the Central Committees, they just barely held onto that money long enough to turn it back over to Tom's people. They got from it Tom and they gave it right back to Tom. He sent his chief of staff and District Office Manager to get the money. He told people to support Bill; but, if they maxed out, to give it to Stanislaus and San Joaquin, even though those Central Committees had no history of supporting Bill with monetary contributions prior to then.

We have got the Joel Anderson matter, which I understand he says that it is not relevant in this case. But I disagree. I disagree very strongly, because 85704 would certainly apply in that situation. It's a perfect example of Joel Anderson's first committee giving the money to the Central Committee and them turning around and giving it to his second

Committee. And it is exactly what it looks like. It's earmarking, which is why it was refunded.

And that was why Joan Clendenin testified she understood that there were problems with some of the other Central Committees, as well. And it was like Fresno and one other one. I can't remember which one. But I mean, that's more likely than not earmarking, just from looking at it. If the fact that she can't recall anything about it and her colleagues are pointing their fingers at her -- I will leave it up to you to decide what to do with that.

I respectfully submit that it's our position that shows her way of doing business. The whole Central Committee is willing to do that. Even Jim DeMartini admitted it was a dumb move for the Central Committee to do that. It was a dumb move for Joel Anderson to send the money to them and expect to it get it back. It was also a dumb move for his own Central Committee to go along with it.

I am not sure what exactly counsel means by logistics when he talks about it in the context of the communications chart. It certainly could include money laundering conversations. And I am not sure why you would have to have so many logistical communications with people if all you are doing was sending them money.

So, for example, there is a whole bunch of texts between Tom and Joan going on. If you want to send some money

to the Central Committee and you want to respect their independence and you want to truly not influence their decision-making about where the money should go, you are not going to have all these communications like Tom did with Joan back and forth.

And the same thing with San Joaquin. I mean, we have got Landon Whitney and Carl Fogliani pestering Dale Fritchen. And we have Bill who met with Dale before. But even more telling is the fact that -- I mean, at some point, before they even get the check, San Joaquin is deciding to give the money to Bill, because of the wiring thing, they are trying to figure that out. They are specifically talking to Kelly Lawler.

The important thing is, why they have to get Chuck Hahn involved? Why did Landon and Carl have to pester Dale? If the Central Committee is truly independent, you simply send them the money, then you leave them alone. And you wait. You let them do their thing on their own time.

ADMINISTRATIVE LAW JUDGE LEW: If I might, just picking up on that thought. If a Central Committee made a determination perhaps earlier that, because of the changing dynamic of this race, we are going to give every last penny we get in to Candidate A's campaign, and then at a later point when the money does come in, and let's say, the original source is greasing the wheels and pushing and creating a sense of urgency, does that somehow transmute that into earmarking, the fact that they are

trying to move the mechanism faster, so forth?

MR. BUCKNELL: I don't know about transmuting.

ADMINISTRATIVE LAW JUDGE LEW: I will call it logistics or the mechanism. Once the decision has been made, the money is going to go to Candidate A, what should it matter if someone steps in and tries to grease the wheels a bit?

MR. BUCKNELL: Those are good questions. Number one is, if the Central Committee has made a decision which, in this case, there is no documentation of a vote to do that. There is no minutes, nothing to that effect. But if that had happened, hypothetically speaking, and they have decided to give all available funds to one particular candidate, then the question is, who knew that? Because if you know it and you gave money to them with that knowledge, you have an understanding or you even have an agreement with them that, if I give you money, it's going to go to this particular candidate.

However, if they had two candidates they wanted to support, different story. Once you have got more than one, in my opinion, it is no longer an understanding or agreement because you give them the money and they have discretion to decide who it is going to go to. If you only have one candidate it's going to go to and you know that, that's an understanding or agreement, 85704, the exact language of the statute.

ADMINISTRATIVE LAW JUDGE LEW: So under your theory, if I am already maxed out to, say, President Candidate Obama -- I

shouldn't give a name -- but to Candidate A, and then a committee makes it clear to whatever source that they have identified that Candidate A's race is the only race in town, which is, I guess, basically saying all your monies are going to be going into that campaign, I am not allowed to put any money in there because I would therefore have an understanding?

MR. BUCKNELL: Under the 85704. That one is Federal you are talking about. For the State, the way the statute reads, how would you not have an understanding what is going to happen with your money? How would you not? The way the statute reads, the plain language of the statute, if you are a committee and you say this is where we are going to put our money if we have it, if you give it to us, this is the one person we are going to give it to, how do you not have an understanding when you give them the money that your money is going to go straight to that person?

I don't see how there is no understanding there. That is a good question to ask. You know my position on it. I can try to brief that some more if you like.

ADMINISTRATIVE LAW JUDGE LEW: I can have a unilateral understanding. I can be writing a check and putting it in the mailbox. They wouldn't know that I believe that, based on things I read in the newspaper, that every penny of that Committee is going to go into Candidate A's race.

MR. BUCKNELL: If you read it in the newspaper, I guess

it boils down to how much certainty do you have they are actually going to follow through on that.

ADMINISTRATIVE LAW JUDGE LEW: Apart from certainty, you are looking at understanding, a unilateral concept, as opposed to you and I reaching an understanding. Is that correct?

MR. BUCKNELL: That's not correct, your Honor, because if a Central Committee has a decision to support a particular candidate and they make that known to everybody, that is their way of communicating it to the people who give them the money. So it's not just unilateral at that point. They are consciously making a choice to spread the word, if you give us money now, it's going to go to this particular candidate.

I accept that it's not unilateral. They voluntarily deliberately let that communication come out to where people like me can get it. If it was two candidates, your Honor, I have no problem with it.

When it's just one candidate -- honestly, I have never heard of it happening with just one candidate before. It's always like a group of candidates and they have discretion. And that's the reason why. They would run into problems with that.

ADMINISTRATIVE LAW JUDGE LEW: That standard seems to be more stringent than U.S. versus O'Donnell, which speaks of an intermediary having acted at the direction or the direction and control.

You are suggesting that, once I know that it's a sure thing, I am not allowed to do it.

MR. BUCKNELL: Well, your Honor, U.S. v. O'Donnell is talking about direction and control. And like I said from the beginning, there is more than one way to show money laundering.

In this case, if you are talking about a Central Committee who had a documented decision where they wanted to support a particular candidate -- which we don't have documents to that effect. But if that were the case, it was communicated to Tom Berryhill and he knows about it, and he gives them money with the understanding that it's going to go that particular candidate, that's the exact language of 85704. I don't know what else to say about that at this point.

ADMINISTRATIVE LAW JUDGE LEW: It seems the the evil to be avoided is having someone like me controlling the intermediary. That's why they use the word on the condition or with the agreement or in this case under the control.

MR. BUCKNELL: I guess what I would say is the public harm. You want to know what's the public harm here? The public harm is, what is the point of the $3,600 per election contribution limit? There is no point in it if a Central Committee can simply do that. Absolutely no point whatsoever.

And that's one of the themes of this case. What is the point of the contribution limits? A lot of people are watching this case to see what happens.

ADMINISTRATIVE LAW JUDGE LEW: If you don't mind, this is helpful for to me. I am going to ask you a question. I maxed out on Candidate A and I give a gift or a contribution -- excuse me -- to a Committee thinking they are going to support Candidate B or maybe a proposition or this or that, and it turns out they put all their money into Candidate A. Am I therefore --

MR. BUCKNELL: You have no problem there, your Honor. It doesn't sound like you have an understanding that they are going to give your money to Candidate A.

ADMINISTRATIVE LAW JUDGE LEW: It all comes to what I believe at the time I give the contribution?

MR. BUCKNELL: Well, it comes down to what your understanding is and maybe how you got that understanding. And in that case, it doesn't sound like they make a decision to support a particular candidate and then then make that known and they tell everybody, If you give us money, it's going to go to this particular candidate.

ADMINISTRATIVE LAW JUDGE LEW: My last comment is, the Government Code doesn't use the word "understanding." They use the word -- they use the article "the," the condition or the agreement.

MR. BUCKNELL: Right.

ADMINISTRATIVE LAW JUDGE LEW: So to you, you would expand that to be an understanding?

MR. BUCKNELL: The Act is supposed to be liberally construed. I have given you the cite for that, your Honor. We have talked about this before. I think I heard you say earlier, and maybe even counsel, that understanding is certainly within -- certainly implied by condition or agreement. And I think that it's fair and it's on Respondent's counsel's own exhibit right there, their own easel.

ADMINISTRATIVE LAW JUDGE LEW: It's not a reg or a rule. I think that's counsel's expansion of it.

MR. BUCKNELL: Right. It's subject to your interpretation, obviously. But even Respondent's counsel agrees that understanding should be part of what the earmarking rules are all about.

ADMINISTRATIVE LAW JUDGE LEW: Please continue.

MR. BUCKNELL: Thank you, your Honor.

I think I was talking about the logistics issue. There is no need for so many communications. I believe we covered that.

And something else to consider is, is Tom is really not taking any responsibility here, your Honor. He did something wrong. And it's ridiculous for him to say that Bob Phelan and Laura Ortega, both of them, they weren't helping him out to give money to his brother as part of his plan that he had with Mike Villines.

I understand he is concerned about some sort of

illegality he is talking about, about having them do stuff on State time, your Honor. I am not here to prosecute him for that.

But when he gets up there and he is talking about how these people are off -- I don't know what was going on. I don't recall. They are usually off. And so I don't know if he is trying to disclaim that he sent them or whatnot. It sure looks like it.

To me, that's not taking responsibility. I mean, at that point, once I found out, your Honor, that Bob Phelan had picked the check up from Gary McKinsey before Gary even got back to his car, I looked over at Tom, and the look on his face was, he registered that. That was a significant piece of evidence, your Honor. It wasn't provided to us during the investigation. It came up right in front of you. It was the first time I heard it. I always suspected it. So I think it's important to remember that. He is really not taking responsibility for what is going on here.

This case boils down to Tom giving the money to the Central Committees, and they have it for just the briefest period of time, and then they turn it around and give it back to Tom's people. Like immediately. That's not right, your Honor. That's a very odd strange transaction to be doing. It's just not right. That's why we call it money laundering. That's what he is doing. He is giving them the money for the briefest

period of time, and then they turn around and give it right back to him so he can give it to his brother with a fake name attached to it. That's what this case is all about.

I will submit it on that, your Honor.

ADMINISTRATIVE LAW JUDGE LEW: Thank you.

Subject to receiving the briefs, this matter will be submitted sometime in mid to late December. I will have 30 days to consider, review all the material and issue a proposed decision. I believe my decision will go directly to the FPPC and they will provide it to you. And a final decision, I believe, will issue something like 30 days after that.

Thank you very much for your time, your effort, your thinking. I look forward to more. And I will do the best job I can in making factual findings and legal conclusion in this case. Thank you.

(Whereupon, the proceedings concluded at 1:20 p.m.)

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REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

I, JAN L. WEISBERG, CSR, hereby certify that I was duly appointed and qualified to take the foregoing matter;

That acting as such reporter, I took down in stenotype notes the testimony given and proceedings had;

That I thereafter transcribed said shorthand notes into typewritten longhand, the above and foregoing pages being a full, true and correct transcription of the testimony given and proceedings had.

JAN WEISBERG

EXHIBIT E

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And SAN JOAQUIN COUNTY REPUBLICAN CENTRAL COMMITTEE/
CALIF. REPUBLICAN VICTORY FUND

BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

STATE OF CALIFORNIA

In the Matter of BILL BERRYHILL, TOM BERRYHILL, BILL BERRYHILL FOR ASSEMBLY – 2008, BERRYHILLL FOR ASSEMBLY 2008, STANISLAUS REPUBLICAN CENTRAL COMMITTEE (STATE ACCT.), and SAN JOAQUIN COUNTY REPUBLICAN CENTRAL COMMITTEE/CALIF. REPUBLICAN VICTORY FUND Respondents.	OAH No. 201201024 FPPC No.: 10/828 **RESPONDENTS' *CORRECTED* POST TRIAL BRIEF** Administrative Hearing Date: November 12-22, 2013 Time: 9:00 a.m. Place: Office of Administrative Hearings 2349 Gateway Oaks Drive, Suite 200 Sacramento, CA

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I. INTRODUCTION:

Tom Berryhill, who was a candidate for re-election to Assembly District 25 in 2008, made two contributions to two Republican county central committees in the amount of $20,000 each, shortly before those central committees contributed similar amounts to Bill Berryhill's 2008 Assembly District 26 campaign. The FPPC alleged that Tom Berryhill's contributions to the two central committees were "earmarked" for his brother's campaign. Because one state candidate can only give another state candidate for Assembly a little more than $3,000 per election, the FPPC alleged that Tom "laundered" excessive contributions through the committees to Bill's campaign. All but two of the other allegations relate to what campaign reports Tom Berryhill, Bill Berryhill, and the two central committees should have filed if the FPPC's allegations were correct. The evidence presented at trial by the Berryhills and the two central committees' leaders refuted those allegations.

This Brief addresses in greater detail issues raised in Respondents' Pre-Trial Brief (pages 1-7) and in the "concise statement of legal issues" contained in the Respondent's Pre-Hearing Conference Statement (pages 5-13) about (a) what constitutes "earmarking" of contributions; (b) the role of political parties and the campaign finance law, in particular Proposition 34, a ballot measure adopted by the voters in 2000 and which is currently operative; and (c) agency.

This Brief also addresses in more detail: (d) why the FPPC's "behest theory" raised in its Trial Brief is wrong as a matter of law and under FPPC advisory letters, whether applied to candidates raising money for other candidates or for political parties; and (e) why the FPPC's theory of this case, if adopted, would improperly harm the operation of the campaign finance law applicable to political party committees, whether they are state political parties or local county central committees. First, however, we address the FPPC's failure to meet its burden of proof in this case.

II. ARGUMENT:

A. BURDEN OF PROOF:

To win, the FPPC must prove its allegations by a preponderance of the evidence. California Civil Jury Instruction (BAJI) defines preponderance of the evidence as follows:

> Preponderance of the evidence' means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it." The FPPC's evidence is less convincing than that presented by Respondents.

The FPPC charged Tom Berryhill with earmarking, for Bill, Tom's $20,000 contributions made on October 29, 2008 to the Stanislaus County Republican Central Committee, and Tom's $20,000 contribution made on October 30, 2008, to the San Joaquin County Republican Central Committee. The FPPC charged Tom, Bill and the two central committees which it alleged participated in that earmarking "scheme," with failing to report those contributions as earmarked (with Tom's 2008 Assembly Committee as their true source and the two central committees as "intermediaries") on their regular campaign reports and on their special "late contribution reports" that were filed within 24 hours after they made the contributions. The FPPC contended this unreported activity violated Gov. Code section 84301, which prohibits undisclosed "contributions made in the name of another" either under the earmarking theory of Gov. Code section 85704, or as contributions by Tom to Bill, made at Bill's behest.

Consistent with the Accusation and earmarking theory, the FPPC charged Tom with making contributions to Bill Berryhill's campaign in excess of the limit of $3,600 applicable to contributions from one state candidate to another candidate, and charged Bill with failing to

report such contributions as exceeding the limit.[1]

The FPPC also charged Tom with making an unreported "non-monetary contribution" to Bill, and charged Bill with allegedly receiving and failing to report this alleged non-monetary contribution, consisting of the value of Tom's fundraising event held on October 28, 2008, at the home of Mr. and Mrs. Matt Bruno. The FPPC's claim failed as a matter of longstanding FPPC interpretation and its own regulation, 2 Cal.Code Regs., § 18215(d), as discussed below.

The FPPC alleged that Tom failed to disclose on his 2008 Form 700 Statement of Economic Interests a gift of one Disneyland ticket given to his spouse, and contended that his amendment of his Form 700 to disclose his wife's Disneyland ticket is an admission that he violated the gift disclosure law. Tom's accommodation of the FPPC's request to correct his reports was unnecessary, because the evidence showed his wife was separately invited by Disneyland, and at the time of this invitation, the FPPC's regulation (2 Cal. Code Regs., § 18944, subdiv. (b)) deemed that ticket not to be Tom's gift or reportable by him.

Finally, the FPPC alleged that Tom failed to disclose on his 2008 Form 700 a gift from the Pechanga Band of Luiseno Mission Indians. No evidence was presented on this issue at trial, and this count of the Accusation should be deemed waived by the Commission. But if the court does not deem this count waived, the court should find that the FPPC is estopped to bring the count on the basis of its conduct concerning the same gifts at the February 2010 Commission meeting when four of the five Commissioners directed the Enforcement staff not to bring actions against public officials for alleged gift reporting violations in similar circumstances. Here, Tom Berryhill's situation was the same as described by the Commissioners when they gave such

[1] Although the FPPC has not disclosed this to this court, recently it sent a letter to two committees (supporting a 2012 state ballot measure) that had accepted undisclosed earmarked contributions of $15 million from an Arizona non-profit organization. The FPPC said that they were obligated to pay $15 million to the State of California for their having received the undisclosed earmarked money. See Gov. Code § 85701. Thus, the potential direct fines against these Respondents may be multiplied well beyond the potential $5,000 per violation for the charged counts, as they concern the receipt and reporting of allegedly earmarked funds. This additional penalty could apply to Bill's

direction. The fact the Enforcement staff brought this count reflects an alarming disregard of the authority of the appointed Commissioners over staff.

As we argued in closing on November 22, 2013, the FPPC failed to prove by a preponderance of its evidence each of the counts of the Accusation.

B. THE FPPC'S THEORIES FAILED:

1) "Behest Theory"

The FPPC's "behest theory," as applied to Gov. Code section 84301, which prohibits contributions made in the name of another without disclosure of their true source, is wrong as a matter of longstanding FPPC interpretation and its own regulation, 2 Cal. Code Regs., § 18215(d). FPPC Regulation 18215(d) provides:

> A contribution made at the behest of a candidate for a different candidate or to a committee not controlled by the behesting candidate is not a contribution to the behesting candidate.

First, Gov. Code § 82016,[2] defining what is a "controlled committee," at subdiv. (b), excepts a "political party committee, as defined in Gov. Code § 85205 [including a county central committee], from the definition of "controlled committee." Thus, the involvement by political candidates with political party county central committees (required by the California Elections Code – see, e.g., Elec. Code § 7404) does not make them "controlled committees." If it did, such involvement would have the perverse, unintended effect of making contributions to the central committees subject to the candidate's contribution limits. The FPPC itself has recognized that candidates can raise money for central committees, and that this activity does not convert the

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committee which received the funds, and potentially to the alleged "intermediary" central committees.

[2] Gov. Code § 82016 states:

(a) Controlled committee" means a committee that is controlled directly or indirectly by a candidate or state measure proponent or that acts jointly with a candidate, controlled committee, or state measure proponent in connection with the making of expenditures. A candidate or state measure proponent controls a committee if he or she, his or her agent, or any other committee he or she controls has a significant influence on the actions or decisions of the committee.

(b) Notwithstanding subdivision (a), a political party committee, as defined in Section 85205, is not a controlled

contributions solicited by (at the behest of) the candidate into contributions to that candidate. See, e.g., *FPPC Gene Raper Adv. Ltr.*, I-97-036 (1997 WL 141935); *FPPC James R. Sutton Adv. Ltr.*, I-97-226 (1997 WL 285555); *FPPC James R. Sutton Adv. Ltr.* (California Republican Party), A-97-487 (1997 WL 768636) and *FPPC Wayne E. Fisher Adv. Ltr.* (California Democratic Party), A-97-488 (1997 WL 768636).

Regulation 18215 and the cited FPPC advisory letters also must be understood in light of the FPPC definition of "at the behest," found in 2 Cal. Code Regs., §18225.7:

> (a) "Made at the behest of" means made under the control or at the direction of, in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express, prior consent of. Such arrangement must occur prior to the making of a communication described in Government Code section 82031.
> (b) Expenditures "made at the behest of" a candidate or committee include expenditures made by a person other than the candidate or committee, to fund a communication relating to one or more candidates or ballot measures "clearly identified" as defined at Title 2, California Code of Regs. section 18225(b)(1), which is created, produced or disseminated,
> (1) After the candidate or committee has made or participated in making any decision regarding the content, timing, location, mode, intended audience, volume of distribution, or frequency of placement of the communication, or
> (2) After discussion between the creator, producer or distributor of a communication, or the person paying for that communication, and the candidate or committee, regarding the content, timing, location, mode, intended audience, volume of distribution or frequency of placement of that communication, the result of which is agreement on any of these topics.
> *(c) An expenditure is presumed to be made at the behest of a candidate or committee if it is:*
> *(1) Based on information about the candidate's or committee's campaign needs or plans*
> *provided to the expending person by the candidate or committee, or*
> *(2) Made by or through any agent of the candidate or committee in the course of the agent's involvement in the current campaign,* or
> (3) For a communication relating to a clearly identified candidate or ballot measure when:
> (A) The person making the expenditure retains the services of a person who provides either the candidate or the committee supporting or opposing the ballot measure with professional services related to campaign or fundraising strategy for that same election, or
> (B) The communication replicates, reproduces, republishes or disseminates, in whole or in substantial part, a communication designed,

committee." (Emphasis added.)

produced, paid for or distributed by the candidate or committee.
(d) An expenditure is not made at the behest of a candidate or committee merely when:

(1) A person interviews a candidate on issues affecting the person making the expenditure, or

(2) The person making the expenditure has obtained a photograph, biography, position paper, press release, or similar material from the candidate or the candidate's agents, or

(3) The person making the expenditure has made a contribution to the candidate or committee, or

(4) The person making the expenditure is responding to a general, non-specific request for support by a candidate or committee, provided that there is no discussion with the candidate or committee prior to the expenditure relating to details of the expenditure, or

(5) The person making the expenditures has invited the candidate or committee to make an appearance before the person's members, employees, shareholders, or the families thereof, provided that there is no discussion with the candidate or committee prior to the expenditure relating to details of the expenditure, or

(6) A person informs a candidate or committee that the person has made an expenditure, provided that there is no other exchange of information, not otherwise available to the public, relating to details of the expenditure, or

(7) An expenditure is made at the request or suggestion of the candidate or committee for the benefit of another candidate or committee.

(e) Notwithstanding any other provision of this section, if two or more committees exchange information between or among themselves, subsequent expenditures by each committee shall not, merely by reason of that exchange, be considered to be "made at the behest of" the other committee(s), where the committees are (i) all general purpose committees, (ii) all committees primarily formed to support or oppose the same candidate or candidates, or (iii) all committees primarily formed to support or oppose the same measure or measures.

(f) Throughout this section the terms "candidate" and "committee" include their agents, when the agent is acting within the course and scope of his or her agency. The term "expenditure" refers to a payment defined as an "expenditure" by Government Code section 82025 and Title 2, California Code of Regs. section 18225. *A determination that an expenditure has been "made at the behest of" a candidate or committee does not establish that the expenditure is a "contribution" as defined by Government Code section 82015 or Title 2, California Code of Regs. section 18215.* However, expenditures governed by Title 2, California Code of Regs. section 18550.1 may be treated as contributions pursuant to the provisions of that section."

(Emphasis added.)

The definition of "at the behest" and its exceptions defeat the allegations of conspiracy

between the accused in this case, including Tom, Tom's legislative staff members (whom the only evidence produced was the acknowledgement that such staffers commonly would take vacation time or time outside their official duties to perform volunteer personal campaign activities), Bill, Carl Fogliani (Bill's agent), and the two central committees (including Jim De Martini who acknowledged longstanding friendships and political and business relationships with both the Berryhill brothers, and Joan Clendenin, who acknowledged longstanding political and personal relationships with both.)

For example, when Bill Berryhill or Carl Fogliani "rang the bell" to leaders of the central committees, the committees' contributions to Bill Berryhill's campaign were permissible and disclosed as "contributions" to his campaign based upon subdiv. (c)(1) and (2) and the definition of agent in subdiv. (f) of Reg. 18225.7, above. When Tom Berryhill contributed to the Stanislaus central committee and communicated with Joan Clendenin on October 30, 2008, Tom described his activities as more likely to have been logistical and informational (i.e., "Heads up, I have sent you a contribution"). The FPPC presented no rebuttal evidence to rebut Tom's activity was not "made at the behest" of Bill under Reg. 18225.7, subdiv. (d)(7) [which restates the exclusion of Regulation 18215(d) discussed above] and Reg. 18225.7, subdiv. (d)(6) ["A person informs a candidate or committee that the person has made an expenditure, provided that there is no other exchange of information, not otherwise available to the public, relating to details of the expenditure".] Even if Tom had suggested in his October 28, 2008 exhortation to guests at the Matt Bruno fundraiser that they could give money to the central committees (which might then give money to support Bill's campaign), this general expression of support, without any "condition" or "agreement," could not constitute a behested contribution under subdiv. (d)(4) of Regulation 18225.7 ["*(4) The person making the expenditure is responding to a general, non-specific request for support by a candidate or committee, provided that there is no discussion*

with the candidate or committee prior to the expenditure relating to details of the expenditure."]

Laura Ortega and Bob Phelan acted in their individual volunteer personal capacities (volunteer personal services being a separate exception to the definition of contribution in Gov. Code, § 82015). Phelan identified himself as Bill's agent to accept the Stanislaus central committee's $20,000 check on October 30, 2008. The FPPC failed to present evidence that Ortega acted in any capacity other than as a campaign volunteer. Phelan was Bill's agent (by self-identification to Gary McKinsey) under Reg. 18225.7, subdiv. (f)'s definition of agency.

Thus, the FPPC's "behest theory" failed. Furthermore, the regulations and advisory letters discussed above undermine its theories of conspiracy and earmarking.

2) **Straw Donor Theory:**

The FPPC's attempt to apply a "straw donor" theory also failed. As noted before in the Pre-Hearing Conference Brief and Pre-Trial Brief, Republican county central committees are bona fide entities[3] that have specific responsibilities to elect Republican candidates for state offices (as well as federal offices), have specific rights recognized by the campaign finance laws

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[3] California political parties are the primary organizations that promote the election of candidates affiliated with those parties, and have played this role since they were organized in California. Support of their nominees is their core function. California political parties include the state central committee and subordinate county central committees or district central committees. (See generally, Division 7 of the California Elections Code, commencing with Elec. Code, § 7250 et seq.)

The Republican Party's state central committee is known as the California Republican Party, and it is governed by its own bylaws and generally by the provisions of Chapters 1-3 of Part 3 of Division 7 of the Elections Code, Sections 7250-7354. Section 7353 provides that the state central committee shall conduct party campaigns for the party and on behalf of the candidates of the party. County central committees, such as the Stanislaus and San Joaquin County Republican Central Committees, are governed by their bylaws and by Part 4 of Division 7 of the Elections Code, Sections 7400-7470. Section 7440 provides that "a [county central] committee shall have charge of the party campaign under general direction of the state central committee. ..."

Until 2010, when California implemented the "Top Two Primary" system formally known as the "voter nominated primary," Californians selected their nominees for partisan offices such as the State Assembly by partisan primary, in which registered voters of a political party chose their nominees for the general elections. In 2008, Bill Berryhill was nominated by Republican voters in San Joaquin and Stanislaus counties as their nominee for the 26th Assembly District. As such, Bill Berryhill was the nominee the San Joaquin and Stanislaus County Republican Central Committees were tasked by law to support for election, and Bill Berryhill also became an "ex officio member" of both these central committees. (Elec. Code, § 7404.) Tom Berryhill, as the incumbent Assemblyman for the 25th Assembly District and also the elected party nominee for re-election to that post, was also an "ex officio member" of the Stanislaus County Republican Central Committee and other county committees that were part of his Assembly District.

(Political Reform Act, Gov. Code §§ 85205, 85301, 85303, 85400.) These central committees have existed for many decades as governing bodies, and they have been recognized as having First Amendment speech and associational rights by the federal and state courts, including the United States Supreme Court and the intermediate federal courts, the California Supreme Court and the intermediate state appellate courts. (See, e.g., *Eu v. San Francisco Demo. Cent. Comm.* (1989) 514 U.S. 190; *Wilson v. San Luis Obispo Dem. Cent. Comm*, 175 Cal.App.4th 489, 497 (D.C.A. 2, 2009).)

These central committees are volunteer organizations and, whether well-organized or not, function according to the rules they have adopted and modified to meet exigent circumstances in carrying out their duties.

The FPPC cites *United States v. O'Donnell* (9th Cir. 2010) 608 F.3d 546 for the proposition that the courts must look at the substance of a transaction to determine whether it involved a "straw donor." The FPPC contends that the central committees were performing a function controlled by Tom Berryhill and were engaged in "an essentially ministerial role" (*Id.* at 550). However, the FPPC ignores the language of the federal statute at issue in that case, 2 USC § 441a(a)(8) cited in the *O'Connell* at p. 551:

> For purposes of the limitations imposed by this section, all contributions made by a person, *either directly or indirectly,* on behalf of a particular candidate, including *contributions which are in any way earmarked or otherwise directed through an intermediary or conduit* to such candidate, shall be treated as contributions from such person to such candidate. (Italics in original).

Section 441a(a)(8) operates in conjunction with 2 USC § 441f, which prohibits contributions made or accepted knowingly in the name of a person other than the contributor, in the context of contribution limits (where the contribution earmarked or directed by a person through an intermediary or conduit is counted against the federal contribution limit to the

recipient of the person earmarking or directing the contribution).[4] Section 441a(a)(8) operates in the federal statutory scheme much as Gov. Code § 85704 (which the Respondents have cited for the definition of earmarking) operates in the state statutory scheme to define what constitutes a contribution made in the name of another. Section 441a(a)(8) says that earmarking or directing a contribution through an intermediary to a candidate triggers its attribution to the person earmarking or directing the contribution. While the term "directing" is not defined in the federal statute (or for that matter in the Political Reform Act or FPPC regulations), Black's Law Dictionary (7th Ed. 1999) defines "direct" as "to guide (something or someone); to govern; to instruct (someone) with authority." Each of these terms connotes that the person directing the action has the authority, control, or influence to do so.

Under Gov. Code § 82016. (b), a candidate by virtue of his position or role on a political party committee (such as a state political party or county central committee) does not "control" the committee. FPPC Regulation 18215, (d) and the FPPC advisory letters cited above show that mere cooperation or coordination between a candidate such as Tom Berryhill in raising money (or giving money) to a political party committee did not *transmute* his own contribution to the central committee into a contribution to a candidate the central committee decided to support with that money. Thus, "direction" depends on the language of Gov. Code § 85704 about a condition or agreement, and the language of former Gov. Code § 85703 about the central committee's

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[4] "Sections 441a(a)(8) and 441f serve different functions in FECA and do different work. Section 441a(a)(8) dictates *how much* one can "contribute" and against whose contribution limits a "contribution" is counted. Section 441f dictates *whether* one can "contribute" in a particular manner. Indeed, whether one is "contributing" at all, for purposes of FECA, is governed by § 431(8)(A)(i), which defines the term "contribution" (yet another provision with a different function). Reading these provisions in harmony as a whole, one sets forth whether there is a "contribution" (§ 431(8)(A)(i)), the next sets forth against whose account that "contribution" is credited (§ 441a(a)(8)), and the next sets forth whether one can even make a particular type of "contribution" at all (§ 441f). That is not to say that § 441f's *role* in FECA, in prohibiting a certain kind of "contribution," *in itself* provides that Defendants' charged conduct is that kind of prohibited conduct. § 441f's text does that."

United States v. Danielczyk, 788 F. Supp. 2d 472, 482-83 (E.D. Va. 2011) *opinion clarified on denial of reconsideration,* 791 F. Supp. 2d 513 (E.D. Va. 2011), *rev'd,* 683 F.3d 611 (4th Cir. 2012), *cert. denied,* 133 S. Ct. 1459 (U.S. 2013) and *rev'd in part,* 683 F.3d 611 (4th Cir. 2012), *cert. denied,* 133 S. Ct. 1459 (U.S. 2013)

abandonment or failure to exercise of its discretion as to when to contribute funds it receives, and to whom.

The unrebutted evidence of Joan Clendenin and Dale Fritchen that they made the decisions to contribute funds they had received at the last minute to Bill Berryhill's campaign, totally severs any possible earmarking link between Tom Berryhill's contributions to their committees and their committees' contributions to Bill's committee.

3) **What Is Earmarking, And Why There Was No Earmarking Of Contributions In This Case:**

Three questions arise: (1) what is "earmarking" under the Political Reform Act and (2) did the FPPC prove that earmarking occurred, or (3) did the Respondents prove why the two central committees made their own decisions to use their campaign funds to support Bill Berryhill in a lawful manner?

The crucial legal issue is whether Tom Berryhill and the two central committees "conditioned" his contributions to the central committees, or did they agree that Tom's funds would be transferred by them to Bill's committee. To reach such an "agreement," the central committees would have had to surrender their discretion to Tom as to how they might use Tom's funds. The FPPC presented no evidence at all that Tom "conditioned" his contributions to the central committees on their using the funds to make contributions to Bill's committee. Tom Berryhill and the leaders of the two central committees consistently and credibly denied that there were any such "conditions" or "agreements."[5] The central committee leaders asserted credibly and vigorously that they made their own contribution decisions and did not yield their discretion to decide when and how to use their funds to Tom or anyone who might be his agent, and that

they had good reasons to contribute to Bill Berryhill, whose district included both Stanislaus and San Joaquin counties, was a "target" race, and whose election victory was imperiled at the time the committees made their contributions to him.

There is a form of earmarking that is benign and associated with how organizations that are not operated for a political purpose but have affiliated political funds that operate for political purposes must report that activity.[6] The Political Reform Act defines "earmarked" contributions provides:

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[5] As we noted in response to the court's inquiry at the opening argument on November 12, 2013, the term "understanding" is not used in the statute and we viewed it as synonymous with "agreement." The term "understanding" does not mean "earmarking" if Tom and the two central committees had a common perspective about how the committees might use his funds, without any "condition" or "agreement" between them under either Gov. Code § 85704 or 84301.

[6] The "earmarking" concept is used elsewhere in FPPC regulations such as Regulation 18419 in a very benign way. There are at least two examples of this:
(1) Trade associations and membership organizations often have non-profit tax exempt status under Internal Revenue Code § 501(c)(6) that permits them to have affiliated, sponsored political funds – known as "political action committees," "PACs" or "separate segregated funds" – that have different federal tax status (under Internal Revenue Code § 527) than the sponsoring associations. See also Gov. Code, § 82047.8 [defining sponsored committees.] The IRS's tax treatment of political accounts or funds of section 501(c)(6) entities requires the segregation of the political funds from those entities' own funds, and both federal law (the Federal Election Campaign Act for political funds used in connection with federal elections) and state law (the Political Reform Act for funds used in connection with state elections) accommodates the system founded on the tax laws. The FEC and the FPPC both require that these political funds be accumulated by the sponsor that collects them and regularly and promptly transferred to the PAC/527 tax exempt fund. This approach also avoids the requirement that the sponsoring organization disclose its regular treasury fund receipts and disbursements that are not used for political activity. Thus, FPPC Regulation 18419 permits the sponsoring organization to raise its own member dues and political funds from members in a single check, when the sponsor's dues statement expressly "earmarks" how much of the single check's funds will be set aside as dues for the association sponsor's use and how much has been solicited, set aside and transferred to a separate bank account of the sponsored PAC. This separate bank account is required to be registered as a "recipient campaign committee" under Gov. Code, § 82013, (a), and to report its receipt of contributions and expenditures. The FPPC will cite several advice letters that define "earmarking" for this benign purpose. (See, e.g., *FPPC Adv. Ltr to Mark Krausse*, A-96-349 (1997) (1997 WL 695528); *FPPC Adv. Ltr to Lance H. Olson*, I-97-321 (1997)(1997 WL 587595).)
(2) In another circumstance, where several committees operate together to engage in "joint fundraising" activities, where they collectively solicit donations, the solicitation can "earmark" (i.e., disclose to each potential donor how the donor's check will be divided between the participating committees.) (See, e.g., *FPPC Adv. Ltr to Charles H. Bell, Jr.*, A-11-102 (2011) (2011WL3788943.) In both of these examples, this type of earmarking is express, intended to identify funds that will be used for political purposes by a sponsored PAC, or participants in a joint fundraising effort, and those soliciting the funds expressly intend to inform the donor that the donor's funds are solicited for and will be used by the sponsor's PAC or the joint fundraising participants for California political activity. This is an example of a process the Political Reform Act provides for the disclosure of political funding. Just like the *O'Donnell* and *Danielcyzk* case citations above demonstrate that different provisions of the Federal Election Campaign Act work for different purposes and may not work harmoniously, this is true of the different purposes that the term "earmarking" serves in statutes and regulations such as Gov. Code 82047.5, Regulation 18419, Gov. Code 84301 and 85704.

> 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. (Government Code § 85704.)

This definition is consistent with former law, which provided:

> No person shall make and no person, other than a candidate or the candidate's controlled committee, shall accept any contribution on the condition or with the agreement that it will be contributed to any particular candidate. The expenditure of funds received by a person shall be made at the sole discretion of the recipient person. (Former Government Code § 85703 which was enacted in 1996 and repealed in 2000 by Proposition 34.)

Thus, a contribution is "earmarked" if either conditioned by the donor on that recipient's contributing the funds to a particular candidate, or if the donor and the recipient agree about the recipient contributing the funds to a particular candidate. Former Gov. Code section 85703 stated that same proposition in a different way: if the recipient of the contribution makes a contribution decision in its sole discretion, there is no condition or agreement between the original donor and that recipient.

The testimony and evidence in this case proved that: (1) Tom Berryhill did not condition his contributions to the Stanislaus and San Joaquin committees that they be contributed by them to Bill's committee; (2) there were no agreements or understandings between Tom and the two committees that Tom's contributions to them be contributed to Bill's committee; and (3) the Stanislaus and San Joaquin committees made their own decisions to contribute funds to Bill's committee, with knowledge that they had full discretion to do so.

The FPPC presented no direct evidence of earmarking. There was no writing between the donors and recipients (Tom, the two central committees, their leadership, or anyone who would have been an agent of them) of earmarking. The FPPC presented neither any document, nor oral testimony (in interviews, declarations, or at trial) of earmarking.

The FPPC's main "evidence" -- a timeline/chart (Exhibit 1.2) – presents no

communication by donors and recipients conditioning or agreeing how the contributions would be spent. That chart contains no evidence whatsoever of earmarking. The FPPC presented no independent witnesses of its own. In witness interviews and at trial, the FPPC tried to get admissions of earmarking by the two central committees' leaders and Tom Berryhill. All of these witnesses denied there was any "condition" or "agreement" between them that Tom's contributions would be spent on Bill's campaign.

Respondents argued at closing that each citizen in this political process had a perspective on the legal and ethical prohibitions against earmarking that were akin to the Ten Commandments. Jim DeMartini said "You can't talk with the donor about how his money can be used." Joan Clendenin said "You just can't talk about this, and we don't." Tom Berryhill said "You give the money and you just hope they use it well or do the right thing with it." Bill Berryhill said "You can't even talk about someone else's donation with the potential contributor." Dale Fritchen, Joan Clendenin and Jim DeMartini said the central committee must make its own spending decisions.

The testimony of the two key witnesses, Joan Clendenin for the Stanislaus county central committee and Dale Fritchen for the San Joaquin county central committee, credibly and convincingly demonstrated that, as the decisionmakers for their two committees, they made spending decisions independent of any (falsely) alleged conditioning or agreements, of which there were none.

a. Stanislaus County Central Committee: Authority and Decisionmaking

Leaders of Stanislaus County's central committee testified that their bylaws authorized the central committee's chairperson to make contribution decisions at the end of the election (between the committee's regular meetings). Joan Clendenin testified that she made the decision to contribute to Bill's campaign based on her knowledge gleaned from phone calls conducted by

the committee with Republican voters that showed Bill did not have strong name recognition with these Republican voters. She also related her decision not to allow Bill's campaign to go without funds, if she had them, and suffer the same losses that Bill's now-deceased father and former legislator, Clare Berryhill, had suffered in 1989 during a similar last-minute advertising blitz by his opponent. Joan also testified that she made the decision to contribute to Bill's campaign because Tom had faced a similar situation in 1996 when he lost an Assembly race by less than 100 votes and he ended the campaign without spending $70,000 he had in the bank.

Joan Clendenin decided to contribute Stanislaus' money to Bill to avoid the repeat of those two defeats, and she authorized the committee treasurer, Mr. McKinsey, to cut a check for $20,000 (the contribution at issue in this case) and execute a wire transfer of another $20,000.[7] Her reasons for deciding to contribute to Bill's campaign were sound. Her committee had already supported other candidates in "target" races. Bill's race was in peril due to very heavy late spending by his opponent, whose campaign had been fueled in the last two weeks before the election by almost $1 million from the California Democratic Party and its allies. His prospective district included Stanislaus County.

b. San Joaquin County Central Committee: Authority and Decisionmaking

The FPPC failed to prove that San Joaquin did not exercise its own discretion to support Bill's campaign with Tom's funds. Dale Fritchen, Chairman of the San Joaquin committee, had received delegated authority to make last minute contribution decisions for his committee. Dale testified that he made the decision to contribute the committee's funds to Bill's campaign. Dale

[7] We discuss the FPPC's futile attempt to use "pattern and practice" evidence of 2009 contribution activity against the Stanislaus committee, but the better "pattern and practice" evidence in its favor is the fact the FPPC has not challenged in this case Stanislaus' receipt and use of the second $20,000 contribution it received to contribute to Bill's campaign. Joan Clendenin's testimony about how she used both $20,000 contributions the committee received, making the decision herself to support Bill's campaign, is more credible pattern and practice evidence supporting the Respondents.

also testified that he authorized the spending of substantial committee funds on other "target" races. He understood that Bill's campaign was in peril, and needed financial support. Fritchen emailed his treasurer, "Let's give $21K to Bill." This request reflected his decision to contribute to Bill's campaign. He denied that he had had any conversation, let alone any agreement, with Tom Berryhill about Dale's decision. The email request to his treasurer, Louis Lemos, reflected Dale's exercise of the committee's discretion. There is no dispute that the San Joaquin's executive committee, which had power to act between regular monthly meetings of the committee, had delegated its authority to make last minute contribution decisions to Dale. It also directed him to contribute to "target candidates identified by the California Republican Party." Dale also testified that he was asked by the California Republican Party to spend funds to support Bill Berryhill and Gary Jeandron, a candidate in another Assembly race in the Palm Springs area. Committee records also show that the San Joaquin County committee spent substantial funds to support other California Republican Party "target" candidates, including Tony Strickland, who was a Senate candidate in a competitive "target" race in Ventura County.

Dale's knowledge of Bill Berryhill's need for support – whether Dale learned it from Bill Berryhill, the California Republican Party or someone else – is irrelevant to the earmarking issue, because there is no factual dispute that such knowledge did not come from communications with Tom Berryhill involving a "condition" or "agreement" with him about San Joaquin giving Tom's funds to Bill's committee or to anyone else in particular.

c. There Is No Dispute That Bill Berryhill's Race Was a "Target" and Possibly the Only Remaining "Target Race" to Need Help

Although the FPPC initially appeared to dispute the fact that Bill Berryhill's race was a "target" race that had become a hotly-contested race in late October 2008 when his opponent received and spent over $1 million received in last minute contributions, the uncontroverted testimony is that Bill's race needed assistance in late October 2008, and was perhaps the only

such remaining "target" if funds became available to spend on it. The testimony is uncontroverted that the Stanislaus and San Joaquin county central committees had already contributed substantial amounts to other "targets" before the late-October 2008 advertising blitz by Bill's opponent. Bill, Tom, Mike Villines (who was the Assembly Republican Leader responsible to raise funds to elect all Republican Assembly candidates), and the leaders of the two central committees testified that Bill's race was a "target" race. They also testified that the Obama wave in late 2008 threatened Bill's race and that an impending landslide threatened to carry other down-ticket Democrats in state legislative and Congressional races to victory. The strongest motivation to support Bill was, however, the last minute infusion of a staggering amount of money into Bill's opponent's campaign that was being spent on a heavy barrage of negative advertising against Bill.

The evidence showed that the California Republican Party contributed $50,000 to Bill Berryhill's campaign on October 30 and 31, 2008. It also showed that Dale Fritchen, on behalf of San Joaquin County, was influenced by the California Republican Party's request that San Joaquin contribute funds to Bill, and that Dale acted on that request, not on any agreement or condition with Tom. Joan Clendenin's decision to contribute to Bill was influenced primarily by her own alarm at Bill's relatively weak standing among likely Republican voters from whom he would need to attract votes, and by Joan's desire to avoid the election defeat Bill's father, Clare, had suffered some years earlier when he wasn't able to muster sufficient resources to respond to his opponent's negative advertising blitz, and by Tom Berryhill's narrow loss in 1996 when he ended the campaign with a substantial, unspent surplus.

4) **Proposition 34 And The Role of Political Parties:**

The FPPC attacked the contributions made to Bill Berryhill by the two central committees as if the committees were "straw donors," ministerial bodies with no power or authority to make contributions using lawful funds they received. That is not the law. The zeal with which the

FPPC pursued this case reflects its fundamental distaste for the system California voters approved in 2000. Proposition 34, adopted by the voters to replace an earlier campaign reform measure, favored political parties over all other contributors to campaigns, and it specifically allowed any person (including a candidate) to contribute up to $30,200 to each county central committee (as a political party committee) each year. Proposition 34 further authorized each political party committee to contribute, or spend, an unlimited amount of such funds to or on behalf of any of its nominee candidates for state elective office. Tom Berryhill made lawful contributions to the two county central committees in late 2008, and these central committees made lawful contributions to Bill Berryhill's committee. The FPPC failed to prove otherwise.

Political parties operate under the campaign finance laws of the federal government and the State of California with respect to participation in federal, state, and local campaigns. Federal campaign activity is governed by the Federal Election Campaign Act of 1971, as amended, 2 USC § 431, *et seq*. State and local campaign activity is governed by the California Political Reform Act, Title 9 of the Gov. Code, § 81000, *et seq*.

There are fundamentally differing policy views about the role political parties should play in our campaign finance system, and the constitutional justification for regulating campaign contributions to and by political parties to candidates. One view appears in the U.S. Supreme Court's affirmance of Congress' authority to regulate political party finances in cases such as *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001)("*Colorado II*") [affirming the Federal Election Campaign Act limits on coordinated expenditures by political parties to support party-nominated candidates] and in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003) ("*McConnell*") [affirming most of the Bi-Partisan Campaign Reform Act of 2002 ("McCain-Feingold"), Public Law 1007-15, 107 Cong., 2nd sess. (March 27, 2002)]. This view is that political parties are too closely linked to candidates

they support, and therefore stricter regulation of political party finance prevents corruption or its appearance associated with candidates and officeholders, under the broad constitutional scheme outlined in the seminal U.S. Supreme Court campaign finance decision, *Buckley v. Valeo*, 424 U.S. 1 (1976) [affirming much of the Federal Election Campaign Act of 1971, Public Law 92-225, 92nd Cong., 2nd sess. (February 7, 1972), as amended by the Federal Election Campaign Act Amendments of 1974, Public Law 93-443, 93rd Cong., 2nd sess. (October 15, 1974)]. Under this approach, contributions to and by political parties can be regulated just as much as contributions made directly to candidates. A plethora of additional Congressional and State statutes and regulations support such regulation.

Another view advocated by Peter J. Wallison, Arthur Burns Fellow at the American Enterprise Institute, and Joel M. Gora, Professor of Law at Brooklyn Law School and former legal counsel to the American Civil Liberties Union in the *Buckley v. Valeo* case, is that a political campaign finance system that is political party-centered, rather than candidate-centered, is better from a freedom of speech and anti-corruption standpoint. (See, Peter J. Wallison and Joel M. Gora, *Better Parties, Better Government: A Realistic Program for Campaign Finance Reform*, American Enterprise Institute Press (2009).) Wallison and Gora argue that the existing campaign finance reform scheme, although advertised as the best prescription for combatting political/campaign finance corruption, has served primarily to protect incumbent officeholders and consequently has reduced competitiveness in elections. Adopting a more party-centered system would, theoretically, increase electoral competitiveness by affording political parties the opportunity to provide greater support to challenger candidates against incumbents, would increase information to voters, and would make candidates and political parties more accountable to the electorate. They argue that giving political parties the ability to spend funds to support their candidates without limitations would yield both political and governance benefits by

reducing corruption and the appearance of corruption of officeholders.[8]

By enacting Proposition 34 in 2000, California voters largely adopted the Wallison/Gora view about political parties.

5) **Proposition 34 Authorizes Political Parties To Accept And Use Unearmarked Contributions To Support State Candidates:**

Proposition 34 favors contributions to political parties[9] and authorizes them to contribute or spend unlimited amounts of contributions they receive from donors to support candidates for state elective offices. In Proposition 34, section 1, the voters declared:

> (1) Monetary contributions to political campaigns are a legitimate form of participation in the American political process, but large contributions may corrupt or appear to corrupt candidates for elective office.
>
> ***
>
> *(3) Political parties play an important role in the American political process and help insulate candidates from the potential corrupting influence of large contributions.*
>
> ***
>
> (b) The people enact the Campaign Contribution and Voluntary Expenditure Limits Without Taxpayer Financing Amendments to the Political Reform Act of 1974 to accomplish all of the following purposes:
>
> (1) To ensure that individuals and interest groups in our society have a fair and equitable opportunity to participate in the elective and governmental processes.
>
> (2) To minimize the potentially corrupting influence and appearance of corruption caused by large contributions by providing reasonable contribution and voluntary expenditure limits.
>
> (3) To reduce the influence of large contributors with an interest in matters before state government by prohibiting lobbyist contributions.
>
> (4) To provide voluntary expenditure limits so that candidates and officeholders can spend a lesser proportion of their time on fundraising and a

[8] No campaign finance system eliminates the opportunity for officeholders to engage in corrupt activities, although recent examples in the Sacramento press show that the FBI continues to target the Capitol for investigation of bribery, extortion and other politics-related crimes.

[9] Gov. Code, § 85205 defines a political party committee:
" 'Political party committee' means the state central committee or county central committee of an organization that meets the requirements for recognition as a political party pursuant to Section 5100 of the Elections Code."

greater proportion of their time conducting public policy.

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(7) *To strengthen the role of political parties in financing political campaigns by means of reasonable limits on contributions to political party committees and by limiting restrictions on contributions to, and expenditures on behalf of, party candidates, to a full, complete, and timely disclosure to the public.* (Emphasis added.)

6) **Political Parties' Contribution Limits:**

Proposition 34 provided more favorable contribution limits to political parties (to support state candidates) than for any other type of political committee or political candidate. Donors may currently contribute $34,000 per person per year to each political party committee (the amount was $30,200 in 2008) (Gov. Code, § 85303(b).) The political party can use such funds to make unlimited contributions to candidates for elective state office, such as State Assemblymember. The right of a political party to make unlimited contributions to a candidate for elective state office (mentioned in the italicized subdivisions of section 1 of Proposition 34 quoted above) is found in three places:

(a) the specific exclusions of political parties from the contribution limits to candidates found in Gov. Code, §§ 85301(a), 85301(b) and 85301(c) [10] and 85303(a),[11]

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[10] Gov. Code § 85301: (a) A person, other than a small contributor committee or *political party committee*, may not make to any candidate for elective state office other than a candidate for statewide elective office, and a candidate for elective state office other than a candidate for statewide elective office may not accept from a person, any contribution totaling more than three thousand dollars ($3,000) per election. (b) Except to a candidate for Governor, a person, other than a small contributor committee or *political party committee*, may not make to any candidate for statewide elective office, and except a candidate for Governor, a candidate for statewide elective office may not accept from a person other than a small contributor committee or a political party committee, any contribution totaling more than five thousand dollars ($5,000) per election. (c) A person, other than a small contributor committee or political party committee, may not make to any candidate for Governor, and a candidate for governor may not accept from any person other than a small contributor committee or political party committee, any contribution totaling more than twenty thousand dollars ($20,000) per election. (d) The provisions of this section do not apply to a candidate's contributions of his or her personal funds to his or her own campaign. (Emphasis added.)

[11] Gov. Code § 85303: (a) A person may not make to any committee, *other than a political party committee*, and a committee other than a political party committee may not accept, any contribution totaling more than five thousand dollars ($5,000) per calendar year for the purpose of making contributions to candidates for elective state office.
(b) A person may not make to any political party committee, and a political party committee may not accept, any contribution totaling more than twenty-five thousand dollars ($25,000) per calendar year for the purpose of making contributions for the support or defeat of candidates for elective state office. Notwithstanding Section 85312, this

(b) the absence of any direct statutory limitation on contributions by political party committees to candidates for elective state office in sections 85301, 85303 or any other provision of chapter 5 of Division 9, and,

(c) the specific exclusion of political party campaign expenditures from the spending limits of Gov. Code, § 85400, found in subdivs. (d) of section 85400.[12]

7) The FPPC's Mistaken Theory of Earmarking Reflects Not Only Its Disagreement with Proposition But Would, If Accepted, Fundamentally Thwart the Operation of Proposition 34

a. The FPPC's Mistaken Theory of Earmarking

The FPPC closed by asserting that earmarking occurred when a donor made a contribution to a committee when the donor knew that thee Committees indicated they would support a specific candidate or candidates, even if there was no "condition" placed on the donation by the donor and there was no "agreement" between the donor and the recipient. That is not the law. When a committee identifies the potential candidate(s) it "targets" and intends to support, the effect is not an "offer" that can be accepted by a donor. Implicit in the expression of the

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limit applies to contributions made to a political party used for the purpose of making expenditures at the behest of a candidate for elective state office for communications to party members related to the candidate's candidacy for elective state office. (c) Except as provided in Section 85310, nothing in this chapter shall limit a person's contributions to a committee or political party committee provided the contributions are used for purposes other than making contributions to candidates for elective state office. (Emphasis added.)

[12] Gov. Code § 85400: (a) A candidate for elective state office, other than the Board of Administration of the Public Employees' Retirement System, who voluntarily accepts expenditure limits may not make campaign expenditures in excess of the following: (1) For an Assembly candidate, four hundred thousand dollars ($400,000) in the primary or special primary election and seven hundred thousand dollars ($700,000) in the general or special general election. (2) For a Senate candidate, six hundred thousand dollars ($600,000) in the primary or special primary election and nine hundred thousand dollars ($900,000) in the general or special general election. (3) For a candidate for the State Board of Equalization, one million dollars ($1,000,000) in the primary election and one million five hundred thousand dollars ($1,500,000) in the general election. (4) For a statewide candidate other than a candidate for Governor or the State Board of Equalization, four million dollars ($4,000,000) in the primary election and six million dollars ($6,000,000) in the general election. (5) For a candidate for Governor, six million dollars ($6,000,000) in the primary election and ten million dollars ($10,000,000) in the general election.
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(b) For purposes of this section, "campaign expenditures" has the same meaning as "election-related activities" as defined in clauses (i) to (vi), inclusive, and clause (viii) of subparagraph (C) of paragraph (2) of subdivision (b) of Section 82015. *(c) A campaign expenditure made by a political party on behalf of a candidate may not be attributed*

committee's intent about how it will use the funds is the condition that it retains the discretion as to how to use or not use the funds. It can always change its mind.

The FPPC's characterization of these Republican central committees as "straw donors" reflects its fundamental distaste for the Proposition 34 system. The FPPC's theory above, if applied, would prevent political party committees from communicating to potential donors and supporters the essential political information about whom they may support, since every committee would then be suspect as a potential "straw donor," and every communication would be improperly construed as "laundering."

Because violating Gov. Code §§ 84301 and 85704 are the most serious offenses in the campaign law, and because such violations may be charged as crimes under Gov. Code, § 91000 (and are treated as the equivalent of crimes by the media, even if they are prosecuted only as civil or administrative offenses by the FPPC), the court should reject the FPPC's contention that its various loose definitions and theories should be given a "liberal construction" to promote the purposes of the Political Reform Act. Rather, the court should apply an objective standard, one bound by the terms of Gov. Code, § 85704, requiring that a "condition" or "agreement" be explicit or clearly inferred from the evidence presented. The court should not find earmarking has occurred on the basis of inference of such a condition or agreement where the evidence does not show the central committees failed to exercise their discretion in making their own contribution decisions or allowed someone else to direct or control their decisions.

b. FPPC's Erroneous Attempt to Use Stanislaus' Anderson Contribution As Pattern and Practice Evidence

The FPPC attempted to use the Stanislaus County Central committee's 2009 receipt of a contribution from Assemblyman Joel Anderson's 2010 committee and subsequent contribution of funds the next day to another Anderson committee as evidence of a "pattern and practice" of

to the limitations on campaign expenditures set forth in this section. (Emphasis added.)

accepting and making earmarked contributions in this case (the October 2008 contributions). But the FPPC also objected to Respondents' request for judicial notice of the FPPC's own November 2009 letter declining to prosecute the Stanislaus county central committee for any violation of law on grounds of insufficient evidence. There are several problems with the FPPC's inconsistency:

First, the Stanislaus committee's use of the $20,000 Tom Berryhill contribution was charged as "earmarking" in this Accusation, but its use of the $20,000 contribution it received from the San Joaquin Valley Leadership Fund was not charged in this Accusation. If the latter contribution was made in a lawful manner, and there was unrebutted evidence that Tom's $20,000 contribution was treated the same way by the Stanislaus committee when it made its own decision to give money to Bill's committee, the Stanislaus committee's pattern and practice in October 2008 was of lawful contribution decisionmaking.

Second, it is a cardinal rule that a pattern and practice evidentiary claim must be founded on making a *prima facie* case of the violation that is claimed to establish the unlawful pattern and practice. But the FPPC cannot make such a claim about the 2009 Stanislaus/Anderson contributions. As noted in closing, the FPPC's November 2009 letter to the Stanislaus county central committee did not identify or mention Gov. Code §§ 84301 or 85704, which are at issue in this case.

Third, the FPPC declined to prosecute the Stanislaus/Anderson matter for insufficient evidence. For these reasons, the FPPC cannot use anything about the Anderson contribution as *prima facie* evidence of an "earmarking" violation on the basis of a pattern and practice claim.

Finally, the FPPC did not establish sufficient facts to support its allegations in the Accusation in *this case* that would be necessary to show any unlawful pattern and practice. For this reason, the FPPC had no basis to claim the use of the Stanislaus/Anderson transactions for a pattern and practice claim.

c. Timing of Contributions Cannot Be Used to Infer Earmarking

There is no "blackout period" or "timeout period" in the Political Reform Act within which a contribution cannot be made to California candidates, political parties, or other political committees before an election. Campaign committees try to spend their funds before an election on voter communications because spending them afterward could not affect the election, and at the last minute of a campaign, there isn't much time to hold money.

Both central committees received monetary contributions from other sources on or around the days when Tom Berryhill also contributed funds to the central committees. The sources of these other contributions to the central committees (which include Blue Shield of California; Mike Villines for Assembly 2008; San Francisco Bar Pilots PAC; California Hospital Association PAC; San Joaquin Valley Leadership PAC; San Manuel Band of Mission Indians; and the California Mortgage Association PAC) were as likely to have been the source of funds of the central committees' contributions to Bill as were the funds contributed by Tom. The FPPC did not charge any of those other contributors to the central committees with violating the Political Reform Act.

d. Family Relationship

No California law prohibits family members of a state candidate from contributing to political party committees even with knowledge that such party committees have targeted a nominee candidate for support and are likely to use the family members' funds to support the donors' relative. Separate persons, including spouses, are considered separate contributors under the Act. (Gov. Code §§ 82047 [definition of "person" includes "individuals"]; 85301 ["a person may contribute"], 85302, 85303.) Tom Berryhill acknowledged that he was his brother Bill's key adviser and helped raise money for him, but Tom also testified that Tom understood the law about earmarking, the role of political party committees, and what Tom and the committees could and could not do. Finally, even if Tom contributed to a central committee knowing that the central

committee *might* help his brother's campaign, that did not amount to "earmarking," which requires a specific agreement or condition between contributor and recipient that the contributor's money will be given to a specified third party.

e. Agency

The FPPC failed to present any evidence that any other person acted as an agent for Tom. Nor did the FPPC present evidence that anyone knew of an alleged "condition" or "agreement" that would constitute "earmarking." While explicit acts of an "agent" might be attributable to one of the agent's principals if the agent had apparent authority to act as an agent, the FPPC neither alleged nor presented any evidence proving actual or apparent authority and agency with respect to any particular individual. "Agency" is defined as the express or apparent authority of an individual to act on behalf of a principal and bind the principal by words or actions. (Black's Law Dictionary, 7th Ed., p. 62; see also 2 Cal. Code Regs., § 18225.7 (f)). There is no evidence that any person other than Tom and the principals of the two central committees were responsible for their respective contributions and their decisions to make them. If the FPPC were trying to impute agency to another person, it failed to meet its burden of proof. In the absence of any concrete evidence of express earmarking by a recognized agent of the principals involved, earmarking cannot be inferred.

Even if the court were permitted to make such inferences, it would be unreasonable to do so, because the FPPC presented no evidence of the content of any communications that warrants any inference of earmarking.

III. OTHER ISSUES:

A. UNREPORTED GIFTS:

Count 15 alleged a failure to timely report a gift of a ticket from Disneyland. But Tom's letter of January 18, 2010, to the FPPC Enforcement Division showed that the gift was

erroneously reported by the Walt Disney Company as having been gifted to Tom, when it was made to Tom's wife. (See Letter from Tom Berryhill to Gary Winuk, dated January 18, 2010 (Resp. Exh. 1).) The FPPC contended that Tom's amendment of his Form 700 to disclose his spouse's gift was an admission of guilt. The uncontroverted testimony refuted the FPPC's contention. Moreover, the FPPC made no effort to rebut the fact that its own Regulation 18944 that was in force in 2008,[13] which provided that gifts given separately to the spouse of a public official were not gifts to the public official (and need not be reported by the official as his gift). Because the gift was not made to Tom, the FPPC's claim of failure to timely report the gift is meritless and should be dismissed.

Count 16 alleged non-reporting of a gift from the Pechanga Band of Luiseno Indians. The circumstances concerning this matter are partially in the public record. Tom was verbally invited to an event by a representative of the Pechanga Band, and the invitation did not go through Tom's staff, which normally handles invitations. The Pechanga Band admitted its misstep, and was fined for failing to provide gift notices to affected public officials. This charge against Tom Berryhill is inappropriate in light of the FPPC Commissioners' statement about the charging of gift violations with respect to similar enforcement actions in February 2010. The FPPC Commissioners' statement, while approving stipulations that had already been entered with defendant legislators, made the following comments:

> PROPOSED CONSENT CALENDAR - ITEMS 2 THROUGH 63
>
> Chairman Johnson announced that more than 60 Enforcement matters were on the consent calendar, and he congratulated the Enforcement Division staff for their

[13] Former Reg. 18944, subdiv. (b), adopted in 1994 and repealed January 11, 2011, provided as follows:

(b) A gift given to a member or members of an official's immediate family is not a gift to the official unless it confers a personal benefit on the official. A gift given to a member or members of an official's immediate family confers a "personal benefit" on the official for purposes of this regulation, when any of the following factors apply:

(1) Benefit: The official enjoys direct benefit from the gift, except for a benefit of nominal value;

(2) Use: The official uses the gift, and the official's use is not nominal or incidental to the use by the member or members of the official's immediate family;

(3) Discretion and Control: The official exercises discretion and control over who will use the gift or dispose of the gift.

hard work over the past several months in bringing the cases to resolution. He advised that, at some point, he intended to schedule a hearing to give the Commissioners an opportunity to gain a clearer understanding of how the Enforcement Division operates, how they prioritize their cases, and how they exercise their prosecutorial discretion. This had been done in the past, but he thought it would be worthwhile since the majority of the commissioners are relatively new to the Commission.

The Chairman reported that 41 stipulations on the consent calendar were the result of a proactive investigation by staff, which involved a number of lawful gifts received by members of the Legislature and their aides, but which they failed to report. He commended the speed with which staff reached settlements in these cases, and thought it was important to note that the individuals agreeing to the stipulations did not hesitate to correct the record by filing amended statements. Moreover, each paid what he or she and our staff agreed to as appropriate penalties. He said he intended to vote for each of these items with the exception of Item 50, which he wanted to remove from the consent calendar, and asked staff to seek a higher penalty as it appeared to him that the Pechanga Band of Luiseño Mission Indians failed to appropriately notify a number of individuals that they had made a reportable gift to them. While the individuals had a nondelegable duty to report the gifts that they received, it would seem that the Respondent committed multiple violations and the penalty suggested was proportionately low.

Chairman Johnson asked if the Commissioners had any comments or wanted any other items removed from the consent calendar.

Commissioners Hodson, Garrett and Montgomery echoed Chairman Johnson's positive comments to staff, *but expressed policy concerns with how the gift reporting violation cases involving members of the Legislature and their aides had been handled. They thought that, in general, persons with first-time violations and failing to report only one gift, with no prior history of any violations, should have received only warning letters, not stipulations with $200 fines, but that they would approve these items since the respondents had signed the stipulations and paid the fines.*

(Emphasis added.)

The charge in Count 16 falls inside the grounds the FPPC Commissioners' direction that the Enforcement staff not to charge a fine for situations involving officials who received gifts such as the Pechanga gifts. Count 16 should be dismissed.

B. <u>TOM BERRYHILL'S OCTOBER 28, 2008 FUNDRAISER</u>:

The FPPC alleged that Tom Berryhill's October 28, 2008, fundraiser was reportable as a non-monetary contribution to Bill Berryhill's campaign because Tom, in introducing his brother at the event, exhorted the attendees to support his brother. There is no legal and factual basis for

this charge. First, as fundraiser Diane Stone Gilbert testified and the documentary evidence made clear, the event raised money for Tom's Assembly committee. Second, the invitations were for a Tom Berryhill fundraiser; the receipts were for Tom's committee; and the FPPC produced no evidence that a single dollar was raised for Bill's committee at the event. The FPPC's sole basis for this count was a statement made by Tom in his FPPC interview that he made an oral request to the attendees to support his brother's campaign. Such a request clearly comes within the "volunteer personal services" exemption from the definition of "contribution." (Gov. Code § 82015) or falls within the Reg. 18225.7(d)(7) exception with respect to one candidate's solicitation of contributions to another candidate or committee.

Fourth, the FPPC did not produce a single instance in which it has brought and succeeded in making an enforcement claim based on an event being converted into a "non-monetary contribution" to another candidate because of a single exhortation to support that candidate made at the first candidate's fundraising event. Likewise, the FPPC produced no evidence that a single contributor gave money to the Stanislaus County central committee, in response to Tom's exhortation, that was earmarked or used for contributions from that central committee to Bill's campaign.

IV. CONCLUSION:

The law and the FPPC's evidence does not prove by a "preponderance" that Tom Berryhill "conditioned" or agreed with the San Joaquin and Stanislaus County Republican Central Committees that his contributions to those committees be "earmarked" solely for Bill's campaign. The evidence does not support any FPPC claim that the two central committees failed to exercise their own discretion in making contributions to Bill Berryhill's campaign in late October 2008; in fact, the uncontroverted evidence supports the committees.

The FPPC could not prove the claims of each of the counts alleging "earmarked"

contributions, including its allegations of "earmarking" by the central committees for supposedly failing to disclose Tom's committee as the "true source" of their contributions to Bill's committee. There was no evidence, let alone preponderant evidence, to support these claims.

The law and evidence does not prove the FPPC's claim that Tom Berryhill's fundraiser on October 28, 2008, was a "non-monetary contribution" to Bill Berryhill's campaign by virtue of a mere exhortation by Tom to his supporters to also help his brother Bill.

Finally, the law and evidence does not prove the FPPC's claim that Tom Berryhill's initial failure to report gifts from Disneyland or the Pechanga Band of Luiseno Indians violated the gift disclosure laws. The claim about the Pechanga gift was also foreclosed by the FPPC Commissioners' actions in 2011 directing the FPPC Enforcement staff not to bring claims against other legislators concerning the Pechanga gifts, which the Pechanga donor had failed to disclose.

If the court does not agree with Respondent Tom Berryhill that such a finding is foreclosed, the court might as a possible option the minimum penalty ($200) the FPPC's Enforcement Division sought and obtained against dozens of legislators similarly situated in 2011.

Dated: December 6, 2013.

Respectfully Submitted,

BELL, McANDREWS & HILTACHK, LLP

By: _____
Charles H. Bell, Jr.

Attorneys for Respondents BILL BERRYHILL, TOM BERRYHILL, BILL BERRYHILL FOR ASSEMBLY – 2008, BERRYHILLL FOR ASSEMBLY 2008, et al.

PROOF OF SERVICE

In the Accusation Against: Berryhill for Assembly 2008, et al.
FPPC No. 10/828
OAH No. 201201024

1. I am over the age of 18 and not a party to this cause. I am employed in the county where the mailing occurred. The following facts are within my first-hand and personal knowledge and if called as a witness, I could and would testify thereto.

2. My business address is 455 Capitol Mall, Suite 600, Sacramento, CA 95814.

I served the foregoing document entitled RESPONDENTS' POST-TRIAL BRIEF on each person named below by enclosing a true copy in an envelope addressed as shown in Item 5 and by:

a. depositing the sealed envelope with the United States Postal Service with the postage fully prepaid.
b. placing the sealed envelope with postage prepaid for collection and mailing on the date and at the place shown in Item 4 following our ordinary business practices. I am readily familiar with this business practice for collecting and processing correspondence for mailing. In 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 the place shown in Item 4.
c. transmitting via facsimile to the number(s) during regular business hours.
d. personally serving.
e. x transmitting by email to the offices of the addressee(s) following ordinary business practices during ordinary business hours.
f. causing to be deposited in a sealed envelope with FedEx Overnight Mail.
g. causing to be hand-delivered via a professional courier service.

5. Name and address of each person served:

Hon. Jonathan Lew
Administrative Law Judge
Office of Administrative Hearings
2349 Gateway Oaks, Suite 200
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Facsimile: (916) 263-0545

Via email at: sacfilings@dgs.ca.gov

Neil Bucknell, Counsel
Enforcement Division
Fair Political Practices Commission
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Sacramento, CA 95814

Via email at: NBucknell@fppc.ca.gov

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 10, 2013, at Sacramento, California.

CORIANNE DURKEE

EXHIBIT F

Attachment to Respondents' Reply Brief

Government Code Section 85704

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.

Government Code Section 85311

(a) For purposes of the contribution limits of this chapter, the following terms have the following meanings:
(1) "Entity" means any person, other than an individual.
(2) "Majority owned" means an ownership of more than 50 percent.
(b) The contributions of an entity whose contributions are directed and controlled by any individual shall be aggregated with contributions made by that individual and any other entity whose contributions are directed and controlled by the same individual.
(c) If two or more entities make contributions that are directed and controlled by a majority of the same persons, the contributions of those entities shall be aggregated.
(d) Contributions made by entities that are majority owned by any person shall be aggregated with the contributions of the majority owner and all other entities majority owned by that person, unless those entities act independently in their decisions to make contributions.