FEDERAL ELECTION COMMISSION
1050 FIRST STREET, N.E.
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Mark Takai for Congress and Dylan Beesley in his official capacity as treasurer	)	MUR 7310
	)	
Dylan Beesley	)	
Lanakila Strategies, LLC	)	

STATEMENT OF REASONS OF CHAIRMAN ALLEN J. DICKERSON AND COMMISSIONERS SEAN J. COOKSEY AND JAMES E. "TREY" TRAINOR, III

This matter arose from a Complaint alleging that Mark Takai for Congress and Dylan Beesley in his official capacity as treasurer ("the Committee"), and Beesley and his consulting firm Lanakila Strategies, LLC ("Lanakila") converted campaign funds to personal use in violation of the Federal Election Campaign Act of 1971("FECA" or "the Act").

On June 4, 2019, the Commission found reason to believe that Respondents violated 52 U.S.C. § 30114(b) when Lanakila continued to receive payments for consulting services after Takai's withdrawal from the 2016 congressional election and subsequent death, and the Office of General Counsel ("OGC") opened an investigation. After its investigation, OGC recommended that the Commission find probable cause to believe that Respondents converted campaign funds to personal use. OGC concluded that, although Lanakila provided *bona fide* services to the Committee under flat-rate contracts between February 2016 and April 2018, the negotiated fee for those services was too high from March 2017 until December 2017.

The Commission has not, however, promulgated any rules governing permissible use of campaign funds to wind down a campaign after a candidate withdraws from a race or dies (despite receiving a rulemaking petition that presented an opportunity to do so). Moreover, the Commission has neither the authority nor the expertise to second-guess the terms of the arm's-length contract for *bona fide* services that Respondents negotiated. Accordingly, we declined to find probable cause to believe that the Committee and Lanakila violated 52 U.S.C. § 30114(b) by converting campaign funds to personal use.

I. FACTUAL BACKGROUND

Congressman Mark Takai represented Hawai'i's First Congressional District beginning in 2014 and indicated that he would seek re-election in 2016.[1] In February 2016, the Committee and Lanakila entered into a contract for Lanakila to provide political consulting services to the Committee in exchange for monthly installment payments of $4,000 (upon signing the contract in February, and in March and April of 2016) and $5,500 (in May and June of 2016).[2] By its terms, the contract terminated on June 30, 2016.[3]

In May 2016, Congressman Takai announced that he would not seek re-election due to serious illness, and on June 2, 2016, he filed paperwork with the Commission indicating that he was no longer a candidate.[4] In June 2016, Lanakila and the Committee amended their contract to make Lanakila responsible for the Committee's wind-down, maintain the existing monthly payment for services of $5,500 indefinitely, and extend the contract term until terminated by either party.[5]

Lanakila began work on the Committee's wind-down that month. These services—which Beesley provided—involved various tasks over the course of months, including terminating or renegotiating vendor and lease agreements, refunding contributions, communicating with contributors, managing Congressman Takai's leadership PAC until its termination, managing the disposition of the Committee's assets, completing tax documents, corresponding on the Committee's behalf, paying bills, and maintaining records.[6] In September 2016, at the request of Congressman Takai's

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1 *See* 1st Gen'l Counsel's Rep't at 2-3.

2 Joint Production at 00018-24; *see also* 1st Gen'l Counsel's Rep't at 3.

3 Joint Production at 00018-24.

4 1st Gen'l Counsel's Rep't at 3 & n.12.

5 Joint Production at 00026-28; *see also* 1st Gen'l Counsel's Rep't at 3-4.

6 For a few examples, *see, e.g.*, Joint Production at 00570-72, 00590-93 (June 2016 wind-down updates to Congressman & Mrs. Takai); 02400 (November 2016 emails re: Form 1099s); 02403 (November 2016 letter re: contribution refund); 03878 (September 2016 letter to another campaign re: in-kind donation); 02411 (November & December 2016 emails re: leadership PAC); 02422-25 (emails with vendors re: pricing and payment); 03335 (April 2017 emails re: compliance); 03337 (April 2017 emails regarding "Q1 FEC report"); 03354-55 (April 2017 emails with Sami Takai re: vendor invoice); 03402-04 (January 2018 letters re: refunds); 03407-09 (April 2018 letters re: refunds).

widow, Sami, Beesley also agreed to take on the role of Committee treasurer with no increase in the monthly compensation he received via Lanakila.[7]

The record indicates that Lanakila and Beesley attentively performed these wind-down and Committee treasurer services, promptly advised Congressman and Mrs. Takai of developments, and encouraged Mrs. Takai to dispose of Committee assets and terminate the Committee after her husband's passing.[8] The Committee continued to pay Lanakila the contracted-for monthly payments through January 2018, and the monthly fee was renegotiated to $750 for February, March, and April 2018, when Respondents apparently terminated their contract.[9] In a March 18, 2018 email, Beesley indicated a preference "not to take anything" for Lanakila's services at that point, but stated that the "FEC says the campaign has to pay me at fair market value."[10]

II. LEGAL FRAMEWORK

The Act prohibits conversion of candidate contributions to personal use.[11] The rule is permissive: funds in a campaign account may be used for "any [] lawful purpose, unless such use is personal use."[12] The Act and Commission regulations identify certain expenses as *per se* personal use,[13] and require the Commission to "determine, on a case-by-case basis, whether other uses of funds in a campaign account fulfill a commitment, obligation or expense that would exist irrespective of the candidate's campaign or duties as a Federal officeholder, and therefore are personal use."[14] It is the Commission's "long-standing opinion that candidates have wide discretion over the use of campaign funds. If the candidate can reasonably show that the expenses

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7 *See* Committee Resp. at 2 & n.11 (citing Mark Takai for Congress, Amended Statement of Organization, https://docquery.fec.gov/pdf/784/201609089030751784/201609089030751784.pdf).

8 *See generally* Joint Production; *see also supra* n.6.

9 *See* Joint Production at 004105-07; 004085-89; 03440 (Feb. & Mar. 2018); 03781 (Apr. 2018).

10 Joint Production at 004085; 40106.

11 52 U.S.C. § 30114(b).

12 11 C.F.R. § 113.2(e); *see also* 52 U.S.C. § 30114(a)(6).

13 52 U.S.C. § 30114(b)(2); 11 C.F.R § 113.1(g)(1)(i).

14 11 C.F.R § 113.1(g)(1)(ii); *see also* 52 U.S.C. § 30114(b)(2) ("a contribution or donation shall be considered to be converted to personal use if the contribution or amount is used to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office, including . . . .") (listing examples).

at issue resulted from campaign or officeholder activities, the Commission will not consider the use to be personal use."[15]

Neither the Act nor our regulations place conditions on the reasonableness of a political consulting fee, except that an in-kind contribution can result when providing services for less than the usual and normal charge.[16] And, though Commission regulations specify that campaign funds may be used for "winding down the office of a former Federal officeholder for a period of 6 months after he or she leaves office," they place no similar presumptive timeframe on the use of campaign funds to wind down a campaign.[17] Because the Act and regulations are silent as to use of campaign funds for winding down a campaign, the default rule applies: funds in a campaign account may be used for "any [] lawful purpose, unless such use is personal use"[18] – meaning, on these facts, that the funds are used to "fulfill a commitment, obligation or expense that would exist irrespective of the candidate's campaign."[19]

Commission enforcement practice confirms that, in assessing whether campaign funds have been converted to personal use, we look to whether there was a *bona fide*, commercially reasonable relationship. For instance, MUR 6275 considered an allegation that a former Congressman violated 52 U.S.C. § 30114(b) by paying a former chief of staff $40,000 for campaign-management services.[20] In dismissing the allegation, the Commission noted that "Committees and candidates have latitude to retain services and compensate staff within commercially reasonable bounds," and stated that the record "suggests that at least some portion of the payment was legitimate compensation for [the chief of staff's] work on the campaign."[21] The

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[15] Expenditures; Reports by Political Committees; Personal Use of Campaign Funds, 60 Fed. Reg. 7,862, 7,867 (Feb. 9, 1995).

[16] 11 C.F.R. §§ 100.52(d), 100.54.

[17] *Id.* § 113.2(a)(2). *See also* Expenditures; Reports by Political Committees; Personal Use of Campaign Funds, 60 Fed. Reg. 7,862, 7,867 ("It should also be noted that, as written, this [six-month] provision acts as a safe harbor. It does not preclude a former officeholder who can demonstrate that he or she has incurred ordinary and necessary winding down expenses more than six months after leaving office from using campaign funds to pay those expenses.").

[18] 11 C.F.R. § 113.2(e); *see also* 52 U.S.C. § 30114(a)(6).

[19] 11 C.F.R. § 113.1(g); *see also* 52 U.S.C. § 30114(b)(2).

[20] *See* Factual & Legal Analysis, MUR 6275 (Massa for Congress).

[21] *Id.* at 3. There was also ongoing litigation regarding the value of the services. *Id.*

Commission has reached similar results in cases involving potential *per se* personal use, which is not at issue here.[22]

III. ANALYSIS

Because payments to political consulting vendors are not *per se* personal use,[23] the question is whether the Committee's payments to Lanakila "would exist irrespective of the candidate's campaign."[24] The answer is "no." Plainly, the contract between the Committee and Lanakila would not exist, and Beesley and Lanakila would not have provided the services at issue, absent Congressman Takai's 2016 candidacy for Congress. Nevertheless, based on its conclusion that the work required to fulfill the contract lessened after March 15, 2017, OGC proposed finding probable cause to believe that the Committee's payments to Lanakila after that date "were partially converted to personal use."[25] We reject this enforcement theory for several reasons.

First, this theory is not well supported by the Act. As already noted, there is no dispute as to the propriety of the contract between the Committee and Lanakila. While OGC focuses heavily on the law governing personal use, it says little of the underlying statutory command that campaign funds may be used for "any [] lawful purpose."[26] That is the permissive baseline against which the personal use prohibition functions. OGC does not persuade us that an entirely lawful contract, agreed to by extant parties, negotiated with knowledge of Congressman Takai's condition, ratified after he had withdrawn from his race for reelection, and drafted for the express purpose of managing the Committee's wind-down, reflects an "obligation…that would exist irrespective of the candidate's election campaign."[27]

Second, OGC's theory would require us to establish—in an enforcement matter—a rule for the use of campaign funds to wind down a campaign, despite the

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[22] *See, e.g.*, Factual & Legal Analysis, MUR 6864 (Ruiz III for Congress, *et al.*) at 2, 5 (finding no reason to believe that funds were converted to personal use where a candidate's wife was allegedly "overpaid for managing a virtually nonexistent campaign," and there was evidence the wife "provided *bona fide* services to the campaign;" noting that "[e]ven a virtually 'nonexistent' campaign would require continued compliance services in advance of termination.").

[23] *See* 52 U.S.C. § 30114(b)(2); 11 C.F.R § 113.1(g).

[24] *Id.*

[25] *See* Gen'l Counsel's Br. at 21 (capitalization altered).

[26] 11 C.F.R. § 113.2(e); *see also* 52 U.S.C. § 30114(a)(6).

[27] 52 U.S.C. § 30114(b)(2); *see also* 11 C.F.R § 113.1(g).

Commission's declination to conduct a rulemaking on that very subject. As Complainant, Respondents, and OGC all note,[28] Commission regulations expressly contemplate the use of campaign funds for "winding down *the office* of a former Federal officeholder,"[29] but are silent as to how campaign funds may be used to wind down the *campaign* of a former candidate (particularly when a candidate withdraws from a race or passes away during their candidacy). The Commission has had an opportunity to do so. In fact, the Commission received a petition for rulemaking that mentioned Congressman Takai's situation in particular.[30] But the Commission has not, thus far, adopted a rule to govern these circumstances. We will not do through enforcement what the Commission has declined to do by rulemaking, not least because we are prohibited from doing so by law.[31]

Third, OGC's enforcement theory would require us to second-guess the reasonableness of prices negotiated at arm's length for *bona fide* services that were indisputably provided. As noted above, we have historically declined to undertake such inquiries[32]—for good reason, as this is a task that the Commission is neither authorized nor qualified to perform. Market participants are better-suited than administrative regulators to value campaign services.

OGC's suggestion that we rewrite a duly negotiated contract illustrates how ill-equipped we are to do that very thing. OGC reasons that because (1) the Committee and Lanakila agreed on a $750 monthly rate for February, March, and April of 2018,[33] and (2) Lanakila's work for the Committee generally became lighter beginning in March 2017, then (3) $750 is an appropriate rate to impose on the parties *post hoc* for

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[28] *See* Compl. ¶ 25; Committee Resp. at 3; Lanakila Resp. at 2; Gen'l Counsel's Br. at 17-18.

[29] 11 C.F.R. § 113.2(a)(2).

[30] *See* Letter from Campaign Legal Center to Federal Election Commission, Re: Petition for Rulemaking to Revise and Amend Regulations Relating to Former Candidate's Personal Use of Campaign Funds at 2, 6 (Feb. 5, 2018), *available at* https://campaignlegal.org/sites/default/files/02-05-18%20CLC%20Former%20Member%20Personal%20Use%20petition.pdf; Rulemaking Petition: Former Candidates' Personal Use, 83 Fed. Reg. 12,283 (Mar. 21, 2018) (providing notice of rulemaking petition asking "the Commission to identify the 'permissible and impermissible uses of campaign funds for an individual who is no longer a candidate or officeholder.'"). The Commission has not promulgated new rules in response to this petition.

[31] *See* 52 U.S.C. § 30111(d)(1), (4) (providing for congressional review when Commission "prescribe[s]" a "rule of law," including by regulation).

[32] *See, e.g., supra* nn. 20-22.

[33] *See* 2nd Gen'l Counsel's Br. at 18.

nine other months of services.[34] Yet, OGC has no quarrel with leaving the $5,5000 negotiated rate in place for the rest of the contract term. We simply have no workable standard for reaching this conclusion. After all, the record is clear that workload varied across the entire contract term. Why would we respect the parties' agreement for one part of that term, but presume to know better and set it aside for another?

OGC's proposal also ignores the fact that monthly fixed-rate contracts, by their very nature, contemplate that work will be heavier in some months and lighter in others, while payment will remain constant. If the parties wanted to contract for services on another basis (hourly, for example), they were free to do so. But they did not, likely reflecting their mutual agreement that a fixed-rate contract eliminated significant risk of dramatic variations in the payment due for any given month. Similarly, the Committee and Lanakila remained at liberty to alter the terms of their contract (which they did) or terminate it altogether at any time. We are unable to second-guess Respondents' decisions in this regard.

Similarly, taking it upon ourselves to re-price lawfully negotiated contracts creates competing hazards of liability for market participants. Political committees (and their vendors and consultants) already must be vigilant to avoid contracting for goods or services at prices that are too low, lest they be subject to Commission enforcement for an impermissible contribution. (In fact, there is indication that this consideration guided Beesley's conduct here.)[35] OGC's enforcement theory would thus create a trap whereby market participants could justly fear hyper-policing of whether they are paying either too much *or* too little for services. We are campaign finance regulators, not market economists, and we frankly lack the ability to measure with such granularity. Moreover, enforcement on this novel theory would muddy the legal waters, unsettle expectations, and sow confusion among campaign participants seeking, in good faith, to exercise their constitutional right to engage with the electorate.

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[34] Gen'l Counsel's Br. at 23-27; Gen'l Counsel's Mem. to Comm'n Re: Proposed Probable Cause Conciliation Agreement at 2 (May 16, 2022).

[35] *Supra* n.10 and accompanying text.

IV. CONCLUSION

The Commission has consistently declined to second-guess what candidates and campaigns decide to pay their vendors and consultants—especially in the context of arm's-length contracts for *bona fide* services. Absent a relevant regulation, our inquiry in this context is limited to whether there is a commercially reasonable relationship between the parties. We are satisfied of that here. Moreover, to proceed with enforcement on these facts would risk exceeding our authority, contravening the rulemaking process, and assuming an unauthorized price-setting role for which we are entirely ill-equipped. We decline to do so and, accordingly, declined to find probable cause to believe that Respondents violated 52 U.S.C. § 30114(b) by converting campaign funds to personal use.

July 5, 2022
Date

Allen Dickerson
Chairman

July 5, 2022
Date

Sean J. Cooksey
Commissioner

July 5, 2022
Date

James E. "Trey" Trainor, III
Commissioner