UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FEDERAL ELECTION COMMISSION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 8:06-cv-00068-SDM-EAJ
	)	
CONSTANTINE KALOGIANIS, et al.,	)	**Dispositive Motion**
	)	
Defendants.	)	

PLAINTIFF FEDERAL ELECTION COMMISSION'S MOTION FOR SUMMARY JUDGMENT

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v.	)	Case No. 8:06-cv-00068-SDM-EAJ
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CONSTANTINE KALOGIANIS, et al.,	)	**DISPOSITIVE MOTION**
	)	
Defendants.	)	

PLAINTIFF FEDERAL ELECTION COMMISSION'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Federal Election Commission ("Commission" or "FEC") moves for summary judgment. As we will demonstrate, there are no material facts in genuine dispute and the Commission is entitled to judgment as a matter of law. Accordingly, the Commission's motion for summary judgment should be granted.

It is beyond dispute that Defendants Kalogianis & Associates and Liberty Title Agency, Inc. violated 2 U.S.C. 441b(a) by making six prohibited corporate contributions in the form of loans, as well as other in-kind contributions, to Kalogianis For Congress, Inc. In addition, the Kalogianis Committee and its treasurer violated 2 U.S.C. 441b by accepting those contributions, and violated 2 U.S.C. 434(b) by misreporting the source of two of those loans and misreporting the repayment dates for two other loans. Defendant Constantine Kalogianis also violated Section 441b(a) by consenting to the making and acceptance of the loans and other contributions.

BACKGROUND

I. PARTIES

Plaintiff Federal Election Commission is the independent agency of the United States government empowered with exclusive jurisdiction over the administration, interpretation and civil enforcement of the Federal Election Campaign Act ("Act" or "FECA"), codified at 2 U.S.C. 431-455. Facts ¶ 1.[1] See generally 2 U.S.C. 437c(b)(1), 437d(a), and 437g. The Commission is authorized to institute investigations of possible violations of the Act, 2 U.S.C. 437g(a)(1) and (2), and to initiate civil actions in the United States district courts to obtain judicial enforcement of the Act. Complaint ¶ 5; Answer ¶ 5. See 2 U.S.C. 437d(e), 437g(a)(6).

Defendant Constantine Kalogianis was a candidate for the United States House of Representatives from the Ninth Congressional District of Florida in the 2002 Democratic primary election and the November 2002 general election. Facts ¶¶ 3-5. See 2 U.S.C. 431(2).

Defendant Kalogianis & Associates, P.A. ("Kalogianis and Associates") was and is a law firm that was organized as a for-profit corporation under the laws of the state of Florida in March 1994. Facts ¶ 15. At all relevant times, Constantine Kalogianis was and is an officer of Kalogianis and Associates. Facts ¶ 16. Defendant Liberty Title Agency, Inc. was and is a for-profit corporation organized under the laws of the state of Florida in July 1995. Facts ¶ 23. At all relevant times, Constantine Kalogianis has been an officer and or director of Liberty Title Agency, Inc. Facts ¶ 24.

Kalogianis For Congress, Inc. ("Kalogianis Committee" or "Committee") was and is the principal campaign committee for Mr. Kalogianis the 2002 elections. Facts ¶ 8. See 2 U.S.C. 431(5). On February 21, 2001, Mr. Kalogianis filed a Statement of Candidacy with the

[1] Citations to Defendants' Answer are to the initial Answer (Docket #5) filed on March 13, 2006, unless noted.

Commission, and designated the Kalogianis Committee as his campaign committee. Facts ¶ 3. Mr. Kalogianis's wife, Kathy Kalogianis, was the initial treasurer of the Kalogianis Committee, and Defendant Patricia Jones has been treasurer since at least June 27, 2001. Facts ¶¶ 8-9. Ms. Jones also serves as the accountant for Mr. and Mrs. Kalogianis, Kalogianis & Associates, Inc., and Liberty Title Agency, Inc. Facts ¶¶ 10-11.

II. RELEVANT STATUTORY AND REGULATORY PROVISIONS[2]

The Act prohibits the making and acceptance of corporate contributions in connection with an election for federal office. 2 U.S.C. 441b(a), 441b(b)(2); 11 C.F.R. 114.2(a)–(b). Section 441b states that "[i]t is unlawful . . . *for any corporation whatever* . . . to make a contribution . . . in connection with any election at which . . . a Senator or Representative in . . . Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices." 2 U.S.C. 441b(a) (emphasis added). The Act also prohibits any officer or director of a corporation from consenting to any contribution, and any candidate, political committee, or other person from knowingly accepting any contribution made by a corporation in connection with an election for federal office. 2 U.S.C. 441b(a).

Corporate contributions include "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization, or any other person" in connection with

[2] All the facts occurred prior to the effective date of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 107-155, 116 Stat. 81 (2002). Accordingly, unless specified, all citations to the Act or statements regarding provisions of the Act in this brief refer to the Act as it existed prior to the effective date of BCRA. Similarly, all citations to the Commission's regulations or statements regarding any particular regulations refer to the 2002 edition of Title 11, Code of Federal Regulations, published prior to the Commission's promulgation of regulations under BCRA.

any primary or general election for Congress. 2 U.S.C. 441b(a), (b)(2); 11 C.F.R. 114.1(a)(1).[3] The term "anything of value" includes all in-kind contributions. 11 C.F.R. 100.7(a)(1)(iii)(A) [now codified at 11 C.F.R. 100.52(d)(1)]. The provision of goods or services without charge is an in-kind contribution, examples of which include facilities, supplies, and services. Id.

The Act requires candidate campaign committees to report to the Commission for disclosure to the public the identity of each person who makes a loan to the committee during the reporting period, together with the identification of any endorser or guarantor of such loan, and the date and amount of such loan. 2 U.S.C. 434(b)(3)(E). The Act also requires authorized candidate committees to report to the Commission for disclosure to the public all disbursements, including the repayment of loans, during the reporting period. 2 U.S.C. 434(b)(4)(E).

III. RELEVANT FACTS

A. Reports And Communications With The Commission.

This case starts with the very first disclosure report the Kalogianis Committee filed with the Commission after it registered as a political committee and began to raise and spend campaign funds. In that report, the 2001 Mid-Year Report covering the period January 1 through June 20, 2001, FEC0007-FEC00036, the Committee disclosed that it had received six loans from corporations – three in the amounts of $10,000, $5,500 and $42,175 from "Kalogianis & Associates, P.A. Kalogianis, Constantine" and three in the amounts of $500, $200 and $27,000 from "Liberty Title Agency, Inc. Kalogianis, Constantine" FEC00016-00017; FEC00031-

[3] The Commission's regulations define the term "contribution" to include a loan, which includes a guarantee, endorsement, and any other form of security. 11 C.F.R. 100.7(a)(1). A loan that exceeds the contribution limits under the Act is unlawful, whether or not it is repaid. 11 C.F.R. 100.7(a)(1)(i)(A). However, the term "contribution" does not include a loan from a qualifying bank if such loan is made in accordance with applicable banking law and regulations and is made in the ordinary course of business. 2 U.S.C. 431(8)(B)(vii); 11 C.F.R. 100.7(b)(11).

00036, FEC0009. See Facts ¶ 61. According to the report, the Committee had used the first four loans – the four smaller ones totaling $16,200 – as the campaign's initial seed money. Facts ¶¶ 181-191. The primary purpose of the fifth and sixth loans – for $27,000 and $42,175, respectively—was to push the campaign's receipts above $100,000 for the reporting period in order to convince political donors of the campaign's viability. Facts ¶ 192. Mr. Kalogianis testified at deposition that he thought a pubic showing that he could raise $100,000 would attract additional money, including contributions from the national party committees and PACs. Facts ¶¶ 193, 197. Made just one day before the end of the reporting period, these last two loans pushed the Committee's year-to-date receipts to $100,001.50. Facts ¶¶ 197-198.

The Commission sent a letter to the Committee in December 2001, notifying it that its report indicated that the Committee had received prohibited loans from corporations. Facts ¶ 62. The Commission instructed the Committee that if the loans were in fact from corporations, the Committee must repay those loans promptly, and that the Committee should send copies of the refund checks to the Commission. Id.

On February 13, 2002, Committee treasurer Patricia Jones submitted a letter stating that the $10,000 and $5,000 loans from Kalogianis & Associates, Inc. and the $500 and $200 loans from Liberty Title Agency, Inc. were in fact "loans from the candidate's corporations." FEC00188-00189. See Facts ¶ 75. She stated that these four loans had been repaid on December 27, 2001 and that the refunds were being reported on the Committee's 2001 Year-end Report. Id. She enclosed copies of the refund checks, all four of which were payable to the

corporations, endorsed to the payee corporation, and deposited into the respective corporation's account. FEC00190-00192.[4]

Ms. Jones also asserted that the $42,175 loan, which she had earlier reported as being received from Kalogianis & Associates, was a loan from the candidate instead. FEC00188-FEC00193. See Facts ¶ 76. Ms. Jones explained that the "[l]oan of $42,175.50 was incorrectly reported as loan [sic] from Kalogianis & Associates, Inc. The candidate established campaign account with Prudential Financial (Account xxx-xxxx71-28) by loaning the money." FEC00188. Ms. Jones also claimed that the "[l]oan of $27,000 was incorrectly reported as loan [sic] from Liberty Title Agency, Inc. Candidate had loaned money to the campaign." FEC00188. Several days later, the Committee amended its 2001 Mid-Year Report to state that the $42,175.50 and $27,000 loans had been received from Constantine Kalogianis. Facts ¶ 77.

The Kalogianis Committee then filed its 2001 Year-End Report – covering the period July 1 through December 31, 2001 – on February 15, 2002. FEC00118-FEC00176. See Facts ¶¶ 78-79. That report itemized the repayment of the $10,000 and $5,500 loans to "Kalogianis and Associates" (FEC00010), but not the repayment of the $500 and $200 loans from Liberty Title Agency. See FEC00118-FEC00176.[5] On February 21, 2002, Commission staff called the

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[4] Documents obtained during discovery indicate that the Kalogianis Committee did not have sufficient cash-on-hand on December 27, 2001 in its bank account to repay these four loans. FEC Facts at 70. Therefore, in order to cover the refund checks, Constantine Kalogianis, the candidate, loaned $16,200 to the Kalogianis Committee on December 27, 2001, the same day and the Committee issued the four "refund" checks totaling $16,200 to the corporations. Facts ¶ 71. The two corporations issued checks to Mr. Kalogianis reimbursing him the full $16,200 that same day. Facts ¶ 71. Accordingly, at the end of the day none of the parties to this transaction had gained or lost any funds, and the "refunds" reported to the Commission appear to have been for appearances only.

[5] The Committee did not report these latter refunds until one year later, on its 2002 Year-End report, which covered the period July 1 to December 31, 2002. The report listed the disbursement date of the two repayments as December 27, 2002. Facts ¶ 78.

Committee to inquire why the latter refunds did not appear on the Committee's 2001 Year-End Report. FEC00739. Committee treasurer Patricia Jones told Commission staff that she would fix the error (FEC00740), but no amendment was ever filed. Facts ¶ 80. During this same conversation, Ms. Jones also said that the $42,175 and $27,000 loans had actually originated from the corporations. FEC00740. Commission staff told Ms. Jones that in that case, Mr. Kalogianis was merely acting as a conduit for the money, and was not the source of the loans. The Commission advised Ms. Jones that the loans must still be refunded as the candidate may only loan money from his personal funds. Ms. Jones told Commission staff that she would confer with Mr. Kalogianis. FEC00740.

On March 15, 2002, Commission staff telephoned Ms. Jones again to ask about the status of the refunds of the $42,000 loan from Kalogianis and Associates and the $27,000 loan from Liberty Title Agency, Inc. Facts ¶ 97. Ms. Jones told Commission staff that the Committee had issued a refund to Liberty Title Agency, Inc., and that she would fax copies of the refund check and the Committee's explanations to the Commission. FEC00742. Commission staff told Ms. Jones that everything must be resolved by March 30, 2002 (the closing date of the Committee's next quarterly report), otherwise the matter would be referred to the Commission's Office of General Counsel. FEC00742. Ms. Jones assured Commission staff that the matter would be resolved by March 30, 2002. FEC00742.[6] The Kalogianis Committee subsequently

[6] Contrary to Ms. Jones's representation, no portion of the $42,175 loan was ever refunded to Kalogianis & Associates. Facts ¶ 83. Instead, the Kalogianis Committee transferred all the securities it had received from Kalogianis & Associates to a new Prudential Financial account solely in the name of Constantine Kalogianis. Facts ¶ 85. This transfer was not reported to the Commission by the Committee, and the loan still appears as outstanding on the last report the Committee filed. Facts ¶ 144. The Prudential funds in the new account in Mr. Kalogianis's name were later sold and converted into cash, which Mr. Kalogianis then loaned to the Committee. Facts ¶ 85. See n.7, infra.

reported that on March 27, 2002, it "repaid" the original $27,000 loan to Mr. Kalogianis (not to Liberty Title Agency) and received a new loan for $29,000 from Mr. Kalogianis.[7]

On March 18, 2002, Ms. Jones sent a letter to the Commission enclosing a copy of the refund check for the $27,000 loan from Liberty Title Agency, Inc. FEC00194-00198. According to Ms. Jones:

> [t]his loan to the campaign was paid through a BusinessLine account with Wells Fargo from Liberty Title Agency, Inc. To correct the matter, payment was issued on March 14, 2002 to repay the business line for Liberty Title. Copies of the checks are attached. The candidate is a 100% shareholder of Liberty Title, Inc. . . . Regarding the loan from Kalogianis & Associates, Inc. [sic] through Prudential in the amount of $42,175, I have requested documentation from the broker and he is detailing the transactions of the account. I will forward to you upon receipt tomorrow.

FEC0194-95. No such documentation was received by the Commission until three years later, well after the Commission had initiated an enforcement investigation of the Committee's activities.

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[7] Again, the transaction seems to have been for appearances only, and did not result in any substantial change in the Defendants' financial position. According to the bank records, the Kalogianis Committee did not have sufficient funds to repay the $27,000 loan to Liberty Title Agency, Inc, so on March 14, 2002, Mr. Kalogianis loaned the Committee $29,000 so that the Committee could repay the loan. Facts ¶ 194. Mr. Kalogianis obtained the $29,000 he used to make this new "loan" to the Committee from the proceeds from the sale of the Prudential mutual funds described supra, p. 7, n. 6 (the same Prudential securities previously transferred from the Committee's Prudential account to a newly opened Prudential account in Mr. Kalogianis's name). Facts ¶¶ 87-88. On the same date, the Kalogianis Committee "repaid" the original $27,000 loan from Liberty Title Agency, Inc. Facts ¶ 88. Although the check was made payable to "Wells Fargo," not the corporation, Liberty Title Agency, Inc.'s BusinessLine account number and a notation "Liberty Title Loan Payment" were written on the check. Facts ¶ 89. A week later, on March 22, 2002, a check for $29,000 was written on the Wells Fargo BusinessLine account payable to Mr. Kalogianis. Facts ¶ 92. (The first $29,000 check was returned unpaid and was replaced by a second check for $29,000 dated April 5, 2002. Facts ¶ 92). Mr. Kalogianis used the $29,000 from Wells Fargo and the remaining proceeds from the sale of the mutual funds to make a series of additional loans to the Kalogianis Committee in 2002. Facts ¶¶ 93-94.

On April 16 and May 29, 2002, the Commission sent another letter to Ms. Jones, again seeking information regarding the sources of the loans. Facts ¶ 104. The Commission advised Ms. Jones that additional information was required even if the loans had been made by the candidate, including whether the candidate had used personal funds to make those loans, or instead had borrowed funds. The Commission explained that if the candidate had borrowed money to make the loans, the Committee was also required to provide detailed information concerning the loan terms and lender. FEC00074-00075 (emphasis in original). See also FEC00080-00085.

On May 10, 2002, the Committee filed yet another amendment to the Committee's 2001 Mid-Year Report. See Facts ¶¶ 106-107. In this second amended report, the Committee once again changed its description of the source of the loans, this time listing Mr. Kalogianis as the sole source of the $42,175 loan, as well as all of the others -- the $27,000, $10,000, $5,500, $500 and $200 loans that had supposedly been refunded to the corporations months earlier. FEC00097-FEC00098. The amended report did not indicate whether any of the loans disclosed on the report were "personal funds" of the candidate, indicate whether the funds were borrowed from lending institutions or some other source, or provide the names of the lenders or the terms of the loans. See FEC00087-FEC00117.

After receiving this second amended report, the Commission again telephoned Ms. Jones, leaving a detailed message regarding the Committee's continued failure to disclose the source of the loans. Facts ¶ 112. More than a year later, on May 27, 2003, Ms. Jones sent a letter stating "In reply to your request, please be advised that the loans received from the candidate were personal funds as strictly defined by the Commission Regulations," and assuring the Commission that the Committee would file amended reports concerning the loans for two

reporting periods. FEC00607-FEC00608. However, the Committee has never filed such amended reports. Facts ¶ 113.

The last report filed with the Commission by the Kalogianis Committee and its treasurer – the Committee's July 2003 Quarterly Report – listed cash-on-hand of $767.41 on the closing date of the report, June 30, 2003, and outstanding debts and obligations owed by the Committee totaling $169,070.29. FEC00585. See Facts ¶¶ 108, 110, 114. The Committee has filed no financial disclosure reports with the Commission since then, despite receiving repeated notices from the Commission that such reports were due. Facts ¶¶ 114, 116-117.[8]

B. Administrative Proceedings.

The Act authorizes the Commission to initiate administrative enforcement proceedings based on "information ascertained in the normal course of carrying out its supervisory responsibilities." 2 U.S.C. 437g(a)(2). Pursuant to that provision, on November 29, 2004, the Commission found reason to believe the Defendants (then "respondents") had violated 2 U.S.C. 441b, the prohibition against corporate contributions, and 2 U.S.C. 434(b), which contains the Act's disclosure requirements. FEC00609 [FEC Ex. 400]. Following the Act's detailed enforcement procedures, 2 U.S.C. 437g(a), the Commission notified the Defendants of this finding, provided each defendant with a factual and legal analysis that set out the facts and law that were the basis of the Commission's determination, and offered each of them an opportunity to respond. FEC00609-FEC00610, FEC00614-FEC00633; Facts ¶ 164. See 2 U.S.C. 437g(a)(2).

[8] A committee's reporting obligations under the Act do not end with an election. It must continue to report until the committee is terminated. 2 U.S.C. 434(4)(a)(iv). Among other requirements, a political committee cannot terminate if it has outstanding debts and obligations or if it is continuing to receive contributions and make expenditures. 2 U.S.C. 433(d)(1); 11 C.F.R. 102.3.

Mr. Kalogianis responded by letter, appearing as counsel for himself and the other Defendants. FEC00635-FEC00638. See Facts ¶¶ 164-168. He asserted that he had "authorized staff to accept only loans from personal funds and not the corporations," but conceded that "it would appear that a technical violation of the Act may have occurred approximately 4 years ago regarding various corporate loans made from corporations in which I was 100% shareholder." FEC00636. Kalogianis represented that "the Committee did cease and desist once the matter was brought to the treasurer's attention by the FEC . . ., and the money derived has since been repaid to its original source. In other words, the matter was corrected and no harm came from it." Id. Mr. Kalogianis also submitted a Prudential statement documenting the $42,175 loan at issue in this case, and explaining that only a portion of that amount had come from Kalogianis's Associates:

> Attached please find a copy of the June 30, 2001 Prudential Financial monthly statement which should hopefully clarify the issue regarding the $42,175.50 Kalogianis and Associates "loan." The Committee authorized a personal candidate loan directing the transfer of $42,175.50 in personal funds to the Kalogianis for Congress campaign. The account reflects $30,847.34 were, in fact, personal candidate funds and $11,423.15 were Kalogianis & Associates, P.A. funds (Total: $42,270.49). The bulk of the account was transferred to the Committee and classified as a loan, first by Kalogianis & Associates, P.A., then by the candidate, when in fact, it appears to be both. A portion of the funds ($11,423.15) were in a Kalogianis & Associates account. Please see attached.

FEC00637.[9]

As authorized by 2 U.S.C. 437d(a)(1), (3), the Commission issued subpoenas to Defendants for documents and written answers to obtain facts regarding the claims in Kalogianis's response, and evidence about the loans and their alleged repayment. FEC00639-

[9] The Commission took Mr. Kalogianis's explanation into account, and ultimately found probable case to believe Defendants had violated 2 U.S.C. 441b only insofar as the loan came from Kalogianis & Associates. See Complaint ¶ 22 (alleging with regard to the $42,175 loan that "at least" $11,328.16 came from the corporation).

FEC00672; FEC00673-FEC00691. See Facts ¶ 169. In reviewing the Committee's reports and response, the Commission's legal staff had also noted that the Kalogianis Committee used the same address and accountant, Ms. Jones, as Kalogianis's law firm, yet the Committee had not reported any payments for rent or accounting services. Accordingly, the subpoenas sought information about that as well. Defendants acknowledged receipt of the Commission's subpoenas (FEC00673, FEC00692), but refused to submit any responses at all.[10] Facts ¶ 170.

Pursuant to 2 U.S.C. 437g(a)(3), the Commission's General Counsel sent briefs to the Defendants in September, 2005, explaining the General Counsel's position on the legal and factual issues of the case and notifying them of his intention to recommend that the Commission find probable cause to believe they had violated the Act's prohibition of corporation contributions and the reporting requirements with regard to the six loans, and also with regard to the apparently free office space and services the Committee had received from Kalogianis & Associates. FEC00701-FEC00723; Facts ¶ 171. See 2 U.S.C. 437g(a)(3). Although the General Counsel's notification letter advised Defendants of their opportunity to respond, and the Commission's legal staff followed up by telephone and letter, none of the Defendants submitted a response to the General Counsel's briefs. FEC00724; Facts ¶ 171.

Two months later, pursuant to 2 U.S.C. 437g(a)(4)(A)(i), the Commission found probable cause to believe that Kalogianis & Associates, P.A., Liberty Title Agency, Inc., Kalogianis for

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[10] Mr. Kalogianis testified at his deposition that the Defendants had thrown away almost all of the campaign's records right after the November 2002 election. CK Depo. [252] at 70. This was unlawful, for the Act explicitly requires political committee to preserve all records for a period of no less than three years after filing the related disclosure report. 2 U.S.C. 432(d). Ms. Jones testified that her accounting records for 2001, including those concerning Defendants, were destroyed just three weeks before her October 2006 deposition, at a point when she was well aware that the 2001 financial transactions of her clients were at issue in this Court and the subject of ongoing discovery. PJ Depo. [251] at 62 ("I shred, and my 2001 docs were just shredded about three weeks ago.").

Congress, Inc., Patricia Jones, in her official capacity as treasurer, and Constantine Kalogianis violated 2 U.S.C. 441b(a); and that Kalogianis for Congress, Inc., and Patricia Jones, in her official capacity as treasurer, violated 2 U.S.C. 434(b). FEC00612-FEC00613. The Commission notified all of the Defendants of its determination, and provided them with proposed conciliation agreements to settle the case. FEC00725; Facts ¶ 172. See 2 U.S.C. 437g(a)(4)(A). When it was unable to secure an acceptable conciliation agreement with the Defendants, the Commission authorized the filing of this civil suit. FEC00612, FEC00610; Facts ¶ 175.

2 U.S.C. 437g(a)(6)(A).

ARGUMENT

I. THE SUMMARY JUDGMENT STANDARD.

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Facts are deemed material only if a dispute over them might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In this case, summary judgment should be granted because there are no material facts in genuine dispute, and the Commission is entitled to judgment as a matter of law. Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Liberty Lobby, 477 U.S. at 250, 255.

II. DEFENDANTS VIOLATED 2 U.S.C. 441b(a) BY MAKING, ACCEPTING AND CONSENTING TO CORPORATE LOANS.

A. The Six Loans Are Corporate Contributions Prohibited By Section 441b.

Section 441b prohibits the making and knowing acceptance of corporate contributions in connection with an election for federal office, and prohibits corporate officers from consenting to such contributions. 2 U.S.C. 441b(a). Corporate contributions include "loan[s]" made in connection with a federal election. 2 U.S.C. 441b(b)(2).

There are no genuine factual disputes about the material elements of the Commission's claim that the Defendants violated Section 441b of the Act. Kalogianis & Associates, P.A. and Liberty Title Agency, Inc. made six corporate contributions in the form of loans to the Kalogianis Committee. Between January 11, 2001 and March 2, 2001, the corporations made four interest-free loans totaling $16,200 drawn on corporate accounts. Facts ¶ 41. All four of these loans were contemporaneously reported by the Kalogianis Committee and its treasurer as receipts from corporations. Facts ¶ 60. As we have described supra pp. 4-13, the treasurer and candidate repeatedly referred to the loans in communications with the Commission as loans from the corporations. Each of the four loan checks was written on the respective corporation's operating account, Facts ¶ 41, and the three checks produced during discovery all contained the respective corporations' full name and were signed by the corporations' bookkeeper, Kathy Kalogianis. Facts ¶ 41. When the loans were later "refunded," the refund checks were made payable to the respective corporations and deposited into the corporations' checking accounts. Facts ¶ 69. The Kalogianis Committee later reported the respective corporations as the recipients of the refunds to the Commission. Facts ¶¶ 78, 109.

On June 27, 2001, the corporation made the fifth and sixth loans to the campaign. The fifth loan occurred when defendant Kalogianis & Associates transferred securities in the corporation's account at Prudential Financial to the Kalogianis Committee. Facts ¶¶ 42-46. During the Commission's administrative proceeding, Defendants submitted a Prudential Financial Client statement showing that the net value of the securities loaned to the Committee was $47,929.58. Facts ¶ 48. The statement indicates that of this amount, $11,367 was from an account in the name of Kalogianis & Associates, and the remainder came from a second account

held at least in part by the candidate. FEC00638. To date, no portion of the $11,367 has been refunded to Kalogianis & Associates by the Committee. Facts ¶ 83. See p. 7 n.6, supra.

The sixth loan was from defendant Liberty Title Agency, Inc. to the Kalogianis Committee in the amount of $27,000. The check for this sixth loan, signed by Constantine Kalogianis, was an advance written on a $35,000 "BusinessLine" line of credit from Wells Fargo Bank. The preprinted name on the advance check from Wells Fargo is "Liberty Title Agency." Facts ¶ 50. Wells Fargo's records for the account show that the BusinessLine account, which was opened on December 20, 2000, was in the name of "Liberty Title Agency" and list the taxpayer identification number ("TIN") for Liberty Title Agency, Inc. Facts ¶¶ 34-35. The $250 annual fee for the BusinessLine account was paid on March 15, 2001 by a check written on Liberty Title Agency, Inc.'s operating expense account. Facts ¶ 39. On March 14, 2002, the Committee supposedly "repaid" the Wells Fargo loan. See p. 7, n. 7, supra. Although the check was payable to "Wells Fargo," not the corporation, Liberty Title Agency, Inc.'s BusinessLine account number and a notation "Liberty Title Loan Payment" were written on the check. The Defendants have admitted that all six of these loans were accepted by the Kalogianis Committee and its treasurer, and that Constantine Kalogianis, as an officer and director of the corporations and as candidate, consented to the making and acceptance of these loans. See Answer ¶¶ 52-58; Request for Admissions ("RFA") 12. [11]

[11] The statute prohibits "knowingly accepting" a corporate contribution. See 2 U.S.C. 441b(a). However, "the [statutory] term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense." Bryan v. United States, 524 U.S. 184, 193 (1998). See FEC v. Malenick, 310 F. Supp. 2d 230, 237 n.9 (D.D.C. 2004); FEC v. Dramesi for Cong., 640 F. Supp. 985, 987 (D.N.J. 1986) (citing cases); FEC v. Cal. Med. Ass'n, 502 F. Supp. 196, 203 (N.D. Cal. 1980). There is no doubt that Mr. Kalogianis and Ms. Jones knew that the corporations were the source of the funds at the time the loans were made, since Mr. Kalogianis authorized the loans from his corporations and Ms. Jones reported to the Commission at that time

B. Kalogianis & Associates Violated Section 441b By Providing The Committee With Office Space And Furniture At No Charge.

The Act treats as a "contribution" the provision of "anything of value," 2 U.S.C. 441(6)(b)(2); 431(8)(a)(i). Therefore, the provision to a political committee of facilities, goods and services without charge, or at less than the usual and normal rate, is an "in-kind contribution." 11 C.F.R. 100.7(a)(1)(iii)(A). Defendants have admitted that Kalogianis and Associates permitted the Kalogianis Committee to use for its campaign office space that the law firm had been occupying as well as some of its office furniture at no charge. Answer ¶ 26. FEC Facts at ¶¶ 128-160; CK Depo at 39-40]. In addition, the Kalogianis Committee's reports do not show that it paid monthly fees for operating expenses or to reimburse the owner of the building for electricity usage, as other tenants did, including Kalogianis & Associates. The close proximity of the Kalogianis campaign office to the Kalogianis corporate offices was particularly valuable because it facilitated campaign activities, and permitted the easy sharing of personnel, including the candidate. See CK Depo. at 39:17-40:6. [12]

According to documents the Commission obtained from the owner of the office building, the office space that the Kalogianis Committee occupied was 1612 square feet, and based on the rate the Kalogianis corporations were paying for their space, was worth approximately $2,080 per month. FEC04734. Kalogianis & Associates could have provided office space to the

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that they came from corporations, and that is enough to make acceptance of the loans "knowingly."

[12] Defendants emphasized during the litigation that the space the campaign occupied, which was next door to the corporations' shared offices, was separate space with its own entrance, and that the corporations paid no rent for that particular space. Mr. Kalogianis stated at deposition that the space was once part of the corporations' office, and that the building's owner permitted him to use the space for storage after the corporations stopped paying for it. FEC Facts ¶¶ 149-150. Mr. Kalogianis testified that he moved out corporate property in order for the campaign to move into the space. FEC Facts ¶¶ 149-150. Thus, whether or not Kalogianis & Associates had the legal right to that space, it did provide this valuable benefit to the campaign without charge. Accordingly, it violated Section 441b(a) by providing "anything of value" to the Committee.

Committee consistent with federal law if it had required the campaign to pay the usual and normal rates for its use. See FEC Advisory Opinion 1994-8, 1994 WL 236408 (FEC) (candidate committee may rent, for the usual and normal charge, office space from a corporation owned jointly by the candidate and his wife and may also lease the corporation's office equipment for the usual and normal charge) and Advisory Opinion 1995-8, 1995 WL 247472 (FEC) (candidate committee may rent office space in a building owned by the candidate and his wife and may use office equipment owned by the candidate's law firm, a professional corporation, as long as the committee pays the usual and normal rate for its usage). But because the Committee did not pay anything at all for the office space and furniture, the usual and normal rental value of the office space and furniture, and the ordinary operating expenses, such as electricity, were in-kind contributions that violated 2 U.S.C. 441b.

C. The Corporate Assets Of Kalogianis & Associates And Liberty Title Agency, Inc. Are Not Mr. Kalogianis's Personal Funds.

The Act limits the amount an individual may contribute to a political committee for each election. 2 U.S.C. 441a(a)(1)(A) (2001). However, federal candidates, other than publicly financed presidential candidates, may make unlimited contributions to their own campaigns from their own personal funds. See 11 C.F.R. 110.10(a). Defendants have asserted during this litigation that the contributions made by the two corporations should be treated as Mr. Kalogianis's "personal funds" under 11 C.F.R. 110.10, and not as corporate assets, because Mr. Kalogianis claims to have been the only stockholder in the two corporations.[13] As we show

[13] It is unclear whether Mr. Kalogianis really owns all of the stock in both corporations, or whether his wife is a part owner. Although Mr. Kalogianis has stated that he is Liberty Title Agency's sole owner, he has to date produced no documents to support that assertion and his wife, Kathy Kalogianis, stated at deposition that she owns half of everything he owns. Facts ¶ 5. Mrs. Kalogianis is also listed as a guarantor on the Wells Fargo loan to Liberty Title Agency, Inc., and according to the conditions of the loan included in the application a spouse must be a guarantor only where she is an "owner" of the "business" to whom a loan is made. Facts ¶ 37.

below, the assets belonging to the two corporations are not Mr. Kalogianis's "personal funds" within the meaning of the Commission's regulation.

11 CFR 110.10 unambiguously defines "personal funds" as including "assets which, under applicable state law, at the time he or she became a candidate, the candidate had legal right of access to or control over, and with respect to which the candidate had either: (i) [l]egal and rightful title, or (ii) [a]n equitable interest." 11 C.F.R. 110.10(b) (emphasis added).[14] It is a well established principle of corporate law that a corporation and its shareholders are separate legal entities. Cedric Kushner Promotions, LTD v. King, 533 U.S. 158, 163 (2001) ("The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status."); Am. States Ins. Co. v. Kelley, 446 So.2d 1085, 1086 (Fla. App. 1984) ("The general rule is that corporations are legal entities separate and distinct from the persons comprising them."); Hanish v. Clark, 200 So.2d 601, 604 (Fla. App. 1967) ("They are separate legal entities and in an action at law may not be regarded as one."). While a shareholder owns stock in the corporation, it is the

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In other instances, what Mr. Kalogianis asserted to be a "sole" interest has turned out to be a shared interest with his wife. He claimed in his Answer to be the "sole director" of Kalogianis and Associates, Answer ¶ 10, but corporate documents obtained during discovery reveal that he and Mrs. Kalogianis are both directors. Facts ¶ 18. Contributions that the campaign attributed in its reports solely to Mr. Kalogianis, appear instead to have been made from accounts he held jointly with his wife, using checks signed only by Kathy Kalogianis. See, e.g., FEC01490, FEC03279, FEC03281, FEC01788. Under Commission regulations, contributions received in the form of a check drawn on a joint account are presumptively attributed to the person signing the check. 11 C.F.R. 104.8(c).

[14] This regulation, which was in effect during the whole 2002 election cycle, was later revised by the Commission. The Bipartisan Campaign Reform Act of 2002 ("BCRA") added new provisions to the Federal Election Campaign Act including, for the first time, a statutory definition of the term "personal funds." See generally 2 U.S.C. 431(26) (2006). The "personal funds" definition was added as part of the so-called "Millionaires' Amendment," which regulates contribution limits for the opponents of certain candidates who finance their campaign with large amounts of their personal funds. See generally 2 U.S.C. 441a(i) (2006) (Senate); 441a-1(2006) (House). Following the enactment of BCRA, the Commission promulgated a new definition of "personal funds," codified at 11 C.F.R. 100.33 (2006).

corporation that owns the assets of the corporation. See Fletcher Cyclopedia of the Law of Corporations § 5100 ("It follows as a necessary conclusion from the nature of a share of stock, that, while it represents a proportionate interest or aliquot part in the capital stock, property and assets of the corporations . . ., the owner does not, in any strict legal sense, own any part of the corporate capital and has not the legal title to, and is not the owner, or entitled to the possession of, any portion of its property or assets) (footnotes omitted).[15] Indeed, "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." Cedric Kushner Promotions, 533 U.S. at 163.[16]

Thus, since a shareholder has no legal right of access or control over a corporation's assets, those assets cannot be the "personal funds" of a shareholder under Section 110.10 of the Commission's regulations. In fact, the regulation specifies the particular circumstances in which funds received from a corporation, or deriving from an interest in a corporation, may be treated as "personal funds" of a candidate, none of which is claimed to be applicable here: "[s]alary and other earned income from bona fide employment" and "dividends and proceeds from the sale of the candidate's stocks or other investments," 11 CFR 110.10(b)(2). Thus, if Mr. Kalogianis had sold his stock in the corporations, the proceeds would have been "personal funds," but there is

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[15] See Cruising World, Inc. v. Westermeyer, 351 So.2d 371, 373 (Fla. App. 1977) (citing cases); see also Fla. Stat. § 607.01401(25) ("[S]hares" are the "units into which the property interests in a corporation are divided."); Fla. Stat. § 607.01401(24) ("'[S]hareholder' or 'stockholder' means one who is a holder of record of shares in a corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation.").

[16] As the Florida Supreme Court has recognized, "[t]he corporate entity is an accepted, well used and highly regarded form of organization in the economic life of our state and nation. . . . 'Their purpose is generally to limit liability and serve a business convenience.'" Roberts' Fish Farm v. Spencer, 153 So.2d 718, 721 (Fla. 1963) (quoting State v. Vocelle, 158 Fla. 100, 27 So.2d 728 (Fla. 1946)).

nothing in the regulation indicating that a corporation's assets are to be treated as the personal funds of a stockholder while the stockholder continues to own the stock.

In fact, the Commission has a long history of construing its regulations as treating assets held by corporations owned in whole or part by candidates as corporate assets that cannot be contributed to a campaign under Section 441b(a) rather than as "personal funds" of the candidate that could be contributed without limit. In Advisory Opinion 1990-5, 1990 WL 171434 (FEC), a Congressional candidate asked the Commission whether a newsletter that she intended to publish during her campaign would be considered campaign-related, so that the expenses of publishing the newsletter would be reportable expenditures under the Act. Advisory Opinion 1990-5, 1190 WL 171434 (FEC). Prior to the campaign, the candidate had been publishing the newsletter through a corporation that she owned. After concluding that the newsletter would be considered campaign-related, the Commission advised her that if she continued to publish the newsletter through her corporation, her campaign committee would be required to reimburse the corporation for the publishing expenses within a commercially reasonable time. Otherwise, a prohibited in-kind contribution by her publishing corporation would result.[17]

Similarly, in Advisory Opinion 1995-8, 1995 WL 247472 (FEC), the Commission concluded that a candidate could rent office equipment from his former law office, a professional corporation owned solely by him, so long as he paid the usual and normal rental charge for the

[17] Subsequently, the same candidate sought a second advisory opinion, in which she "state[d] that, in order to avoid corporate contributions by the publishing company, [she] wish[ed] to continue publication of the newsletter as a sole proprietor." Advisory Opinion 1990-9, 1990 WL171434 (FEC). The Commission concluded that, "[a]s a sole proprietor, and not as a corporate entity, [she could] expend [her] personal funds without limit for campaign-related editions of the newsletter." Id.

equipment. Advisory Opinion 1995-8, 1995 WL 247472 (FEC). Payment of less than that amount would result in a prohibited corporate contribution to his campaign committee. Id.[18]

The Commission's construction of the Act is entitled to deference unless demonstrably irrational or clearly contrary to the plain meaning of the statute. FEC v. National Rifle Ass'n of America, 254 F.3d 173, 185 (D.C. Cir. 2001); see also In re Sealed Case, 223 F.3d 775, 779 (D.C. Cir. 2000). Moreover, "[a]n agency's interpretation of its own regulations is 'controlling unless plainly erroneous or inconsistent with the regulation.'" Sierra Club v. Johnson, 436 F.3d 1269, 1274 (11th Cir. 2006) (quoting Auer v. Robbins, 519 U.S. 452, 461 (1997)). The "obligation to defer to an agency's reasonable interpretation of its own regulations is rooted not only in our case law, but also in binding Supreme Court precedent." U.S. Steel Mining Co. v. Director, OWCP, 386 F.3d 977, 985 (11th Cir. 2004). "[T]he Commission is precisely the type of agency to which deference should presumptively be afforded." FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 37 (1981).

The Commission's application of Section 441b to candidate-owned SubchapterS corporations has also been upheld by the courts. FEC v. Woods, No. CV-S-97-551 (D. Nev. 1997), was an enforcement action in which the Commission alleged that a subchapter S

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[18] Contrary to the Defendants' apparent belief, see FEC Facts ¶¶ 63-68, depositing corporate funds into Mr. Kalogianis's personal account so that he then could then lend them to the Kalogianis Committee, or using them to reimburse him for loans he had already made, did not transform the corporate funds into personal funds that could be contributed without limitation. Once an individual becomes a candidate, he or she becomes an agent of his or her authorized committee, and any funds transferred to the candidate in connection with the campaign will be regarded as campaign contributions to the authorized committee. 2 U.S.C. 432(e)(2) (emphasis added); see also 2 U.S.C. 441a(a)(8). "Federal election law treats the candidate and his committees as a single unit for the purpose of accepting contributions. Under 2 U.S.C. 432(e)(2), any candidate who receives a contribution for use in connection with his campaign is considered as having received the contribution as the agent of the authorized committee or committees of the candidate." United States v. Goland, 959 F.2d 1449, 1453 (9th Cir. 1992). Thus, regardless of the route corporate funds took in reaching the Kalogianis Committee, transfers originating from a corporation violate Section 441b.

corporation that was wholly owned by a candidate had violated Section 441b when it transferred money to the campaign. The district court found that the Defendants had violated Section 441b, concluding that the statute's application to "all corporations whatever" was "unambiguous," and imposed a $50,000 civil penalty. FEC Ex. 506.

D. Section 441b Is Constitutional As Applied To Defendants.

The Supreme Court has held that the Act's prohibition of contributions by corporations and unions in Section 441b serves the compelling governmental interest of preserving the integrity of the political process by avoiding corruption and the appearance of corruption. In FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 257 (1986) ("MCFL"), the Court explained that even "[d]irect corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace." Corporate spending raises this threat because "[s]tate law grants corporations special advantages – such as limited [shareholder] liability, perpetual life, and favorable treatment of the accumulation and distribution of assets – that enhance their ability to attract capital." Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 658-659 (1990). "We have repeatedly sustained legislation aimed at the corrosive effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." McConnell v. FEC, 540 U.S. 93, 205 (2003) (internal quotation marks omitted). Section 441b serves this interest by "ensur[ing] that substantial aggregations of wealth by the special advantages which go with the corporate form of organization are not converted into political 'war chests.'" FEC v. National Right To Work Committee, 459 U.S. 197, 207 (1983) ("NRWC").

Congress fashioned the prohibition contained in Section 441b broadly to apply to "any corporation whatever," and the courts have repeatedly held the broad language of this section applicable to any entity that takes the corporate form. In NRWC, the Supreme Court stated that Section 441b could be applied to restrict the political contributions of both for-profit and nonprofit corporations, concluding that Section 441b "reflect[ed] a permissible assessment of the dangers posed by [corporations] to the electoral process." Id. at 209. The Court saw no difficulty in applying Section 441b to "corporations . . . without great resources, as well as those more fortunately situated, [and] accept[ed] Congress's judgment that it is the potential for such influence that demands regulation." Id. at 210. The Court refused to "second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." Id.

Similarly, in Austin, the Supreme Court concluded that the prohibitions in a state statute modeled on Section 441b applied in full to closely held corporations, and held that its application to these corporations did not make the statute overbroad. "Although some closely held corporations, just as publicly held ones, may not have accumulated significant amounts of wealth, they received from the State the special benefits conferred by the corporate structure and present the potential for distorting the political process." Austin, 494 U.S. at 661. The Court concluded that this potential alone "justifies [the state statute's] general applicability to all corporations." Id. (emphasis added). [19]

The Supreme Court has never recognized any exception at all to the prohibition in Section 441b on direct contributions to candidates by all corporations and unions. In MCFL,

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[19] Thus, a corporation's actual "ability to amass great financial resources is irrelevant to Congress's authority to enact broad legislation limiting direct contributions by corporations to political candidates." Kentucky Right to Life v. Terry, 108 F.3d 637, 646 (6th Cir. 1997) (citing NRWC, 459 U.S. at 209-210). "[A] legislature may restrict direct contributions to political candidates from both for-profit and non-profit corporations in order to limit the potential for corruption commensurate with those contributions." Id. (citing MCFL, 479 U.S. at 259-260).

the Court found that Section 441b's prohibition on independent expenditures cannot constitutionally be applied to a small class of incorporated advocacy groups. MCFL, 439 U.S. at 241. More recently, however, in Beaumont v. FEC, 539 U.S. 146, 159 (2003), the Court explicitly refused to extend the MCFL rationale to allow even these groups to make corporate contributions, explaining that "we could not hold for [the non-profit corporation] without recasting our understanding of the risks of harm posed by corporate political contributions, of the expressive significance of contributions, and of the consequent deference owed to legislative judgments on what to do about them." The Eleventh Circuit has also rejected a First Amendment challenge to Section 441b by a closely-held corporation. Athens Lumber Co., Inc. v. FEC, 718 F.2d 363 (1983) (en banc). "Viewing the substantive constitutional issues as being controlled by the Court's unanimous opinion" in NRWC, the court held application of Section 441b constitutional. Id. at 363.

In the face of all this clear precedent, there is no basis for a claim that Section 441b is unconstitutional as applied to the corporate contributions here because "they are incapable of corrupting or giving the appearance of corrupting Constantine Kalogianis." Answer ¶ 5. According to the Defendants, loans from Kalogianis & Associates and Liberty Title Agency, Inc. to the Kalogianis campaign "did not corrupt Kalogianis, and did not give the appearance of corruption of Kalogianis, nor did [they] act as a conduit for contributions by entities described in [Section] 441b(a) that are prohibited from making contributions." Defendants' Response to FEC First Discovery Requests at 22.

However, like the corporations discussed in Austin, Defendants Kalogianis & Associates and Liberty Title Agency, Inc. are commercial, for-profit businesses that benefited from the "special advantages" of limited shareholder liability, perpetual life, and favorable treatment in

the accumulation and expenditure of assets, all provided by the corporate form. See Austin, 494 U.S. at 658-59. The money these corporations loaned to the Kalogianis Committee was accumulated through commercial business enterprises conducted under the special advantages of the corporate form. As a result, they represent just the sort of "traditional corporatio[n] organization for economic gain,' . . . that has been the focus of regulation of corporate political activity." MCFL, 479 U.S. at 259 (quoting FEC v. National Conservative PAC, 470 U.S. 480, 500 (1985)). Like the corporations at issue in Austin, they "present the potential for distorting the political process," which alone is sufficient to justify application of Section 441b. Austin, 494 U.S. at 661.

The Defendants' suggestion that a corporate contribution does not violate Section 441b absent evidence that a candidate was actually corrupted by it, or appeared in some demonstrable way to be corrupted, is inconsistent with the plain language of the statute and contrary to Supreme Court precedent. The Supreme Court has explicitly recognized that Congress designed Section 441b to be a prophylactic provision, stating that "we accept Congress' judgment that it is the potential for such influence that demands regulation" and that the Court would not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." NRWC, 459 U.S. at 210 (emphasis added). Thus, in Buckley v. Valeo, 424 U.S. 1 (1976), the Supreme Court explicitly assumed that most large contributors do not seek improper influence, but nevertheless upheld application of the contribution limits in 2 U.S.C. 441a(a) to all contributors, without any need to show a particularized corrupting effect to establish a violation. Buckley, 424 U.S. at 29-30. See also, e.g., California Medical Ass'n. v. FEC, 453 U.S. 182 (1981) (upholding application of contribution limits to money given to political committee solely for administrative expenses, and not for political use); Goland v. FEC, 959 F.2d 1449, 1453 (9th

Cir. 1992) (upholding application of contribution limits to anonymous donations, despite argument that donor could not gain corrupt influence if candidate lacked knowledge of his identity). The Buckley Court even concluded that "[a]lthough the risk of improper influence is somewhat diminished in the case of large contributions from immediate family members, we cannot say that the danger is sufficiently reduced to bar Congress from subjecting family members to the same limitations as nonfamily contributors." Buckley, 424 U.S. at 53 n.59.

"A prophylactic measure, because its mission is to prevent, typically encompasses more than the core activity prohibited." United States v. O'Hagan, 521 U.S. 642, 672-73 (1997); see also Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 464 (1978) ("objective" of prophylactic measures is "the prevention of harm before it occurs"). Section 441b(a) prohibits all contributions to candidates by "any corporation whatever," and its validity "depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interest in an individual case." United States v. Edge Broad. Co., 509 U.S. 418, 430 (1993) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 801 (1989)). The Supreme Court has repeatedly upheld federal statutes based "on the relation it bears to the overall problem the government seeks to correct," and the government is not required to prove the validity of that relationship in each case in which the statute is violated." Id.

III. DEFENDANTS KALOGIANIS COMMITTEE AND ITS TREASURER VIOLATED 2 U.S.C. 434(b).

In addition to the violations of Section 441b(a), the Kalogianis Committee and Patricia Jones, in her official capacity as treasurer, also violated 2 U.S.C. 434(b) by falsely reporting Mr. Kalogianis as the source of the loans, Facts ¶¶ 77, 105, and by misreporting the date two loan refunds were made. Facts ¶¶ 78, 109. The Act requires political committees to report all

receipts and disbursements, including loans received by the committee and repayments on those loans, on the periodic reports they file with the Commission for disclosure to the public. 2 U.S.C. 434(b)(2)(H), 434(b)(4)(E). These reports must accurately state the amounts and dates of the transactions, including the source of any loan received by the committee. 2 U.S.C. 434(b)(3)(E).

More than thirty years ago, the Supreme Court found the Act's disclosure requirements serve three compelling government interests: providing the electorate with information about candidates, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce the campaign finance laws. Buckley, 424 U.S. at 66-68. In 2003, the Supreme Court reiterated those same compelling interests in upholding new disclosure requirements in the BCRA against First Amendment challenge. McConnell, 540 U.S. at 196. In particular, avoiding full disclosure infringes the "First Amendment interests of individual citizens seeking to make informed choices in the political marketplace." Id., 540 U.S. at 197 (quotations omitted).

As we have already explained, there is no genuine factual dispute about the source of the loans made to the Kalogianis Committee – they came from corporate funds, and that is how the Committee initially reported them. But after the Commission questioned the loans, and advised the Committee that corporate loans are prohibited, the Committee amended its reports to state falsely that the $42,000 and $27,000 loans were from Mr. Kalogianis, instead of the corporations that were the true source of the funds. See Facts ¶¶ 77, 105. Defendants have failed and refused to correct this public record for more than five years now, so that the Committee's reports state to this day that the loans were from Mr. Kalogianis. By amending the Committee's reports to identify Mr. Kalogianis as the sole source of the two loans, when in fact those loans were from

corporations, the Kalogianis Committee and Patricia Jones, in her official capacity as treasurer, violated 2 U.S.C. 434(b), and continue to violate that provision by refusing to correct those reports.

In addition, as we have already described supra p. 6, n. 5 the Committee delayed reporting the refund of two corporate loans – those to Liberty Title Agency, Inc. for $200 and $500 – and ultimately misstated the repayment date by a year. Facts ¶¶ 78, 109. The Committee did so despite repeated telephone calls to Ms. Jones by Commission staff asking whether the refunds had been made, and letters from the Commission instructing her to report them promptly. See e.g., Facts ¶¶ 62, 74, 80, 97, 104, 111 and 112. Defendants have also failed and refused to correct this report to the present day, despite the enforcement proceedings brought against them, with the result that the public record still states that those loans were repaid in 2002 rather than in 2001. Accordingly, the Kalogianis Committee and Patricia Jones violated 2 U.S.C. 434(b) by reporting, and failing to correct false information regarding the repayment of these loans.

IV. DEFENDANTS' CONDUCT WARRANTS A SUBSTANTIAL CIVIL PENALTY AND INJUNCTIVE RELIEF

A. Defendants' Conduct Warrants Imposition Of A Substantial Civil Penalty.

Although the appropriate civil penalty varies from case to case, the Act provides that the size of the civil penalty that can be awarded depends on the number of violations found by the court and the amount of any contributions or expenditures involved in each violation. Under 2 U.S.C. 437g(a)(6)(B), the Court may impose a civil penalty, for each defendant, up to the greater of (i) $5,500 for each violation or (ii) the amount of any contributions or expenditures involved in each violation. See 2 U.S.C. 437g(a)(6)(B); 11 C.F.R. 111.24(a)(1) (2000). The maximum civil penalty the Act authorizes the Court to assess for all of the violations alleged in this case is almost $300,000. See FEC Exhibit 513.

The purpose of a civil penalty is to punish past, and to deter future, violations. While the assessment of a civil penalty under Section 2 U.S.C. 437g(a)(6)(B) rests within the sound discretion of the district court, FEC v. Furgatch, 869 F.2d 1256, 1258 (9th Cir. 1989), a civil penalty should be fashioned not only to punish the violator, but also to deter the defendant and others who might consider engaging in similar activities in the future. See United States v. ITT Cont'l Baking Corp., 420 U.S. 223, 231-32 (1975). To serve these purposes adequately, a civil penalty must be sufficiently large that potential violators will not regard it as "nothing more than an acceptable cost of violation, rather than as a deterrence to violation." Id. "[T]he efficacy of any regulatory program depends on the sanctions imposed in individual cases. If these sanctions are set too low, potential violators may be insufficiently motivated to minimize the social harm resulting from their behavior, or society may be under compensated for the harm that does occur." United States v. Reader's Digest Ass'n, 662 F.2d 955, 967 n.16 (3d Cir. 1981) (internal quotation omitte; cf. United States v. Kattan-Kassin, 696 F.2d 893, 897 (11th Cir. 1983) ("[T]o have any real deterrent effect, the potential fine must be large enough to have some real economic impact on potential violators"). That is particularly true in the campaign finance area, in which violators are typically anxious to spend money to achieve political goals, and not just to accumulate funds.

Because there are "very few cases discussing the factors which should guide a court's discretion in imposing a civil penalty under [2 U.S.C] 437g(a)(6)(B)," courts have sought guidance from "cases that deal with the imposition of discretionary civil penalties under other federal statutes." Furgatch, 869 F.2d at 1258. In determining the appropriate civil penalty for each defendant for their respective violations, the Court may consider, inter alia: "(1) the good or bad faith of the defendants; (2) the injury to the public; (3) the defendant's ability to pay; and (4)

the necessity of vindicating the authority of the responsible federal agency." Id. (citing United States v. Danube Carpet Mills, 737 F.2d 988, 933 (11th Cir. 1984)) (footnote omitted)). As the Commission demonstrates below, there are no mitigating factors present in this case, and a substantial civil penalty is required to punish these Defendants adequately for their violations and to deter future unlawful conduct by them and others who may be similarly tempted to try to circumvent the Act's restrictions to achieve their political ambitions.

1. Defendants Did Not Act in Good Faith.

The Act does not require any evidence of bad faith beyond the finding of a violation to justify assessment of a penalty within the statutory limit. However, courts have sometimes relied upon evidence that the violations were good faith mistakes as a mitigating factor. There is no such evidence of good faith here. To the contrary, although Constantine Kalogianis is himself a lawyer who knows how to discover legal precedents, the Defendants acted in disregard of the clear language of the Act and the Commission's longstanding application of Section 441b to closely held corporations owned by candidates. When the Commission pointed out the illegal corporate contributions, Defendants tried to cover up those violations, first by recharacterizing the loans falsely as having come from Kalogianis's "personal funds," and later by purporting to "refund" the loans to the corporations, using corporate assets they routed through Mr. Kalogianis's personal accounts to make the refunds. To this day Defendants have refused to correct their disclosure reports and continue to insist they are legally entitled to make and accept corporate loans despite the plain language of the statute and Supreme Court precedent. A civil penalty in the higher reaches of the statutorily authorized amount is warranted to impress upon Defendants, who continue to follow a strategy of denial and subterfuge, and upon others who might pursue such a course, of the seriousness of their violations. See FEC v. National Rifle

Ass'n, 1991 WL 277378, at *2 (D.D.C. 1991) (assessing high civil penalty against defendants who continued to maintain their conduct was lawful, the court hoped that through civil penalty, "the seriousness of the offense will be impressed upon [defendants]").

The Act's prohibition on corporate contributions is a century old and unambiguous. The Commission has repeatedly pointed out to Defendants, both while the campaign was ongoing and throughout the administrative and judicial stages of this enforcement matter, that the Act broadly prohibits "any corporation whatever" from making contributions in connection with a federal election, and that the Commission has consistently construed the provision to apply to candidate-owned corporations, including candidate-owned law firms/professional corporations. See pp. 19-21, supra. The Supreme Court had clearly ruled, decades prior to the contributions in this case, that the ban on corporate contributions applies to corporations that are closely held as well as those owned by a large number of shareholders, Austin, 494 U.S. at 661, and applies both to "corporations . . . without great financial resources, as well as those more fortunately situated," NRWC, 459 U.S. at 210. The Defendants' continuing insistence upon disregarding the plain language of the statute and the wealth of precedent weigh strongly against the conclusion that Defendants acted in good faith, as does their strategy of covering up their violations rather than accepting responsibility.

The collective impact of Defendants' repeated attempt to mislead the public and the Commission further demonstrates their lack of good faith. Defendants caused inaccuracies and omissions in the reports the campaign filed for public disclosure, including incomplete and incorrect information about the sources of the loans, failed to disclose that one of the loans was drawn on commercial lines of credit, and refused to disclose the terms and conditions under which the loans were made. The misreporting of the loans and repayments ensured that the

public was not informed of the true nature of how, and by whom, the Kalogianis campaign was financed. This was especially important because Defendants derived substantial benefit from the initial loans, which served as crucial seed money enabling the Committee to make necessary expenditures to start the campaign.[20] Mr. Kalogianis testified that the large loans and contributions made to his campaign were designed to encourage other contributions and to garner support from his political party. It is particularly egregious that the campaign of a candidate for Congress sets out to mislead the public for his own political strategy while at the same time seeking the public's trust in electing him to office.

Defendants also failed to act in good faith during the administrative and judicial enforcement proceedings. Instead of exhibiting good faith by taking action to remedy their violations after the Commission explained to them that the Act prohibits corporate contributions and that the loans and certain refunds had been misreported, the Defendants caused unnecessary expense to the government and taxpayers and diverted judicial resources from a busy docket, based solely on their untenable assertions that they are entitled to act contrary to the Act's longstanding prohibition on corporate contributions to candidates. Cf. AFL-CIO v. FEC, 628 F.2d 97, 102 (D.C. Cir. 1980) (violation might well have been found knowing and willful, justifying double penalty, if respondent had not acquiesced in Commission's view of law during administrative proceeding and attempted in good faith to correct violation).

2. Injury to the Public

As we have explained, for 100 years the Act's prohibition against corporate contributions to candidates has been one of the central safeguards of the integrity of the federal electoral

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[20] "'Seed money,' is the politician's and political scientist's term for a critical mass of money to be applied at the outset of a campaign to establish a 'viable' candidacy." Buckley v. Valeo, 519 F.2d 821, 855 n. 85 (D.C. Cir. 1975) aff'd in part, rev'd in part, 424 U.S. 1 (1976).

system. The Act's disclosure requirements also serve compelling state interests -- "to aid voters in evaluating those who seek federal office," to "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity," and to provide the "essential means of gathering the data necessary to detect violations of the contribution limitations." Buckley, 424 U.S. at 66-68. Without the assurance that violations of these protections will be met by the courts with large enough penalties to deter even ambitious politicians from doing whatever is expedient to achieve public office, public confidence in the integrity of the election process, and through it the integrity of the government, will be undermined.

The statute does not require the Commission to prove particularized harm to the public, in order to justify a civil penalty within the statutory limit, but rather the Court should presume such harm from the violation of statutory provisions designed by Congress to safeguard the integrity of our election system:

> The importance of the FECA's reporting and disclosure provisions, and the difficulty of proving that violations of them actually deprived the public of information, justify a rule allowing a district court to presume the harm to the public from the magnitude or seriousness of the violation of these provisions.

Furgatch, 869 F.2d at 1259; see also Reader's Digest, 662 F.2d at 969 (court presumed actual deception of public from fact that Reader's Digest distributed materials in violation of consent order). By repeatedly making and accepting prohibited contributions and covering up their attempts to circumvent the statutory requirements by falsely describing the transactions in their public disclosure reports, Defendants committed very serious violations that compromised the integrity of the electoral process, from which harm to the public should be presumed.

3. There Is a Need to Vindicate the Commission's Authority

There is a strong public interest in vindicating the Commission's authority to investigate and effectively remedy civil violations of the Act like those alleged to have been committed by Defendants. Defendants' refusal to cooperate with the Commission's law enforcement investigation and their continuing resistance to complying with the Act based upon insubstantial grounds makes this interest particularly acute in this case. See FEC v. Toledano, 317 F.3d 939, 954 (9th Cir. 2002) (in concluding that defendant "acted in bad faith, vexatiously [and] wantonly," Court found that "given the undisputed facts established during the course of the FEC's administrative proceedings and Toledano's own admissions, it was an unjustifiable waste of the taxpayers' money to force the FEC to bring this action to collect a civil penalty that was unquestionably due") (internal citation omitted).

To this day, the Committee and its treasurer have failed and refused to correct the false information they included in the disclosure reports they filed with the Commission. In addition to failing to file the necessary amendments to correct the public record concerning the sources, terms, and repayment of the various loans at issue, the Committee and its treasurer have not filed any reports at all since June 30, 2003. In spite of their legal obligation to report accurately the Kalogianis Committee's receipts and disbursements, Defendants continue to refuse to provide the public accurate information regarding the campaign's finances and activities. [21]

[21] The violations alleged in this suit are not the only instances of Defendants ignoring their obligations under the Act. The Commission assessed two administrative fines against the Kalogianis Committee and its treasurer, in the amounts of $1,200 and $2,475, for filing the Committee's public disclosure reports late. Those fines remain unpaid. Facts ¶ 119. Responses to RFAs 118-120.

In sum, a civil penalty in this case must be high enough to provide a compelling incentive for Defendants, and future candidates, to avoid such violations in the future despite their political ambitions, and to accept responsibility for their violations of the Act when they are incurred.

B. Injunctive Relief Is Needed To Prevent Future Violations

Finally, in addition to imposing a civil penalty, this Court should impose an injunction prohibiting each of the Defendants from committing similar violations of Sections 441b and 434 in the future. The Act explicitly authorizes the Court to grant a "permanent" injunction upon a showing that Defendants violated the Act. 2 U.S.C. 437g(a)(6)(B). "In an action for permanent injunctive relief, the Commission is not required to make a specific showing of irreparable injury or inadequacy of other remedies, which private litigants must make." CFTC v. Int'l Berkshire Group Holdings, Inc., No. 05-6158, 2006 WL 3716390, at *10 (S.D. Fla. Nov. 3, 2006). Entry of a permanent injunction is warranted by a district court's finding that there is a likelihood of future violations. Id. at 11. This Court may infer likelihood of future violations based on Defendants' past illegal conduct. CFTC v. Sidoti, 178 F.3d 1132 (11th Cir. 1999); SEC v. Carriba Air, Inc., 681 F.2d 1318, 1322 (11th Cir. 1982).

"A defendant's persistence in claiming that (and acting as if) his conduct is blameless is an important factor in deciding whether future violations are sufficiently likely to warrant an injunction." Furgatch, 869 F.2d at 1262. As we have already shown, although the prohibition on the use of corporate contributions is not difficult to discern and the Commission has consistently interpreted the Act as described above, Defendants continue to deny the illegality of their conduct. In addition, Defendants continue to refuse to correct the disclosure reports the Committee filed with the Commission. Mr. Kalogianis testified that he would like to run for public office again in the future, Facts ¶ 214 [CK Depo. Transcript at 167, Line 25] Facts ¶ 215,

he still owns his corporations, and Ms. Jones is still a certified public accountant who might again serve as the treasurer for a political campaign. The Court should therefore conclude that there is a likelihood that these Defendants will violate the Act again in the future, in the same manner as they did before, and enter an injunction prohibiting such prohibited activity.

An injunction would only preclude Defendants from repeating the sort of unlawful conduct found, Reader's Digest, 662 F.2d at 969-70, and thus would not interfere with any of their lawful future activities. "'[I]njunctive processes are a means of effecting general compliance with national policy as expressed by Congress.'" Marshall v. Chala Enters., Inc., 645 F.2d 799, 804 (9th Cir. 1981) (quoting Mitchell v. Pidcock, 299 F.2d 281, 287 (5th Cir. 1962)). "The injunction 'subjects the defendants to no penalty, to no hardship. It requires the [d]efendants to do what the Act requires anyway – to comply with the law.'" Id. Accordingly, the public is entitled to the assurance that an injunction would provide against Defendants again violating Section 441b or the Act's reporting requirements.

CONCLUSION

For all the reasons stated above, this Court should grant the Commission's motion for summary judgment.

Respectfully submitted,

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February 28, 2007

Certificate of Service

I hereby certify that on February 28, 2007, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following: Stephen E. Hershkowitz and Charles H. Lichtman, counsel for Defendants.

I further certify that, pursuant to an agreement with Defendant's counsel, I emailed the foregoing document to non-CM/ECF participant Neil Reiff.

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