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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. PIERCE O'DONNELL, Defendant.	NO. CR 08-872-SJO GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS INDICTMENT HEARING DATE: 5-4-09

Plaintiff United States of America, by and through its counsel of record, the United States Attorney's Office for the Central District of California, hereby submits its brief in opposition to defendant's motion to dismiss indictment ("Defendant's Motion").

I.

INTRODUCTION

The indictment in this case sets forth three simple, sufficiently alleged crimes, all of which arose from defendant's evasion of federal contribution limits by using employees and other associates to make contributions which defendant promised

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to finance through either an advance or reimbursement of the contributions. Defendant's acts, which the indictment charges were done knowingly and willfully, constitute a violation of 18 U.S.C. § 371 and 2 U.S.C. § 441f (Counts One and Two, respectively) and 18 U.S.C. § 1001 (Count Three). As shown below, § 441f, despite defendant's arguments, is unambiguous, constitutional, and applicable to defendant's conduct. In addition, Count Three, despite defendant's arguments, sufficiently alleges all the elements of the crime of false statement. Accordingly, defendant's motion lacks any legal merit.

II.

COUNTS ONE AND TWO SUFFICIENTLY ALLEGE VIOLATIONS OF 2 U.S.C. § 441f AND 18 U.S.C. § 371

Section 441f[1] expressly states, in relevant part, "No person shall make a contribution in the name of another person...." 2 U.S.C. § 441f.[2] Count One charges defendant with conspiring to violate that section. It specifically alleges that defendant solicited individuals to make contributions to a federal candidate, and that he informed such prospective contributors that "he would reimburse their contributions" (hereafter referred

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[1] Section 441f is one of the provisions enacted by Congress in 1971 as part of the Federal Election Campaign Act ("FECA").

[2] Section 441f, in its entirety, provides as follows: "No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person."

to as "conduit contributions"). See Indictment, 4:15-16.

Count Two charges defendant with a substantive violation of § 441f. It specifically alleges that defendant "advanced" and "reimbursed" more than $10,000 to various individuals who made contributions to a political committee supporting the election of a candidate for federal office.

Defendant asserts that § 441f can only apply to a defendant who makes a contribution and provides a false name in doing so. Defendant's Motion, 4:21-22. While such conduct would obviously constitute a violation of § 441f, defendant's interpretation is too narrow, and is inconsistent with both the language of § 441f and with appellate opinions that have recognized that § 441f prohibits conduit contributions.

A. COURTS, INCLUDING THE NINTH CIRCUIT, HAVE RECOGNIZED THAT § 441f PROHIBITS CONDUIT CONTRIBUTIONS.

In United States v. Goland, 903 F.2d 1247, 1251 (9th Cir. 1990), the Ninth Circuit described various provisions of the Federal Election Campaign Act of 1971, and the 1974 amendments thereto, including the individual maximum limit on contribution to a candidate and the requirement imposed on a candidate's campaign committee to keep a record of the identity of each person who contributes more than $50. 903 F.2d at 1251. The court also described § 441f's prohibition against conduit contributions as well as its purpose. The court stated,

> The Act prohibits the use of "conduits" to circumvent these restrictions: 'No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a

> contribution made by one person in the name of another person."

903 F.2d at 1251.

The court's statement recognizes that § 441f prohibits an evasion of the individual contribution limits and reporting requirements in FECA by using conduit contributors to make contributions. See Mariani v. United States, 212 F.3d 761, 775 (3rd Cir. 2000)(In upholding the district court's rejection of a constitutional challenge to § 441f, the court noted § 441f's "[p]roscription of conduit contributions"), United States v. Sun-Diamond Growers of California, 138 F.3d 961, 969 (D.C. Cir. 1998)(in reciting factual background in which individual proposed a way to get around campaign finance restrictions by reimbursing employees' campaign contributions, the court, citing 2 U.S.C. § 441f, stated that " no one may make a campaign contribution in the name of another person....").

As demonstrated above, the Ninth Circuit and Third Circuits and the D.C. Circuit have recognized that § 441f prohibits making contributions through conduits. Defendant's interpretation of § 441f is overly narrow and in sharp contrast to the obvious scope of § 441f.[3]

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[3] Defendant indicates that there was no mention of "conduits" in the legislative history for § 441f. However, in 2002, Congress passed the Bi-Partisan Campaign Reform Act ("BICRA") which contained several amendments to the FECA. Among those provisions was an increased criminal penalty for violation of § 441f. In House Report No. 107-131(I) July 10, 2001, § 316 of the proposed legislation is entitled, Increase in penalties imposed for violations of conduit contribution ban."

B. THE LANGUAGE OF § 441f, ALONG WITH THE STATUTORY DEFINITION OF "CONTRIBUTION" (2 U.S.C. § 431(8)) CLEARLY SHOWS THAT § 441f PROHIBITS CONDUIT CONTRIBUTIONS.

Section 441 expressly prohibits making a contribution in the name of another person. The definition of "contribution," as used in § 441f, is set forth in 2 U.S.C. § 431(8). That section provides a contribution "includes (i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(Emphasis added). By providing an advance or reimbursement, defendant clearly provided a thing of value, i.e., money. Moreover, when defendant channeled that money through a conduit contributor, defendant essentially made a contribution in the name of another person. Accordingly, defendant cannot reasonably claim that § 441f does not apply to conduit contributions.

III.

DEFENDANT'S ANALYSIS OF 2 U.S.C. §§ 431(8) AND 441a(a)(1)(8)DOES NOT SHOW THAT § 441f ALLOWS FOR REIMBURSEMENT OF CONDUIT CONTRIBUTIONS

For purposes of § 441f, the definition of "contribution," (2 U.S.C. § 431(8)) "includes ... any gift, subscription, loan, advance, or deposit of money or anything of value...." (emphasis added).

Section 441a(a) sets forth the maximum limits on contributions to a candidate or political committee. Within that section, Subsection 441a(a)(1)(8) specifically states that all

contributions made, "either directly or indirectly, ..., including contributions ... directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate." Moreover, Subsection 441a(a)(1)(8) also requires a conduit to report the original source of a contribution to the FEC and to the intended recipient.

Defendant argues that because Subsection 441a(a)(1)(8), which contains the term "conduit," applies only to § 441a, and because § 431(8)(the statutory definition of contribution) does not specifically refer to a conduit or indirect contribution, § 441f cannot prohibit conduit contributions. Otherwise, defendant argues, inclusion of conduit contributions within the statutory definition of § 431(8) would render the "conduit" language in § 441a(a)(1)(8) superfluous. Defendant's Motion, 14:8-16:5.

Defendant's reasoning defies logic and the clear import of these statutes. To begin with, § 431(8) states that contribution "includes" a gift, subscription, and various other items. It does not purport to set forth a complete list of those items constituting a contribution. Rather, § 431(8) sets forth a very broad definition of contribution which includes "anything of value." 2 U.S.C. § 431(8). Given such a broad definition of "contribution," one can easily see that money given to a conduit as an advance or reimbursement is something of value, and, therefore, within the definition of a "contribution."

With respect to Subsection 441a(a)(1)(8), the fact that this Subsection specifically refers to contributions "directed through an intermediary or conduit" does not, in any way, contradict the definition of contribution set forth in § 431(8). Rather than define the term "contribution," Subsection 441a(1)(8) makes clear how all contributions made by a person are counted toward that person's individual maximum limit, and further requires that a conduit report the original source of money used for a contribution. 2 U.S.C. 441a(1)(8).

Consequently, it is clear that these two statutes serve different purposes. Section 431(8)'s definition of "contribution" is broadly drafted to include "anything of value" given for the purpose of influencing an election. That definition would certainly include reimbursements provided by defendant to a conduit in order to influence an election.

Section 4411a(a)(1)(8), on the other hand, pertains to the reporting of contributions by including any types of contributions made by an individual, including conduit contributions, in calculating whether an individual has met his maximum contribution limit. Given the different purposes served by these statutes, defendant cannot seriously argue that the absence of the term "conduit" or the phrase "indirectly or directly" in § 431(8)'s definition of contribution somehow prevents § 441f from applying to conduit contributions.

A. THE FEDERAL ELECTION COMMISSION HAS INTERPRETED § 441f AS PROHIBITING THE REIMBURSEMENT OF CONDUIT CONTRIBUTIONS.

It should be noted that the FEC, which provides civil enforcement of the provisions of FECA, has provided advisory opinions which confirm that § 441f applies to conduit contributions, including the reimbursement of such contributions. See AO 1996-33, 1996 WL 549698 (F.E.C.)("[T]he Act and Commission regulations prohibit the making and knowing acceptance of contributions in the name of another, and also prohibit the use of one's name to effect such a contribution. 2 U.S.C. § 41f; 11 CFR 110.4(b). This includes the reimbursement or other payment of funds by one person to another for the purpose of making a contribution.")

The FEC has also issued a regulation which provides examples of prohibited conduit contribution acts. 11 C.F.R. § 110.4(b)(2)(i)(for example, "giving money or anything of value, all or part of which was provided to the contributor by another person (the true contributor) without disclosing the source of money or the thing of value to the recipient candidate or committee at the time the contribution is made"). See Ward v. Rock Against Racism, 491 U.S. 781, 795-796, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), quoting Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 n.5 , 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)("Administrative interpretation and implementation of a regulation are ... highly relevant to our [vagueness] analysis , for '[i]n evaluating a facial challenge to a state law, a federal court must ... consider any limiting

construction that a state court or *enforcement agency* has proffered.'")(emphasis in original).

IV.

NEITHER THE RULE OF LENITY NOR THE FIRST AMENDMENT PROVIDE DEFENDANT WITH ANY BASIS TO ARGUE THAT THE INDICTMENT SHOULD BE DISMISSED

A. THE RULE OF LENITY DOES NOT APPLY IN THIS CASE.

Defendant vigorously argues that, under the rule of lenity, § 441f should be interpreted as proposed by defendant - that § 441f does not prohibit one from reimbursing conduit contributions. Defendant, however, fails to realize that the rule of lenity does not apply in this case.

Courts use the rule of lenity only as a last resort. In United States v. Devorkin, 159 F.3d 465, 469 (9th Cir. 1998), the court acknowledged that the rule of lenity requires a court to adopt the interpretation of an ambiguous statute that is most favorable to the criminal defendant. However, the court also made clear as to when the rule of lenity may apply.

> However, the rule [of lenity] can be invoked only when a statute remains ambiguous 'after consulting traditional canons of statutory construction.' United States v. Shabani, 513 U.S. 10, 17, 115 S.Ct. 382, 130 L.Ed.2d 225 (1994). In fact, the Supreme Court has found the rule to be inapplicable 'unless there is a grievous ambiguity or uncertainty in the language and structure of the Act, such that even after a court has seized every thing from which aid can be derived, it is still left with an ambiguous statute.'" Chapman v. United States, 500 U.S. 453, 463, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991).

159 F.3d at 469. The court in Devorkin also made clear that simply proposing an alternative interpretation, even one that is

plausible, does not mean that the rule of lenity is applicable.

> Moreover, it is insufficient for ... [the defendant] to put forth an alternative interpretation, because '[t]he mere possibility of articulating a narrower construction ... does not by itself make the rule of lenity applicable.' Smith v. United States, 508 U.S. 223, 239, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993). Instead the rule applies 'for those situations in which a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute. [citations omitted].

159 F.3d at 469. See United States v. Carr, 513 F.3d 1164 (9th Cir. 2007)("Lenity ...may not be used ... to 'dictate an implausible interpretation of a statute' or 'one at odds with the generally accepted contemporary meaning of a term [citation omitted.'")

As pointed out above, courts have had no apparent difficulty in appreciating that § 441f applies to conduit contributions. See II A, supra. Section 441f does not contain any sort of "grievous" ambiguity or uncertainty. Accordingly, the rule of lenity does not apply in this case.

B. ASSUMING ARGUENDO, THAT THE RULE OF LENITY APPLIES, DEFENDANT'S INTERPRETATION OF THE STATUTE IS NOT PLAUSIBLE.

Defendant argues that § 441f only applies when a person makes a contribution and provides a false name. While § 441f certainly prohibits such conduct, one cannot reasonably say that § 441f cannot apply to one who makes conduit contributions by reimbursing the conduit contributors.

The language of § 441f expressly prohibits the making of a contribution in the name of another person. Funneling money to another person (through either an advance or reimbursement) in

order for that person to make a contribution is basically a contribution in the name of another person. Defendant's narrow interpretation of § 441f contradicts the broad language of the statute itself. Accordingly, defendant's interpretation of § 441f is not plausible.

C. SECTION 441f GIVES FAIR NOTICE THAT IT PROHIBITS REIMBURSEMENT OF CONDUIT CONTRIBUTIONS.

The Supreme Court has made clear that due process requires that a statute is void for vagueness if the conduct it prohibits is not clearly defined. Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). In Grayned, the Court stated,

> [B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.

408 U.S. at 108. See Humanitarian Law Project v. Reno, 205 F.3d 1130, 1137 (9th Cir. 2000)(when a criminal law implicates First Amendment concerns, law must be sufficiently clear so as to allow persons of ordinary intelligence a reasonable opportunity to know what is prohibited.)

1. The Opinions Cited By Defendant As Examples of Lack Of Fair Notice Should Not Apply To This Case.

Defendant argues that § 441f fails to provide fair notice because it prohibits reimbursements of conduit contributions. Defendant's Motion, 21:7-8. Defendant cites to opinions, however, which pertain to statutes and factual scenarios that are easily distinguishable from the facts here. For example, in

General Electric Company v. United States Environmental Protection Agency, 53 F.3d 1324 (D.C. Cir. 1995), General Electric Company ("GE") had appealed the Environmental Protection Agency's ("EPA") finding of a civil violation of its disposal regulations and its imposition of a fine.[4]

The EPA found that GE had violated the EPA's disposal regulations and imposed a fine. Both GE and the EPA agreed that the regulations required that a particular solvent be incinerated. Their disagreement focused on whether the EPA's regulations allowed GE to engage in its distillation and recycling process before incinerating the solvent. On appeal, the court found that while the EPA's interpretation of the regulations was plausible, the court also found that GE was never on notice of the EPA's interpretation for which GE was fined for violating. 53 F.3d at 1327-28. The factual scenario and the complex regulations at issue in General Electric, are so distinguishable from the simple facts and statute at issue here

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[4] The EPA enforced a technically complex set of regulations which applied to the disposal of "dielectric fluid" - a material that contained high concentrations of polychlorinated biphyenyls ("PCBs") - which GE had used in electric transformers that were being decommissioned. 53 F.3d at 361.

These regulations generally required that the decommissioned transformer be soaked in PCB solvent prior to being placed in a chemical waste landfill, and that the PCB solvent be incinerated at an approved facility. Id. at 1326. The controversy arose after GE, in order to recycle freon from the PCB solvent, initiated a procedure whereby it would first distill the freon from the solvent and then incinerate the remaining solvent.

that the opinion cannot provide any useful guidance.[5]

2. The Specific Intent Element Contained In A Criminal Violation of § 441f Militates Against A Fair Notice Claim.

In United Sates v. Bohonus, 628 F.2d 1167 (9th Cir. 1980), the Ninth Circuit recognized that

> [T]he Supreme Court has 'long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea. Colautti v. Franklin, 439 U.S. 379, 395, 99 S.Ct. 675, 685, 58 L.Ed.2d 596 (1979)(citations omitted). A specific intent requirement does not necessarily validate a criminal statute against all vagueness challenges. It does, however, eliminate the objection that the statute punishes the accused for an offense of which he was unaware.

628 F.2d at 1174.

In Bonhonus, the indictment, which charged the defendant with mail fraud (18 U.S.C. § 1341), was dismissed by the district court on the ground that § 1341, as applied to the defendant, was unconstitutionally vague. 628 F.2d at 1169. On appeal, the appellate court noted that mail fraud is a specific intent crime, that this specific intent was alleged in the indictment, and that the court had to assume the veracity of the allegations contained

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[5] Similarly, in United States v. Whiteside, 285 F.3d 1345 (11th Cir. 2002), another opinion cite by defendant, the appellate court reversed convictions for false statement because the defendants' interpretation of Medicare regulations pertaining to the reporting of debt interest expenses was not unreasonable. The court found that "under the current law reasonable people could differ as to whether the debt interest was, as defendants reported, capital-related. Not surprisingly, the court further found that "'the competing interpretations of the applicable law were far too reasonable to justify these convictions." 285 F.3d at 1353, citing United States v. Mallas, 762 F.2d 361, 363 (4th Cir. 1985).

in the indictment. Id. Consequently, the court had to assume that defendant intended to defraud the alleged victim. Accordingly, the court held, the defendant "cannot maintain that he was unaware of the offense." Id. See Village Of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)(acknowledging that the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.)

In this case, Title 2, United States Code, § 437g(d) provides criminal sanctions for a knowing and wilful violation of § 441f. In this case, defendant is charged with knowingly and wilfully violating § 441f. Therefore, in order for defendant to be criminally liable for violating § 441f, the government must prove, beyond a reasonable doubt, that defendant's violation of the statute was committed voluntarily and intentionally with the purpose of violating a known legal duty.[6] Consequently, as in Bonhonus, defendant cannot maintain that he is charged with an offense for which he did not have fair notice.

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[6] See Comment, Ninth Circuit Model Jury Instruction 5.5 [Willfully]. In United States v. Sehnal, 930 F.2d 1420, 1427 (9th Cir. 1991), a prosecution for making false statements on corporate tax returns, the Ninth Circuit approved the following instruction: "An act is done wilfully if done voluntarily and intentionally with the purpose of violating an known legal duty."

D. APPLYING § 441f TO PROHIBIT DEFENDANT'S REIMBURSEMENT OF CONDUIT CONTRIBUTIONS WOULD NOT VIOLATE DEFENDANT'S FIRST AMENDMENT RIGHTS.

Defendant asserts that his "reimbursing others for contributing to a campaign" is a protected right under the First Amendment. Defendant's Motion, 21:22-22:1. Defendant has not and cannot cite any authority to support that argument.

While the Supreme Court has acknowledged that the First Amendment is implicated when one chooses to make a contribution to a candidate (See Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976)), the government is not aware of any authority which holds that the First Amendment protects the reimbursement of conduit contributions.

The Third Circuit has already addressed a First Amendment challenge to § 441f. In Mariani, 212 F.3d at 775-776, the defendant claimed that § 441f violated the First Amendment because it failed to advance any compelling state interest. Id. The court, relying on the holding and reasoning in Buckley, rejected defendant's claim.

The court noted how the Buckley court explained that the reporting and disclosure requirements in FECA imposed "'only a marginal restriction upon the contributor's ability to engage in free communication.'" The court also noted that in Buckley, the Court had accepted as compelling three purposes behind FECA's disclosure requirement: (1) to provide the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in

evaluating those who seeks federal office, (2) to deter actual or apparent corruption, and (3) to gather the data necessary to detect violations of the contribution limits. Id., citing Buckley, 424 U.S. at 66-68.

The court found that "proscription of conduit contributions (with the concomitant requirement that the true source of contributions be disclosed) would seem to be at the very core of the Court's analysis." 212 F.3d at 775-776. Accordingly, the court, in light of Buckley, rejected the defendant's argument that § 441f failed to advance a compelling state interest.[7]

As shown above, one appellate court has already rejected a constitutional challenge to § 441f. In addition, the specific intent requirement for criminal liability under § 441f significantly weakens, if not eliminates, defendant's claim that the statute fails to provide fair notice. Finally, the language of § 441f itself, along with the individual contribution limits set forth in § 441a, should, at the very least, alert a person of ordinary intelligence that making conduit contributions in order to evade contribution limits is prohibited. Given these facts, defendant's constitutional challenge to § 441f lacks any legal merit.

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[7] The court also rejected defendant's alternative constitutional challenge that § 441f was fatally under-inclusive. Id. at 776.

V.

BECAUSE DEFENDANT'S CONSTITUTIONAL CHALLENGE TO § 441f LACKS ANY LEGAL MERIT, THIS COURT SHOULD NOT CERTIFY DEFENDANT'S CONSTITUTIONAL CHALLENGE FOR APPEAL UNDER 2 U.S.C. § 437h

Title 2, United States Code, § 437h provides that a district court shall immediately certify all questions of constitutionality of any provision of FECA to the United States Court of Appeals for the circuit involved.[8] The Ninth Circuit, however, has made clear that if a district court finds that constitutional challenge is frivolous, the district court is not required to immediately certify such challenge for appeal. See Goland, 903 F.2d at 1256 (holding that the district court was acting within its discretion when it refused to certify the case once it found the constitutional questions to be frivolous.)

In Goland, the court also indicated that where a legal issue has been resolved by the Supreme Court, the district court need not certify the constitutional challenge. Id. at 1258. In this case, based on the language of § 441f, as well as the contribution limits set forth in § 441a, the elements necessary for conviction under § 441f, and the appellate court's rejection

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[8] Section 437h provides in relevant part: "The Commission, ... or any individual ... may institute such actions in the appropriate district court of the United States, ..., as may be appropriate to construe the constitutionality of any provision of this Act. The district court shall immediately certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter siting en banc."

of the constitutional challenge made by the defendant in Mariani, this Court should find that defendant's constitutional challenge does not warrant an immediate certification to the appellate court.

VI.

COUNT THREE OF THE INDICTMENT SUFFICIENTLY ALLEGES A VIOLATION OF 18 U.S.C. § 1001

A. COUNT THREE ALLEGES THE ESSENTIAL ELEMENTS OF A § 1001 VIOLATION.

Count Three charges defendant with causing the treasurer of EFP to make false statements to the Federal Election Commission ("FEC"). Specifically, it alleges that defendant caused the treasurer of EFP to state that certain individuals had each made a $2,000 contribution to the EFP campaign, when, in fact, as defendant well knew, defendant had made those contributions by providing his money to those individuals to make those contributions. See Indictment, 8:6-15.

Defendant first argues that Count Three "fails to identify the mens rea required to convict a person for causing a false statement in the context of FEC reporting." Defendant's Motion, 9:11-12. Defendant, however, fails to cite any authority to show that Count Three does not sufficiently plead the required mens rea. For example, defendant's reliance on the Third Circuit's opinion in United States v. Curran, 20 F.3d 560, 5701-71 (3rd Cir. 1994), is misplaced. In that opinion, the court set forth various elements that the government was obligated to prove in order to establish a violation of 18 U.S.C. § 1001. The court

did not address whether the indictment itself sufficiently alleged that offense.[9]

Defendant's reliance on the Ninth Circuit's opinion in United States v. Du Bo, 186 F.3d 1177 (9th Cir. 1999) is also misplaced. In Du Bo, the court reversed a conviction under the Hobbs Act because the indictment did not allege that defendant had acted knowingly and wilfully. 186 F.3d at 1179. Consequently, the indictment on its face was fatally deficient. Id.

In this case, however, Count Three specifically alleges that defendant "knowingly and wilfully" caused the treasurer of a political committee, EFP, to make a false statement. In addition, to the extent that this Court determines that certain elements must be proven in order to show that defendant acted knowingly and wilfully, those particular burdens of proof can be set forth in the Court's instructions to the jury. Nevertheless, because the indictment specifically alleges that defendant acted knowingly and wilfully, defendant cannot complain that Count Three fails to allege the requisite mens rea.

B. DEFENDANT CANNOT INSULATE HIMSELF FROM CRIMINAL LIABILITY ON THE GROUNDS THAT THE EFP'S STATEMENT TO THE FEC WAS LITERALLY TRUE.

Defendant also argues that even if Count Three adequately alleges the essential elements of a § 1001 violation, defendant

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[9] It should also be noted that the opinion in Curran is in conflict with the D.C. Circuit court opinion in United States v. Hsia, 176 F.3d 517 (D.C. Cir. 1999). In Hsia, the court set forth less required elements to sustain a conviction under § 1001 in the context of FEC reports.

cannot be criminally liable because the treasurer's statement to the FEC was "indisputably true." Defendant's Motion, 11:11-14.

In Hsia, 176 F.3d at 523-24, the D.C. Circuit addressed this precise issue and squarely rejected the argument that defendant presents here. In Hsia, the defendant had allegedly funneled money from a non-profit corporation through "straw contributors into various campaigns." 176 F.3d at 521. All of these "nominal contributors" were fully reimbursed by the non-profit. Id. Consequently, as the court described, these individuals "thus simply served as conduits for IBPS's [the non-profit's] money." Id. Consequently, defendant was charged with willfully causing the recipients of those conduit contributions to make false statements to the FEC, in violation of 18 U.S.C. §§ 2 and 1001.

Upon motion by the defendant, the district court dismissed the false statements counts. In reversing the district court's dismissal, the appellate court rejected the district court's suggestion that the allegedly false statements were "literally true." 176 F.3d at 525.

The appellate court referred to the FECA's requirement that political committees file periodic reports containing the identification of any person contributing more than $200 within a calendar year, 176 F.3d at 523, citing 2 U.S.C. § 434(b)(3). The court also examined § 441f and the reporting requirement addressed to a conduit set forth in 2 U.S.C. § 431(8)(A)(i).[10]

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[10] That section provides: For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular

That section specifically required a conduit to report the original source of a contribution to the FEC. 176 F.3d at 523-24, citing 2 U.S.C. § 431(8)(A)(i).

After examining these provisions, the court stated,

> We are convinced by these latter provisions that § 431(b)(3)'s demand for identification of the "person ... who makes a contribution" is *not* a demand for a report on the person in whose name money is given; it refers to the true source of the money. As the committees here did not report the true sources, their statements would appear to be false.

176 F.3d at 524 (emphasis in original).

Consequently, the appellate court rejected "all arguments that the statements alleged in the indictment were "literally true." Id. at 525. See United States v. Kanchanalak, 192 F.3d 1037, 1042 (D.C. Cir. 1999)(following Hsia, court reversed district court's dismissal of false statement counts and stated, "By thus causing political committees to report conduits instead of the true sources of donations, defendants have caused false statements to be made to a government agency.")

Despite the opinions in Hsia and Kanchanalak, defendant relies on opinions that addressed distinguishable factual scenarios. For example, in United States v. Camper, 384 F.3d 1073, 1076 (9th Cir. 2004), the court upheld defendant's conviction for false statement for failing to disclose on an

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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. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

airport security badge application that he had previously been convicted of unlawful possession of a weapon.[11]

In United States v. Mayberry, 913 F.2d 719 (9th Cir. 1990), another opinion cited by defendant, the court addressed whether there was sufficient evidence to uphold each of several convictions for false statements made in connection with the purchases of homes by defendant's clients that were made with federally insured funds. Unlike the opinions in Hsia and Kanchanalak, the opinions cited by defendant do not address the issue addressed herein, namely, the criminal liability of defendant for knowingly and wilfully causing a political committee, EFP, to make a false statement to the FEC. Under those authorities, defendant cannot insulate himself from criminal liability for causing a false statement to the FEC.

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[11] Defendant's citation to Camper for the proposition that "indisputable truth" is an affirmative defense to charges of making a false statement under § 1001 is misplaced. In Camper, the Ninth Circuit made clear that the Supreme Court's ruling in Bronston v. United States, 409 U.S. 352, 93 S.Ct. 595, 34 L.Ed.2d 568 (1973) is "limited to cases in which the statement is indisputably true, though misleading, because it was unresponsive to the question asked." 384 F.3d at 1076. In Bronstein, the defendant, when asked whether he had any Swiss bank accounts, answered, "The company had an account there for about six months, in Zurich." 409 U.S. at 354. The defendant neglected to mention that he also had once had a personal Swiss bank account. Id. In this case, the false statement made by EFP to the FEC was not only misleading but also responsive in that it purported to identify the contributors to the EFP campaign.

VII.

CONCLUSION

For the reasons set forth above, defendant's motion to dismiss the indictment should be denied.

Respectfully Submitted,

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